UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

(Mark One)

☒ **QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the quarterly period ended October 2, 2010

or

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from to

Commission file number 001-33170

NETLIST, INC.
(Exact name of registrant as specified in its charter)

Delaware	**95-4812784**
State or other jurisdiction of incorporation or organization	(I.R.S. Employer Identification No.)

51 Discovery, Suite 150
Irvine, CA 92618
(Address of principal executive offices) (Zip Code)

(949) 435-0025
(Registrant's telephone number, including area code)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (section 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☐ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer or a smaller reporting company. See definition of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check One):

Large accelerated filer ☐	Accelerated filer ☐
Non-accelerated filer ☐ (Do not check if a smaller reporting company)	Smaller reporting company ☒

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No ☒

The number of shares outstanding of each of the registrant's classes of common stock as of the latest practicable date:

Common Stock, par value $0.001 per share
25,305,603 shares outstanding at November 1, 2010

NETLIST, INC. AND SUBSIDIARIES
QUARTERLY REPORT ON FORM 10-Q
FOR THE THREE AND NINE MONTHS ENDED OCTOBER 2, 2010

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PART I. FINANCIAL INFORMATION

Item 1. Financial Statements

NETLIST, INC. AND SUBSIDIARIES
Condensed Consolidated Balance Sheets
(in thousands, except par value)

	(unaudited) October 2, 2010	(audited) January 2, 2010
ASSETS		
Current assets:		
Cash and cash equivalents	$ 14,722	$ 9,942
Investments in marketable securities	3,426	3,949
Accounts receivable, net	6,951	4,273
Inventories	3,861	2,232
Prepaid expenses and other current assets	1,522	854
Total current assets	30,482	21,250
Property and equipment, net	4,275	4,779
Long-term investments in marketable securities	894	941
Other assets	172	221
Total assets	$ 35,823	$ 27,191
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current liabilities:		
Accounts payable	$ 6,234	$ 4,057
Accrued payroll and related liabilities	1,884	2,332
Accrued expenses and other current liabilities	566	605
Accrued engineering charges	573	661
Current portion of long-term debt	640	108
Deferred gain on sale and leaseback transaction	20	108
Total current liabilities	9,917	7,871
Long-term debt, net of current portion	1,078	51
Total liabilities	10,995	7,922
Commitments and contingencies		
Stockholders' equity:		
Common stock, $0.001 par value - 90,000 shares authorized; 25,306 (2010) and 20,111 (2009) shares issued and outstanding	25	20
Additional paid-in capital	88,812	71,332
Accumulated deficit	(63,904)	(52,026)
Accumulated other comprehensive loss	(105)	(57)
Total stockholders' equity	24,828	19,269
Total liabilities and stockholders' equity	$ 35,823	$ 27,191

See accompanying notes.

NETLIST, INC. AND SUBSIDIARIES
Unaudited Condensed Consolidated Statements of Operations
(in thousands, except per share amounts)

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Net sales	$ 10,565	$ 6,446	$ 27,759	$ 11,781
Cost of sales(1)	7,545	4,879	21,103	10,507
Gross profit	3,020	1,567	6,656	1,274
Operating expenses:				
Research and development(1)	4,958	1,975	11,156	5,619
Selling, general and administrative(1)	2,986	2,115	8,163	6,170
Total operating expenses	7,944	4,090	19,319	11,789
Operating loss	(4,924)	(2,523)	(12,663)	(10,515)
Other income (expense):				
Interest income (expense), net	(3)	(25)	1	75
Other income, net	—	4	71	134
Total other income (expense), net	(3)	(21)	72	209
Loss before provision (benefit) for income taxes	(4,927)	(2,544)	(12,591)	(10,306)
Provision (benefit) for income taxes	12	(458)	(713)	(409)
Net loss	$ (4,939)	$ (2,086)	$ (11,878)	$ (9,897)
Net loss per common share:				
Basic and diluted	$ (0.20)	$ (0.11)	$ (0.51)	$ (0.50)
Weighted-average common shares outstanding:				
Basic and diluted	24,799	19,855	23,422	19,855

(1) Amounts include stock-based compensation expense as follows:

Cost of sales	$ 11	$ 146	$ 33	$ 213
Research and development	134	156	297	262
Selling, general and administrative	268	329	891	753

See accompanying notes.

NETLIST, INC. AND SUBSIDIARIES
Unaudited Condensed Consolidated Statements of Cash Flows
(in thousands)

	Nine Months Ended	
	October 2, 2010	October 3, 2009
Cash flows from operating activities:		
Net loss	$ (11,878)	$ (9,897)
Adjustments to reconcile net loss to net cash used in operating activities:		
Depreciation and amortization	1,691	1,710
Amortization of deferred gain on sale and leaseback transaction	(88)	(89)
Gain on disposal of assets	—	(118)
Stock-based compensation	1,221	1,228
Changes in operating assets and liabilities:		
Accounts receivable	(2,678)	(815)
Inventories	(1,629)	(57)
Income taxes receivable	—	1,880
Prepaid expenses and other current assets	(668)	126
Other assets	49	(18)
Accounts payable	1,907	183
Income taxes payable	—	78
Accrued payroll and related expenses	(448)	320
Accrued expenses and other current liabilities	(39)	179
Accrued engineering charges	(88)	511
Net cash used in operating activities	(12,648)	(4,779)
Cash flows from investing activities:		
Acquisition of property and equipment	(718)	(89)
Proceeds from sales of equipment	—	342
Purchase of investments in marketable securities	(2,395)	(10,837)
Proceeds from maturities and sales of investments in marketable securities	2,917	12,170
Net cash (used in) provided by investing activities	(196)	1,586
Cash flows from financing activities:		
Borrowings on line of credit	3,000	12,784
Payments on line of credit	(3,000)	(12,784)
Proceeds from public offering, net	16,210	—
Proceeds from exercise of stock options and warrants	54	—
Proceeds of bank term loan	1,500	—
Payments on debt	(140)	(520)
Net cash provided by (used in) financing activities	17,624	(520)
Increase (decrease) in cash and cash equivalents	4,780	(3,713)
Cash and cash equivalents at beginning of period	9,942	15,214
Cash and cash equivalents at end of period	$ 14,722	$ 11,501
Supplemental disclosure of non-cash investing activities:		
Unrealized losses from investments in marketable securities	$ 48	$ 32
Purchase of assets under capital lease	$ 199	$ 108
Increase in purchases of property and equipment accrued in accounts payable	$ 270	$ —

See accompanying notes.

NETLIST, INC. AND SUBSIDIARIES
NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS
October 2, 2010

Note 1—Description of Business

Netlist, Inc. (the "Company" or "Netlist") designs, manufactures and sells high-performance, logic-based memory subsystems for the server, storage and communications equipment markets. The Company's memory subsystems consist of combinations of dynamic random access memory integrated circuits, NAND flash memory, application-specific integrated circuits ("ASICs") and other components assembled on printed circuit boards. The Company primarily markets and sells its products to leading original equipment manufacturer ("OEM") customers. Netlist's solutions are targeted at applications where memory plays a key role in meeting system performance requirements.

Note 2—Summary of Significant Accounting Policies

Basis of Presentation

The interim unaudited condensed consolidated financial statements have been prepared in accordance with accounting principles generally accepted in the United States of America (the "U.S.") for interim financial information and with the instructions to Securities and Exchange Commission ("SEC") Form 10-Q and Article 8 of SEC Regulation S-X. These financial statements do not include all of the information and footnotes required by accounting principles generally accepted in the U.S. for complete financial statements. Therefore, these unaudited condensed consolidated financial statements should be read in conjunction with the Company's audited consolidated financial statements and notes thereto for the year ended January 2, 2010, included in the Company's Annual Report on Form 10-K filed with the SEC on February 19, 2010.

The condensed consolidated financial statements included herein as of October 2, 2010 are unaudited; however, they contain all normal recurring accruals and adjustments that, in the opinion of the Company's management, are necessary to present fairly the condensed consolidated financial position of the Company and its wholly-owned subsidiaries as of October 2, 2010, the condensed consolidated results of its operations for the three and nine months ended October 2, 2010 and October 3, 2009, and the condensed consolidated cash flows for the nine months ended October 2, 2010 and October 3, 2009. The results of operations for the three and nine months ended October 2, 2010 are not necessarily indicative of the results to be expected for the full year or any future interim periods.

Reclassifications

Certain amounts in the 2009 financial statements have been reclassified to conform to the current year presentation.

Principles of Consolidation

The condensed consolidated financial statements include the accounts of Netlist, Inc. and its wholly-owned subsidiaries. All intercompany balances and transactions have been eliminated in consolidation.

Fiscal Year

The Company operates under a 52/53-week fiscal year ending on the Saturday closest to December 31. For fiscal 2010, the Company's fiscal year is scheduled to end on January 1, 2011 and will consist of 52 weeks. Each of the Company's first three quarters in a fiscal year is comprised of 13 weeks.

Use of Estimates

The preparation of financial statements in conformity with accounting principles generally accepted in the U.S. requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the condensed consolidated financial statements, and the reported amounts of net sales and expenses during the reporting period. By their nature, these estimates and assumptions are subject to an inherent degree of uncertainty. Significant estimates made by management include, among others, provisions for uncollectible receivables and sales returns, warranty liabilities, valuation of inventories, fair value of financial instruments, impairment of long-lived assets, stock-based compensation expense and realization of deferred tax assets. The Company bases its estimates on historical experience, knowledge of current conditions and our beliefs of what could occur in the future considering available information. The Company reviews its estimates on an on-going basis. The actual results experienced by the Company may differ materially and adversely from its estimates. To the extent there are material differences between the estimates and the actual results, future results of operations will be affected.

Revenue Recognition

The Company's revenues primarily consist of product sales of high-performance memory subsystems to OEMs. Revenues also include sales of excess component inventories to distributors and other users of memory integrated circuits ("ICs"). Such sales amounted to less than $0.1 million for each of the three and nine months ended October 2, 2010, and totaled approximately $0.6 million and $0.7 million, respectively, for each of the three and nine months ended October 3, 2009.

The Company recognizes revenues in accordance with the Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC") Topic 605. Accordingly, the Company recognizes revenues when there is persuasive evidence of an arrangement, product delivery and acceptance have occurred, the sales price is fixed or determinable, and collectibility of the resulting receivable is reasonably assured.

The Company generally uses customer purchase orders and/or contracts as evidence of an arrangement. Delivery occurs when goods are shipped for customers with FOB Shipping Point terms and upon receipt for customers with FOB Destination terms, at which time title and risk of loss transfer to the customer. Shipping documents are used to verify delivery and customer acceptance. The Company assesses whether the sales price is fixed or determinable based on the payment terms associated with the transaction and whether the sales price is subject to refund. Customers are generally allowed limited rights of return for up to 30 days, except for sales of excess component inventories, which contain no right-of-return privileges. Estimated returns are provided for at the time of sale based on historical experience or specific identification of an event necessitating a reserve. The Company offers a standard product warranty to its customers and has no other post-shipment obligations. The Company assesses collectibility based on the creditworthiness of the customer as determined by credit checks and evaluations, as well as the customer's payment history.

All amounts billed to customers related to shipping and handling are classified as revenues, while all costs incurred by the Company for shipping and handling are classified as cost of sales.

Cash and Cash Equivalents

Cash and cash equivalents consist of cash and short-term investments with original maturities of three months or less, other than short-term investments in securities that lack an active market.

Investments in Marketable Securities

The Company accounts for its investments in marketable securities in accordance with ASC Topic 320. The Company determines the appropriate classification of its investments at the time of purchase and reevaluates such designation at each balance sheet date. The Company's investments in marketable securities have been classified and accounted for as available-for-sale based on management's investment intentions relating to these securities. Available-for-sale securities are stated at market value, generally based on market quotes, to the extent they are available. Unrealized gains and losses, net of applicable deferred taxes, are recorded as a component of other comprehensive income (loss). Realized gains and losses and declines in value judged to be other than temporary are determined based on the specific identification method and are reported in other income, net in the unaudited condensed consolidated statements of operations.

The Company generally invests its excess cash in domestic bank-issued certificates of deposit which carry federal deposit insurance, money market funds and highly liquid debt instruments of U.S. municipalities, corporations and the U.S. government and its agencies. All highly liquid investments with stated maturities of three months or less from the date of purchase are classified as cash equivalents; all investments with stated maturities of greater than three months are classified as investments in marketable securities.

Fair Value of Financial Instruments

The Company's financial instruments consist principally of cash and cash equivalents, investments in marketable securities, accounts receivable, accounts payable, accrued expenses and debt instruments. Other than for certain investments in auction rate securities (see Note 4) commercial paper and short-term corporate bonds, the fair value of the Company's cash equivalents and investments in marketable securities is determined based on quoted prices in active markets for identical assets or Level 1 inputs. Because of their short-term nature, commercial paper and short-term corporate bonds are not frequently traded. Although there are observable quotes for these securities, the markets are not considered active. Accordingly, the fair values of these investments are based on Level 2 inputs. The Company recognizes transfers between Levels 1 through 3 of the fair value hierarchy at the beginning of the reporting period. The Company believes that the carrying values of all other financial instruments approximate their current fair values due to their nature and respective durations.

Allowance for Doubtful Accounts

The Company evaluates the collectibility of accounts receivable based on a combination of factors. In cases where the Company is aware of circumstances that may impair a specific customer's ability to meet its financial obligations subsequent to the original sale, the Company will record an allowance against amounts due, and thereby reduce the net recognized receivable to the amount the Company reasonably believes will be collected. For all other customers, the Company records allowances for doubtful accounts based primarily on the length of time the receivables are past due based on the terms of the originating transaction, the current business environment and its historical experience. Uncollectible accounts are charged against the allowance for doubtful accounts when all cost effective commercial means of collection have been exhausted.

Concentration of Credit Risk

Financial instruments that potentially subject the Company to significant concentrations of credit risk consist principally of cash and cash equivalents, investments in marketable securities, and accounts receivable.

The Company invests its cash equivalents primarily in money market funds. Cash equivalents are maintained with high quality institutions, the composition and maturities of which are regularly monitored by management. The Company had $0.4 million of Federal Deposit Insurance Corporation insured cash and cash equivalents at October 2, 2010. Investments in marketable securities are generally in high-credit quality debt instruments with an active resale market. Such investments are made only in instruments issued or enhanced by high-quality institutions. The Company has not incurred any credit risk losses related to these investments.

The Company's trade accounts receivable are primarily derived from sales to OEMs in the computer industry. The Company performs credit evaluations of its customers' financial condition and limits the amount of credit extended when deemed necessary, but generally requires no collateral. The Company believes that the concentration of credit risk in its trade receivables is moderated by its credit evaluation process, relatively short collection terms, the high level of credit worthiness of its customers (see Note 3), and foreign credit insurance. Reserves are maintained for potential credit losses, and such losses historically have not been significant and have been within management's expectations.

Inventories

Inventories are valued at the lower of actual cost to purchase or manufacture the inventory or net realizable value of the inventory. Cost is determined on an average cost basis which approximates actual cost on a first-in, first-out basis and includes raw materials, labor and manufacturing overhead. At each balance sheet date, the Company evaluates its ending inventory quantities on hand and on order and records a provision for excess quantities and obsolescence. Among other factors, the Company considers historical demand and forecasted demand in relation to the inventory on hand, competitiveness of product offerings, market conditions and product life cycles when determining obsolescence and net realizable value of raw material inventory. Provisions are made to reduce excess or obsolete inventories to their estimated net realizable values. Once established, write-downs are considered permanent adjustments to the cost basis of the excess or obsolete inventories.

Property and Equipment

Property and equipment are recorded at cost and depreciated on a straight-line basis over their estimated useful lives, which generally range from three to seven years. Leasehold improvements are recorded at cost and amortized on a straight-line basis over the shorter of their estimated useful lives or the remaining lease term.

Impairment of Long-Lived Assets

The Company evaluates the recoverability of the carrying value of long-lived assets held and used in its operations for impairment on at least an annual basis or whenever events or changes in circumstances indicate that their net book value may not be recoverable. When such factors and circumstances exist, the Company compares the projected undiscounted future net cash flows associated with the related asset or group of assets over their estimated useful lives against their respective carrying amount. These projected future cash flows may vary significantly over time as a result of increased competition, changes in technology, fluctuations in demand, consolidation of our customers and reductions in average selling prices. If the carrying value is determined not to be recoverable from future operating cash flows, the asset is deemed impaired and an impairment loss is recognized to the extent the carrying value exceeds the estimated fair value of the asset. The fair value of the asset or asset group is based on market value when available, or when unavailable, on discounted expected cash flows.

Warranties

The Company offers warranties generally ranging from one to three years, depending on the product and negotiated terms of the purchase agreements with customers. Such warranties require the Company to repair or replace defective product returned to the Company during the warranty period at no cost to the customer. Warranties are not offered on sales of excess component inventory. The Company records an estimate for warranty-related costs at the time of sale based on its historical and estimated product return rates and expected repair or replacement costs (see Note 3). Such costs have historically been consistent between periods and within management's expectations and the provisions established.

Stock-Based Compensation

The Company accounts for equity issuances to non-employees in accordance with ASC Topic 505. All transactions in which goods or services are the consideration received for the issuance of equity instruments are accounted for based on the fair value of the consideration received or the fair value of the equity instrument issued, whichever is more reliably measurable. The measurement date used to determine the fair value of the equity instrument issued is the earlier of the date on which the third-party performance is complete or the date on which it is probable that performance will occur.

In accordance with ASC Topic 718, employee and director stock-based compensation expense recognized during the period is based on the value of the portion of stock-based payment awards that is ultimately expected to vest during the period. Given that stock-based compensation expense recognized in the condensed consolidated statements of operations is based on awards ultimately expected to vest, it has been reduced for estimated forfeitures. ASC Topic 718 requires forfeitures to be estimated at the time of grant and revised, if necessary, in subsequent periods if actual forfeitures differ from those estimates. The Company's estimated average forfeiture rates are based on historical forfeiture experience and estimated future forfeitures.

The fair value of common stock option awards to employees and directors is calculated using the Black-Scholes option pricing model. The Black-Scholes model requires subjective assumptions regarding future stock price volatility and expected time to exercise, along with assumptions about the risk-free interest rate and expected dividends, which affect the estimated fair values of the Company's common stock option awards. The expected term of options granted is calculated as the average of the weighted vesting period and the contractual expiration date of the option. This calculation is based on the safe harbor method permitted by the SEC in instances where the vesting and exercise terms of options granted meet certain conditions and where limited historical exercise data is available. The expected volatility is based on the historical volatility of the Company's common stock. The risk-free rate selected to value any particular grant is based on the U.S. Treasury rate that corresponds to the expected term of the grant effective as of the date of the grant. The expected dividend assumption is based on the Company's history and management's expectation regarding dividend payouts. Compensation expense for common stock option awards with graded vesting schedules is recognized on a straight-line basis over the requisite service period for the last separately vesting portion of the award.

The Company recognizes the fair value of restricted stock awards issued to employees and outside directors as stock-based compensation expense on a straight-line basis over the vesting period for the last separately vesting portion of the awards. Fair value is determined as the difference between the closing price of our common stock on the grant date and the purchase price of the restricted stock award, if any, reduced by expected forfeitures.

Income Taxes

Under ASC Topic 270, the Company is required to adjust its effective tax rate each quarter to be consistent with the estimated annual effective tax rate. The Company is also required to record the tax impact of certain discrete items, unusual or infrequently occurring, including changes in judgment about valuation allowances and effects of changes in tax laws or rates, in the interim period in which they occur. In addition, jurisdictions with a projected loss for the year or a year-to-date loss where no tax benefit can be recognized are excluded from the estimated annual effective tax rate. The impact of such an exclusion could result in a higher or lower effective tax rate during a particular quarter, based upon the mix and timing of actual earnings versus annual projections.

Deferred tax assets and liabilities are recognized to reflect the estimated future tax effects, calculated at currently effective tax rates, of future deductible or taxable amounts attributable to events that have been recognized on a cumulative basis in the condensed consolidated financial statements. A valuation allowance related to a net deferred tax asset is recorded when it is more likely than not that some portion of the deferred tax asset will not be realized.

ASC Topic 740 prescribes a recognition threshold and measurement requirement for the financial statement recognition of a tax position that has been taken or is expected to be taken on a tax return and also provides guidance on de-recognition, classification, interest and penalties, accounting in interim periods, disclosure, and transition. Under ASC Topic 740 the Company may only recognize or continue to recognize tax positions that meet a "more likely than not" threshold.

Research and Development Expenses

Research and development expenditures are expensed in the period incurred.

Collaborative Arrangement

The Company has entered into a collaborative arrangement with a partner in order to develop products using certain of the Company's proprietary technology. Under the arrangement, the development partner was granted a non-exclusive license to specified intellectual property for exclusive use in the development and production of ASIC chipsets for the Company. Both the Company and the development partner provided and continue to provide engineering project management resources at their own expense. The development partner is entitled to non-recurring engineering fees based upon the achievement of development milestones, and to a minimum portion of the Company's purchasing allocations for the component. Expenses incurred and paid to the development partner are included in research and development expense in the accompanying condensed consolidated statements of operations.

Comprehensive Loss

ASC Topic 220 establishes standards for reporting and displaying comprehensive income and its components in the condensed consolidated financial statements. Accumulated other comprehensive loss includes unrealized gains or losses on marketable securities.

Risks and Uncertainties

The Company's operations in the People's Republic of China ("PRC") are subject to various political, geographical and economic risks and uncertainties inherent to conducting business in China. These include, but are not limited to, (i) potential changes in economic conditions in the region, (ii) managing a local workforce that may subject the Company to uncertainties or certain regulatory policies, (iii) changes in other policies of the Chinese governmental and regulatory agencies, and (iv) changes in the laws and policies of the U.S. government regarding the conduct of business in foreign countries, generally, or in China, in particular. Additionally, the Chinese government controls the procedures by which its local currency, the Chinese Renminbi ("RMB"), is converted into other currencies and by which dividends may be declared or capital distributed for the purpose of repatriation of earnings and investments. If restrictions in the conversion of RMB or in the repatriation of earnings and investments through dividend and capital distribution restrictions are instituted, the Company's operations and operating results may be negatively impacted. Restricted net assets of the Company's subsidiary in the PRC totaled $2.5 million and $2.7 million at October 2, 2010 and January 2, 2010, respectively.

Foreign Currency Re-measurement

The functional currency of the Company's foreign subsidiary is the U.S. dollar. Local currency financial statements are re-measured into U.S. dollars at the exchange rate in effect as of the balance sheet date for monetary assets and liabilities and the historical exchange rate for nonmonetary assets and liabilities. Expenses are re-measured using the average exchange rate for the period, except items related to nonmonetary assets and liabilities, which are re-measured using historical exchange rates. All re-measurement gains and losses are included in determining net loss.

Net Loss Per Share

Basic net loss per share is calculated by dividing net loss by the weighted-average common shares outstanding during the period, excluding unvested shares issued pursuant to restricted share awards under our share-based compensation plans. Diluted net loss per share is calculated by dividing the net loss by the weighted-average shares and dilutive potential common shares outstanding during the period. Dilutive potential shares consist of dilutive shares issuable upon the exercise or vesting of outstanding stock options and restricted stock awards, respectively, and the exercise of warrants, computed using the treasury stock method. In periods of losses, basic and diluted loss per share are the same, as the effect of stock options, unvested restricted share awards and warrants on loss per share is anti-dilutive.

New Accounting Pronouncements

In September 2009, the FASB issued Accounting Standards Update ("ASU") 2009-13, *Multiple-Deliverable Revenue Arrangements* ("ASU 2009-13"), which amends the revenue guidance under ASC Topic 605, which describes the accounting for multiple element arrangements. ASU 2009-13 addresses how to determine whether an arrangement involving multiple deliverables contains more than one unit of accounting and how arrangement consideration shall be measured and allocated to the separate units of accounting in the arrangement. ASU 2009-13 is effective on a prospective basis for the Company's fiscal year 2011, with earlier adoption permitted. The Company is currently evaluating the adoption of ASU 2009-13 and the impact that ASU 2009-13 will have on its condensed consolidated financial statements.

In September 2009, the FASB issued ASU 2009-14, *Certain Revenue Arrangements That Include Software Elements* ("ASU 2009-14"), which excludes tangible products containing software components and non-software components that function together to deliver the product's essential functionality from the scope of ASC Topic 985, which describes the accounting for software revenue recognition. ASU 2009-14 is effective on a prospective basis for the Company's fiscal year 2011, with earlier adoption permitted. The Company is currently evaluating the impact that ASU 2009-14 will have on its condensed consolidated financial statements.

Note 3—Supplemental Financial Information

Inventories

Inventories consist of the following (in thousands):

	October 2, 2010	January 2, 2010
Raw materials	$ 2,103	$ 997
Work in process	345	342
Finished goods	1,413	893
	$ 3,861	$ 2,232

Warranty Liability

The following table summarizes the activity related to the warranty liability (in thousands):

	Nine Months Ended	
	October 2, 2010	October 3, 2009
Beginning balance	$ 240	$ 277
Charged to costs and expenses	176	122
Usage	(214)	(155)
Ending balance	$ 202	$ 244

The warranty liability is included as a component of accrued expenses and other current liabilities in the accompanying condensed consolidated balance sheets.

Facility Relocation Costs

The following table summarizes the activity related to the Company's accrual for facility relocation costs during the nine months ended October 2, 2010 and October 3, 2009 (in thousands):

	Nine Months Ended	
	October 2, 2010	October 3, 2009
Beginning balance	$ 84	$ 80
(Reduction) increase in expected costs	(28)	61
Net payments	(10)	(16)
Ending balance	$ 46	$ 125

In May 2009, the Company entered into an agreement to sublease a portion of its new domestic headquarters facility to another tenant at a discount from the rent required under its lease commitment. As a result, the Company recorded an additional charge of approximately $61,000. In February 2010, the sublessor vacated the space that it had subleased. The Company determined that the space could be used in its operations. As a result, the Company reversed $28,000 of its accrual for facility relocation costs. The resulting expense increase and reduction are included as a component of selling, general and administrative expenses in the accompanying condensed consolidated statement of operations for the nine months ended October 2, 2010 and October 3, 2009.

The liability for facility relocation costs is included as a component of accrued expenses and other current liabilities in the accompanying condensed consolidated balance sheets.

Comprehensive Loss

The components of comprehensive loss, net of taxes, consist of the following (in thousands):

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Net loss	$ (4,939)	$ (2,086)	$ (11,878)	$ (9,897)
Other comprehensive loss:				
Change in net unrealized gain (loss) on investments, net of tax	(1)	(6)	(48)	32
Total comprehensive loss	$ (4,940)	$ (2,092)	$ (11,926)	$ (9,865)

Accumulated other comprehensive loss reflected on the condensed consolidated balance sheets at October 2, 2010 and January 2, 2010, represents accumulated net unrealized losses on investments in marketable securities.

Computation of Net Loss Per Share

Basic and diluted net loss per share is calculated by dividing net loss by the weighted-average common shares outstanding during the period. The following table sets forth the computation of net loss per share (in thousands, except per share data):

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Numerator: Net loss	$ (4,939)	$ (2,086)	$ (11,878)	$ (9,897)
Denominator: Weighted-average common shares outstanding, basic and diluted	24,799	19,855	23,422	19,855
Net loss per share, basic and diluted	$ (0.20)	$ (0.11)	$ (0.51)	$ (0.50)

The following table sets forth potentially dilutive common share equivalents, consisting of shares issuable upon the exercise or vesting of outstanding stock options and restricted stock awards, respectively, and the exercise of warrants, computed using the treasury stock method. These potential common shares have been excluded from the diluted net loss per share calculations above as their effect would be anti-dilutive for the periods then ended (in thousands):

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Common share equivalents	1,779	600	1,978	420

The above common share equivalents would have been included in the calculation of diluted earnings per share had the Company reported net income for the periods then ended.

Major Customers

Net sales to some of the Company's OEM customers include memory modules that are qualified by the Company directly with the OEM customer and sold to electronic manufacturing services providers ("EMSs"), for incorporation into products manufactured exclusively for the OEM customer or in some instances, to facilitate credit and logistics. These net sales to EMSs have historically fluctuated period to period as a portion of the total net sales to the OEM customers. Net sales to Hon Hai Precision Industry Co. Ltd., an EMS operating under the trade name Foxconn that purchases memory modules from the Company for incorporation into products manufactured exclusively for Dell, Inc. ("Dell"), represented approximately 94% and 61% of net sales to Dell for the nine months ended October 2, 2010 and October 3, 2009, respectively. Arrow Electronics Inc. ("Arrow") is an EMS for DRS Electronics, Inc. ("DRS Electronics"). Substantially all of the Company's products sold to Arrow are incorporated into components manufactured for DRS Electronics. Similarly, Flextronics International Ltd. ("Flextronics") distributes substantially all of the products purchased from the Company to F5 Networks, Inc. ("F5 Networks"). The following table sets forth sales to customers comprising 10% or more of the Company's net sales for the periods presented:

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Customer:				
Dell (including Foxconn)	69%	47%	53%	48%
Flextronics (F5 Networks)	13%	*%	25%	*%
Arrow Electronics (DRS Electronics)	*%	10%	*%	13%
Hewlett Packard	*%	18%	*%	10%

* less than 10% of net sales

The Company's accounts receivable are concentrated with two customers at October 2, 2010 representing approximately 70% and 18%, and two customers at January 2, 2010, representing approximately 68% and 10%, of aggregate gross receivables. A significant reduction in sales to, or the inability to collect receivables from, a significant customer could have a material adverse impact on the Company. The Company mitigates risk associated with foreign receivables by purchasing comprehensive foreign credit insurance.

Cash Flow Information

The following table sets forth cash (received) paid for income taxes and interest for the periods presented (in thousands):

	Nine Months Ended	
	October 2, 2010	October 3, 2009
Income taxes	$ (725)	$ (1,175)
Interest	$ 52	$ 78

Note 4—Fair Value Measurements

The following tables detail the fair value measurements within the fair value hierarchy of the Company's investments in marketable securities (in thousands):

		Fair Value Measurements at October 2, 2010 Using		
	Fair Value at October 2, 2010	Quoted Prices in Active Markets for Identical Assets (Level 1)	Significant Other Observable Inputs (Level 2)	Significant Unobservable Inputs (Level 3)
Available-for-sale debt securities:				
Obligations of the U.S. government	$ 1,000	$ 1,000	$ —	$ —
Federal agency notes and bonds	501	501	—	—
Corporate notes and bonds	1,925	—	1,925	—
Auction and variable floating rate notes	894	—	—	894
Total	$ 4,320	$ 1,501	$ 1,925	$ 894

		Fair Value Measurements at January 2, 2010 Using		
	Fair Value at January 2, 2010	Quoted Prices in Active Markets for Identical Assets (Level 1)	Significant Other Observable Inputs (Level 2)	Significant Unobservable Inputs (Level 3)
Available-for-sale debt securities:				
Obligations of the U.S. government	$ 997	$ 997	$ —	$ —
Federal agency notes and bonds	61	61	—	—
Commercial paper	1,048	1,048	—	—
Corporate notes and bonds	1,843	1,843	—	—
Auction and variable floating rate notes	941	—	—	941
Total	$ 4,890	$ 3,949	$ —	$ 941

As of January 3, 2010, the Company reclassified its investments in commercial paper and corporate notes and bonds, with a fair value of $2.9 million, from assets measured at fair value using Level 1 inputs to assets measured at fair value using Level 2 inputs. The transfer resulted solely from management's reassessment of the level of activity in the secondary market for these investments, which historically has been low due to the short-term nature of the instruments. Management does not believe that the reassessment in any way reflects a change in the actual liquidity or credit quality of these investments. The reassessment was precipitated by a change in custodial institutions in connection with the Company's new revolving credit agreement (see Note 6).

Fair value measurements using Level 3 inputs in the table above relate to the Company's investments in auction rate securities. Level 3 inputs are unobservable inputs used to estimate the fair value of assets or liabilities and are utilized to the extent that observable inputs are not available.

The following table provides a reconciliation of the beginning and ending balances for the Company's assets measured at fair value using Level 3 inputs (in thousands):

	Nine Months Ended	
	October 2, 2010	October 3, 2009
Beginning balance	$ 941	$ 960
Unrealized (loss) gain included in other comprehensive loss	(47)	15
Ending balance	$ 894	$ 975

Note 5—Investments in Marketable Securities

Investments in marketable securities consist of the following (in thousands):

	October 2, 2010		
	Amortized Cost	Net Unrealized Gain (Loss)	Fair Value
Obligations of the U.S. government	$ 1,000	$ —	$ 1,000
Federal agency notes and bonds	501	—	501
Corporate notes and bonds	1,923	2	1,925
Auction and variable floating rate notes	1,001	(107)	894
	$ 4,425	$ (105)	$ 4,320

	January 2, 2010		
	Amortized Cost	Net Unrealized Gain (Loss)	Fair Value
Obligations of the U.S. government	$ 997	$ —	$ 997
Federal agency notes and bonds	61	—	61
Commercial paper	1,048	—	1,048
Corporate notes and bonds	1,839	4	1,843
Auction and variable floating rate notes	1,002	(61)	941
	$ 4,947	$ (57)	$ 4,890

Realized gains and losses on the sale of investments in marketable securities are determined using the specific identification method. Net realized gains and losses recorded were not significant in any of the periods reported upon.

The following table provides the breakdown of investments in marketable securities with unrealized losses (in thousands):

	October 2, 2010			
	Continuous Unrealized Loss			
	Less than 12 months		12 months or greater	
	Fair Value	Unrealized Loss	Fair Value	Unrealized Loss
Auction and variable floating rate notes	$ —	$ —	$ 894	$ (107)

	January 2, 2010			
	Continuous Unrealized Loss			
	Less than 12 months		12 months or greater	
	Fair Value	Unrealized Loss	Fair Value	Unrealized Loss
Corporate notes and bonds	$ 366	$ (1)	—	—
Auction and variable floating rate notes	—	—	941	(61)
	$ 366	$ (1)	$ 941	$ (61)

As of October 2, 2010 and January 2, 2010, the Company held two and four investments, respectively, that were in an unrealized loss position.

Auction Rate Securities

Disruptions in the credit market continue to adversely affect the liquidity and overall market for auction rate securities. As of October 2, 2010 and January 2, 2010, the Company held two investments in auction rate securities with a total purchase cost of $1.0 million. These two investments represent (i) a Baa1 rated, fully insured debt obligation of a municipality and (ii) an A3 rated debt obligation backed by pools of student loans guaranteed by the U.S. Department of Education. Given the insufficient observable market inputs and related information available, the Company has classified its investments in auction rate securities within Level 3 of the fair value hierarchy (see Note 4).

The Company does not believe that the current illiquidity of its investments in auction rate securities will materially impact its ability to fund its working capital needs, capital expenditures or other business requirements. The Company, however, remains uncertain as to when liquidity will return to the auction rate markets, whether other secondary markets will become available or when the underlying securities may be called by the issuer. Given these and other uncertainties, the Company's investments in auction rate securities have been classified as long-term investments in marketable securities in the accompanying unaudited condensed consolidated balance sheets. The Company has concluded that the estimated gross unrealized losses on these investments, which totaled approximately $107,000 and $42,000 at October 2, 2010 and January 2, 2010, are temporary because (i) the Company believes that the absence of liquidity that has occurred is due to general market conditions, (ii) the auction rate securities continue to be of a relatively high credit quality and interest is paid as due and (iii) the Company has the intent and ability to hold these investments until a recovery in the market occurs.

Other Investments in Marketable Securities

Excluding its auction rate securities, the gross unrealized losses on the Company's other investments in marketable securities totaled approximately $1,000 as of January 2, 2010. There were no securities other than auction rate securities in an unrealized loss position at October 2, 2010. The fair value of the Company's investments was determined based on Level 1 and Level 2 inputs, consisting of quoted prices from actual market transactions for identical investments.

The Company maintains an investment portfolio of various holdings, types and maturities. The Company invests in instruments that meet high quality credit standards, as specified in its investment policy guidelines. These guidelines generally limit the amount of credit exposure to any one issue, issuer or type of instrument. The fair value of the Company's investments in marketable securities could change significantly in the future and the Company may be required to record other-than-temporary impairment charges or unrealized losses in future periods.

The following table presents the amortized cost and fair value of the Company's investments in marketable securities classified as available-for-sale at October 2, 2010 by contractual maturity (in thousands):

	October 2, 2010	
	Amortized Cost	Fair Value
Maturity		
Less than one year	$ 3,424	$ 3,426
Greater than two years*	1,001	894
	$ 4,425	$ 4,320

* Comprised of auction rate securities which generally have reset dates of 90 days or less but final contractual maturity dates in excess of 15 years.

Note 6—Credit Agreement

On October 31, 2009, the Company entered into a credit agreement with Silicon Valley Bank, which was amended on March 24, 2010, June 30, 2010 and September 30, 2010. Currently, the credit agreement provides that the Company can borrow up to the lesser of (i) 80% of eligible accounts receivable, or (ii) $10.0 million. The Company has the option to increase credit availability to $15.0 million at any time through the maturity date of September 30, 2012, subject to the conditions of the credit agreement.

The credit agreement contains an overall sublimit of $10.0 million to collateralize the Company's contingent obligations under letters of credit, foreign exchange contracts and cash management services. Amounts outstanding under the overall sublimit reduce the amount available pursuant to the credit agreement. At October 2, 2010, letters of credit in the amount of $2.9 million were outstanding. The letters of credit expire on various dates through October 31, 2011.

Interest is payable monthly at either (i) prime plus 1.25%, as long as the Company maintains $8.5 million in revolving credit availability plus unrestricted cash on deposit with the bank, or (ii) prime plus 2.25%. Additionally, the credit agreement requires payments for an unused line, as well as anniversary and early termination fees, as applicable.

In connection with the September 30, 2010 amendment, Silicon Valley Bank extended a $1.5 million term loan, which bears interest at a rate of prime plus 1.75%. The Company is required to make equal monthly principal payments which total $0.5 million annually, and a balloon payment of $0.5 at maturity. Any remaining unpaid principal is due upon maturity of the credit agreement. The term loan is classified as long-term debt in the accompanying consolidated balance sheet.

The Company's previous credit facility, which consisted of a revolving line of credit and a non-revolving equipment line, expired on August 31, 2009 and all borrowings were repaid to the bank. Interest on the credit facility was payable monthly at the greatest of (i) the sum of the prime rate plus 3%, (ii) the sum of LIBOR plus 6% or (iii) 8%.

The following table presents details of interest expense related to borrowings on revolving credit lines, along with certain other applicable information (in thousands):

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Interest expense	$ 12	$ 34	$ 36	$ 46

	October 2, 2010	January 2, 2010
Outstanding borrowings on the revolving line of credit	$ —	$ —
Borrowing availability under the revolving line of credit	$ 2,382	$ —

Obligations under the credit agreement are secured by a first priority lien on the Company's tangible and intangible assets. Silicon Valley Bank released Netlist Technology Texas, LP as an obligor under the credit agreement due to the dissolution of this subsidiary in October 2010.

The credit agreement subjects the Company to certain affirmative and negative covenants, including financial covenants with respect to the Company's tangible net worth and restrictions on the payment of dividends. As of October 2, 2010, the Company was in compliance with its financial covenants.

Note 7—Long-Term Debt

Long-term debt consists of the following (in thousands):

	October 2, 2010	January 2, 2010
Obligations under capital leases	$ 260	$ 159
Term note payable to bank	1,458	—
	1,718	159
Less current portion	(640)	(108)
	$ 1,078	$ 51

Interest expense related to long-term debt is presented in the following table (in thousands):

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Interest expense	$ 5	$ 6	$ 11	$ 25

Note 8—Income Taxes

The following table sets forth the Company's provision (benefit) for income taxes, along with the corresponding effective tax rates (in thousands, except percentages):

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Provision (benefit) for income taxes	$ 12	$ (458)	$ (713)	$ (409)
Effective tax rate	(0.2)%	18%	5.7%	4%

During the nine months ended October 2, 2010, the Company carried back approximately $1.7 million of gross net operating losses under the Worker, Homeownership, and Business Act and received a federal income tax refund of approximately $0.7 million. During the three and nine months ended October 3, 2009, the Company reduced its unrecognized tax benefits by approximately $0.5 million as a result of a lapse in a federal statute of limitations.

The Company evaluates whether a valuation allowance should be established against its deferred tax assets based on the consideration of all available evidence using a "more likely than not" standard. Due to uncertainty of future utilization, the Company has provided a full valuation allowance as of October 2, 2010 and January 2, 2010. Accordingly, no benefit has been recognized for net deferred tax assets, including net operating losses that cannot be realized currently via carryback to periods of taxable income.

The Company had unrecognized tax benefits at October 2, 2010 and January 2, 2010 of approximately $0.1 million that, if recognized, would affect the Company's annual effective tax rate.

Note 9—Commitments and Contingencies

Litigation

Federal Securities Class Action

Beginning in May 2007, the Company, certain of its officers and directors, and the Company's underwriters were named as defendants in four purported class action shareholder complaints, two of which were filed in the U.S. District Court for the Southern District of New York, and two of which were filed in the U.S. District Court for the Central District of California. These purported class action lawsuits were filed on behalf of persons and entities who purchased or otherwise acquired the Company's common stock pursuant or traceable to the Company's November 30, 2006 initial public offering (the "IPO"). The lawsuits were consolidated into a single action—Belodoff v. Netlist, Inc., Lead Case No. SACV07-677 DOC (MLGx)—which is currently pending in the Central District of California. Lead Plaintiff filed the Consolidated Complaint in November 2007. Defendants filed their motions to dismiss the Consolidated Complaint in January 2008. The motions to dismiss were taken under submission in April 2008 and on May 30, 2008, the court granted the defendants' motions. However, plaintiffs were granted the right to amend their complaint and subsequently filed their First Amended Consolidated Class Action Complaint ("Amended Complaint") in July 2008. The defendants filed motions to dismiss the Amended Complaint in January 2009, and on April 17, 2009, the court granted defendants' motions to dismiss. However, plaintiffs were again granted the right to amend their complaint. Plaintiffs' filed their Second Amended Consolidated Class Action Complaint ("Second Amended Complaint") in May 2009. Generally, the Second Amended Complaint, like the preceding complaints, alleged that the Registration Statement filed by the Company in connection with the IPO contained untrue statements of material fact or omissions of material fact in violation of Sections 11 and 15 of Securities Act of 1933. Defendants filed motions to dismiss the Second Amended Complaint in June 2009. The motions to dismiss were taken under submission in August 2009 and on September 1, 2009, the Court granted the defendants' motions. However, plaintiffs again were granted the right to amend their complaint.

In December 2008, the parties reached a tentative agreement in principle to settle the class action. In February 2010, the parties executed a Stipulation and Agreement of Settlement documenting the essential terms of the proposed settlement, informed the court of their proposed settlement, and drafted a joint motion to submit to the court for preliminary approval of the proposed settlement. Under the settlement agreement presented to the court for approval, plaintiffs and the class will dismiss all claims, with prejudice, in exchange for a cash payment of $2.6 million. The Company's directors' and officers' liability insurers will pay the settlement amount in accordance with the Company's insurance policies.

On April 19, 2010, the court issued an order preliminarily approving the settlement. A final settlement approval was issued on September 30, 2010.

Patent Claims

In May 2008, the Company initiated discussions with Google, Inc. ("Google") regarding the Company's claim that Google has infringed on a U.S. patent owned by the Company, U.S. Patent No. 7,289,386 ("the '386 patent"), which relates generally to rank multiplication in memory modules. On August 29, 2008, Google filed a declaratory judgment lawsuit against the Company in the United States District Court for the Northern District of California, seeking a declaration that Google did not infringe the '386 patent and that the '386 patent is invalid. Google is not seeking any monetary damages. On November 18, 2008, the Company filed a counterclaim for infringement of the '386 patent by Google. Claim construction proceedings were held on November 14, 2009, and the Company prevailed on every disputed claim construction issue. On June 1, 2010, the Company filed a motion for summary judgment of patent infringement and a motion for summary judgment to dismiss Google's affirmative defenses based on Netlist's activities in the JEDEC standard-setting organization. The hearings for these motions have been postponed indefinitely by the Court. On September 1, 2010, the United States Patent and Trademark Office ("USPTO") granted Google's request for reexamination of the '386 patent. On September 14, 2010, the Court granted Google's request to stay the litigation pending the conclusion of the reexamination by the USPTO. On October 20, 2010, Smart Modular, Inc. ("SMOD") filed a request for reexamination of the '386 patent with the USPTO. The USPTO is expected to make a determination whether to grant or deny this request in January 2011.

On December 4, 2009, the Company filed a patent infringement lawsuit against Google in the United States District Court for the Northern District of California, seeking damages and injunctive relief based on Google's infringement of U.S. Patent No. 7,619,912 ("the '912 patent"), which issued in November 2009 and is related to the '386 patent. On February 11, 2010, Google answered the Company's complaint and asserted counterclaims against the Company seeking a declaration that the patent is invalid and not infringed, and claiming that the Company committed fraud, negligent misrepresentation and breach of contract based on Netlist's activities in the JEDEC standard-setting organization. The counterclaim seeks unspecified compensatory damages. Claim construction proceedings will be held on March 17, 2011. On October 20 and October 21, respectively, SMOD and Google each filed requests for reexamination of the '912 patent. The USPTO is expected to make a determination whether to grant or deny these requests in January 2011. The Company intends to vigorously pursue its infringement claims against Google and to vigorously defend against Google's claims.

On September 22, 2009, the Company filed a patent infringement lawsuit against Inphi Corporation ("Inphi") in the United States District Court for the Central District of California. The suit alleges that Inphi is contributorily infringing and actively inducing the infringement of a U.S. patent owned by the Company, U.S. Patent No. 7,532,537 ("the '537 patent"), which relates generally to memory modules with load isolation and memory domain translation capabilities. The Company is seeking damages and injunctive relief based on Inphi's use of its patented technology. On December 22, 2009, the Company filed an Amended Complaint asserting claims of patent infringement based on two additional patents, the '912 patent and U.S. Patent No. 7,636,274 ("the '274 patent"), which relate generally to load isolation and memory domain translation technologies, as well as rank multiplication. Inphi has denied infringement and has asserted that the patents-in-suit are invalid. On April 19, 2010, Inphi filed requests for reexamination of the three patents-in-suit, and on April 21, 2010, Inphi filed an interference proceeding on the three patents-in-suit with the USPTO. Inphi then filed a motion to stay the lawsuit, which was granted on May 18, 2010. On September 1, 2010, the USPTO confirmed the patentability of all fifty-one claims of the '912 patent. The Company intends to vigorously pursue its infringement claims against Inphi and to continue to vigorously defend its patent rights in the USPTO.

On November 30, 2009, Inphi filed a patent infringement lawsuit against the Company in the United States District Court for the Central District of California alleging infringement of two Inphi patents generally related to memory module output buffers. Discovery is currently underway, and the Company intends to vigorously defend against Inphi's claims of infringement.

On March 24, 2010, Ring Technologies Enterprises filed a patent infringement lawsuit in the United States District Court for the Eastern District of Texas against Dell Computer and its suppliers. The suit alleges that the Company and forty-two (42) other defendants infringed on its U.S. Patent No. 6,879,526. The Company filed its answer to Ring Technologies' complaint and intends to vigorously defend against Ring Technologies' claims of infringement.

Other Contingent Obligations

During its normal course of business, the Company has made certain indemnities, commitments and guarantees under which it may be required to make payments in relation to certain transactions. These include (i) intellectual property indemnities to the Company's customers and licensees in connection with the use, sales and/or license of Company products; (ii) indemnities to vendors and service providers pertaining to claims based on the Company's negligence or willful misconduct; (iii) indemnities involving the accuracy of representations and warranties in certain contracts; (iv) indemnities to directors and officers of the Company to the maximum extent permitted under the laws of the State of Delaware; and (v) certain real estate leases, under which the Company may be required to indemnify property owners for environmental and other liabilities, and other claims arising from the Company's use of the applicable premises. The duration of these indemnities, commitments and guarantees varies and, in certain cases, may be indefinite. The majority of these indemnities, commitments and guarantees do not provide for any limitation of the maximum potential for future payments the Company could be obligated to make. Historically, the Company has not been obligated to make significant payments for these obligations, and no liabilities have been recorded for these indemnities, commitments and guarantees in the accompanying condensed consolidated balance sheets.

Commitment to Purchase Component Inventory

In September, 2010, the Company entered into a $2.5 million commitment to purchase ASIC devices for use in certain of its high-performance memory modules that are in the evaluation process with OEM and end-user customers. The Company issued a $1.1 million letter of credit to secure payment for future shipments. See note 6.

Note 10—Stockholders' Equity

Common Stock

On March 24, 2010, the Company sold 4,594,250 shares of common stock in a registered public offering. The shares were sold to the public at a price of $3.85 per share. The Company received net proceeds of $16.2 million, after underwriting discounts and commissions, and estimated expenses payable by the Company.

Stock-Based Compensation

The Company has stock-based compensation awards outstanding pursuant to the 2000 Equity Incentive Plan (the "2000 Plan") and the 2006 Equity Incentive Plan (the "2006 Plan"). Effective as of the IPO, no further grants may be made under the 2000 Plan. In addition to awards made pursuant to the 2006 Plan, the Company periodically issues inducement grants outside the 2006 Plan to certain new hires. In the nine months ended October 2, 2010, the Company issued 305,000 stock options pursuant to inducement grants.

On June 2, 2010, the Company's shareholders approved an amendment to the 2006 Plan to provide that the number of shares of common stock that may be issued shall be increased annually by a number of shares equal to the lesser of 5.0% of the issued and outstanding shares as of January 1 of each year or 1,200,000 shares. Prior to June 2, 2010, the annual increase in shares available under the 2006 Plan was capped at 500,000. The amendment is effective for fiscal 2010. An additional 505,566 shares are available for issuance as a result of the amendment to the 2006 Plan. At October 2, 2010, the Company had 367,281 shares available for grant pursuant to option, stock appreciation right, performance unit, restricted stock, restricted stock unit or stock grant awards under the 2006 Plan.

A summary of the Company's common stock option activity as of and for the nine months ended October 2, 2010 is presented below (shares in thousands):

	Options Outstanding	
	Number of Shares	Weighted-Average Exercise Price
Options outstanding at January 2, 2010	4,298	$ 2.41
Options granted	588	3.35
Options exercised	(80)	0.99
Options cancelled	(162)	0.87
Options outstanding at October 2, 2010	4,644	$ 2.61

A summary of the Company's restricted stock awards as of and for the nine months ended October 2, 2010 is presented below (shares in thousands):

	Restricted Stock Outstanding	
	Number of Shares	Weighted-Average Grant-Date Fair Value per Share
Balance outstanding at January 2, 2010	—	$ —
Restricted stock granted	528	3.46
Restricted stock forfeited	(10)	3.49
Restricted stock vested	(60)	3.49
Balance outstanding at October 2, 2010	458	$ 3.46

Restricted stock awards vest in eight equal increments at intervals of approximately six months from the date of grant.

The following table presents details of the assumptions used to calculate the weighted-average grant date fair value of common stock options granted by the Company:

	Nine Months Ended	
	October 2, 2010	October 3, 2009
Expected term (in years)	5.5	5.4
Expected volatility	146%	111%
Risk-free interest rate	2.14%	2.94%
Expected dividends	—	—
Weighted-average grant date fair value per share	$ 3.07	$ 0.28

The weighted-average fair value per share of the restricted stock granted in the nine months ended October 2, 2010 was $3.46, calculated based on the fair market value of the Company's common stock on the respective grant dates.

At October 2, 2010, the amount of unearned stock-based compensation currently estimated to be expensed from fiscal 2010 through fiscal 2014 related to unvested common stock options and restricted stock awards is approximately $3.6 million, net of estimated forfeitures. The weighted-average period over which the unearned stock-based compensation is expected to be recognized is approximately 3.1 years. If there are any modifications or cancellations of the underlying unvested awards, the Company may be required to accelerate, increase or cancel any remaining unearned stock-based compensation expense.

Warrants

A summary of activity with respect to outstanding warrants to purchase shares of the Company's common stock for the nine months ended October 2, 2010 is presented below (shares in thousands):

	Number of Shares	Weighted-Average Exercise Price
Warrants outstanding at January 2, 2010	18	$ 1.25
Warrants exercised	(18)	1.25
Warrants outstanding and exercisable at October 2, 2010	—	$ —

Note 11—Segment and Geographic Information

The Company operates in one reportable segment: the design and manufacture of high-performance memory subsystems for the server, high-performance computing and communications markets. The Company evaluates financial performance on a Company-wide basis.

At October 2, 2010 and January 2, 2010, approximately $2.6 million and $3.0 million, respectively, of the Company's net long-lived assets were located in the PRC.

Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations

Cautionary Statement

The following discussion and analysis of our financial condition and results of operations should be read in conjunction with our Unaudited Condensed Consolidated Financial Statements and the related notes thereto contained in Part I, Item 1 of this Report. The information contained in this Quarterly Report on Form 10-Q is not a complete description of our business or the risks associated with an investment in our common stock. We urge you to carefully review and consider the various disclosures made by us in this Report and in our other reports filed with the Securities and Exchange Commission, or SEC, including our Annual Report on Form 10-K for the fiscal year ended January 2, 2010 and subsequent reports on Form 8-K, which discuss our business in greater detail.

This Report contains forward-looking statements regarding future events and our future performance. These forward-looking statements involve risks and uncertainties that could cause actual results to differ materially from those expected or projected. These risks and uncertainties include, but are not limited to, continuing development, qualification and volume production of NetVault™NV and HyperCloud™; the rapidly-changing nature of technology; risks associated with intellectual property, including the costs and unpredictability of litigation over infringement of our property and the possibility of our patents being reexamined by the United States Patent and Trademark Office; volatility in the pricing of DRAM ICs and NAND; changes in and uncertainty of customer acceptance of, and demand for, our existing products and products under development, including uncertainty of and/or delays in product orders and product qualifications; delays in our and our customers' product releases and development; introductions of new products by competitors; changes in end-user demand for technology solutions; our ability to attract and retain skilled personnel; our reliance on suppliers of critical components and vendors in the supply chain; fluctuations in the market price of critical components; evolving industry standards; and the political and regulatory environment in the People's Republic of China. Other risks and uncertainties are described under the heading "Risk Factors" in Part II, Item IA of this Quarterly Report on Form 10-Q, and similar discussions in our other SEC filings. Except as required by law, we undertake no obligation to revise or update publicly any forward-looking statements for any reason.

Overview

We design, manufacture and sell high-performance, logic-based memory subsystems for the server, storage and communications equipment markets. Our memory subsystems consist of combinations of dynamic random access memory integrated circuits ("DRAM ICs" or "DRAM"), NAND flash memory ("NAND"), application-specific integrated circuits ("ASICs") and other components assembled on printed circuit boards ("PCBs"). We primarily market and sell our products to leading original equipment manufacturer ("OEM") customers. Our solutions are targeted at applications where memory plays a key role in meeting system performance requirements.

In November 2009, we introduced HyperCloud™ DDR3 memory technology. HyperCloud™ utilizes an ASIC chipset that incorporates Netlist patented rank multiplication technology that increases memory capacity and load reduction functionality that increases memory bandwidth. We expect that this achievement will make possible improved levels of performance for memory intensive datacenter applications and workloads, including financial services applications, search engines, social networks/communications, media internet portals, virtualization, and high performance scientific and defense-related computing. HyperCloud™ memory is being evaluated by several of our OEM customers for use in their server products. HyperCloud™ is interoperable with Joint Electronics Devices Engineering Council ("JEDEC") standard DDR3 memory modules. Our HyperCloud™ products are designed to allow for installation in servers without the need for a bios change. As such, their anticipated sales launch is not dependent on the design plans or product cycle of our OEM customers. As of October 2, 2010, we have not shipped any production quantities of HyperCloud™.

In February 2010, we announced general availability of NetVault ™ NV, a non-volatile cache memory subsystem targeting Redundant Array of Independent Disks, ("RAID") storage applications. NetVault ™ NV provides server and storage OEMs a solution for enhanced datacenter fault recovery. Unlike our traditional battery-powered fault tolerant cache product which relied solely on batteries to power the cache, NetVault ™ NV utilizes a combination of DRAM for high throughput performance and flash for extended data retention. The introduction of NetVault ™ NV, as well as the launch of the Dell, Inc. ("Dell") PERC 7 line of servers in December 2009, has resulted in RAID controller subsystem revenues of $13.7 million, or 49% of total revenues for the nine months ended October 2, 2010, including $4.4 million of NetVault NV. This compares favorably with $3.3 million of RAID controller subsystems, or 28% of total revenues for the nine months ended October 3, 2009. Although revenues through October 2, 2010 have been primarily for shipments to Dell, we intend to qualify NetVault ™ NV with several OEMs and to pursue end-user opportunities. Based on sell through activity through October 2010, we do not anticipate significant sales of NetVault ™ NV products for Dell in the fourth quarter of 2010. Dell has initiated marketing activities that we expect will increase the sell through of NetVault™NV such that we can resume volume production and delivery of the product in the first quarter of fiscal 2011.

The remainder of our revenues arises primarily from OEM sales of custom memory modules, the majority of which are utilized in data center and industrial applications. When developing custom modules for an equipment product launch, we engage with our OEM customers from the earliest stages of new product definition, providing us unique insight into their full range of system architecture and performance requirements. This close collaboration has also allowed us to develop a significant level of systems expertise. We leverage a portfolio of proprietary technologies and design techniques, including efficient planar design, alternative packaging techniques and custom semiconductor logic, to deliver memory subsystems with high speed, capacity and signal integrity, small form factor, attractive thermal characteristics and low cost per bit. Revenues from custom modules have improved as a result of OEM product placements on new platforms and improved economic conditions compared with 2009. The continuation of this trend, which cannot be assured, is dependent on our ability to qualify our memory modules on new platforms as current platforms reach the end of their life cycles, and on the state of the global economy.

Consistent with the concentrated nature of the OEM customer base in our target markets, a small number of large customers have historically accounted for a significant portion of our net sales. Dell and Flextronics International Ltd. ("Flextronics") represented approximately 53% and 25%, respectively, of our net sales for the nine months ended October 2, 2010. Dell, Arrow Electronics, Inc. ("Arrow") and Hewlett Packard, Inc. represented approximately 48%, 13% and 10%, respectively, of our net sales for the nine months ended October 3, 2009. Net sales to some of our OEM customers include memory modules that are qualified by us directly with the OEM customer and sold to electronic manufacturing services providers ("EMSs"), for incorporation into products manufactured exclusively for the OEM customer or in some instances, to facilitate credit and logistics. These net sales to EMSs have historically fluctuated period to period as a portion of the total net sales to the OEM customers. Net sales to Hon Hai Precision Industry Co. Ltd., an EMS operating under the trade name Foxconn that purchases memory modules from us for incorporation into products manufactured exclusively for Dell, represented approximately 94% and 61% of net sales to Dell for the nine months ended October 2, 2010 and October 3, 2009, respectively. Arrow is an EMS for DRS Electronics, Inc. ("DRS Electronics"). Substantially all of our products sold to Arrow are incorporated into components manufactured for DRS Electronics. Similarly, Flextronics distributes substantially all of the products purchased from us to F5 Networks, Inc.

Key Business Metrics

The following describes certain line items in our condensed consolidated statements of operations that are important to management's assessment of our financial performance:

Net Sales. Net sales consist primarily of sales of our high performance memory subsystems, net of a provision for estimated returns under our right of return policies, which generally range up to 30 days. We generally do not have long-term sales agreements with our customers. Although OEM customers typically provide us with non-binding forecasts of future product demand over specific periods of time, they generally place orders with us approximately two weeks in advance of scheduled delivery. Selling prices are typically negotiated monthly, based on competitive market conditions and the current price of DRAM ICs and NAND. Purchase orders generally have no cancellation or rescheduling penalty provisions. We often ship our products to our customers' international manufacturing sites. All of our sales to date, however, are denominated in United States ("U.S.") dollars. We also sell excess component inventory of DRAM ICs and NAND to distributors and other users of memory ICs. As compared to previous years, component inventory sales remain a relatively small percentage of net sales as a result of our efforts to diversify both our customer and product line bases. This diversification effort has also allowed us to use components in a wider range of memory subsystems. We expect that component inventory sales will continue to represent a minimal portion of our net sales in future periods.

Cost of Sales. Our cost of sales includes the cost of materials, manufacturing costs, depreciation and amortization of equipment, inventory valuation provisions, stock-based compensation and occupancy costs and other allocated fixed costs. The DRAM ICs and NAND incorporated into our products constitute a significant portion of our cost of sales, and thus our cost of sales will fluctuate based on the current price of DRAM ICs and NAND. We attempt to pass through such DRAM IC and NAND flash memory cost fluctuations to our customers by renegotiating pricing prior to the placement of their purchase orders. However, the sales prices of our memory subsystems can also fluctuate due to competitive situations unrelated to the pricing of DRAM ICs and NAND, which affects gross margins. The gross margin on our sales of excess component DRAM IC and NAND inventory is much lower than the gross margin on our sales of our memory subsystems. We assess the valuation of our inventories on a monthly basis and record a provision to cost of sales as necessary to reduce inventories to the lower of cost or net realizable value.

Research and Development. Research and development expense consists primarily of employee and independent contractor compensation and related costs, non-recurring engineering fees, patent filing and protection legal fees, computer-aided design software licenses, reference design development costs, depreciation or rental of evaluation equipment, stock-based compensation, and occupancy and other allocated overhead costs. Also included in research and development expense are the costs of material and overhead related to the production of engineering samples of new products under development or products used solely in the research and development process, reduced by estimated salvage value. Our customers typically do not separately compensate us for design and engineering work involved in developing application-specific products for incorporation into their products. All research and development costs are expensed as incurred. We anticipate that research and development expenditures will increase in future periods as we seek to expand new product opportunities, increase our activities related to new and emerging markets and continue to develop additional proprietary technologies.

Selling, General and Administrative. Selling, general and administrative expenses consist primarily of employee salaries and related costs, stock-based compensation, independent sales representative commissions, professional services, promotional and other selling and marketing expenses, sample expense and occupancy and other allocated overhead costs. A significant portion of our selling effort is directed at building relationships with OEMs and other customers and working through the product approval and qualification process with them. Therefore, the cost of material and overhead related to products manufactured for qualification is included in selling expenses. As we continue to service existing and establish new customers, we anticipate that our sales and marketing expenses will increase.

Provision (Benefit) for Income Taxes. We are required to adjust our effective tax rate each quarter to be consistent with the estimated annual effective tax rate. We are also required to record the tax impact of certain discrete items, unusual or infrequently occurring, including changes in judgment about valuation allowances and effects of changes in tax laws or rates, in the interim period in which they occur. In addition, jurisdictions with a projected loss for the year or a year-to-date loss where no tax benefit can be recognized are excluded from the estimated annual effective tax rate. The impact of such an exclusion could result in a higher or lower effective tax rate during a particular quarter, based upon the mix and timing of actual earnings versus annual projections.

We evaluate whether a valuation allowance should be established against our deferred tax assets based on the consideration of all available evidence using a “more likely than not” standard. As of October 2, 2010 and January 2, 2010, we have provided a full valuation allowance and no benefit has been recognized for net operating losses and other deferred tax assets due to uncertainty of future utilization.

Critical Accounting Policies

The preparation of our condensed consolidated financial statements in conformity with accounting principles generally accepted in the U.S. requires us to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosures of contingent assets and liabilities at the date of the condensed consolidated financial statements and the reported amounts of net sales and expenses during the reporting period. By their nature, these estimates and assumptions are subject to an inherent degree of uncertainty. We base our estimates on our historical experience, knowledge of current conditions and our beliefs of what could occur in the future considering available information. We review our estimates on an on-going basis. Actual results may differ from these estimates, which may result in material adverse effects on our operating results and financial position. We believe the following critical accounting policies involve our more significant assumptions and estimates used in the preparation of our condensed consolidated financial statements:

Revenue Recognition. We recognize revenues in accordance with the Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC") Topic 605. Accordingly, we recognize revenues when there is persuasive evidence that an arrangement, product delivery and acceptance have occurred, the sales price is fixed or determinable, and collectibility of the resulting receivable is reasonably assured.

We generally use customer purchase orders and/or contracts as evidence of an arrangement. Delivery occurs when goods are shipped for customers with FOB Shipping Point terms and upon receipt for customers with FOB Destination terms, at which time title and risk of loss transfer to the customer. Shipping documents are used to verify delivery and customer acceptance. We assess whether the sales price is fixed or determinable based on the payment terms associated with the transaction and whether the sales price is subject to refund. Customers are generally allowed limited rights of return for up to 30 days, except for sales of excess component inventories, which contain no right-of-return privileges. Estimated returns are provided for at the time of sale based on historical experience or specific identification of an event necessitating a reserve. We offer a standard product warranty to our customers and have no other post-shipment obligations. While these sales returns have historically been within our expectations and the provisions established, we cannot guarantee that we will continue to experience similar sales return rates in the future. Any significant increase in product return rates could have a material adverse effect on our operating results for the period or periods in which such returns materialize. We assess collectibility based on the creditworthiness of the customer as determined by credit checks and evaluations, as well as the customer's payment history.

All amounts billed to customers related to shipping and handling are classified as net sales, while all costs incurred by us for shipping and handling are classified as cost of sales.

Fair Value of Financial Instruments. Our financial instruments consist principally of cash and cash equivalents, investments in marketable securities, accounts receivable, accounts payable, accrued expenses and debt instruments. Other than for certain investments in auction rate securities, commercial paper and short-term corporate bonds, the fair value of our cash equivalents and investments in marketable securities is determined based on quoted prices in active markets for identical assets or Level 1 inputs. Because of their short-term nature, commercial paper and short-term corporate bonds are not frequently traded. Although there are observable quotes for these securities, the markets are not considered active. Accordingly, the fair values of these investments are based on Level 2 inputs. The fair value of our auction rate securities is determined based on Level 3 inputs. We recognize transfers between Levels 1 through 3 of the fair value hierarchy at the beginning of the reporting period. We believe that the carrying values of all other financial instruments approximate their current fair values due to their nature and respective durations.

Allowance for Doubtful Accounts. We perform credit evaluations of our customers' financial condition and limit the amount of credit extended to our customers as deemed necessary, but generally require no collateral. We evaluate the collectibility of accounts receivable based on a combination of factors. In cases where we are aware of circumstances that may impair a specific customer's ability to meet its financial obligations subsequent to the original sale, we will record an allowance against amounts due, and thereby reduce the net recognized receivable to the amount that we reasonably believe will be collected. For all other customers, we record allowances for doubtful accounts based primarily on the length of time the receivables are past due based on the terms of the originating transaction, the current business environment and our historical experience. Uncollectible accounts are charged against the allowance for doubtful accounts when all cost effective commercial means of collection have been exhausted. Generally, our credit losses have been within our expectations and the provisions established. However, we cannot guarantee that we will continue to experience credit loss rates similar to those we have experienced in the past.

Our accounts receivable are highly concentrated among a small number of customers, and a significant change in the liquidity or financial position of one of these customers could have a material adverse effect on the collectability of our accounts receivable, our liquidity and our future operating results.

Inventories. We value our inventories at the lower of the actual cost to purchase or manufacture the inventory or the net realizable value of the inventory. Cost is determined on an average cost basis which approximates actual cost on a first-in, first-out basis and includes raw materials, labor and manufacturing overhead. At each balance sheet date, we evaluate ending inventory quantities on hand and record a provision for excess quantities and obsolescence. Among other factors, we consider historical demand and forecasted demand in relation to the inventory on hand, competitiveness of product offerings, market conditions and product life cycles when determining obsolescence and net realizable value. In addition, we consider changes in the market value of DRAM ICs and NAND in determining the net realizable value of our raw material inventory. Once established, any write downs are considered permanent adjustments to the cost basis of our excess or obsolete inventories.

A significant decrease in demand for our products could result in an increase in the amount of excess inventory quantities on hand. In addition, our estimates of future product demand may prove to be inaccurate, in which case we may have understated or overstated the provision required for excess and obsolete inventory. In the future, if our inventories are determined to be overvalued, we would be required to recognize additional expense in our cost of sales at the time of such determination. Likewise, if our inventories are determined to be undervalued, we may have over-reported our costs of sales in previous periods and would be required to recognize additional gross profit at the time such inventories are sold. In addition, should the market value of DRAM ICs or NAND decrease significantly, we may be required to lower our selling prices to reflect the lower current cost of our raw materials. If such price decreases reduce the net realizable value of our inventories to less than our cost, we would be required to recognize additional expense in our cost of sales in the same period. Although we make every reasonable effort to ensure the accuracy of our forecasts of future product demand, any significant unanticipated changes in demand, technological developments or the market value of DRAM ICs or NAND could have a material effect on the value of our inventories and our reported operating results.

Impairment of Long-Lived Assets. We evaluate the recoverability of the carrying value of long-lived assets held and used in our operations for impairment on at least an annual basis or whenever events or changes in circumstances indicate that their net book value may not be recoverable. When such factors and circumstances exist, we compare the projected undiscounted future net cash flows associated with the related asset or group of assets over their estimated useful lives against their respective carrying amount. These projected future cash flows may vary significantly over time as a result of increased competition, changes in technology, fluctuations in demand, consolidation of our customers and reductions in average selling prices. If the carrying value is determined not to be recoverable from future operating cash flows, the asset is deemed impaired and an impairment loss is recognized to the extent the carrying value exceeds the estimated fair value of the asset. The fair value of the asset or asset group is based on market value when available, or when unavailable, on discounted expected cash flows.

Warranty Reserve. We offer product warranties generally ranging from one to three years, depending on the product and negotiated terms of purchase agreements with our customers. Such warranties require us to repair or replace defective product returned to us during the warranty period at no cost to the customer. Warranties are not offered on sales of excess component inventory. Our estimates for warranty-related costs are recorded at the time of sale based on historical and estimated future product return rates and expected repair or replacement costs. While such costs have historically been consistent between periods and within our expectations and the provisions established, unexpected changes in failure rates could have a material adverse impact on us, requiring additional warranty reserves, and adversely affecting our gross profit and gross margins.

Stock-Based Compensation. We account for equity issuances to non-employees in accordance with ASC Topic 505. All transactions in which goods or services are the consideration received for the issuance of equity instruments are accounted for based on the fair value of the consideration received or the fair value of the equity instrument issued, whichever is more reliably measurable. The measurement date used to determine the fair value of the equity instrument issued is the earlier of the date on which the third-party performance is complete or the date on which it is probable that performance will occur.

In accordance with ASC Topic 718, employee and director stock-based compensation expense recognized during the period is based on the value of the portion of stock-based payment awards that is ultimately expected to vest during the period. Given that stock-based compensation expense recognized in the condensed consolidated statements of operations is based on awards ultimately expected to vest, it has been reduced for estimated forfeitures. ASC Topic 718 requires forfeitures to be estimated at the time of grant and revised, if necessary, in subsequent periods if actual forfeitures differ from those estimates. Our estimated average forfeiture rates are based on historical forfeiture experience and estimated future forfeitures.

The fair value of common stock option awards to employees and directors is calculated using the Black-Scholes option pricing model. The Black-Scholes model requires subjective assumptions regarding future stock price volatility and expected time to exercise, along with assumptions about the risk-free interest rate and expected dividends, all of which affect the estimated fair values of our common stock option awards. The expected term of options granted is calculated as the average of the weighted vesting period and the contractual expiration date of the option. This calculation is based on the safe harbor method permitted by the SEC in instances where the vesting and exercise terms of options granted meet certain conditions and where limited historical exercise data is available. The expected volatility is based on the historical volatility of our common stock. The risk-free rate selected to value any particular grant is based on the U.S. Treasury rate that corresponds to the expected term of the grant effective as of the date of the grant. The expected dividends assumption is based on our history and our expectations regarding dividend payouts. We evaluate the assumptions used to value our common stock option awards on a quarterly basis. If factors change and we employ different assumptions, stock- based compensation expense may differ significantly from what we have recorded in prior periods. Compensation expense for common stock option awards with graded vesting schedules is recognized on a straight-line basis over the requisite service period for the last separately vesting portion of the award.

We recognize the fair value of restricted stock awards issued to employees and outside directors as stock-based compensation expense on a straight-line basis over the vesting period for the last separately vesting portion of the awards. Fair value is determined as the difference between the closing price of our common stock on the grant date and the purchase price of the restricted stock award, if any, reduced by expected forfeitures.

If there are any modifications or cancellations of the underlying vested or unvested stock-based awards, we may be required to accelerate, increase or cancel any remaining unearned stock-based compensation expense, or record additional expense for vested stock-based awards. Future stock-based compensation expense and unearned stock- based compensation may increase to the extent that we grant additional common stock options or other stock-based awards.

Income Taxes. Under ASC Topic 270, we are required to adjust our effective tax rate each quarter to be consistent with the estimated annual effective tax rate. We are also required to record the tax impact of certain discrete items, unusual or infrequently occurring, including changes in judgment about valuation allowances and effects of changes in tax laws or rates, in the interim period in which they occur. In addition, jurisdictions with a projected loss for the year or a year-to-date loss where no tax benefit can be recognized are excluded from the estimated annual effective tax rate. The impact of such an exclusion could result in a higher or lower effective tax rate during a particular quarter, based upon the mix and timing of actual earnings versus annual projections.

Deferred tax assets and liabilities are recognized to reflect the estimated future tax effects, calculated at currently effective tax rates, of future deductible or taxable amounts attributable to events that have been recognized on a cumulative basis in the condensed consolidated financial statements. A valuation allowance related to a net deferred tax asset is recorded when it is more likely than not that some portion of the deferred tax asset will not be realized.

ASC Topic 740 prescribes a recognition threshold and measurement requirement for the financial statement recognition of a tax position that has been taken or is expected to be taken on a tax return and also provides guidance on de-recognition, classification, interest and penalties, accounting in interim periods, disclosure, and transition. Under ASC Topic 740 we may only recognize or continue to recognize tax positions that meet a “more likely than not” threshold.

The application of tax laws and regulations is subject to legal and factual interpretation, judgment and uncertainty. Tax laws and regulations themselves are subject to change as a result of changes in fiscal policy, changes in legislation, the evolution of regulations and court rulings. Therefore, the actual liability for U.S. or foreign taxes may be materially different from our estimates, which could result in the need to record additional tax liabilities or potentially reverse previously recorded tax liabilities.

Results of Operations

The following table sets forth certain condensed consolidated statements of operations data as a percentage of net sales for the periods indicated:

	Three Months Ended		Nine Months Ended	
	October 2, 2010	October 3, 2009	October 2, 2010	October 3, 2009
Net sales	100%	100%	100%	100%
Cost of sales	71	76	76	89
Gross profit	29	24	24	11
Operating expenses:				
Research and development	47	31	40	48
Selling, general and administrative	28	33	29	52
Total operating expenses	75	63	70	100
Operating loss	(46)	(39)	(46)	(89)
Other income (expense):				
Interest income (expense), net	—	—	—	1
Other income, net	—	—	—	1
Total other income (expense), net	—	—	—	2
Loss before provision (benefit) for income taxes	(46)	(39)	(46)	(87)
Provision (benefit) for income taxes	—	(7)	(3)	(3)
Net loss	(46)%	(32)%	(43)%	(84)%

Three and Nine Months Ended October 2, 2010 Compared to Three and Nine Months Ended October 3, 2009

Net Sales, Cost of Sales and Gross Profit

The following table presents net sales, cost of sales and gross profit for the three and nine months ended October 2, 2010 and October 3, 2009 (in thousands, except percentages):

	Three Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Net sales	$ 10,565	$ 6,446	$ 4,119	64%
Cost of sales	7,545	4,879	2,666	55%
Gross profit	$ 3,020	$ 1,567	$ 1,453	93%
Gross margin	29%	24%	4%	

	Nine Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Net sales	$ 27,759	$ 11,781	$ 15,978	136%
Cost of sales	21,103	10,507	10,596	101%
Gross profit	$ 6,656	$ 1,274	$ 5,382	422%
Gross margin	24%	11%	13%	

Net Sales. Overall, net sales of our RAID, data center optimization and industrial applications increased as a result of the selection of our memory modules for inclusion in new product platforms. Net sales in all product categories have benefited from resurgence in technology investment, as general economic conditions have improved since early 2009. Should economic conditions erode positive sales trends may not continue.

The increase in net sales for the three months ended October 2, 2010 as compared with the three months ended October 3, 2009 resulted primarily from increases of approximately (i) $4.9 million in sales of NetVault™ non-volatile cache systems used in RAID controller subsystems, including $1.7 million from the launch of NetVault™ NV, the flash-based cache system that became generally available in 2010, and (ii) $0.8 million in sales of memory modules utilized in data center targeted server applications, offset by decreases of (i) $0.7 million in sales of memory modules used in laptop applications, and (ii) $0.6 million from the re-sale of DRAM components.

The increase in net sales for the nine months ended October 2, 2010 as compared with the nine months ended October 3, 2009 resulted from increases of approximately (i) $10.3 million in sales of NetVault™ products, including $4.4 million from NetVault™ NV, (ii) $5.0 million in sales of memory modules utilized in data center targeted server applications, and (iii) $1.0 million in sales of memory modules designed for industrial applications.

Gross Profit and Gross Margin. The overall improvements in gross profit are due to increased sales and manufacturing volume, as well as a shift in sales toward higher margin products. Gross profit for the three months ended October 2, 2010 as compared to the three months ended October 3, 2009 increased due to the 64% increase in net sales between the two periods, resulting in profits earned on each unit sold, as well as an improved ability to absorb fixed manufacturing costs. These volume based improvements were partially offset by increased DRAM prices, which affected margins in some product categories. Gross profits for the nine months ended October 2, 2010 as compared to the nine months ended October 3, 2009 were impacted by the same trends, including a 136% increase in net sales between the two periods.

Research and Development .

The following table presents research and development expenses for the three and nine months ended October 2, 2010 and October 3, 2009 (in thousands, except percentages):

	Three Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Research and development	$ 4,958	$ 1,975	$ 2,983	151%

	Nine Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Research and development	$ 11,156	$ 5,619	$ 5,537	99%

The increase in research and development expense in the three months ended October 2, 2010 as compared to the three months ended October 3, 2009 resulted primarily from increases of (i) $2.1 million in engineering expenses as a result of an increase in non-recurring engineering charges and both internal engineering headcount and outside contractors engaged in new product development activities, (ii) $0.8 million in material expenses related to product builds and testing, primarily related to our HyperCloud™ products and (iii) $0.1 million in legal and professional fees as we continue to increase patent filing and protection activities related to new and emerging markets.

The increase in research and development expense in the nine months ended October 2, 2010 as compared to the nine months ended October 3, 2009 resulted primarily from increases of (i) $3.1 million in non-recurring engineering charges, headcount, and outside consultants, (ii) $1.1 million in patent filing and protection legal fees, and (iii) $1.3 million in product qualification builds and testing.

Selling, General and Administrative .

The following table presents selling, general and administrative expenses for the three and nine months ended October 2, 2010 and October 3, 2009 (in thousands, except percentages):

	Three Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Selling, general and administrative	$ 2,986	$ 2,115	$ 871	41%

	Nine Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Selling, general and administrative	$ 8,163	$ 6,170	$ 1,993	32%

The increase in selling, general and administrative expense in the three months ended October 2, 2010 as compared to the three months ended October 3, 2009 resulted primarily from increases of approximately (i) $0.4 million in personnel-related expenses primarily attributable to hiring personnel to support the development of markets for HyperCloud™ and NetVault™ NV, (ii) $0.3 million in product samples and travel costs as a result of activities related to the OEM qualification process for HyperCloud™ and NetVault™ NV, and (iii) $0.2 million in commission expenses due to an increase in sales revenue.

The increase in selling, general and administrative expense in the nine months ended October 2, 2010 as compared to the nine months ended October 3, 2009 resulted primarily from increases of approximately (i) $0.9 million in personnel-related expenses, (ii) $0.6 million in product samples and travel costs as a result of activities related to the OEM qualification process for HyperCloud™ and NetVault™ NV, and (iii) $0.5 million in commission expenses.

Other Income (Expense).

The following table presents other income for the three and nine months ended October 2, 2010 and October 3, 2009 (in thousands, except percentages):

	Three Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Interest income (expense), net	$ (3)	$ (25)	$ 22	(88)%
Other income, net	—	4	(4)	100%
Total other income (expense), net	$ (3)	$ (21)	$ 18	86%

	Nine Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Interest income (expense), net	$ 1	$ 75	$ (74)	(99)%
Other income, net	71	134	(63)	(47)%
Total other income (expense), net	$ 72	$ 209	$ (137)	(66)%

Net interest income (expense) for the three and nine months ended October 2, 2010 was comprised of nominal interest income, offset by nominal interest expense. Net interest income for the three and nine months ended October 3, 2009 was comprised of interest income of approximately $0.02 million and $0.1 million, respectively, partially offset by interest expense of approximately $0.05 million and $0.03 million, respectively. The decrease in interest income in the three and nine months ended October 2, 2010 as compared to the three and nine months ended October 3, 2009 was due to a combination of our lower average cash and investment balances and the decrease in the yield earned on those balances due to lower interest rates. The decrease in interest expense in the three months and nine months ended October 2, 2010 as compared to the three and nine months ended October 3, 2009 resulted primarily from our lower average outstanding balances on our line of credit and debt balances during the current year.

Other income, net, for the nine months ended October 2, 2010 was primarily comprised of cash proceeds from the early termination of a sublease of our headquarters facility. Other income, net, for the nine months ended October 3, 2009 was primarily comprised of gains from the sale of equipment held for sale during the first quarter.

Provision (Benefit) for Income Taxes .

The following table presents the provision (benefit) for income taxes for the three and nine months ended October 2, 2010 and October 3, 2009 (in thousands, except percentages):

	Three Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Provision (benefit) for income taxes	$ 12	$ (458)	$ 470	(103)%

	Nine Months Ended			
	October 2, 2010	October 3, 2009	Change	% Change
Provision (benefit) for income taxes	$ (713)	$ (409)	$ 304	(74)%

During the nine months ended October 2, 2010, we carried back approximately $1.7 million of gross net operating losses under the Worker, Homeownership, and Business Act and recorded a tax benefit and income tax receivable of approximately $0.7 million, which was received in April 2010. Our income tax benefit of $0.5 million and $0.4 million for the three and nine months ended October 3, 2009, respectively, was the result of a change in our liability for unrecognized tax benefits due to a lapse in a federal statute of limitations. We recorded a provision for income taxes for the quarter ended October 2, 2010 as a result of state taxes.

Liquidity and Capital Resources

Since our inception, we have financed our operations primarily through issuances of equity and debt securities and cash generated from operations. We have also funded our operations with a revolving line of credit under our bank credit facility, from capitalized lease obligations and from the sale and leaseback of our domestic manufacturing facility.

Working Capital and Cash and Marketable Securities

The following table presents working capital, cash and cash equivalents and investments in marketable securities (in thousands):

	October 2, 2010	January 2, 2010
Working Capital	$ 20,565	$ 13,379
Cash and cash equivalents(1)	$ 14,722	$ 9,942
Short-term marketable securities(1)	3,426	3,949
Long-term marketable securities	894	941
	$ 19,042	$ 14,832

(1) Included in working capital

Our working capital increased in the nine months ended October 2, 2010 primarily as a result of our increase in cash, cash equivalents and short-term marketable securities resulting from our public offering of our shares of common stock. Additionally, we experienced increases in certain operating assets, offset by increases in certain operating liabilities resulting from our increase in sales of our legacy products and production ramp up for HyperCloud™ and NetVault™ NV.

Cash Provided and Used in the Nine Months Ended October 2, 2010 and October 3, 2009

The following table summarizes our cash flows for the periods indicated (in thousands):

	Nine Months Ended	
	October 2, 2010	October 3, 2009
Net cash provided by (used in):		
Operating activities	$ (12,648)	$ (4,779)
Investing activities	(196)	1,586
Financing activities	17,624	(520)
Net increase (decrease) in cash and cash equivalents	$ 4,780	$ (3,713)

Operating Activities. Net cash used in operating activities for the nine months ended October 2, 2010 was primarily a result of (i) net loss of approximately $11.9 million and (ii) cash used by changes in operating assets and liabilities of approximately $3.6 million, partially offset by approximately $2.8 million in net non-cash operating expenses, primarily consisting of depreciation and amortization and stock-based compensation expense. Net cash used in operating activities for the nine months ended October 3, 2009 was primarily a result of a net loss of approximately $9.9 million, partially offset by (i) approximately $2.7 million in net non-cash operating expenses, primarily comprising depreciation and amortization and stock-based compensation, and (ii) approximately $2.4 million in net cash provided by changes in operating assets and liabilities.

Accounts receivable increased approximately $2.7 million during the nine months ended October 2, 2010 primarily as a result of the increase in our net sales during the period. During the same period, we were successful in collecting cash from sales to our customers substantially in accordance with our standard payment terms with those customers. Inventories increased approximately $1.6 million during the nine months ended October 2, 2010 as we prepared for qualification and production of our HyperCloud™ products and initiated production of our NetVault™ NV products. During the nine months ended October 2, 2010, we were able to partially fund the growth in our accounts receivable and inventory through an increase in accounts payable of $1.9 million, primarily from component vendors.

Investing Activities. Net cash used in investing activities for the nine months ended October 2, 2010 was primarily the result of the acquisition of $0.7 million in property and equipment, offset by net sales of marketable securities of $0.5 million. Net cash provided by investing activities for the nine months ended October 3, 2009 was primarily a result of net sales of marketable securities of $1.3 million and proceeds from the sale of equipment of $0.3 million.

Financing Activities. Net cash provided by financing activities for the nine months ended October 2, 2010 was a result of the net proceeds of $16.2 million from the sale of 4,594,250 shares of our common stock in a registered public offering, which closed on March 24, 2010, and the proceeds of a $1.5 million term loan obtained from Silicon Valley Bank. Net cash used in financing activities for the nine months ended October 3, 2009 was the result of repayment of approximately $0.5 million on our long-term debt.

Capital Resources

On October 31, 2009, we entered into a credit agreement with Silicon Valley Bank, which was amended on March 24, 2010, June 30, 2010 and September 30, 2010. Currently, the credit agreement provides that we can borrow up to the lesser of (i) 80% of eligible accounts receivable, or (ii) $10.0 million. We have the option to increase credit availability to $15.0 million at any time through the maturity date of September 30, 2012, subject to the conditions of the credit agreement.

The credit agreement contains an overall sublimit of $10.0 million to collateralize our contingent obligations under letters of credit, foreign exchange contracts and cash management services. Amounts outstanding under the overall sublimit reduce the amount available pursuant to the credit agreement. At October 2, 2010, letters of credit in the amount of $2.9 million were outstanding. The letters of credit expire on various dates through October 31, 2011.

In September, 2010, we entered into a $2.5 million commitment to purchase ASIC devices for use in certain of our high-performance memory modules that are in the evaluation process with OEM and end-user customers. We issued a $1.1 million letter of credit to secure payment for future shipments.

Interest is payable monthly at either (i) prime plus 1.25%, as long as we maintain $8.5 million in revolving credit availability plus unrestricted cash on deposit with the bank, or (ii) prime plus 2.25%. Additionally, the credit agreement requires payments for an unused line, as well as anniversary and early termination fees, as applicable.

The following table presents details of outstanding borrowings and availability under our line of credit (in thousands):

	October 2, 2010	January 2, 2010
Outstanding borrowings on the revolving line of credit	$ —	$ —
Borrowing availability under the revolving line of credit	$ 2,382	$ —

In addition, in connection with the September 30, 2010 amendment, Silicon Valley Bank extended a $1.5 million term loan under the credit agreement, which bears interest at a rate of 1.75%. We are required to make equal monthly principal payments which total $0.5 million annually, and a balloon payment of $0.5 million at maturity. As of October 2, 2010, $1.5 million was outstanding under the term loan.

All obligations under the credit agreement are secured by a first priority lien on the Company's tangible and intangible assets. Silicon Valley Bank released Netlist Technology Texas, LP as an obligor under the credit agreement due to the dissolution of this subsidiary in October 2010.

The only restriction on the use of funds under the revolving line of credit is that we must be in compliance with the covenants of the credit agreement. The credit agreement includes affirmative and negative covenants, including financial covenants with respect to our liquidity and profitability. As of October 2, 2010, we were in compliance with all financial covenants and expect to maintain compliance for the foreseeable future. However, we have in the past been in violation of one or more covenants of other credit agreements, and we could violate one or more covenants in the future. If we were to be in violation of covenants under our credit agreement, our lender could choose to accelerate payment on all outstanding loan balances. If that were to occur, we may be unable to quickly obtain equivalent or suitable replacement financing. If we were not able to secure alternative sources of funding, such acceleration would have a material adverse impact on our financial condition.

We have in the past utilized equipment leasing arrangements to finance certain capital expenditures. Equipment leases continue to be a financing alternative that we expect to pursue in the future.

We believe our existing cash balances, borrowing availability under our bank credit facility, and the cash expected to be generated from operations, will be sufficient to meet our anticipated cash needs for at least the next 12 months. Our future capital requirements will depend on many factors, including our levels of net sales, the timing and extent of expenditures to support research and development activities, the expansion of manufacturing capacity both domestically and internationally and the continued market acceptance of our products. We could be required, or may choose, to seek additional funding through public or private equity or debt financings. In addition, in connection with any future acquisitions, we may require additional funding which may be provided in the form of additional debt or equity financing or a combination thereof. These additional funds may not be available on terms acceptable to us, or at all.

New Accounting Pronouncements

In September 2009, the FASB issued Accounting Standards Update ("ASU") 2009-13, *Multiple-Deliverable Revenue Arrangements* ("ASU 2009-13"), which amends the revenue guidance under ASC Topic 605, which describes the accounting for multiple element arrangements. ASU 2009-13 addresses how to determine whether an arrangement involving multiple deliverables contains more than one unit of accounting and how arrangement consideration shall be measured and allocated to the separate units of accounting in the arrangement. ASU 2009-13 is effective on a prospective basis for the Company's fiscal year 2011, with earlier adoption permitted. We are currently evaluating the adoption of ASU 2009-13 and the impact that ASU 2009-13 will have on our condensed consolidated financial statements.

In September 2009, the FASB issued ASU 2009-14, *Certain Revenue Arrangements That Include Software Elements* ("ASU 2009-14"), which excludes tangible products containing software components and non-software components that function together to deliver the product's essential functionality from the scope of ASC Topic 985, which describes the accounting for software revenue recognition. ASU 2009-14 is effective on a prospective basis for our fiscal year 2011, with earlier adoption permitted. We are currently evaluating the impact that ASU 2009-14 will have on its condensed consolidated financial statements.

Off-Balance Sheet Arrangements

We do not have any relationships with unconsolidated entities or financial partnerships, such as entities often referred to as structured finance or special purpose entities, which would have been established for the purpose of facilitating off-balance sheet arrangements or other contractually narrow or limited purposes. In addition, we do not have any undisclosed borrowings or debt, and we have not entered into any synthetic leases. We are, therefore, not materially exposed to any financing, liquidity, market or credit risk that could arise if we had engaged in such relationships.

Item 4. Controls and Procedures

(a) Evaluation of Disclosure Controls and Procedures. We carried out an evaluation, under the supervision and with the participation of our management, including our principal executive officer and principal financial officer, of the effectiveness of the design and operation of our disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) of the Securities Exchange Act of 1934, ("Exchange Act")) as of the end of our fiscal quarter ended October 2, 2010. Based upon that evaluation, our principal executive officer and principal financial officer concluded that our disclosure controls and procedures are effective to provide reasonable assurance that information required to be disclosed by us in reports that we file or submit under the Exchange Act (i) is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms and (ii) is accumulated and communicated to our management, including our principal executive officer and principal financial officer as appropriate to allow timely decisions regarding required disclosure.

(b) Change in internal controls over financial reporting. During the fiscal quarter that ended October 2, 2010, there were no changes in our internal controls over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act) that have materially affected, or are reasonably likely to materially affect, our internal controls over financial reporting.

Inherent Limitations on Internal Control

A control system, no matter how well conceived and operated, can provide only reasonable, not absolute, assurance that the objectives of the control system are met. Further, the benefits of controls must be considered relative to their costs. Because of the inherent limitations in all control systems, no evaluation of controls can provide absolute assurance that all control issues and instances of fraud, if any, have been detected. These inherent limitations include the realities that judgments in decision making can be faulty, and that breakdowns can occur because of simple errors. Additionally, controls can be circumvented by the individual acts of some persons, by collusion of two or more people, or by management override of the control. The design of any system of controls is also based in part upon certain assumptions about the likelihood of future events, and there can be no assurance that any design will succeed in achieving its stated goals under all potential future conditions. Because of the inherent limitations in a cost-effective control system, misstatements due to error or fraud may occur and not be detected.

PART II. OTHER INFORMATION

Item 1. Legal Proceedings

The information set forth in the sections entitled Federal Securities Class Action, Patent Claims and Trade Secret Claim under Note 9 of Notes to Unaudited Condensed Consolidated Financial Statements, included in Part I, Item I of this Report, is incorporated herein by reference.

Item 1A. Risk Factors

You should consider each of the following factors as well as the other information in this Report in evaluating our business and our prospects. The risks described below are not the only ones we face. Additional risks we are not presently aware of or that we currently believe are immaterial may also impair our business operations. The trading price of our common stock could decline due to any of these risks, and you could lose all or part of your investment. In assessing these risks, you should also refer to the other information contained or incorporated by reference in this Report, including our consolidated financial statements and related notes.

Risks related to our business

We expect a number of factors to cause our operating results to fluctuate on a quarterly and annual basis, which may make it difficult to predict our future performance.

Our operating results have varied significantly in the past and will continue to fluctuate from quarter-to-quarter or year-to-year in the future due to a variety of factors, many of which are beyond our control. Factors relating to our business that may contribute to these quarterly and annual fluctuations include the following factors, as well as other factors described elsewhere in this Report:

- our inability to develop new or enhanced products that achieve customer or market acceptance in a timely manner, including our HyperCloud™ memory module and our flash-based memory products;
- our failure to maintain the qualification of our products with our current customers or to qualify future products with our current or prospective customers in a timely manner or at all;
- the timing of actual or anticipated introductions of competing products or technologies by us or our competitors, customers or suppliers;
- the loss of, or a significant reduction in sales to, a key customer;
- the cyclical nature of the industry in which we operate;
- a reduction in the demand for our high performance memory subsystems or the systems into which they are incorporated;
- our customers' failure to pay us on a timely basis;
- costs, inefficiencies and supply risks associated with outsourcing portions of the design and the manufacture of integrated circuits;
- our ability to absorb manufacturing overhead if our revenues decline or vary from our projections;
- delays in fulfilling orders for our products or a failure to fulfill orders;
- our ability to procure an adequate supply of key components, particularly DRAM ICs and NAND;
- dependence on large suppliers who are also competitors and whose manufacturing priorities may not support our production schedules;
- changes in the prices of our products or in the cost of the materials that we use to build our products, including fluctuations in the market price of DRAM ICs and NAND;
- our ability to effectively operate our manufacturing facility in the PRC;
- manufacturing inefficiencies associated with the start-up of new manufacturing operations, new products and initiation of volume production;
- our failure to produce products that meet the quality requirements of our customers;
- disputes regarding intellectual property rights and the possibility of our patents being reexamined by the United States Patent and Trademark Office;
- the costs and management attention diversion associated with litigation;
- the loss of any of our key personnel;
- changes in regulatory policies or accounting principles;
- our ability to adequately manage or finance internal growth or growth through acquisitions; and
- the effect of our investments and financing arrangements on our liquidity.

Due to the various factors mentioned above, and others, the results of any prior quarterly or annual periods should not be relied upon as an indication of our future operating performance. In one or more future periods, our results of operations may fall below the expectations of securities analysts and investors. In that event, the market price of our common stock would likely decline. In addition, the market price of our common stock may fluctuate or decline regardless of our operating performance.

We have historically incurred losses and may continue to incur losses.

Since the inception of our business in 2000, we have only experienced one fiscal year (2006) with profitable results. In order to regain profitability, or to achieve and sustain positive cash flows from operations in the future, we must further reduce operating expenses and/or increase our revenues. Although we have in the past engaged, and are continuing to engage, in a series of cost reduction actions, these expense reductions alone may not make us profitable or allow us to sustain profitability if it is achieved. Our ability to achieve profitability will depend on increased revenue growth from, among other things, increased demand for our memory subsystems and related product offerings, as well as our ability to expand into new and emerging markets. We may not be successful in achieving the necessary revenue growth or the expected expense reductions. Moreover, we may be unable to sustain past or expected future expense reductions in subsequent periods. We may not achieve profitability or sustain such profitability, if achieved, on a quarterly or annual basis in the future.

Any failure to achieve profitability could result in increased capital requirements and pressure on our liquidity position. Many companies are experiencing difficulty in achieving access to capital in these challenging times. We believe our future capital requirements will depend on many factors, including our levels of net sales, the timing and extent of expenditures to support research and development activities, the expansion of manufacturing capacity both domestically and internationally and the continued market acceptance of our products. Our capital requirements could result in our having to, or otherwise choosing to, seek additional funding through public or private equity offerings or debt financings, which funding may not be available on terms acceptable to us, or at all, either of which could result in our inability to meet certain of our financial obligations and other related commitments.

We are subject to risks relating to product concentration and lack of market diversification.

We have historically derived a substantial portion of our net sales from sales of our high performance memory subsystems for use in the server market. We expect these memory subsystems to continue to account for a significant portion of our net sales in the near term. Continued market acceptance of these products for use in servers is critical to our success.

In an attempt to set our products apart from those of our competitors, we have invested a significant portion of our research and development budget into the design of ASIC devices, such as the HyperCloud ™ memory subsystem, introduced in November 2009. This new design and the products they are incorporated into are subject to increased risks as compared to our existing products. For example:

- we may be unable to achieve customer or market acceptance of the HyperCloud ™ memory subsystem or other new products, or achieve such acceptance in a timely manner;
- the HyperCloud ™ memory subsystem or other new products may contain currently undiscovered flaws, the correction of which would result in increased costs and time to market;
- we are dependent on a limited number of suppliers for both the DRAM ICs and the ASIC devices that are essential to the functionality of the HyperCloud ™ memory subsystem, and could experience supply chain disruption as a result of business issues that are specific to our suppliers or the industry as a whole; and
- we will be required to demonstrate the quality and reliability of the HyperCloud ™ memory subsystem or other new products to our customers, and will be required to qualify these new products with our customers, both of which will require a significant investment of time and resources prior to the receipt of any revenue from such customers.

Any failure or delay in placing or qualifying new products with our customers would likely result in reductions in our net sales and would adversely impact our results of operations.

Additionally, if the demand for servers deteriorates or if the demand for our products to be incorporated in servers declines, our operating results would be adversely affected, and we would be forced to diversify our product portfolio and our target markets. We may not be able to achieve this diversification, and our inability to do so may adversely affect our business.

We may lose our competitive position if we are unable to timely and cost-effectively develop new or enhanced products that meet our customers' requirements and achieve market acceptance.

Our industry is characterized by intense competition, rapid technological change, evolving industry standards and rapid product obsolescence. Evolving industry standards and technological change or new, competitive technologies could render our existing products obsolete. Accordingly, our ability to compete in the future will depend in large part on our ability to identify and develop new or enhanced products on a timely and cost-effective basis, and to respond to changing customer requirements. In order to develop and introduce new or enhanced products, we need to:

- identify and adjust to the changing requirements of our current and potential customers;
- identify and adapt to emerging technological trends and evolving industry standards in our markets;
- design and introduce cost-effective, innovative and performance-enhancing features that differentiate our products from those of our competitors;
- develop relationships with potential suppliers of components required for these new or enhanced products;
- qualify these products for use in our customers' products; and
- develop and maintain effective marketing strategies.

Our product development efforts are costly and inherently risky. It is difficult to foresee changes or developments in technology or anticipate the adoption of new standards. Moreover, once these things are identified, if at all, we will need to hire the appropriate technical personnel or retain third party designers, develop the product, identify and eliminate design flaws, and manufacture the product in production quantities either in-house or through third-party manufacturers. As a result, we may not be able to successfully develop new or enhanced products or we may experience delays in the development and introduction of new or enhanced products. Delays in product development and introduction could result in the loss of, or delays in generating, net sales and the loss of market share, as well as damage to our reputation. Even if we develop new or enhanced products, they may not meet our customers' requirements or gain market acceptance. Accordingly, we cannot assure you that our future product development efforts will result in the development of new or enhanced products or that such products will achieve market acceptance.

Our customers require that our products undergo a lengthy and expensive qualification process without any assurance of net sales.

Our prospective customers generally make a significant commitment of resources to test and evaluate our memory subsystems prior to purchasing our products and integrating them into their systems. This extensive qualification process involves rigorous reliability testing and evaluation of our products, which may continue for six months or longer and is often subject to delays. In addition to qualification of specific products, some of our customers may also require us to undergo a technology qualification if our product designs incorporate innovative technologies that the customer has not previously encountered. Such technology qualifications often take substantially longer than product qualifications and can take over a year to complete. Qualification by a prospective customer does not ensure any sales to that prospective customer. Even after successful qualification and sales of our products to a customer, changes in our products, our manufacturing facilities, our production processes or our component suppliers may require a new qualification process, which may result in additional delays.

In addition, because the qualification process is both product-specific and platform-specific, our existing customers sometimes require us to requalify our products, or to qualify our new products, for use in new platforms or applications. For example, as our OEM customers transition from prior generation DDR2 DRAM architectures to current generation DDR3 DRAM architectures, we must design and qualify new products for use by those customers. In the past, this process of design and qualification has taken up to six months to complete, during which time our net sales to those customers declined significantly. After our products are qualified, it can take several months before the customer begins production and we begin to generate net sales.

We must devote substantial resources, including design, engineering, sales, marketing and management efforts, to qualify our products with prospective customers in anticipation of sales. Significant delays in the qualification process could result in an inability to keep up with rapid technology change or new, competitive technologies. If we delay or do not succeed in qualifying a product with an existing or prospective customer, we will not be able to sell that product to that customer, which would harm our operating results and business.

Sales to a limited number of customers represent a significant portion of our net sales and the loss of, or a significant reduction in sales to, any one of these customers could materially harm our business.

Sales to certain of our OEM customers such as Dell, Flextronics, Hewlett Packard and Arrow have historically represented a substantial majority of our net sales. Dell and Flextronics represented approximately 53% and 25%, respectively, of our net sales for the nine months ended October 2, 2010. Dell, Arrow, and Hewlett Packard represented approximately 48%, 13% and 10%, respectively, of our net sales for the nine months ended October 3, 2009. We currently expect that sales to major OEM customers will continue to represent a significant percentage of our net sales for the foreseeable future. We do not have long-term agreements with our OEM customers, or with any other customer. Any one of these customers could decide at any time to discontinue, decrease or delay their purchase of our products. In addition, the prices that these customers pay for our products could change at any time. The loss of any of our OEM customers, or a significant reduction in sales to any of them, could significantly reduce our net sales and adversely affect our operating results.

Our ability to maintain or increase our net sales to our key customers depends on a variety of factors, many of which are beyond our control. These factors include our customers' continued sales of servers and other computing systems that incorporate our memory subsystems and our customers' continued incorporation of our products into their systems. Because of these and other factors, net sales to these customers may not continue and the amount of such net sales may not reach or exceed historical levels in any future period. Because these customers account for a substantial portion of our net sales, the failure of any one of these customers to pay on a timely basis would negatively impact our cash flow. In addition, while we may not be contractually obligated to accept returned products, we may determine that it is in our best interest to accept returns in order to maintain good relations with our customers.

A limited number of relatively large potential customers dominate the markets for our products.

Our target markets are characterized by a limited number of large companies. Consolidation in one or more of our target markets may further increase this industry concentration. As a result, we anticipate that sales of our products will continue to be concentrated among a limited number of large customers in the foreseeable future. We believe that our financial results will depend in significant part on our success in establishing and maintaining relationships with, and effecting substantial sales to, these potential customers. Even if we establish these relationships, our financial results will be largely dependent on these customers' sales and business results.

If a standardized memory solution which addresses the demands of our customers is developed, our net sales and market share may decline.

Many of our memory subsystems are specifically designed for our OEM customers' high performance systems. In a drive to reduce costs and assure supply of their memory module demand, our OEM customers may endeavor to design JEDEC standard DRAM modules into their new products. Although we also manufacture JEDEC modules, this trend could reduce the demand for our higher priced customized memory solutions which in turn would have a negative impact on our financial results. In addition, customers deploying custom memory solutions today may in the future choose to adopt a JEDEC standard, and the adoption of a JEDEC standard module instead of a previously custom module might allow new competitors to participate in a share of our customers' memory module business that previously belonged to us.

If our OEM customers were to adopt JEDEC standard modules, our future business may be limited to identifying the next generation of high performance memory demands of OEM customers and developing solutions that addresses such demands. Until fully implemented, this next generation of products may constitute a much smaller market, which may reduce our net sales and market share.

We may not be able to maintain our competitive position because of the intense competition in our targeted markets.

We participate in a highly competitive market, and we expect competition to intensify. Many of our competitors have longer operating histories, significantly greater resources and name recognition, a larger base of customers and longer-standing relationships with customers and suppliers than we have. As a result, some of these competitors are able to devote greater resources to the development, promotion and sale of products and are better positioned than we are to influence customer acceptance of their products over our products. These competitors also may be able to respond better to new or emerging technologies or standards and may be able to deliver products with comparable or superior performance at a lower price. For these reasons, we may not be able to compete successfully against these competitors.

In addition to the competitors described above, some of our OEM customers have their own internal design groups that may develop solutions that compete with ours. These design groups have some advantages over us, including direct access to their respective companies' technical information and technology roadmaps. Our OEM customers also have substantially greater resources, financial and otherwise, than we do, and may have lower cost structures than ours. As a result, they may be able to design and manufacture competitive products more efficiently or inexpensively. If any of these OEM customers are successful in competing against us, our sales could decline, our margins could be negatively impacted and we could lose market share, any or all of which could harm our business and results of operations. Further, some of our significant suppliers are also competitors, many of whom have the ability to manufacture competitive products at lower costs as a result of their higher levels of integration.

We expect our competitors to continue to improve the performance of their current products, reduce their prices and introduce new or enhanced technologies that may offer greater performance and improved pricing. If we are unable to match or exceed the improvements made by our competitors, our market position would deteriorate and our net sales would decline. In addition, our competitors may develop future generations and enhancements of competitive products that may render our technologies obsolete or uncompetitive.

We also expect to face competition from new and emerging companies that may enter our existing or future markets. These potential competitors may have similar or alternative products which may be less costly or provide additional features.

Our operating results may be adversely impacted by worldwide economic and political uncertainties and specific conditions in the markets we address, including the cyclical nature of and volatility in the memory market and semiconductor industry.

Adverse changes in domestic and global economic and political conditions have made it extremely difficult for our customers, our vendors and us to accurately forecast and plan future business activities, and they could cause U.S. and foreign businesses to slow spending on our products and services, which would further delay and lengthen sales cycles. In addition, sales of our products are dependent upon demand in the computing, networking, communications, printer, storage and industrial markets. These markets have been cyclical and are characterized by wide fluctuations in product supply and demand. These markets have experienced significant downturns, often connected with, or in anticipation of, maturing product cycles, reductions in technology spending and declines in general economic conditions. These downturns have been characterized by diminished product demand, production overcapacity, high inventory levels and the erosion of average selling prices.

We may experience substantial period-to-period fluctuations in future operating results due to factors affecting the computing, networking, communications, printers, storage and industrial markets. A decline or significant shortfall in demand in any one of these markets could have a material adverse effect on the demand for our products. As a result, our sales will likely decline during these periods. In addition, because many of our costs and operating expenses are relatively fixed, if we are unable to control our expenses adequately in response to reduced sales, our gross margins, operating income and cash flow would be negatively impacted.

During challenging economic times our customers may face issues gaining timely access to sufficient credit, which could result in an impairment of their ability to make timely payments to us. If that were to occur, we may be required to increase our allowance for doubtful accounts and our days sales outstanding would be negatively impacted. Furthermore, our vendors may face similar issues gaining access to credit, which may limit their ability to supply components or provide trade credit to us. We cannot predict the timing, strength or duration of any economic slowdown or subsequent economic recovery, worldwide, or in the memory market and related semiconductor industry. If the economy or markets in which we operate fail to improve or continue to worsen, our business, financial condition and results of operations will likely be materially and adversely affected. Additionally, the combination of our lengthy sales cycle coupled with challenging macroeconomic conditions could compound the negative impact on the results of our operations.

Our lack of a significant backlog of unfilled orders, and the difficulty inherent in forecasting customer demand, makes it difficult to forecast our short-term production requirements to meet that demand, and any failure to optimally calibrate our production capacity and inventory levels to meet customer demand could adversely affect our revenues, gross margins and earnings.

We make significant decisions regarding the levels of business that we will seek and accept, production schedules, component procurement commitments, personnel needs and other resource requirements, based on our estimates of customer requirements. We do not have long-term purchase agreements with our customers. Instead, our customers often place purchase orders no more than two weeks in advance of their desired delivery date, and these purchase orders generally have no cancellation or rescheduling penalty provisions. The short-term nature of commitments by many of our customers, the fact that our customers may cancel or defer purchase orders for any reason, and the possibility of unexpected changes in demand for our customers' products each reduce our ability to accurately estimate future customer requirements for our products. This fact, combined with the quick turn-around times that apply to each order, makes it difficult to forecast our production needs and allocate production capacity efficiently. We attempt to forecast the demand for the DRAM ICs, NAND, and other components needed to manufacture our products. Lead times for components vary significantly and depend on various factors, such as the specific supplier and the demand and supply for a component at a given time.

Our production expense and component purchase levels are based in part on our forecasts of our customers' future product requirements and to a large extent are fixed in the short term. As a result, we likely will be unable to adjust spending on a timely basis to compensate for any unexpected shortfall in those orders. If we overestimate customer demand, we may have excess raw material inventory of DRAM ICs and NAND. If there is a subsequent decline in the prices of DRAM ICs or NAND, the value of our inventory will fall. As a result, we may need to write-down the value of our DRAM IC or NAND inventory, which may result in a significant decrease in our gross margin and financial condition. Also, to the extent that we manufacture products in anticipation of future demand that does not materialize, or in the event a customer cancels or reduces outstanding orders, we could experience an unanticipated increase in our finished goods inventory. In the past, we have had to write-down inventory due to obsolescence, excess quantities and declines in market value below our costs. Any significant shortfall of customer orders in relation to our expectations could hurt our operating results, cash flows and financial condition.

Also, any rapid increases in production required by our customers could strain our resources and reduce our margins. If we underestimate customer demand, we may not have sufficient inventory of DRAM ICs and NAND on hand to manufacture enough product to meet that demand. We also may not have sufficient manufacturing capacity at any given time to meet our customers' demands for rapid increases in production. These shortages of inventory and capacity will lead to delays in the delivery of our products, and we could forego sales opportunities, lose market share and damage our customer relationships.

Declines in our average sales prices, driven by volatile prices for DRAM ICs and NAND, among other factors, may result in declines in our revenues and gross profit.

Our industry is competitive and historically has been characterized by declines in average sales price, based in part on the market price of DRAM ICs and NAND, which have historically constituted a substantial portion of the total cost of our memory subsystems. Our average sales prices may decline due to several factors, including overcapacity in the worldwide supply of DRAM and NAND memory components as a result of worldwide economic conditions, increased manufacturing efficiencies, implementation of new manufacturing processes and expansion of manufacturing capacity by component suppliers.

Once our prices with a customer are negotiated, we are generally unable to revise pricing with that customer until our next regularly scheduled price adjustment. Consequently, we are exposed to the risks associated with the volatility of the price of DRAM ICs and NAND during that period. If the market prices for DRAM ICs and NAND increase, we generally cannot pass the price increases on to our customers for products purchased under an existing purchase order. As a result, our cost of sales could increase and our gross margins could decrease. Alternatively, if there are declines in the price of DRAM ICs and NAND, we may need to reduce our selling prices for subsequent purchase orders, which may result in a decline in our expected net sales.

In addition, since a large percentage of our sales are to a small number of customers that are primarily distributors and large OEMs, these customers have exerted, and we expect they will continue to exert, pressure on us to make price concessions. If not offset by increases in volume of sales or the sales of newly-developed products with higher margins, decreases in average sales prices would likely have a material adverse effect on our business and operating results.

We use a small number of custom ASIC, DRAM IC and NAND suppliers and are subject to risks of disruption in the supply of custom ASIC, DRAM ICs and NAND.

Our ability to fulfill customer orders or produce qualification samples is dependent on a sufficient supply of DRAM ICs and NAND, which are essential components of our memory subsystems. We are also dependent on a sufficient supply of custom ASIC devices to produce our HyperCloud™ memory modules. There are a relatively small number of suppliers of DRAM ICs and NAND, and we purchase from only a subset of these suppliers. We have no long-term DRAM or NAND supply contracts. Additionally, we could face obstacles in moving production of our ASIC components away from our current design and production partners. Our dependence on a small number of suppliers and the lack of any guaranteed sources of ASIC components, DRAM and NAND supply expose us to several risks, including the inability to obtain an adequate supply of these important components, price increases, delivery delays and poor quality.

The recent declines in customer demand and revenues have caused us to reduce our purchases of DRAM ICs and NAND. Should we not maintain sufficient purchase levels with some suppliers, our ability to obtain future supplies of raw materials may be impaired due to the practice of some suppliers to allocate their products to customers with the highest regular demand.

From time to time, shortages in DRAM ICs and NAND have required some suppliers to limit the supply of their DRAM ICs and NAND. As a result, we may be unable to obtain the DRAM ICs or NAND necessary to fill customers' orders for our products in a timely manner. If we are unable to obtain a sufficient supply of DRAM ICs or NAND to meet our customers' requirements, these customers may reduce future orders for our products or not purchase our products at all, which would cause our net sales to decline and harm our operating results. In addition, our reputation could be harmed, we may not be able to replace any lost business with new customers, and we may lose market share to our competitors.

Our customers qualify the ASIC components, DRAM ICs and NAND of our suppliers for use in their systems. If one of our suppliers should experience quality control problems, it may be disqualified by one or more of our customers. This would disrupt our supplies of ASIC components, DRAM ICs and NAND and reduce the number of suppliers available to us, and may require that we qualify a new supplier. If our suppliers are unable to produce qualification samples on a timely basis or at all, we could experience delays in the qualification process, which could have a significant impact on our ability to sell that product.

If the supply of other component materials used to manufacture our products is interrupted, or if our inventory becomes obsolete, our results of operations and financial condition could be adversely affected.

We use consumables and other components, including PCBs, to manufacture our memory subsystems. We sometimes procure PCBs and other components from single or limited sources to take advantage of volume pricing discounts. Material shortages or transportation problems could interrupt the manufacture of our products from time to time in the future. These delays in manufacturing could adversely affect our results of operations.

Frequent technology changes and the introduction of next-generation products also may result in the obsolescence of other items of inventory, such as our custom-built PCBs, which could reduce our gross margin and adversely affect our operating performance and financial condition. We may not be able to sell some products developed for one customer to another customer because our products are often designed to address specific customer requirements, and even if we are able to sell these products to another customer, our margin on such products may be reduced.

A prolonged disruption of our manufacturing facility could have a material adverse effect on our business, financial condition and results of operations.

We maintain a manufacturing facility in the PRC for producing most of our products, which allows us to utilize our materials and processes, protect our intellectual property and develop the technology for manufacturing. A prolonged disruption or material malfunction of, interruption in or the loss of operations at our manufacturing facility, or the failure to maintain sufficient labor force at such facility, would limit our capacity to meet customer demands and delay new product development until a replacement facility and equipment, if necessary, were found. The replacement of the manufacturing facility could take an extended amount of time before manufacturing operations could restart. The potential delays and costs resulting from these steps could have a material adverse effect on our business, financial condition and results of operations.

If we are unable to manufacture our products efficiently, our operating results could suffer.

We must continuously review and improve our manufacturing processes in an effort to maintain satisfactory manufacturing yields and product performance, to lower our costs and to otherwise remain competitive. As we manufacture more complex products, the risk of encountering delays or difficulties increases. The start-up costs associated with implementing new manufacturing technologies, methods and processes, including the purchase of new equipment, and any resulting manufacturing delays and inefficiencies, could negatively impact our results of operations.

If we need to add manufacturing capacity, an expansion of our existing manufacturing facility or establishment of a new facility could be subject to factory audits by our customers. Any delays or unexpected costs resulting from this audit process could adversely affect our net sales and results of operations. In addition, we cannot be certain that we will be able to increase our manufacturing capacity on a timely basis or meet the standards of any applicable factory audits.

We depend on third-parties to design and manufacture custom components for some of our products.

Significant customized components, such as ASICs, that are used in some of our products are designed and manufactured by third parties. The ability and willingness of such third parties to perform in accordance with their agreements with us is largely outside of our control. If one or more of our design or manufacturing partners fails to perform its obligations in a timely manner or at satisfactory quality levels, our ability to bring products to market or deliver products to our customers, as well as our reputation, could suffer. In the event of any such failures, we may have no readily available alternative source of supply for such products, since, in our experience, the lead time needed to establish a relationship with a new design and/or manufacturing partner is at least 12 months, and the estimated time for our OEM customers to re-qualify our product with components from a new vendor ranges from four to nine months. We cannot assure you that we can redesign, or cause to have redesigned, our customized components to be manufactured by a new manufacturer in a timely manner, nor can we assure you that we will not infringe on the intellectual property of our current design or manufacture partner when we redesign the custom components, or cause such components to be redesigned by a new manufacturer. A manufacturing disruption experienced by our manufacturing partners, the failure of our manufacturing partners to dedicate adequate resources to the production of our products, the financial instability of our manufacturing or design partners, or any other failure of our design or manufacturing partners to perform according to their agreements with us, would have a material adverse effect on our business, financial condition and results of operations.

We have many other risks due to our dependence on third-party manufacturers, including: reduced control over delivery schedules, quality, manufacturing yields and cost; the potential lack of adequate capacity during periods of excess demand; limited warranties on products supplied to us; and potential misappropriation of our intellectual property. We are dependent on our manufacturing partners to manufacture products with acceptable quality and manufacturing yields, to deliver those products to us on a timely basis and to allocate a portion of their manufacturing capacity sufficient to meet our needs. Although our products are designed using the process design rules of the particular manufacturers, we cannot assure you that our manufacturing partners will be able to achieve or maintain acceptable yields or deliver sufficient quantities of components on a timely basis or at an acceptable cost. Additionally, we cannot assure you that our manufacturing partners will continue to devote adequate resources to produce our products or continue to advance the process design technologies on which the qualification and manufacturing of our products are based.

If our products do not meet the quality standards of our customers, we may be forced to stop shipments of products until the quality issues are resolved.

Our customers require our products to meet strict quality standards. Should our products not meet such standards, our customers may discontinue purchases from us until we are able to resolve the quality issues that are causing us to not meet the standards. Such “quality holds” could have a significant adverse impact on our revenues and operating results.

If our products are defective or are used in defective systems, we may be subject to warranty, product recalls or product liability claims.

If our products are defectively manufactured, contain defective components or are used in defective or malfunctioning systems, we could be subject to warranty and product liability claims and product recalls, safety alerts or advisory notices. While we have product liability insurance coverage, it may not be adequate to satisfy claims made against us. We also may be unable to obtain insurance in the future at satisfactory rates or in adequate amounts. Warranty and product liability claims or product recalls, regardless of their ultimate outcome, could have an adverse effect on our business, financial condition and reputation, and on our ability to attract and retain customers. In addition, we may determine that it is in our best interest to accept product returns in circumstances where we are not contractually obligated to do so in order to maintain good relations with our customers. Accepting product returns may negatively impact our operating results.

If we fail to protect our proprietary rights, our customers or our competitors might gain access to our proprietary designs, processes and technologies, which could adversely affect our operating results.

We rely on a combination of patent protection, trade secret laws and restrictions on disclosure to protect our intellectual property rights. We have submitted a number of patent applications regarding our proprietary processes and technology. It is not certain when or if any of the claims in the remaining applications will be allowed. To date we have had only fifteen patents issued. We intend to continue filing patent applications with respect to most of the new processes and technologies that we develop. However, patent protection may not be available for some of these processes or technologies.

It is possible that our efforts to protect our intellectual property rights may not:

- prevent challenges to, or the invalidation or circumvention of, our existing intellectual property rights;
- prevent our competitors from independently developing similar products, duplicating our products or designing around any patents that may be issued to us;
- prevent disputes with third parties regarding ownership of our intellectual property rights;
- prevent disclosure of our trade secrets and know-how to third parties or into the public domain;
- result in valid patents, including international patents, from any of our pending or future applications; or
- otherwise adequately protect our intellectual property rights.

Others may attempt to reverse engineer, copy or otherwise obtain and use our proprietary technologies without our consent. Monitoring the unauthorized use of our technologies is difficult. We cannot be certain that the steps we have taken will prevent the unauthorized use of our technologies. This is particularly true in foreign countries, such as the PRC, where we have established a manufacturing facility and where the laws may not protect our proprietary rights to the same extent as applicable U.S. laws.

If some or all of the claims in our patent applications are not allowed, or if any of our intellectual property protections are limited in scope by a court or circumvented by others, we could face increased competition with regard to our products. Increased competition could significantly harm our business and our operating results.

We are involved in and expect to continue to be involved in costly legal and administrative proceedings to defend against claims that we infringe the intellectual property rights of others or to enforce or protect our intellectual property rights.

As is common to the semiconductor industry, we have experienced substantial litigation regarding patent and other intellectual property rights. Lawsuits claiming that we are infringing others' intellectual property rights have been and may in the future be brought against us, and we are currently defending against claims of invalidity in the United States Patent and Trademark Office ("USPTO"). See Note 9 of Notes to Unaudited Condensed Consolidated Financial Statements, included in Part I, Item I of this Report, for a description of our legal contingencies.

The process of obtaining and protecting patents is inherently uncertain. In addition to the patent issuance process established by law and the procedures of the USPTO, we must comply with JEDEC administrative procedures in protecting our intellectual property within its industry standard setting process. These procedures evolve over time, are subject to variability in their application, and may be inconsistent with each other. Failure to comply with JEDEC's administrative procedures could jeopardize our ability to claim that our patents have been infringed.

By making use of new technologies and entering new markets there is an increased likelihood that others might allege that our products infringe on their intellectual property rights. Litigation is inherently uncertain, and an adverse outcome in existing or any future litigation could subject us to significant liability for damages or invalidate our proprietary rights. An adverse outcome also could force us to take specific actions, including causing us to:

- cease manufacturing and/or selling products, or using certain processes, that are claimed to be infringing a third party's intellectual property;

- pay damages (which in some instances may be three times actual damages), including royalties on past or future sales;
- seek a license from the third party intellectual property owner to use their technology in our products, which license may not be available on reasonable terms, or at all; or
- redesign those products that are claimed to be infringing a third party's intellectual property.

If any adverse ruling in any such matter occurs, any resulting limitations in our ability to market our products, or delays and costs associated with redesigning our products or payments of license fees to third parties, or any failure by us to develop or license a substitute technology on commercially reasonable terms could have a material adverse effect on our business, financial condition and results of operations.

There is a limited pool of experienced technical personnel that we can draw upon to meet our hiring needs. As a result, a number of our existing employees have worked for our existing or potential competitors at some point during their careers, and we anticipate that a number of our future employees will have similar work histories. In the past, some of these competitors have claimed that our employees misappropriated their trade secrets or violated non-competition or non-solicitation agreements. Some of our competitors may threaten or bring legal action involving similar claims against us or our existing employees or make such claims in the future to prevent us from hiring qualified candidates. Lawsuits of this type may be brought, even if there is no merit to the claim, simply as a strategy to drain our financial resources and divert management's attention away from our business.

We also may find it necessary to litigate against others, including our competitors, customers and former employees, to enforce our intellectual property and contractual and commercial rights including, in particular, our trade secrets, as well as to challenge the validity and scope of the proprietary rights of others. We could become subject to counterclaims or countersuits against us as a result of this litigation. Moreover, any legal disputes with customers could cause them to cease buying or using our products or delay their purchase of our products and could substantially damage our relationship with them.

Any litigation, regardless of its outcome, would be time consuming and costly to resolve, divert our management's time and attention and negatively impact our results of operations. We cannot assure you that current or future infringement claims by third parties or claims for indemnification by customers or end users of our products resulting from infringement claims will not be asserted in the future or that such assertions, if proven to be true, will not materially adversely affect our business, financial condition or results of operations.

If we are required to obtain licenses to use third party intellectual property and we fail to do so, our business could be harmed.

Although some of the components used in our final products contain the intellectual property of third parties, we believe that our suppliers bear the sole responsibility to obtain any rights and licenses to such third party intellectual property. While we have no knowledge that any third party licensor disputes our belief, we cannot assure you that disputes will not arise in the future. The operation of our business and our ability to compete successfully depends significantly on our continued operation without claims of infringement or demands resulting from such claims, including demands for payments of money in the form of, for example, ongoing licensing fees.

We are also developing products to enter new markets. Similar to our current products, we may use components in these new products that contain the intellectual property of third parties. While we plan to exercise precautions to avoid infringing on the intellectual property rights of third parties, we cannot assure you that disputes will not arise.

If it is determined that we are required to obtain inbound licenses and we fail to obtain licenses, or if such licenses are not available on economically feasible terms, our business, operating results and financial condition could be significantly harmed.

The flash memory market is constantly evolving and competitive, and we may not have rights to manufacture and sell certain types of products utilizing emerging flash formats, or we may be required to pay a royalty to sell products utilizing these formats.

The flash-based storage market is constantly undergoing rapid technological change and evolving industry standards. Many consumer devices, such as digital cameras, PDAs and smartphones, are transitioning to emerging flash memory formats, such as the Memory Stick, and xD Picture Card formats, which we do not currently manufacture and do not have rights to manufacture. Although we do not currently serve the consumer flash market, it is possible that certain OEMs may choose to adopt these higher-volume, lower-cost formats. This could result in a decline in demand, on a relative basis, for other products that we manufacture such as CompactFlash, SD and embedded USB drives. If we decide to manufacture flash memory products utilizing emerging formats such as those mentioned, we will be required to secure licenses to give us the right to manufacture such products that may not be available at reasonable rates or at all. If we are not able to supply flash card formats at competitive prices or if we were to have product shortages, our net sales could be adversely impacted and our customers would likely cancel orders or seek other suppliers to replace us.

Our indemnification obligations for the infringement by our products of the intellectual property rights of others could require us to pay substantial damages.

As is common in the industry, we currently have in effect a number of agreements in which we have agreed to defend, indemnify and hold harmless our customers and suppliers from damages and costs which may arise from the infringement by our products of third-party patents, trademarks or other proprietary rights. The scope of such indemnity varies, but may, in some instances, include indemnification for damages and expenses, including attorneys' fees. Our insurance does not cover intellectual property infringement. The term of these indemnification agreements is generally perpetual any time after execution of the agreement. The maximum potential amount of future payments we could be required to make under these indemnification agreements is unlimited. We may periodically have to respond to claims and litigate these types of indemnification obligations. Although our suppliers may bear responsibility for the intellectual property inherent in the components they sell to us, they may lack the financial ability to stand behind such indemnities. Additionally, it may be costly to enforce any indemnifications that they have granted to us. Accordingly, any indemnification claims by customers could require us to incur significant legal fees and could potentially result in the payment of substantial damages, both of which could result in a material adverse effect on our business and results of operations.

We depend on a few key employees, and if we lose the services of any of those employees or are unable to hire additional personnel, our business could be harmed.

To date, we have been highly dependent on the experience, relationships and technical knowledge of certain key employees. We believe that our future success will be dependent on our ability to retain the services of these key employees, develop their successors, reduce our reliance on them, and properly manage the transition of their roles should departures occur.

The loss of these key employees could delay the development and introduction of, and negatively impact our ability to sell, our products and otherwise harm our business. We do not have employment agreements with any of these key employees other than Chun K. Hong, our President, Chief Executive Officer and Chairman of the Board. In 2010, we obtained "Key Man" life insurance on Chun K. Hong; however, we do not carry "Key Man" life insurance on any of our other key employees.

Our future success also depends on our ability to attract, retain and motivate highly skilled engineering, manufacturing, and other technical and sales personnel. Competition for experienced personnel is intense. We may not be successful in attracting new engineers or other technical personnel, or in retaining or motivating our existing personnel. If we are unable to hire and retain engineers with the skills necessary to keep pace with the evolving technologies in our markets, our ability to continue to provide our current products and to develop new or enhanced products will be negatively impacted, which would harm our business. In addition, the shortage of experienced engineers, and other factors, may lead to increased recruiting, relocation and compensation costs for such engineers, which may exceed our expectations and resources. These increased costs may make hiring new engineers difficult, or may reduce our margins.

Historically, a significant portion of our workforce has consisted of contract personnel. We invest considerable time and expense in training these contract employees. We may experience high turnover rates in our contract employee workforce, which may require us to expend additional resources in the future. If we convert any of these contract employees into permanent employees, we may have to pay finder's fees to the contract agency.

We rely on third-party manufacturers' representatives and the failure of these manufacturers' representatives to perform as expected could reduce our future sales.

We sell some of our products to customers through manufacturers' representatives. We are unable to predict the extent to which our manufacturers' representatives will be successful in marketing and selling our products. Moreover, many of our manufacturers' representatives also market and sell competing products. Our representatives may terminate their relationships with us at any time. Our future performance will also depend, in part, on our ability to attract additional manufacturers' representatives that will be able to market and support our products effectively, especially in markets in which we have not previously distributed our products. If we cannot retain our current manufacturers' representatives or recruit additional or replacement manufacturers' representatives, our sales and operating results will be harmed.

The establishment and ongoing operation of our manufacturing facility in the PRC could expose us to new and significant risks.

During fiscal 2007, we invested significant time and effort in establishing a manufacturing facility in the PRC and preparing it for full-scale operations. This manufacturing facility became operational in July 2007 and was successfully qualified by certain key customers at that time. As of February 1, 2009, substantially all of our world-wide manufacturing production was being performed in the PRC. Language and cultural differences, as well as the geographic distance from our headquarters in Irvine, further compound the difficulties of running a manufacturing operation in the PRC. Our management has limited experience in creating or overseeing foreign operations, and this new facility may divert substantial amounts of their time. We cannot assure you that we will be able to maintain control over product quality, delivery schedules, manufacturing yields and costs as we increase our output. We also have to manage a local workforce that may subject us to uncertainties or regulatory policies and we remain subject to risks related to managing the increased production capacity provided by the facility. Should anticipated demand not materialize, the costs related to having excess capacity would have an adverse impact on our gross margins and operating results.

Changes in the labor laws of the PRC could increase the cost of employing the local workforce. The increased industrialization of the PRC could also increase the price of local labor. Either of these factors could negatively impact the cost savings we currently enjoy from having our manufacturing facility in the PRC.

In the future, some of our net sales may be denominated in Chinese Renminbi ("RMB"). The Chinese government controls the procedures by which RMB is converted into other currencies, and conversion of RMB generally requires government consent. As a result, RMB may not be freely convertible into other currencies at all times. If the Chinese government institutes changes in currency conversion procedures, or imposes restrictions on currency conversion, those actions may negatively impact our operations and could reduce our operating results. In addition, fluctuations in the exchange rate between RMB and U.S. dollars may adversely affect our expenses and results of operations as well as the value of our assets and liabilities. These fluctuations may also adversely affect the comparability of our period-to-period results. If we decide to declare dividends and repatriate funds from our Chinese operations, we will be required to comply with the procedures and regulations of applicable Chinese law. Any changes to these procedures and regulations, or our failure to comply with those procedures and regulations, could prevent us from making dividends and repatriating funds from our Chinese operations, which could adversely affect our financial condition. If we are able to make dividends and repatriate funds from our Chinese operations, these dividends would be subject to U.S. corporate income tax.

The PRC currently provides for favorable tax rates for certain foreign-owned enterprises operating in specified locations in the PRC. We have established our PRC facility in such a tax-favored location. Should the PRC government enact a revised tax structure, it is possible that we would not realize the tax benefits that we currently anticipate and this could adversely impact our operating results.

Economic, political and other risks associated with international sales and operations could adversely affect our net sales.

Part of our growth strategy involves making sales to foreign corporations and delivering our products to facilities located in foreign countries. To facilitate this process and to meet the long-term projected demand for our products, we have set up a manufacturing facility in the PRC. Selling and manufacturing in foreign countries subjects us to additional risks not present with our domestic operations. We have begun operating in business and regulatory environments in which we have little or no previous experience. We will need to overcome language and cultural barriers to effectively conduct our operations in these environments. In addition, the economies of the PRC and other countries have been highly volatile in the past, resulting in significant fluctuations in local currencies and other instabilities. These instabilities affect a number of our customers and suppliers in addition to our foreign operations and continue to exist or may occur again in the future.

International turmoil and the threat of future terrorist attacks, both domestically and internationally, have contributed to an uncertain political and economic climate, both in the U.S. and globally, and have negatively impacted the worldwide economy. The occurrence of one or more of these instabilities could adversely affect our foreign operations and some of our customers or suppliers, each of which could adversely affect our net sales. In addition, our failure to meet applicable regulatory requirements or overcome cultural barriers could result in production delays and increased turn-around times, which would adversely affect our business.

Our international sales are subject to other risks, including regulatory risks, tariffs and other trade barriers, timing and availability of export licenses, political and economic instability, difficulties in accounts receivable collections, difficulties in managing distributors, lack of a significant local sales presence, difficulties in obtaining governmental approvals, compliance with a wide variety of complex foreign laws and treaties and potentially adverse tax consequences. In addition, the United States or foreign countries may implement quotas, duties, taxes or other charges or restrictions upon the importation or exportation of our products, leading to a reduction in sales and profitability in that country.

Our operations could be disrupted by power outages, natural disasters or other factors.

Our current manufacturing facilities are located in Suzhou, PRC. Due to this geographic concentration, a disruption of our manufacturing operations, resulting from equipment failure, power failures, quality control issues, human error, government intervention or natural disasters, including earthquakes, fires or floods, could interrupt or interfere with our manufacturing operations and consequently harm our business, financial condition and results of operations. Such disruptions would cause significant delays in shipments of our products and adversely affect our operating results.

Our failure to comply with environmental laws and regulations could subject us to significant fines and liabilities or cause us to incur significant costs.

We are subject to various and frequently changing U.S. federal, state and local and foreign governmental laws and regulations relating to the protection of the environment, including those governing the discharge of pollutants into the air and water, the management and disposal of hazardous substances and wastes, the cleanup of contaminated sites and the maintenance of a safe workplace. In particular, some of our manufacturing processes may require us to handle and dispose of hazardous materials from time to time. For example, in the past our manufacturing operations have used lead-based solder in the assembly of our products. Today, we use lead-free soldering technologies in our manufacturing processes, as this is required for products entering the European Union. We could incur substantial costs, including clean-up costs, civil or criminal fines or sanctions and third-party claims for property damage or personal injury, as a result of violations of, or noncompliance with, environmental laws and regulations. These laws and regulations also could require us to incur significant costs to remain in compliance.

Our internal controls over financial reporting may not be effective, which could have a significant and adverse effect on our business.

Section 404 of the Sarbanes-Oxley Act of 2002 and the rules and regulations of the SEC, which we collectively refer to as Section 404, require us to evaluate our internal controls over financial reporting to allow management to report on those internal controls as of the end of each year. Effective internal controls are necessary for us to produce reliable financial reports and are important in our effort to prevent financial fraud. In the course of our Section 404 evaluations, we may identify conditions that may result in significant deficiencies or material weaknesses and we may conclude that enhancements, modifications or changes to our internal controls are necessary or desirable. Implementing any such matters would divert the attention of our management, could involve significant costs, and may negatively impact our results of operations.

We note that there are inherent limitations on the effectiveness of internal controls, as they cannot prevent collusion, management override or failure of human judgment. If we fail to maintain an effective system of internal controls or if management or our independent registered public accounting firm were to discover material weaknesses in our internal controls, we may be unable to produce reliable financial reports or prevent fraud, and it could harm our financial condition and results of operations, result in a loss of investor confidence and negatively impact our stock price.

If we do not effectively manage future growth, our resources, systems and controls may be strained and our results of operations may suffer.

We have in the past expanded our operations, both domestically and internationally. Any future growth may strain our resources, management information and telecommunication systems, and operational and financial controls. To manage future growth effectively, including the expansion of volume in our manufacturing facility in the PRC, we must be able to improve and expand our systems and controls. We may not be able to do this in a timely or cost-effective manner, and our current systems and controls may not be adequate to support our future operations. In addition, our officers have relatively limited experience in managing a rapidly growing business or a public company. As a result, they may not be able to provide the guidance necessary to manage future growth or maintain future market position. Any failure to manage our growth or improve or expand our existing systems and controls, or unexpected difficulties in doing so, could harm our business.

If we acquire other businesses or technologies in the future, these acquisitions could disrupt our business and harm our operating results and financial condition.

We will evaluate opportunities to acquire businesses or technologies that might complement our current product offerings or enhance our technical capabilities. We have no experience in acquiring other businesses or technologies. Acquisitions entail a number of risks that could adversely affect our business and operating results, including, but not limited to:

- difficulties in integrating the operations, technologies or products of the acquired companies;
- the diversion of management's time and attention from the normal daily operations of the business;
- insufficient increases in net sales to offset increased expenses associated with acquisitions or acquired companies;
- difficulties in retaining business relationships with suppliers and customers of the acquired companies;
- the overestimation of potential synergies or a delay in realizing those synergies;
- entering markets in which we have no or limited experience and in which competitors have stronger market positions; and
- the potential loss of key employees of the acquired companies.

Future acquisitions also could cause us to incur debt or be subject to contingent liabilities. In addition, acquisitions could cause us to issue equity securities that could dilute the ownership percentages of our existing stockholders. Furthermore, acquisitions may result in material charges or adverse tax consequences, substantial depreciation, deferred compensation charges, in-process research and development charges, the amortization of amounts related to deferred stock-based compensation expense and identifiable purchased intangible assets or impairment of goodwill, any or all of which could negatively affect our results of operations.

Incurring indebtedness could adversely affect our cash flow and prevent us from fulfilling our financial obligations.

On September 30, 2010, we renewed our revolving credit agreement and concurrently obtained term loan financing. Incurring debt could have material consequences, such as:

- requiring us to dedicate a portion of our cash flow from operations and other capital resources to debt service, thereby reducing our ability to fund working capital, capital expenditures, and other cash requirements;
- increasing our vulnerability to adverse economic and industry conditions;
- limiting our flexibility in planning for, or reacting to, changes and opportunities in, our business and industry, which may place us at a competitive disadvantage; and
- limiting our ability to incur additional debt on acceptable terms, if at all.

Additionally, if we are unable to maintain liquidity levels, as defined in the credit agreement, or if we were to default under our credit agreement and were unable to obtain a waiver for such a default, interest on the obligations would accrue at an increased rate. In the case of a default, the lenders could accelerate our obligations under the credit agreement; however, acceleration will be automatic in the case of bankruptcy and insolvency events of default.

Additionally, to the extent we have made intercompany loans to our subsidiaries and have pledged such loans to the lenders under the credit agreement, our subsidiaries would be required to pay the amount of the intercompany loans to the lenders in the event we are in default under the credit agreement. Any actions taken by the lenders against us in the event we are in default under the credit agreement could harm our financial condition. Finally, the credit facility contains certain restrictive covenants, including provisions restricting our ability to incur additional indebtedness, guarantee certain obligations, create or assume liens and pay dividends.

Our investments in auction rate securities are subject to risks which may cause losses and affect the liquidity of these investments.

We hold certain investments in auction rate securities that have failed, or may in the future fail, their respective auctions. An auction failure means that the parties wishing to sell their securities could not do so. As a result of failed auctions, our ability to liquidate and fully recover the carrying value of our investments in the near term may be limited or not exist. If the issuers of these investments are unable to close future auctions and their credit ratings deteriorate, we may in the future be required to record an impairment charge on these investments. We also may be required to wait until market stability is restored for these investments or until the final maturity of the underlying notes (up to 30 years) to realize our investments' cost value.

Risks related to our common stock

Our principal stockholders have significant voting power and may take actions that may not be in the best interest of our other stockholders.

As of October 18, 2010, our executive officers, directors and 5% stockholders beneficially own, in total, approximately 25% of our outstanding common stock. As a result, these stockholders, acting together, have the ability to exert substantial influence over all matters requiring approval by our stockholders, including the election and removal of directors and any proposed merger, consolidation or sale of all or substantially all of our assets and other corporate transactions. This concentration of control could be disadvantageous to other stockholders with interests different from those of our executive officers, directors and principal stockholders. For example, our executive officers, directors and principal stockholders could delay or prevent an acquisition or merger even if the transaction would benefit other stockholders. In addition, this significant concentration of share ownership may adversely affect the trading price for our common stock because investors may perceive disadvantages in owning stock in companies with stockholders that have the ability to exercise significant control.

Anti-takeover provisions under our charter documents and Delaware law could delay or prevent a change of control and could also limit the market price of our stock.

Our certificate of incorporation and bylaws contain provisions that could delay or prevent a change of control of our company or changes in our board of directors that our stockholders might consider favorable. In addition, these provisions could limit the price that investors would be willing to pay in the future for shares of our common stock. The following are examples of provisions which are included in our certificate of incorporation and bylaws, each as amended:

- our board of directors is authorized, without prior stockholder approval, to designate and issue preferred stock, commonly referred to as "blank check" preferred stock, with rights senior to those of our common stock;
- stockholder action by written consent is prohibited;
- nominations for election to our board of directors and the submission of matters to be acted upon by stockholders at a meeting are subject to advance notice requirements; and
- our board of directors is expressly authorized to make, alter or repeal our bylaws.

In addition, we are governed by the provisions of Section 203 of the Delaware General Corporate Law, which may prohibit certain business combinations with stockholders owning 15% or more of our outstanding voting stock. These and other provisions in our certificate of incorporation and bylaws, and of Delaware law, could make it more difficult for stockholders or potential acquirers to obtain control of our board of directors or initiate actions that are opposed by the then-current board of directors, including delaying or impeding a merger, tender offer, or proxy contest or other change of control transaction involving our company. Any delay or prevention of a change of control transaction or changes in our board of directors could prevent the consummation of a transaction in which our stockholders could receive a substantial premium over the then-current market price for their shares.

The price of and volume in trading of our common stock has and may continue to fluctuate significantly.

Our common stock has been publicly traded since November 2006. The price of our common stock and the trading volume of our shares are volatile and have in the past fluctuated significantly. There can be no assurance as to the prices at which our common stock will trade in the future or that an active trading market in our common stock will be sustained in the future. The market price at which our common stock trades may be influenced by many factors, including but not limited to, the following:

- our operating and financial performance and prospects, including our ability to achieve and sustain profitability in the future;
- investor perception of us and the industry in which we operate;
- the availability and level of research coverage of and market making in our common stock;
- changes in earnings estimates or buy/sell recommendations by analysts;
- general financial and other market conditions; and
- changing and recently volatile domestic and international economic conditions.

In addition, shares of our common stock and the public stock markets in general, have experienced, and may continue to experience, extreme price and trading volume volatility. These fluctuations may adversely affect the market price of our common stock and a shareholders ability to sell their shares into the market at the desired time or at the desired price.

In 2007, following a drop in the price of our stock, securities litigation was initiated against the company. Given the historic volatility of our industry, we may become engaged in this type of litigation in the future. Securities litigation is expensive and time-consuming.

Item 5. Other Information

Bank Financing Agreement

On September 30, 2010, we entered into an amendment to our existing credit agreement with Silicon Valley Bank. The amendment extends the maturity date of our revolving credit facility to September 30, 2012 and increases our borrowing capacity to the lesser of (i) 80% of eligible accounts receivable, or (ii) $10.0 million. We have the option to increase credit availability under the revolving credit facility to $15.0 million at any time through the extended maturity date, subject to the conditions of the credit agreement. At October 2, 2010, there were no borrowings outstanding under the revolving credit facility.

Interest on the revolving credit facility is payable monthly at either (i) prime plus 1.25%, as long as we maintain $8.5 million in revolving credit availability plus unrestricted cash on deposit with Silicon Valley Bank, or (ii) prime plus 2.25%. Additionally, the credit agreement requires payments for an unused line, as well as anniversary and early termination fees, as applicable.

In connection with the amendment, Silicon Valley Bank also extended a $1.5 million term loan under the credit agreement, which bears interest at a rate of prime plus 1.75%. We are required to make equal monthly principal payments which total $0.5 million annually, and a balloon payment of $0.5 at maturity. Any remaining unpaid principal is due upon maturity of the credit agreement. As of October 2, 2010, $1.5 million was outstanding under the term loan.

All obligations under the credit agreement are secured by a first priority lien on our tangible and intangible assets. The credit agreement subjects us to certain affirmative and negative covenants, including financial covenants with respect to our tangible net worth and restrictions on the payment of dividends. As of October 2, 2010, we were in compliance with its financial covenants.

ASIC Design and Production Agreement

On August 11, 2010, we entered into an agreement with Open Silicon, Inc. for the design and production of an ASIC device to be incorporated into a product that is under development. The agreement requires that we pay non-recurring engineering fees over the course of the design phase and specifies terms regarding the purchase of production devices. We have requested confidential treatment regarding portions of this agreement pursuant to Rule 24b-2 of the Securities and Exchange Act of 1934.

Item 6. Exhibits

Exhibit Number	Description of Document
3.1(1)	Restated Certificate of Incorporation of Netlist, Inc.
3.2(1)	Amended and Restated Bylaws of Netlist, Inc.
10.1(2)	Amendment to Loan Documents entered into as of September 30, 2010, by and between Silicon Valley Bank and Netlist, Inc.
10.2(2)*	ASIC Design and Production Agreement between Open Silicon, Inc. and Netlist, Inc.
10.3(2)*	Design and Production Agreement relating to Register ASIC (the "Production Register Agreement"), dated July 31, 2008, by and between Netlist, Inc. and Toshiba America Electronic Components, Inc. ("Toshiba").
10.4(2)*	Amendment #1 to the Production Register Agreement, dated May 22, 2009, by and between Netlist, Inc. and Toshiba.
10.5(2)*	Amendment #1 to the Production Register Agreement, dated January 28, 2010, by and between Netlist, Inc. and Toshiba.
10.6(2)*	Amendment #2 to the Production Register Agreement, dated March 10, 2010, by and between Netlist, Inc. and Toshiba.
10.7(2)*	Design and Production Agreement relating to ID ASIC (the "Production ID Agreement"), dated July 31, 2008, by and between Netlist, Inc. and Toshiba.
10.8(2)*	Amendment #1 to the Production ID Agreement, dated January 28, 2010, by and between Netlist, Inc. and Toshiba.
10.9(2)*	Amendment #2 to the Production ID Agreement, dated March 10, 2010, by and between Netlist, Inc. and Toshiba.
10.10(2)*	Development and Supply Agreement, dated as of September 10, 2008, by and between Netlist, Inc. and Diablo Technologies, Inc. ("Diablo").
10.11(2)*	Settlement Agreement and Amendment to Development and Supply Agreement, dated January 12, 2010, between Netlist, Inc. and Diablo.
31.1(2)	Certification of Chief Executive Officer pursuant to Rule 13a-14(a) and Rule 15d-14(a) of the Securities Exchange Act, as Amended.
31.2(2)	Certification of Chief Financial Officer pursuant to Rule 13a-14(a) and Rule 15d-14(a) of the Securities Exchange Act, as Amended.
32(3)	Certification of Chief Executive Officer and Chief Financial Officer pursuant to 18 U.S.C. 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 and furnished herewith pursuant to SEC Release No. 33-8238.

(1) Incorporated by reference to the corresponding exhibit number of the registration statement on Form S-1 of the registrant (No. 333-136735) filed with the Securities and Exchange Commission on October 23, 2006.

(2) Filed herewith.

(3) The information in Exhibit 32 shall not be deemed "filed" for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, (the "Exchange Act"), or otherwise subject to the liabilities of that section, nor shall they be deemed incorporated by reference in any filing under the Securities Act of 1933, as amended, or the Exchange Act (including this Report), unless the registrant specifically incorporates the foregoing information into those documents by reference.

* Confidential treatment has been requested with respect to portions of this exhibit pursuant to Rule 24b-2 of the Securities Exchange Act of 1934 and these confidential portions have been redacted from the filing made herewith. A complete copy of this exhibit, including the redacted terms, has been separately filed with the Securities and Exchange Commission.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

Date: November 16, 2010

NETLIST, INC.
a Delaware corporation
(Registrant)

By: /s/ Chun K. Hong

Chun K. Hong
President, Chief Executive Officer and Chairman of the Board
(Principal Executive Officer)

By: /s/ Gail M. Sasaki

Gail M. Sasaki
Vice President and Chief Financial Officer
(Principal Financial Officer)

EXHIBIT INDEX

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(2) Filed herewith.

(3) The information in Exhibit 32 shall not be deemed "filed" for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, (the "Exchange Act"), or otherwise subject to the liabilities of that section, nor shall they be deemed incorporated by reference in any filing under the Securities Act of 1933, as amended, or the Exchange Act (including this Report), unless Netlist, Inc. specifically incorporates the foregoing information into those documents by reference.

* Confidential treatment has been requested with respect to portions of this exhibit pursuant to Rule 24b-2 of the Securities Exchange Act of 1934 and these confidential portions have been redacted from the filing made herewith. A complete copy of this exhibit, including the redacted terms, has been separately filed with the Securities and Exchange Commission.

AMENDMENT TO LOAN DOCUMENTS

THIS **AMENDMENT TO LOAN DOCUMENTS** (this "Amendment") is entered into as of September 30, 2010, by and between SILICON VALLEY BANK ("Bank" or "Silicon") and NETLIST, INC., a Delaware corporation ("Borrower"). Borrower's chief executive office is located at 51 Discovery, Suite 150, Irvine, CA 92618.

RECITALS

A. Bank and Borrower are parties to that certain Loan and Security Agreement with an Effective Date of October 31, 2009 (as amended, modified, supplemented or restated, the "Loan Agreement") in effect between Bank and Borrower.

B. Bank has extended credit to Borrower for the purposes permitted in the Loan Agreement.

C. Borrower has requested that Bank amend the Loan Agreement to modify the Profitability Financial Covenant as more fully set forth herein.

D. Bank has agreed to so amend the Loan Agreement, but only to the extent, in accordance with the terms, subject to the conditions and in reliance upon the representations and warranties set forth below.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and intending to be legally bound, the parties hereto agree as follows:

1. Definitions. Capitalized terms used but not defined in this Amendment shall have the meanings given to them in the Loan Agreement.

2. Amendments to Loan Documents.

2.1 Modified LC Sublimit. The LC Sublimit, as defined in Section 2.1.2(a) of the Loan Agreement is hereby amended from "$2,500,000" to "$10,000,000."

2.2 Modified FX Sublimit. The FX Sublimit, as defined in Section 2.1.3 of the Loan Agreement is hereby amended from "$2,500,000" to "$10,000,000."

2.3 Modified Cash Management Services Sublimit. The CMS Sublimit, as defined in Section 2.1.4 of the Loan Agreement is hereby amended from "$2,500,000" to "$10,000,000."

2.4 Modified Overall Sublimit. The Overall Sublimit, as set forth in Section 2.1.5 of the Loan Agreement is hereby amended from "$2,500,000" to "$10,000,000."

2.5 Addition of Term Loan. The following language is hereby added to the Loan Agreement as Section 2.1.6 and shall read as follows:

2.1.6 Term Loan.

(a) Availability . Bank shall make one (1) term loan available to Borrower in an amount up to the Term Loan Amount on or before September 30, 2010, subject to the satisfaction of the terms and conditions of this Agreement.

(b) Repayment . Borrower shall repay the Term Loan in (i) thirty-six (36) equal installments of principal, plus (ii) monthly payments of accrued interest (the "Term Loan Payment"). Beginning on the first day of the month following the month in which the Funding Date occurs, each Term Loan Payment shall be payable on the first day of each month. Borrower's final Term Loan Payment, due on the Term Loan Maturity Date, shall include all outstanding principal and accrued and unpaid interest under the Term Loan.

2.6 Modified Interest Rate. Section 2.3(a) of the Loan Agreement is hereby amended in its entirety to read as follows:

(a) Interest Rate .

(i) Advances . Subject to Section 2.3(b), the principal amount outstanding under the Revolving Line shall accrue interest at a per annum rate equal to the following: (i) at all times that a Streamline Period is in effect, one and one-quarter of one percentage points (1.25%) above the Prime Rate; and (ii) at all times that a Streamline Period is not in effect, two and one-quarter of one percentage points (2.25%) above the Prime Rate; which interest shall be payable monthly in accordance with Section 2.3(f) below.

(ii) Term Loan . Subject to Section 2.3(b), the principal amount outstanding under the Term Loan shall accrue interest at a per annum rate equal to one and three-quarters of one percentage point (1.75%) above the Prime Rate, which interest shall be payable monthly in accordance with Section 2.3(f) below.

2.7 **Modified Minimum Monthly Interest.** Section 2.3(e) of the Loan Agreement is hereby amended in its entirety to read as follows:

(e) Minimum Monthly Interest . [Omitted]

2.8 **Modified Fees.** Subclauses (c) and (d) of Section 2.4 of the Loan Agreement are hereby amended in their entirety to read as follows:

(c) Termination Fee . Subject to the terms of Section 12.1, a termination fee; and

(d) Unused Revolving Line Facility Fee . A fee (the " **Unused Revolving Line Facility Fee** "), payable quarterly, in arrears, on a calendar year basis, in an amount equal to 0.50% per annum of the average unused portion of the Revolving Line. The unused portion of the Revolving Line, for purposes of this calculation, shall equal the difference between (x) the Maximum Revolver Amount (as it may be modified from time to time) and (y) the average for the period of the daily closing balance of the Revolving Line outstanding plus the sum of the aggregate amount of outstanding Letters of Credit (including drawn but unreimbursed Letters of Credit and any Letter of Credit Reserve). Borrower shall not be entitled to any credit, rebate or repayment of any Unused Revolving Line Facility Fee previously earned by Bank pursuant to this Section notwithstanding any termination of the Agreement, or suspension or termination of Bank's obligation to make loans and advances hereunder, including during any Streamline Period; and

2.9 **New Anniversary Fee.** The following language is hereby added to the Loan Agreement as Section 2.4(g) and shall read as follows

(g) Anniversary Fee . A fully earned, non-refundable fee equal to 0.50% of the Maximum Revolver Amount, on the first anniversary of the September 2010 Amendment Effective Date; and if this Agreement is terminated prior to the first anniversary of the September 2010 Amendment Effective Date, either by Borrower or Bank, Borrower shall pay such Anniversary Fee to Bank in addition to any Termination Fee.

2.10 Modified Financial Covenants. Section 6.9(b) of the Loan Agreement is hereby amended in its entirety to read as follows:

(b) Tangible Net Worth . A Tangible Net Worth of at least $ **17,500,000 ("Minimum Tangible Net Worth")** plus (i) 50% of all consideration received after the date hereof for equity securities and subordinated debt of the Borrower, plus (ii) 50% of the Borrower's net income in each fiscal quarter ending after the date hereof. Increases in the Minimum Tangible Net Worth based on consideration received for equity securities and subordinated debt of the Borrower shall be effective as of the end of the month in which such consideration is received, and shall continue effective thereafter. Increases in the Minimum Tangible Net Worth based on net income shall be effective on the last day of the fiscal quarter in which said net income is realized, and shall continue effective thereafter. In no event shall the Minimum Tangible Net Worth be decreased.

2.11 Modified Termination Fee. Section 12.1 of the Loan Agreement is hereby amended in its entirety to read as follows:

12.1 Termination Prior to Revolving Line Maturity Date . On the Revolving Line Maturity Date or on any earlier effective date of termination, Borrower shall pay and perform in full all Obligations, whether evidenced by installment notes or otherwise, and whether or not all or any part of such Obligations are otherwise then due and payable. This Agreement may be terminated prior to the Revolving Line Maturity Date by Borrower, effective three (3) Business Days after written notice of termination is given to Bank. Notwithstanding any such termination, Bank's lien and security interest in the Collateral and all of Bank's rights and remedies under this Agreement shall continue until Borrower fully satisfies its Obligations. If such termination is at Borrower's election, or at Bank's election due to the occurrence and continuance of an Event of Default, Borrower shall pay to Bank, in addition to the payment of any other expenses or fees then-owing, a termination fee in an amount equal to 2.0% of the Maximum Revolver Amount if termination occurs on or before the first anniversary of the September 2010 Amendment Effective Date, and 1.0% of the Maximum Revolver Amount if termination occurs after the first anniversary of the September 2010 Amendment Effective Date; provided that no termination fee shall be charged if the credit facility hereunder is replaced with a new facility from another division of Silicon Valley Bank

2.12 Modified Definitions. In Section 13.1 of the Loan Agreement, the following definitions are, as applicable, either hereby (i) amended in their entirety to read as follows or (ii) added to read as follows:

" **Credit Extension** " is any Advance, Term Loan, Letter of Credit, FX Forward Contract, amount utilized for Cash Management Services, or any other extension of credit by Bank for Borrower's benefit.

"Liquidity Condition" is the condition that the sum of (1) the aggregate amount of Borrower's unencumbered (except for Bank's security interest), unrestricted cash on deposit at Bank, plus (2) the Availability Amount, is at least $10,000,000.

"Maximum Revolver Amount" is $10,000,000; provided , however , at Borrower's option and upon at least five (5) days prior written notice to Bank by Borrower, the Maximum Revolver Amount shall be increased to $15,000,000 provided that at the time of such increase, no Default or Event of Default has occurred and is continuing (including, without limitation, with respect to Borrower's reporting requirements set forth in Section 6.2 hereof and Borrower's financial covenants set forth in Section 6.9 hereof).

" **Revolving Line Maturity Date** " September , 2012 [the date that is two years from the date of this Amendment].

"September 2010 Amendment Effective Date" is as defined in that certain Amendment to Loan Documents between Borrower and Bank and dated approximately September , 2010.

" **Tangible Net Worth** " is, on any date, the consolidated total assets of Borrower and its Subsidiaries minus (a) any amounts attributable to (i) goodwill, (ii) intangible items including unamortized debt discount and expense, patents, trade and service marks and names, copyrights and research and development expenses except prepaid expenses, (iii) notes, accounts receivable and other obligations owing to Borrower from its officers or other Affiliates, and (iv) reserves not already deducted from assets, minus (b) Total Liabilities, plus (c) Subordinated Debt.

"Term Loan" is a loan made by Bank pursuant to the terms of Section 2.1.6 hereof.

"Term Loan Amount" is an amount equal to One Million Five Hundred Thousand Dollars ($1,500,000).

" **Term Loan Maturity Date** " is the earlier of the following dates: (i) September 1, 2013, (ii) the Revolving Line Maturity Date or (iii) the date this Agreement terminates by its terms or is terminated by either party in accordance with its terms.

" **Term Loan Payment** " is defined in Section 2.1.6(b).

" **Unused Revolving Line Facility Fee"** is defined in Section 2.4(d).

2.13 Additional Commitment Fee. In the event the Maximum Revolver Amount is increased from $10,000,000 to $15,000,000, at the time of such increase, Borrower shall pay to Bank an additional fully earned, non-refundable commitment fee of $25,000.

2.14 Modified Exhibit B. Exhibit B to the Loan Agreement is hereby amended in its entirety to read as set forth in Exhibit B attached hereto.

2.15 Netlist Technology Texas LP. Reference is hereby made to the following documents: (i) that certain Unconditional Continuing Guaranty executed by Netlist Technology Texas LP ("Netlist Texas") in favor of Bank and dated October 31, 2009 (the "Netlist Texas Guaranty"), (ii) that certain Security Agreement executed by and between Netlist Texas and Bank and October 31, 2009 (the "Netlist Texas Security Agreement") and (iii) that certain Intercompany Subordination Agreement executed by Borrower and Netlist Texas in favor of Bank and dated October 31, 2009 (the "Netlist Texas Subordination Agreement"). The Netlist Texas Guaranty, Netlist Texas Security Agreement and Netlist Texas Subordination Agreement are, collectively, referred to herein as the "Netlist Texas Documents." Borrower has advised Bank that Netlist Texas shall be dissolved on or about October 1, 2010. Based upon such representation by Borrower, Bank hereby agrees that upon Bank receiving written evidences, satisfactory to Bank in its good faith business judgment, of the dissolution of Netlist Texas, the Netlist Texas Documents will terminate and Netlist Texas will be released and discharged from it liabilities and obligations thereunder subject to any terms or provisions that by their terms survive the release, revocation or termination of the Netlist Texas Documents. Notwithstanding the foregoing, the termination of the Netlist Texas Guaranty does not affect the provisions of Section 5 of the Netlist Texas Guaranty or the of Section 12 of the Netlist Guaranty to the extent that it pertains to reasonable costs and expenses of enforcing the Netlist Texas Guaranty.

3. Limitation of Amendments.

3.1 The amendments set forth in **Section 2** , above, are effective for the purposes set forth herein and shall be limited precisely as written and shall not be deemed to (a) be a consent to any amendment, waiver or modification of any other term or condition of any Loan Document, or (b) otherwise prejudice any right or remedy which Bank may now have or may have in the future under or in connection with any Loan Document.

3.2 This Amendment shall be construed in connection with and as part of the Loan Documents and all terms, conditions, representations, warranties, covenants and agreements set forth in the Loan Documents (as amended by this Amendment, as applicable) are hereby ratified and confirmed and shall remain in full force and effect.

4. Representations and Warranties. To induce Bank to enter into this Amendment, Borrower hereby represents and warrants to Bank as follows:

4.1 Immediately after giving effect to this Amendment, (a) the representations and warranties contained in the Loan Documents are true, accurate and complete in all material respects as of the date hereof (except to the extent such representations and warranties relate to an earlier date, in which case they are true and correct as of such date, or except as otherwise previously disclosed in writing by Borrower to Bank), and (b) no Event of Default has occurred and is continuing;

4.2 Borrower has the power and authority to execute and deliver this Amendment and to perform its obligations under the Loan Documents, as amended by this Amendment;

4.3 The organizational documents of Borrower delivered to Bank on the Effective Date remain true, accurate and complete and have not been otherwise amended, supplemented or restated and are and continue to be in full force and effect;

4.4 The execution and delivery by Borrower of this Amendment and the performance by Borrower of its obligations under the Loan Documents, as amended by this Amendment, have been duly authorized;

4.5 The execution and delivery by Borrower of this Amendment and the performance by Borrower of its obligations under the Loan Documents, as amended by this Amendment, do not and will not contravene (a) any law or regulation binding on or affecting Borrower, (b) any contractual restriction with a Person binding on Borrower, (c) any order, judgment or decree of any court or other governmental or public body or authority, or subdivision thereof, binding on Borrower, or (d) the organizational documents of Borrower;

4.6 The execution and delivery by Borrower of this Amendment and the performance by Borrower of its obligations under the Loan Documents, as amended by this Amendment, do not require any order, consent, approval, license, authorization or validation of, or filing, recording or registration with, or exemption by any governmental or public body or authority, or subdivision thereof, binding on either Borrower, except as already has been obtained or made; and

4.7 This Amendment has been duly executed and delivered by Borrower and is the binding obligation of Borrower, enforceable against Borrower in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, liquidation, moratorium or other similar laws of general application and equitable principles relating to or affecting creditors' rights.

5. Release by Borrower and Guarantor . Each of Borrower and Guarantor (individually and collectively, "Obligor") hereby agree as follows:

5.1 FOR GOOD AND VALUABLE CONSIDERATION , Obligor hereby forever relieves, releases, and discharges Bank and its present or former employees, officers, directors, agents, representatives, attorneys, and each of them, from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, costs and expenses, actions and causes of action, of every type, kind, nature, description or character whatsoever, whether known or unknown, suspected or unsuspected, absolute or contingent, arising out of or in any manner whatsoever connected with or related to facts, circumstances, issues, controversies or claims existing or arising from the beginning of time through and including the date of execution of this Amendment (collectively " **Released Claims** "). Without limiting the foregoing, the Released Claims shall include any and all liabilities or claims arising out of or in any manner whatsoever connected with or related to the Loan Documents, the Recitals hereto, any instruments, agreements or documents executed in connection with any of the foregoing or the origination, negotiation, administration, servicing and/or enforcement of any of the foregoing.

5.2 In furtherance of this release, Obligor expressly acknowledges and waives any and all rights under Section 1542 of the California Civil Code, which provides as follows:

> **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR EXPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."** (Emphasis added.)

5.3 By entering into this release, Obligor recognizes that no facts or representations are ever absolutely certain and it may hereafter discover facts in addition to or different from those which it presently knows or believes to be true, but that it is the intention of Obligor hereby to fully, finally and forever settle and release all matters, disputes and differences, known or unknown, suspected or unsuspected; accordingly, if

Obligor should subsequently discover that any fact that it relied upon in entering into this release was untrue, or that any understanding of the facts was incorrect, Obligor shall not be entitled to set aside this release by reason thereof, regardless of any claim of mistake of fact or law or any other circumstances whatsoever. Obligor acknowledges that it is not relying upon and has not relied upon any representation or statement made by Bank with respect to the facts underlying this release or with regard to any of such party's rights or asserted rights.

5.4 This release may be pleaded as a full and complete defense and/or as a cross-complaint or counterclaim against any action, suit, or other proceeding that may be instituted, prosecuted or attempted in breach of this release. Obligor acknowledges that the release contained herein constitutes a material inducement to Bank to enter into this Amendment, and that Bank would not have done so but for Bank's expectation that such release is valid and enforceable in all events.

5.5 Obligor hereby represents and warrants to Bank, and Bank is relying thereon, as follows:

(a) Except as expressly stated in this Amendment, neither Bank nor any agent, employee or representative of Bank has made any statement or representation to Obligor regarding any fact relied upon by Obligor in entering into this Amendment.

(b) Obligor has made such investigation of the facts pertaining to this Amendment and all of the matters appertaining thereto, as it deems necessary.

(c) The terms of this Amendment are contractual and not a mere recital.

(d) This Amendment has been carefully read by Obligor, the contents hereof are known and understood by Obligor, and this Amendment is signed freely, and without duress, by Obligor.

(e) Obligor represents and warrants that it is the sole and lawful owner of all right, title and interest in and to every claim and every other matter which it releases herein, and that it has not heretofore assigned or transferred, or purported to assign or transfer, to any person, firm or entity any claims or other matters herein released. Obligor shall indemnify Bank, defend and hold it harmless from and against all claims based upon or arising in connection with prior assignments or purported assignments or transfers of any claims or matters released herein.

6. Bank Expenses. Borrower shall pay to Bank, when due, all Bank Expenses (including reasonable attorneys' fees and expenses), when due, incurred in connection with or pursuant to this Amendment.

7. Counterparts. This Amendment may be executed in any number of counterparts and all of such counterparts taken together shall be deemed to constitute one and the same instrument.

8. Effectiveness . This Amendment shall be deemed effective upon (a) the due execution and delivery to Bank of this Amendment by each party hereto, (b) Borrower's payment of an amendment fee in an amount equal to $57,500 ($50,000 with respect to the Revolving Line and $7,500 with respect to the Term Loan) and (c) Bank's receipt of the Consent attached hereto, duly executed and delivered by Guarantor (unless Bank, in its sole discretion at any time waives in writing the receipt of any such Consent). The above-mentioned fees shall be fully earned and payable concurrently with the execution and delivery of this Amendment and shall be non-refundable and in addition to all interest and other fees payable to Bank under the Loan Documents. Bank is authorized to charge such fees to Borrower's loan account. The date that this Amendment is deemed effective is referred to herein as the "September 2010 Amendment Effective Date."

[Remainder of page intentionally left blank; signature page immediately follows.]

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered as of the date first written above.

BANK	**BORROWER**
Silicon Valley Bank	NETLIST, INC.
By: /s/ Brian Lowry	By: /s/ Gail Sasaki
Name: Brian Lowry	Name: Gail Sasaki
Title: Relationship Manager	Title: Vice President and Chief Financial Officer

CONSENT

The undersigned hereby expressly agrees to Section 5 of the foregoing Amendment and acknowledges that its consent to the rest of the foregoing Amendment is not required, but the undersigned nevertheless does hereby agree and consent to the entire foregoing Amendment and to the documents and agreements referred to therein and to all future modifications and amendments thereto, and any termination thereof, and to any and all other present and future documents and agreements between or among the foregoing parties. Nothing herein shall in any way limit any of the terms or provisions of the Guaranty, the Guarantor Security Agreement, or any other Loan Documents, executed by the undersigned, all of which are hereby ratified and affirmed.

GUARANTOR:

NETLIST TECHNOLOGY TEXAS LP, a Texas limited partnership

By: NETLIST, INC., its general partner

By: /s/ Gail Sasaki
Name: Gail Sasaki
Title: Vice President and Chief Financial Officer

EXHIBIT B

COMPLIANCE CERTIFICATE

TO: SILICON VALLEY BANK Date:
FROM: NETLIST, INC.

The undersigned authorized officer of NETLIST, INC. ("Borrower") certifies that under the terms and conditions of the Loan and Security Agreement between Borrower and Bank (the "Agreement"), (1) Borrower is in complete compliance for the period ending with all required covenants except as noted below, (2) there are no Events of Default, (3) all representations and warranties in the Agreement are true and correct in all material respects on this date except as noted below; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date, (4) Borrower, and each of its Subsidiaries, has timely filed all required tax returns and reports, and Borrower has timely paid all foreign, federal, state and local taxes, assessments, deposits and contributions owed by Borrower except as otherwise permitted pursuant to the terms of Section 5.9 of the Agreement, and (5) no Liens have been levied or claims made against Borrower or any of its Subsidiaries relating to unpaid employee payroll or benefits of which Borrower has not previously provided written notification to Bank. Attached are the required documents supporting the certification. The undersigned certifies that these are prepared in accordance with GAAP consistently applied from one period to the next except as explained in an accompanying letter or footnotes. The undersigned acknowledges that no borrowings may be requested at any time or date of determination that Borrower is not in compliance with any of the terms of the Agreement, and that compliance is determined not just at the date this certificate is delivered. Capitalized terms used but not otherwise defined herein shall have the meanings given them in the Agreement.

Please indicate compliance status by circling Yes/No under "Complies" column.

Reporting Covenant	Required	Complies
Monthly financial statements with Compliance Certificate	Monthly within 30 days	Yes No
Annual financial statement (CPA Audited)	Concurrently with Form 10-K	Yes No
10-Q, 10-K and 8-K	Within 5 days after filing with SEC	Yes No
A/R & A/P Agings; Deferred Revenue Report	Monthly within 20 days	Yes No
Transaction Reports	(i) if Streamline Period is in effect, monthly (within twenty (20) days after the end of each month) and at the time of each request for an Advance; and (ii) if Streamline Period is not in effect, weekly and at the time of each request for an Advance	Yes No

The following intellectual property was registered after the Effective Date (if no registrations, state "None")

Financial Covenant	Required	Actual	Complies
Maintain on a Monthly Basis:			
Minimum Adjusted Quick Ratio	1.25 : 1.00	: 1.00	Yes No
Minimum Tangible Net Worth	$17,500,000 plus (i) 50% of new equity and sub debt plus (ii) 50% of quarterly net income	$	Yes No

The following financial covenant analysis and information set forth in Schedule 1 attached hereto are true and accurate as of the date of this Certificate.

The following are the exceptions with respect to the certification above: (If no exceptions exist, state "No exceptions to note.")

NETLIST, INC.

By: _____
Name: _____
Title: _____

BANK USE ONLY

Received by: _____
AUTHORIZED SIGNER
Date: _____

Verified: _____
AUTHORIZED SIGNER
Date: _____

Compliance Status: Yes No

Schedule 1 to Compliance Certificate

Financial Covenants of Borrower

In the event of a conflict between this Schedule and the Loan Agreement, the terms of the Loan Agreement shall govern.

Dated:

I. Adjusted Quick Ratio (Section 6.9(a))

Required: 1.25 : 1.00

Actual:

A.	Borrower's cash and Cash Equivalents that are unencumbered (except for Bank's security interest) and unrestricted	$	
B.	Aggregate net amount of Borrower's Eligible Accounts	$	
C.	Sum of line A plus line B	$	
D.	Current Liabilities	$	
E.	Adjusted Quick Ratio (line C divided by line D)		: 1.00

Is line F equal to or greater than 1.25 : 1.00 ?

☐ No, not in compliance ☐ Yes, in compliance

[continued on next page]

II. Minimum Tangible Net Worth (Section 6.9(b))

Required Amount: $17,500,000 plus (i) 50% of consideration for equity securities and subordinated debt plus (ii) 50% of Borrower's quarterly net income

Actual:

A.	Aggregate value of total assets of Borrower and its Subsidiaries	$
B.	Aggregate value of goodwill of Borrower and its Subsidiaries	$
C.	Aggregate value of intangible assets of Borrower and its Subsidiaries	$
D.	Aggregate value of investments of Borrower and its Subsidiaries consisting of minority investments in companies which investments are not publicly-traded	$
E.	Aggregate value of any reserves not already deducted from assets	$
F.	Aggregate value of liabilities of Borrower and its Subsidiaries (including all Indebtedness) and current portion of Subordinated Debt permitted by Bank to be paid by Borrower (but no other Subordinated Debt)	$
G.	Aggregate value of Indebtedness of Borrower subordinated to Borrower's Indebtedness to Bank	$
H.	Tangible Net Worth (line A minus line B minus line C minus line D minus line E minus line F plus line G)	$

Is line H equal to or greater than Required Amount?

☐ No, not in compliance ☐ Yes, in compliance

ASIC DESIGN AND PRODUCTION AGREEMENT

between

OPEN-SILICON, INC.
490 N. McCarthy Blvd., Suite 220
Milpitas, CA 95035

and

NETLIST, INC.
51 Discovery, Suite 150
Irvine, CA 92618

Customer Contact: Telephone No:

Fax No.: Email Address:

Effective Date

OPEN-SILICON ASIC DESIGN AND PRODUCTION AGREEMENT

THIS ASIC DESIGN AND PRODUCTION AGREEMENT (this " **Agreement** ") is made and entered as of , 2010 (the " **Effective Date** ") by and between **OPEN-SILICON, INC.** , a Delaware corporation with its principal place of business at 490 North McCarthy Boulevard, Suite 220, Milpitas, California 95035 (" **Open-Silicon** ") and **NETLIST, INC.** , a Delaware corporation with its principal place of business at 51 Discovery, Suite 150, Irvine, California 92618 (" **Customer** "), for purposes of setting forth the terms and conditions governing the manufacture and sale by Open-Silicon of one or more ASIC devices for Customer, as further specified in one or more Statements of Work (each, a " **Statement of Work** " or " **SOW** ") attached hereto as **Exhibit A** and incorporated herein.

1. DEFINITIONS. Any capitalized terms that are used herein shall have the meanings set forth below or, if not set forth below, the meanings ascribed to them in the other exhibits to this Agreement.

1.1 "Delivery Release" means Customer's authorization to ship a definite quantity of Products on a specified schedule.

1.2 "Design Respin" is a redesign of a Product due to a deficiency in the initial design of the Product, as evidenced in the Prototypes.

1.3 "Intellectual Property Rights" shall mean all intellectual property rights, including, without limitation, patents, copyrights, authors' rights, mask work rights, trademarks, trade names, know-how and trade secrets, irrespective of whether such rights arise under U.S. or international intellectual property, unfair competition or trade secret laws.

1.4 "IP Provider" is a third party provider of intellectual property and/or the embodiments of such intellectual property, by way of license, sale, or otherwise.

1.5 "Macrocell " shall mean the hardware implementation of any functions requested by Customer and furnished by Open-Silicon or its suppliers that Open-Silicon makes available for incorporation by Customer into a specified Product.

1.6 " Macrofunctions " shall mean the software implementation of any functions requested by Customer and furnished by Open-Silicon or its suppliers that Open-Silicon makes available for incorporation by Customer into a specified Product.

1.7 " Netlist " shall mean the list form in Verilog or other format of a structural circuit implementation describing the basic design building blocks and their logical connections.

1.8 "Product" means an application specific integrated circuit (ASIC) described or referenced in a Statement of Work, and unless otherwise specified, refers to Production Units and Prototypes.

1.9 "Project Technology" means (i) the [***] and any [***] in the performance of this Agreement and (ii) [***] in the performance of this Agreement, and [***] (or otherwise in a writing signed by both parties) or are [***].

1.10 "Prototypes" are engineering samples or the preliminary implementations on silicon of a specified Product, which are intended for internal use, and are not yet qualified and approved for production.

1.11 **"Prototype Approval"** occurs when Customer has completed the Prototype Approval Form attached hereto as **Exhibit B-1** , certifying that the Prototypes meet the agreed to specifications.

1.12 **"Production Units"** means product manufactured after Prototype Approval and Release to Production. Production Units do not include Prototypes or Risk Product.

1.13 **"Project"** shall mean the ASIC project specified in the applicable Statement of Work.

1.14 **"Purchase Order"** is Customer's document setting forth specific Products ordered and including Delivery Release information.

1.15 **"Release to Production"** occurs when Customer has completed the Release to Production Form attached hereto as **Exhibit B-2** .

1.16 **"Risk Product"** is Product (other than Prototypes) ordered by Customer pursuant to a Delivery Release for a delivery date occurring before Release to Production. For the avoidance of doubt, [***].

1.17 **"Services"** shall mean the ASIC design and manufacturing services to be performed by Open-Silicon (or by a third party on behalf of Open-Silicon) as set forth in a Statement of Work, and any related consulting services.

1.18 **"Statement of Work" or "SOW"** means a document which sets forth the responsibilities and deliverables of each party within the Project.

1.19 **"Subcontractor"** is a third party (other than an IP Provider) who provides services to a party in furtherance or fulfillment of its obligations to the other party under this Agreement .

1.20 [***] means the occurrence of any of the following: (i) [***], (ii) [***] of this Agreement by Open-Silicon [***], (iii) [***] or other similar laws, (iv) [***]; or (v) [***].

2. ASIC DEVELOPMENT AND PRODUCTION.

2.1 **Development Services.** The development activities for Products covered by this Agreement shall be set forth in one or more SOWs developed and mutually agreed to by the parties. Each SOW shall set forth the responsibilities and deliverables of each party regarding the development of the Products. Each party will perform its obligations and deliver its deliverables as set forth in and in accordance with the applicable SOW, and each party will cooperate with the other for the timely achievement of Project milestones. In performing the Services, Open-Silicon shall provide its own personnel, equipment, tools and other materials at its own expense. Customer will promptly acknowledge the completion of each milestone (at the request of Open-Silicon, such acknowledgement shall be in writing in substantially the form of **Exhibit D**). Customer acknowledges and agrees that Open-Silicon's ability to perform the Services and to deliver its deliverables may be dependant upon Customer's timely delivering certain deliverables or information as set forth in the applicable SOW. In the event that Open-Silicon cannot timely meet its development or delivery obligations due late delivery of such Customer deliverables and/or information, the parties shall renegotiate in good faith any affected schedule as reasonably necessary in light of the extent and nature of the delay.

2.2 **ECO Process.** Open-Silicon will [***] to implement Customer's requests for changes to the SOW and/or the design of the Products (" **Change(s)** "), provided such Changes are technically feasible. Customer will submit requested Changes in writing. Open-Silicon will promptly evaluate such

requests and inform Customer in writing of the potential effects on the SOW [***], including: (i) effect on the original schedule, (ii) effect on the engineering development charges, (iii) effect on the estimated production unit pricing due to die size, package or other changes, and (iv) other relevant factors. Any Changes that are mutually agreed to in writing shall be documented in accordance with Open-Silicon's Engineering Change Order process (" **ECO Process** ") described in **Exhibit C** . The parties will discuss in good faith any requested Changes and any impacts of pricing and scheduling of such Changes. Unless Changes are mutually agreed to in writing by the parties, the parties will continue their respective activities under the SOW without making any modifications to the SOW and/or the design of the Products.

2.3 Delivery of Prototypes. Upon completion of the engineering milestones specified in the SOW, Open-Silicon will manufacture and deliver the Prototype units to Customer in accordance with the SOW. Open-Silicon shall test each Prototype with the test program as specified in the SOW prior to delivery and shall provide all test results to Customer together with the Prototypes (provided, however, that such test results shall not be binding on Customer). The parties' activities in such regard will be further defined within the SOW. Customer acknowledges the Prototypes are delivered and intended for evaluation purposes only and are not intended for other use or resale for use in any system or application.

2.4 Prototype Evaluation. Customer will promptly evaluate the Prototypes and advise Open-Silicon in writing whether the Prototypes conform to agreed upon specifications for the Product, as set forth in the SOW. The prototype evaluation period shall not exceed [***] after shipment of initial prototypes (the " **Prototype Evaluation Period** "). If Customer concludes during the Prototype Evaluation Period, that the Prototypes are not conforming, then Customer will submit a written notice of rejection (" **Notice of Prototype Rejection** ") to Open-Silicon describing in reasonable detail the perceived deficiency or nonconformance of the prototype. [***]. Customer may accept the Prototypes prior to the expiration of the Prototype Evaluation Period by signing and submitting to Open-Silicon a Prototype Approval Form attached hereto as **Exhibit B-1** .

2.5 Effect of Notice of Prototype Rejection. If Customer submits a Notice of Prototype Rejection, the Parties will mutually cooperate to determine the source of any Prototypes nonconformance stated in the Notice of Prototype Rejection. Further, Customer and Open-Silicon will cooperate to resolve and, as appropriate, to develop and implement a corrective action plan, to remedy all reported defects. Open-Silicon shall deliver a corrected version of such Prototype within a reasonable period of time given engineering time and manufacturing lead times. The process detailed in Sections 2.3, 2.4 and 2.5 shall be repeated until the Prototypes successfully pass Customer's evaluation in accordance with Section 2.4 (" **Conforming Prototypes** "), and the cost for such repeated procedure shall be borne by Open-Silicon; provided, however, that if a Design Respin is required for any reason other than an error or deficiency resulting from the design services provided by Open-Silicon or its Subcontractors, Customer will be liable for the costs associated with the Design Respin. If Open-Silicon fails to deliver Conforming Prototypes after the foregoing procedure is [***] shall [***] of this Agreement and [***] may, in its [***] either (i) [***], or (ii) [***] and [***].

2.6 Changes to Functionality or Performance. In the event that Customer desires to change the functionality or performance of the Product (either before or after delivery of Prototypes) and receive new Prototypes prior to Release to Production, Customer and Open-Silicon will develop a new mutually agreed upon SOW or will amend the existing SOW, in accordance with the ECO Process set forth in Section 2.2.

2.7 Risk Product. Prior to Release to Production, Customer may request the delivery of Risk Product. The provision by Open-Silicon of Risk Product to Customer will be subject to the terms of this Section 2.7, as well as such other terms and conditions separately agreed to by the parties. [***] . Customer assumes full responsibility and liability for Risk Product, including but not limited to all work in process (WIP) without regard to issues of design or performance.

2.8 **Acceptance Prior to Manufacturing.** Open-Silicon will not commence production of Production Units until Customer confirms the Release to Production of the Product by signing and submitting a Release to Production Form attached hereto as **Exhibit B-2** , and submitting a purchase order for the units as set forth in Section 4.2.

2.9 **Escrow.** Within [***] after the Effective Date, Open-Silicon and Customer will enter into a technology escrow agreement (the " **Escrow Agreement** "), with terms reasonably satisfactory to both parties, with [***] or another escrow agent designated by Customer (" **Escrow Agent** "). Thereafter, Open-Silicon will deposit with the Escrow Agent the following items on a regular basis (*i.e.* , as soon as they are developed or created) during the term of this Agreement: (a) all [***] developed, created or obtained by or for Open-Silicon, and (b) such [***] in [***] possession necessary or useful to enable a [***] or other relevant vendors to [***] and collectively with the [***] will [***] to ensure that the Escrow Materials deposited with the Escrow Agent are kept current. Customer shall be responsible for any and all payments to the Escrow Agent associated with such Escrow Agreement; provided that in the event of [***]. The parties agree, and the Escrow Agreement will specify, that upon receipt by the Escrow Agent of a written notice from [***] has occurred, [***] will immediately [***] (i) [***] and (ii) [***] hereby covenants that it will [***] until the [***] further agrees that [***] created or developed [***] hereunder will [***] to perform the Services on [***] to [***] unless and until [***] or a [***].

3. COMPENSATION FOR DESIGN SERVICES.

3.1 **NRE Fees.** Design engineering charges for Product development are set forth in the applicable SOW and are based on the specifications and assumptions therein (" **NRE Fees** "). Customer will pay the NRE Fees in accordance with the milestone schedule set forth in the applicable SOW. Unless otherwise specified in the SOW, Open-Silicon will invoice Customer upon successful completion of each such milestone (which shall be determined in accordance with the acceptance criteria and procedure set forth in this Agreement and the applicable SOW). Payments relating to a milestone, the completion of which has been acknowledged by Customer, [***]. Payment of NRE Fees will be payable within [***] after Customer's receipt of the invoice. If Customer requests changes to the specifications or the SOW that increase the cost of the development, Open-Silicon will evaluate the requested changes and notify Customer in writing of the increased costs that Customer will be required to pay, in accordance with Section 2.2.

3.2 **Taxes.** Each pa rty shall bear and be responsible to pay any tax (and any related interest or penalty), however designated, legally imposed upon it with respect to the design and development activities contemplated by this Agreement.

4. FORECASTING AND ORDERS FOR PRODUCTION UNITS.

4.1 **Forecasts.** Following Release to Production, Customer shall provide Open-Silicon, on a monthly basis, good-faith, non-binding rolling forecasts of its purchase requirements for the Production Units, [***] following the month in which the forecast is submitted (each, a " **Forecast** "). Any Forecasts provided by Customer are for planning purposes only and do not constitute a Delivery Release or other commitment by Customer. Customer shall have no obligation with respect to the purchase of Products under this Agreement until such Products are specified in an issued Purchase Order that contains specific Delivery Release dates for specific Products.

4.2 Purchase Orders. Customer may order Production Units from time to time by issuing a purchase order to Open-Silicon for such units. Open-Silicon shall confirm its receipt of such purchase order within [***] in a written acknowledgment to Customer. Such purchase order shall not request delivery inconsistent with the applicable lead time (as set forth in the applicable SOW) without a line item for the appropriate expedite fees. Customer's purchase orders and Forecasts may [***] for Production Units set forth in the applicable SOW. Open-Silicon will not be obligated to make shipments [***]. Any Customer purchase order received by Open-Silicon that complies with the foregoing (a " **Purchase Order** ") shall be binding on Customer and Open-Silicon. All Purchase Orders and Open-Silicon 's acknowledgements shall be subject to and expressly limited to the terms and conditions of this Agreement and the applicable SOW and any terms or conditions contained in Purchase Orders or acknowledgements (or in other documents issued by either party) that are inconsistent with or in addition to the terms and conditions contained in this Agreement or the applicable SOW shall be of no force or effect, regardless of any failure of Open-Silicon or Customer to object to such terms or conditions, unless expressly accepted in writing by both parties.

4.3 Supply Commitment . During the term of this Agreement, Open-Silicon agrees to supply to Customer [***] of Customer's requirements for the Production Units, as specified in Purchase Orders that are [***] of the then-current Forecast. Notwithstanding the foregoing, Customer understands that yields for Production Units are subject to fluctuations; therefore, Customer will accept delivery of and accept as full performance: (a) [***] or (b) [***] of the total quantity ordered, with price adjusted for the quantity actually delivered.

5. CANCELLATION AND RESCHEDULING OF ORDERS.

5.1 Cancellation. Upon notice to Open-Silicon, Customer may cancel any Purchase Order or portion thereof at any time, subject only to the applicable cancellation fees set forth below:

Time of cancellation	Cancellation fee (percentage of sales price of cancelled units)
[***] weeks or more prior to the delivery date	[***]
[***] weeks prior to the delivery date	[***]
[***] weeks prior to the delivery date	[***]
[***] weeks prior to the delivery date	[***]

Notwithstanding the above, Open-Silicon shall use commercially reasonable efforts to mitigate any damages or expenses it may incur due to Customer's cancellation of a Purchase Order (or a portion thereof) by redeploying the Production Units ordered in such Purchase Order to other Purchase Orders of Customer, and Customer's payment obligation under this Section shall be reduced accordingly. For purposes of this Section 5.1, "delivery date" with respect of any Purchase Order or portion thereof which has been rescheduled under Section 5.2 shall be deemed to mean the delivery date prior to any rescheduling; provided, however, that any rescheduling of more than thirteen (13) weeks prior to the delivery date shall be deemed a new Purchase Order with a new delivery date.

5.2 Rescheduling. Each Purchase Order may be deferred by Customer no more than [***] time and by no more [***], subject to the terms of this Section 5.2. Customer acknowledges and agrees that the right to defer or reschedule an order will be subject to the scheduling flexibility of the foundry. Moreover, Customer agrees that, in the event that Customer requests to reschedule an order as permitted by this Section 5.2, Customer shall be responsible for reimbursing any costs incurred by Open-Silicon as a result of such rescheduling. Notwithstanding the foregoing, any Purchase Orders with scheduled delivery dates beyond the applicable lead time may be rescheduled by Customer at any time upon written notice to Open-Silicon, provided that [***] incurred by Open-Silicon as a result of accommodating Customer's request.

5.3 Process Discontinuance by Foundry. If for any reason, Open-Silicon's third party foundry supplier discontinues a process, Open-Silicon shall give Customer written notice thereof [***] prior to the last date on which Customer can place an order for Production Unit (s) to be affected by such process discontinuance, and will use its diligent efforts to provide Customer with longer than [***] notice of same. If such foundry discontinues or is expected to discontinue a process, Open-Silicon shall [***] to a [***] and shall provide [***] to effect a smooth and seamless transition.

6. TITLE AND DELIVERY.

6.1 Deliveries. All shipments to delivery destinations are made [***] at the [***]. All Products shall be deemed accepted by Customer upon delivery at point of shipment, subject to the Limited Product Warranty set forth in Section 10. Title to Production Units and risk of loss pass to Customer, or in the case of a Drop Shipment (as defined below), to the receiving party of the shipment (unless such receiving party is serving as Customer's agent, in which event, title and risk of loss will pass to Customer), upon [***]. In the absence of written instructions from Customer, all Products shall be packed and prepared for shipment in a manner that: (i) follows good commercial practice; (ii) is acceptable to common carriers for shipment at the lowest rate; and (iii) is adequate to ensure safe arrival. Open-Silicon shall mark all containers with Purchase Order number, lot tracking information, date of shipment, and Customer's and Open-Silicon's names, provided in the event that any shipments are made to Customer's customers (" **Drop Shipments** "), upon Customer's request, Open-Silicon's name will be omitted from the containers. Shipment of Production Units may originate from either Open-Silicon or its Subcontractors or authorized distributors.

6.2 Delivery Timeframes. Open-Silicon will deliver Products in accordance with the delivery dates set forth in Customer's Purchase Order. In the event that Production Units ordered in a Purchase Order are delivered late solely due to Open-Silicon's (excluding its Subcontractors') delay, Customer will be entitled to deduct from the payments otherwise due to Open-Silicon for such Purchase Order an amount equal to [***] of the total amount of such payments for each week the shipment is late, [***] provided, however, that if the delayed Production Units are delivered to Customer within [***] of the scheduled delivery date, such deduction will be waived. Without limiting the generality of the foregoing, Open-Silicon will give Customer prompt notice if it reasonably expects a delay in meeting a delivery date or that only a portion of the Products will be available for shipment to meet a delivery date, and Open-Silicon will specify the reasons therefor. For partial shipments, Open-Silicon will ship the available Products unless directed by Customer to reschedule a shipment. Customer may specify a delivery destination other than its own premises (e.g., Drop Shipment) in order to facilitate delivery directly to its customers. Open-Silicon does not require that delivery be made directly to Customer. For the avoidance of doubt, Customer will be responsible for all costs relating to shipment.

6.3 Early Deliveries. If Products are delivered more than [***] in advance of the Delivery Dates, Customer may, at its option, either return the Products at Open-Silicon's expense or keep the Products with payment due as provided in this Agreement.

6.4 Die Banking. Open-Silicon will provide die banking services to Customer in accordance with the terms and conditions of **Exhibit E** (" **Die Banking** "). Customer shall order sufficient material be held in die bank to assure continued supply of product within its Forecast.

7. PRODUCTION UNITS PRICING AND PAYMENT.

7.1 Pricing. Product pricing is set forth in the SOW. Both parties acknowledge and agree that pricing will not be known until die size is fixed and actual performance frequency and yield of the design is established. If die size increases or performance/yield is marginal, then Open -Silicon may in good-faith increase pricing in accordance with such changes and to the extent that such price increase shall be reasonable

7.2 Payment. Unless otherwise agreed, payment terms are [***] from receipt of invoice by Customer. For overdue invoices that are not reasonably disputed by Customer, Customer will pay Open-Silicon interest on the overdue amount at a rate of [***] for each month or part of a month (or the maximum rate allowed by law, whichever is less) that the payment is overdue. For the avoidance of doubt, for Product invoices, Open-Silicon will invoice Customer upon Product shipment, unless shipment is not made (at Customer's request), in which event, Open-Silicon will invoice Customer when such Product is ready for shipment. Unless otherwise instructed by Open-Silicon in writing, all amounts payable to Open-Silicon shall be paid by company check, tendered to such address as Open-Silicon shall designate in an invoice or other notice. Should the parties agree that payments will be made by wire transfer, then Customer shall instruct the paying financial institution to route all domestic wire transfers via FEDWIRE).

7.3 Taxes. Customer is responsible for and will pay any tax on Production Units. The prices specified in each applicable quote and/or SOW excludes all duties, taxes and excises and specifically excludes value-added tax (VAT) relating to Production Units. Open-Silicon shall separately state such taxes if it is required by law to collect such taxes, and Customer agrees to pay such amounts. The parties will reasonably cooperate to take advantage of benefits provided by any tax treaties.

8. TERM.

This Agreement shall commence as of the Effective Date and, subject to Section 9.4 below and unless earlier terminated in accordance with Section 9 ("Termination"), shall remain in force for a period of [***], except that [***] will [***] after the Effective Date.

9. TERMINATION.

9.1 Termination for Cause. Either party may terminate this Agreement and/or any or all SOWs upon at least [***] prior written notice if the other party materially breaches any term or condition hereof and fails to cure the breach within the notice period. The parties acknowledge that any breach of Sections 4.3 or 7.1 shall be deemed a material breach of this Agreement.

9.2 Termination for Infringement. Open-Silicon may, upon written notice to Customer, suspend its obligations under an SOW in respect of certain Products where Open-Silicon reasonably believes, after good faith discussions with Customer, that a third party suit or action brought against Open-Silicon and/or Customer alleging that the design, manufacture, or sale of such Products violates the intellectual property rights of the third party has merits. A suspension under this Section 9.2 that continues for more than [***] shall be deemed a termination of the SOW for such Products.

9.3 Termination for Business Discontinuity. Either party may terminate this Agreement and/or any or all SOWs in the event that the other party (a) becomes insolvent, otherwise unable to pay its debts as they mature, makes an assignment for the benefit of creditors, or files, or has filed against it (which is not dismissed in [***]), any claim for an action in bankruptcy or under any other debtor, insolvency, liquidation, or other similar laws, or (b) dissolves, or otherwise ceases doing business in the ordinary course.

9.4 Effect of Termination. Upon termination, each party will return to the other, or at the other party's request, destroy (and certify in writing as to such destruction), all Confidential Information in such party's possession provided by the other party, provided that (i) in the event that there is any dispute arising out of or relating to this Agreement or the termination thereof, each party will be permitted to retain such information as may be relevant to resolution of that dispute but use such information solely in the resolution of the dispute and not for any other purpose, including but not limited to, any commercial use, and when such dispute is resolved, each party will return the retained Confidential Information to the other party; (ii) Open-Silicon will be permitted to retain such information as is necessary for Open-Silicon to perform its surviving obligations under this Agreement; and (iii) Customer will be permitted to retain such information as is necessary for Customer to perform its surviving obligations or exercise surviving rights under this Agreement. Customer remains liable to pay Open-Silicon for Products and Services received (and accepted, if applicable) through the respective date of termination, and any applicable cancellation charges hereunder. [***]. The following sections will survive any expiration or termination of this Agreement: Section 1 ("Definitions"); Section 2.7 ("Risk Product") (solely with respect to the warranty disclaimer), Section 2.9 ("Escrow"); Section 3 ("Compensation for Design Services") (solely with respect to amounts incurred upon or prior to expiration or termination); Section 7 ("Production Units Pricing and Payment"); Section 9.4 ("Effect of Termination"); Section 10 ("Limited Product Warranty; Disclaimer") (solely with respect to the warranty disclaimers); Section 11 ("Limitation of Liability"); Section 12 ("Confidentiality and Publicity"); Section 13 ("Intellectual Property Ownership; Licensing") (except for Section 13.4); Section 14 ("Indemnification"); Section 17 ("Governing Law"); and Section 18 ("Miscellaneous"). Notwithstanding anything to the contrary, upon any termination or expiration of this Agreement, Customer shall be permitted to sell all remaining inventory of Products in Customer's possession, and to retain all Prototypes and related design information to permit providing maintenance and support services to its customers.

10. LIMITED PRODUCT WARRANTY; DISCLAIMER.

10.1 Limited Product Warranty. Open-Silicon warrants solely to Customer that Production Units delivered hereunder will [***] approved by Customer and, if properly used, will be [***] for [***] following the date of receipt of the Production Units by Customer. Except as expressly set forth in this Agreement (or an SOW), Open-Silicon makes no warranty with respect to any Services, Prototypes, or Risk Product. [***].

10.2 Remedy. If any Production Unit furnished by or for Open-Silicon fails to conform to the warranty provided in Section 10.1 (" **Limited Product Warranty** "), Open-Silicon's sole and exclusive liability and Customer's sole and exclusive remedy will be, at Open-Silicon's option and expense, to promptly repair or replace the Production Unit, or if repair or replacement is not technically feasible, refund to Customer an amount equal to the price paid for any such Production Unit which fails during the applicable warranty period, provided that: (a) Customer notifies Open-Silicon in writing during the warranty period indicated above that such Production Unit is defective and furnishes an explanation of the deficiency; (b) upon Open-Silicon's request, such Production Unit is returned, either to Open-Silicon's service facility or to such other facility designated by Open-Silicon, at Open-Silicon's risk and expense; and (c) the claimed deficiencies exist and were not caused by accident, misuse, neglect, improper installation, improper testing or unauthorized alteration or repair (all of which will operate to void the warranty provided herein). If such Production Unit is defective, and Open-Silicon elects to repair or replace it, the transportation charges for the repaired or replaced Production Unit from Open-Silicon to Customer within the USA will be paid by Open-Silicon. For all other locations, the Limited Product Warranty excludes all costs of shipping, duty, customs clearance, and other related charges. A repaired or replaced Production Unit will continue to be warranted for the longer of [***] from the original shipment date of the defective Production Unit or [***] after Customer receives the replacement or repaired Production Unit. All Production Units returned to Open-Silicon shall be returned in accordance with Open-Silicon's return material authorization procedure. [***] **.**

10.3 Disclaimer. [***].

10.4 Third Party Technology. Customer will be responsible for all third party technology provided or requested by Customer to be included in the Product to ensure that such technology is compatible with, and suitable for, Customer's intended purposes and applications.

11. LIMITATION OF LIABILITY.

11.1 Consequential Damages Disclaimer. [***], IN NO EVENT WILL EITHER PARTY OR ITS SUPPLIERS BE LIABLE FOR ANY INCIDENTAL, PUNITIVE, INDIRECT, OR CONSEQUENTIAL DAMAGES WITH RESPECT TO PERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING WITHOUT LIMITATION LOST PROFITS, INTERRUPTION OF BUSINESS, OR COST OF PROCUREMENT OF ANY SUBSTITUTE GOODS OR SERVICES, REGARDLESS OF WHETHER SUCH PARTY HAS ADVANCE NOTICE OF THE POSSIBILITY OF SUCH DAMAGES.

11.2 Damages Limitation. [***] **, IN NO EVENT WILL EITHER PARTY'S TOTAL CUMULATIVE LIABILITY TO THE OTHER PARTY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED THE HIGHER OF (A) THE AMOUNTS PAID OR PAYABLE BY CUSTOMER TO OPEN-SILICON UNDER THIS AGREEMENT, AND (B) AN AMOUNT EQUAL TO THE NRE FEES PAID OR TO BE PAID BY CUSTOMER UNDER THIS AGREEMENT.**

11.3 Indemnity. [***] WILL OPEN-SILICON BE OBLIGATED TO INDEMNIFY CUSTOMER OR ANY THIRD PARTY WITH RESPECT TO ANY CLAIM ARISING OUT OF OR RELATED TO THIS AGREEMENT.

11.4 Limitations Essential. THE PARTIES ACKNOWLEDGE THAT THESE LIMITATIONS ON POTENTIAL LIABILITIES WERE AN ESSENTIAL ELEMENT IN SETTING CONSIDERATION UNDER THIS AGREEMENT AND THAT, IN THE ABSENCE OF SUCH LIMITATIONS, THE ECONOMIC TERMS OF THIS AGREEMENT WOULD BE SUBSTANTIALLY DIFFERENT. LIABILITY FOR DAMAGES SHALL BE LIMITED AND EXCLUDED, EVEN IF ANY EXCLUSIVE REMEDY PROVIDED FOR IN THIS AGREEMENT FAILS OF ITS ESSENTIAL PURPOSE.

12. CONFIDENTIALITY AND PUBLICITY.

12.1 Confidential Information. "Confidential Information" means all information, trade secrets, technology and other materials disclosed or otherwise made available by one party (the " **Discloser** ") to the other party (the " **Recipient** "), whether before, on or after the Effective Date, (i) in a tangible form marked "Confidential", "Proprietary" (or with similar legend), (ii) in intangible form or orally and expressed as being confidential at the time of disclosure and confirmed as being confidential in a writing delivered to Recipient within thirty (30) days after initial disclosure, or (iii) under circumstances indicating it is confidential or proprietary. Confidential Information may be owned by a third party, including a Subcontractor or IP Provider. Neither party will disclose this Agreement any SOW or their terms, to any third party without the specific, written consent of the other. Without limiting the foregoing, Project Technology shall be deemed Confidential Information of Customer. Customer acknowledges that Project Technology may include Confidential Information of Open-Silicon.

12.2 Duties in Respect of Confidential Information.

(a) Recipient agrees not to use Confidential Information or disclose such Confidential Information except as expressly permitted under this Agreement or as expressly agreed in writing by the Discloser. Each party shall use Confidential Information disclosed to it solely as permitted under this Agreement. Subject to the following, Recipient agrees to not disclose Confidential Information except to those employees and contractors of Recipient who have agreed to be bound by confidentiality obligations not less protective than that contained in this Agreement. Recipient has the right to use and disclose Confidential Information reasonably in connection with the exercise of its rights or performance of its obligations under this Agreement, subject to confidentiality obligations no less protective of such Confidential Information as the terms and conditions contained in this Agreement. Recipient shall exercise the same degree of care to prevent unauthorized use or disclosure of Confidential Information as it takes to preserve and safeguard its own confidential information of similar importance, but in any event, no less than a reasonable degree of care. Notwithstanding any other provision of this Agreement or any SOW, Open-Silicon's provision to Customer of anything which contains confidential information or materials of third parties is conditioned on Open-Silicon's receipt of documentation showing that such third parties permit Customer to receive such confidential information or materials.

(b) Open-Silicon agrees not to, directly or indirectly (including, without limitation, through Subcontractors), [***]. Notwithstanding the provisions of Section 12.2(b), licensing of software and/or technology that Open-Silicon makes generally available shall not be deemed a violation of this provision even if such software and/or technology is used by one of the enumerated companies or their affiliates in products Similar to the Products. As used in this Section 12.2(b), "Similar" means identical to, substantially similar to, or comprising the same form, fit and function as, the Products.

12.3 Compelled Disclosure. If disclosure of Confidential Information is required by applicable law: (i) the Parties shall use all legal means available to minimize the disclosure to third parties of the Confidential Information; (ii) the Recipient compelled to make disclosure shall inform the Discloser at least ten (10) business days in advance of the disclosure or, if such notice is impossible, as soon as possible; and (iii) the Recipient compelled to make disclosure shall make reasonable efforts to give the Disclosure a reasonable opportunity to review and comment upon the disclosure, and any request for confidential treatment or a protective order pertaining thereto, prior to making such disclosure, provided that it is not impracticable to do so.

12.4 Exceptions. The Recipient shall be relieved of its duties in respect of specific Confidential Information to the extent that any such information: (a) falls into the public domain or becomes publicly known through no fault of Recipient (or its personnel or Subcontractors); (b) becomes known to Recipient, without restriction, from a third party through no breach of trust or an obligation of confidentiality; and/or (c) was independently developed by Recipient without use of the Confidential Information and by employees or contractors of Recipient who had no access to any Confidential Information of Discloser and have not been involved in performance of this Agreement. The burden of proof of the existence of an exception shall be on Recipient. The Parties may disclose this Agreement and SOWs in confidence to their respective legal counsel, accountants, bankers, and other similar advisors, and financing sources, including potential acquirers or merger partners, as necessary in connection with obtaining services from such third parties or the negotiating of an acquisition or merger.

12.5 Publicity. Neither party may use the other party's name or trademarks in any type of advertisement materials, web sites, press releases, interviews, articles, brochures, business cards, project reference or client listings without the other's prior written consent except as may be required by law.

13. INTELLECTUAL PROPERTY OWNERSHIP; LICENSING.

13.1 Ownership of Pre-Existing Technology. Other than the rights expressly granted or assigned in this Section 13, Open-Silicon or its licensors will own and retain all [***] to the Effective Date, or [***] of performing any Services for Customer, including, without limitation: [***] and (iii) [***]. Customer or its licensors shall own and retain all [***], including, without limitation, [***].

13.2 [***] . Customer shall solely and exclusively own all [***] and Open-Silicon hereby irrevocably assigns, and agrees to assign, to Customer all right, title and interest, including all [***], that Open-Silicon may have in and to any [***]. Customer agrees that [***] created or developed by Open-Silicon hereunder will not be used by Customer to [***] to a [***] unless and until [***].

13.3 Mask Ownership. [***] shall own the masks produced in connection with the performance of this Agreement (including any SOW) and all [***], subject to [***] of any [***] agrees that such masks shall not be used for any purpose other than [***] unless otherwise agreed [***] shall destroy such [***] and certify to [***] thereof. Effective upon a [***] hereby (a) [***] and (b) [***].

13.4 Development License . [***] hereby grants to [***], for the term of this Agreement, a [***] in the [***] and [***] to [***] the [***] and [***] solely to [***] under the Agreement.

13.5 License to Customer . If Open-Silicon incorporates any [***] (including any technology provided by IP Providers) in any [***], Open-Silicon hereby grants, under any of Open-Silicon's [***] therein (including rights licensed to Open-Silicon from IP Providers), to Customer [***] to (a) [***], and to [***] any products or services; and (b) [***] such [***].

13.6 No Implied Licenses. Except as expressly set forth in this Agreement or any separate license agreement, the parties do not, directly or by implication, by estoppel or otherwise, grant to each other any rights or licenses, and neither party shall have any ownership rights in any intellectual or tangible property of the other. Any rights not expressly granted hereunder are retained by their respective owner(s).

14. INDEMNIFICATION.

14.1 Indemnification by Open-Silicon. [***], Open-Silicon will defend or settle any third party claim, action, suit or proceeding brought against Customer based upon a claim that the Services or Production Units, alone and not in combination with any other product or service, constitute a direct infringement of any patent (in effect as of the Effective Date) or copyright issued under the laws of [***], and will pay all damages and costs finally awarded against Customer in connection with such claim. Customer will: (i) promptly notify Open-Silicon in writing of any such suit or proceeding, (ii) provide Open-Silicon with sole control over the defense or settlement of any such claim or action; and (iii) provide reasonable information and assistance in the defense or settlement of any such claim or action. [***]. Open-Silicon shall obtain Customer's prior written consent, which consent shall not be unreasonably withheld, to any settlement of any third party claim, action, suit or proceeding, except if the settlement is only for monetary damages and contains a full release of Customer from the claim.

14.2 Exclusions from Indemnification by Open-Silicon . Open-Silicon will not be liable for any expenses, damages, costs or losses arising out of or resulting from any suit or proceeding based upon a claim of intellectual property infringement to the extent arising from: (a) [***], or any [***], or (b) any alleged [***].

14.3 Indemnification by Customer. [***], Customer will defend or settle any third party claim, action, suit or proceeding brought against Open-Silicon based upon a claim of direct infringement of any patent (in effect as of the Effective Date) or copyright issued under the laws of [***], arising from: (a) [***], or (b) any [***], and will pay all damages and costs finally awarded against Open-Silicon in connection with such claim. Open-Silicon will: (i) promptly notify Customer in writing of any such suit or proceeding, (ii) provide Customer with sole control over the defense or settlement of any such claim or action; and (iii) provide reasonable information and assistance in the defense or settlement of any such claim or action. [***]. Customer shall obtain Open-Silicon's prior written consent, which consent shall not be unreasonably withheld, to any settlement of any third party claim, action, suit or proceeding, except if the settlement is only for monetary damages and contains a full release of Open-Silicon from the claim. Notwithstanding the foregoing, Customer reserves the right (but shall have no obligation) to cancel the Project giving rise to a third party claim (or a threat thereof), which may be subject to an indemnity obligation under this Section 14.3.

14.4 Exclusions from Indemnification by Customer . Customer will not be liable for any expenses, damages, costs or losses to the extent arising out of or resulting from any suit or proceeding based upon a claim of intellectual property infringement that (a) [***] and not in combination with any other product or service constitute [***] (in effect as of the Effective Date) or [***] as such under the [***].

14.5 Entire Obligation; Exclusive Remedy. The foregoing states the entire obligation and exclusive remedy of each of the parties hereto with respect to any alleged intellectual property infringement regarding any Product, Intellectual Property Right, or Service furnished hereunder.

15. EXPORT.

Customer will not export, either directly or indirectly, any Open-Silicon-furnished Technology or any Product or system incorporating such Product without first obtaining any required license or other approval from the Government of the country into which the technology or product is imported ("Host Government") or the U.S. Department of Commerce or any other agency or department of the Host Government or the United States Government.

16. ELECTRONIC TRANSACTIONS.

16.1 General. Subject to the terms and conditions of this Section 16.1, the parties agree to receive electronic documents and accept electronic signatures relating to transactions contemplated by this Agreement, including delivery releases, purchase orders, purchase order acknowledgments, invoices and other transactions as may be agreed by the parties from time to time. Electronic documents and electronic signatures shall be a substitute for paper-based documents and signatures, and the legal validity of a transaction will not be denied on the ground that it is not in writing. This Agreement may not be amended or terminated by these means.

16.2 Transmission of Electronic Documents. All electronic documents shall be transmitted through the use of EDI, XML or other web-based transmission formats. Electronic documents may be transmitted or received electronically directly by the parties or through designated third party communication network service providers with which either party may contract. Each party agrees to designate all transmissions as confidential and protect all electronic documents from improper or unauthorized access in accordance with Section 12 ("Confidentiality and Publicity"). Information contained in any electronic document or otherwise exchanged electronically between the parties shall be considered the confidential information of the disclosing party and shall be maintained in accordance with Section 12 ("Confidentiality and Publicity").

16.3 "Electronic Signature" Defined. For purposes of this Agreement, an electronic signature shall mean information or data in electronic form that is attached to or logically associated with an electronic document and executed or adopted with the intent to sign the electronic document. An oral communication or a recording of an oral communication shall not qualify as an electronic signature. Nothing in this Section 16.3 shall be construed to limit or otherwise affect the rights of either party to assert that an electronic signature is a forgery, is used without authority, or otherwise is invalid for reasons that would invalidate the effect of a signature in written form.

17. GOVERNING LAW.

This Agreement is to be construed and interpreted according to the laws of the State of Delaware, excluding its conflict of laws provisions that would require the application of the laws of another state. **THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (UCITA) SHALL NOT APPLY TO THIS AGREEMENT.**

18. MISCELLANEOUS.

18.1 Restricted Use. Customer acknowledges and agrees that the Products are not designed, intended, or certified for use in components of systems intended for, or in relation to the operation of [***], or for any other application in which the failure of the Product could create a situation where [***] may occur, and Customer shall not use, sell, or otherwise distribute the Products for said uses.

18.2 Notices. Unless otherwise stated herein, written notices shall be delivered by hand, mail, fax, or email (with contemporaneous delivery by one of the foregoing means) to the persons and at the addresses as set forth below (in the case of Open-Silicon), or as set forth on the signature page of the Agreement (in the case of Customer). Either party may change its address for receipt of notice to the other party by delivering written notice of such change pursuant to this Section 18.2.

Open-Silicon, Inc.
490 N. McCarthy Blvd., Suite 220
Milpitas, CA 95035
Attn: Contract Management

18.3 Force Majeure. Except for the obligation to pay any amounts when due, neither party will be liable for any failure to perform acts due to unforeseen circumstances or causes beyond the parties' reasonable control. If any such circumstances occur, the affected party's time for delivery or other performance will be extended for a period equal to the duration of the delay caused thereby, provided that the party affected by such circumstances or causes uses commercially reasonable efforts to mitigate the effect of such delay. Either party may terminate this Agreement upon written notice if such circumstances or causes delay any party's performance under this Agreement by a period of more than thirty (30) days.

18.4 Assignment. This Agreement will be binding upon and inure to the benefit of the parties hereto and their permitted successors and assigns. Notwithstanding the foregoing, neither this Agreement, nor any rights or obligations hereunder, may be assigned or otherwise transferred by either party without the prior written consent of the other party, provided, however, that either party may assign, without prior written consent all or any of its rights or delegate all or any of its obligations under this Agreement to a majority owned subsidiary of such party or to a third party in connection with merger or the sale of all or substantially all of the assets or business to which this Agreement relates. Any other attempted assignment or transfer without prior written consent will be voidable at the option of the non-consenting party.

18.5 Subcontractors. Customer acknowledges that in performing the Services Open-Silicon may use Subcontractors to design, manufacture and/or ship Products without Customer's prior approval; provided that Open-Silicon shall remain fully responsible and liable for the performance of the Services and its other obligations under this Agreement, and any act or omission of Open-Silicon's Subcontractors (other than Subcontractors designated by Customer in writing) shall constitute an act or omission of Open-Silicon, and any act or omission by an such Subcontractors (other than Subcontractors designated by Customer in writing) that would constitute a breach of the terms and conditions of this Agreement if it were an act or omission by Open-Silicon shall constitute a breach of this Agreement by Open-Silicon. Notwithstanding the foregoing, in the event that the SOW identifies a specific Subcontractor to perform certain functions hereunder or requires that the Subcontractor for certain functions will be mutually agreed upon by the parties, Open-Silicon may not use another Subcontractor to perform such functions without obtaining Customer's prior written approval therefor.

18.6 Counterparts. This Agreement may be executed in multiple counterparts, each of which will be deemed to be an original and all of which will be deemed a single agreement.

18.7 Construction. The headings provided in this Agreement are for convenience only and shall not be used in interpreting or construing this Agreement. For purposes of this Agreement, the term, "including" means "including but not limited to".

18.8 Independent Contractors. The parties hereto are independent contractors. Nothing in this Agreement will be construed to make the parties partners or joint venture or to make either party liable for the obligations, acts, or activities of the other.

18.9 Third Party Rights. The provisions of this Agreement are intended solely for the benefit of Customer and Open-Silicon, and shall create no rights or obligations enforceable by any other party. Notwithstanding the foregoing, to the extent that a third party is licensed hereunder, such third party is a beneficiary of the provisions hereof that related to such licensed rights.

18.10 Rights and Remedies Cumulative. Except as provided in Section 10 ("Limited Product Warranty; Disclaimer"), the parties' rights and remedies under this Agreement are cumulative. Each party acknowledges and agrees that an actual or threatened breach of any of the provisions contained in this Agreement may result in immediate, irreparable and continuing damage to the non-breaching party for which there may be no adequate remedy at law, and the non-breaching party may apply to any court of competent jurisdiction for specific performance or injunctive relief to enforce or prevent any breach of the provisions of this Agreement.

18.11 Severability; Limitations Period. If any provision of this Agreement becomes or is declared by a court of competent jurisdiction to be illegal, invalid or unenforceable for any reason, then such provision will be enforced to the maximum extent permissible under the circumstances so as to effect the intent of the parties and the economic effect of the Agreement. Neither the legality, validity or enforceability of the remaining provisions hereof nor the legality, validity, or enforceability of the provision at issue in other circumstances will otherwise be affected or impaired thereby, and the remainder of the provisions of this Agreement will remain in full force and effect. The parties will replace any unenforceable provision with a valid, legal and enforceable provision that most early achieves the economic effect of the unenforceable provision. Without limiting the generality of the foregoing, the parties agree that Section 11 ("Limitation of Liability") will remain in effect notwithstanding the illegality, invalidity, unenforceability, or failure of the essential purpose of any provision in Section 10 ("Limited Product Warranty; Disclaimer").

18.12 Entire Agreement. This Agreement, including the exhibits hereto and each SOW, contains the entire understanding between Customer and Open-Silicon with respect to the subject matter hereof and merges and supersedes all prior and contemporaneous agreements, dealings and negotiations. Any modification, alteration, or amendment to this Agreement will not be effective unless made in writing, dated and signed by duly authorized representatives of both parties. All rights and remedies, whether conferred hereunder, or by operation of law, will be cumulative and may be exercised singularly or concurrently. Failure by either party to enforce a term will not be deemed a waiver of future enforcement of that or any other term. The following Exhibits are hereby incorporated herein by this reference: **Exhibit A** ("Statement of Work"), **Exhibit B-1** ("Prototype Approval Form"), **Exhibit B-2** ("Release to Production Form"), **Exhibit C** ("Engineering Change Order Process"), **Exhibit D** ("Milestone Acknowledgement Letter"), and **Exhibit E** ("Die Banking"). In the event of a conflict between the terms of this Agreement and any exhibit, the terms of this Agreement will govern. In the event of a conflict between **Exhibit A** and a change order executed by parties, the change order will govern.

IN WITNESS WHEREOF, the parties have caused their duly authorized representatives to enter into this Agreement, effective as of the Effective Date.

OPEN-SILICON, INC. **("OPEN-SILICON")**	**NETLIST, INC.** **("CUSTOMER")**
By: _____	By: _____
Print Name: _____	Print Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

EXHIBIT A
OPEN-SILICON, INC.
[***]

EXHIBIT B-1
OPEN-SILICON, INC.
PROTOTYPE APPROVAL

Customer:
Address:

Customer Agreement Number/Date (incorporated by reference):

Customer Part Number:
Project Code Name:

We have completed our evaluation of the prototypes for the above-referenced part. The part meets our requirements, and the part complies with the test vectors to which we mutually agreed.

We formally approve the prototypes for the above-referenced part.

Approval:
ACKNOWLEDGED AND AGREED:
(Print or Type Customer Name)

By: _____
(Signature)

Print Name: _____

Title: _____

Date:

EXHIBIT B-2
OPEN-SILICON, INC.
RELEASE TO PRODUCTION

Customer:
Address:

Customer Agreement Number/Date (incorporated by reference):

Customer Part Number:
Project Code Name:

We formally request that the part be released to production.

Approval:
ACKNOWLEDGED AND AGREED:
(Print or Type Customer Name)

By: _____
(Signature)

Print Name: _____

Title: _____

Date:

EXHIBIT C
OPEN-SILICON, INC.
ENGINEERING CHANGE ORDER PROCESS

PURPOSE

To describe method to be used in accepting Engineering Change Orders from Customers

SCOPE

This procedure applies to all designs that are in active execution phase.

PROCESS OWNER

The process is owned by the ASIC Program Manager (APM). The release and any subsequent changes to this procedure must have the approvals of the Director of APM and Engineering.

APPLICABLE / REFERENCE DOCUMENTS

1.1 OS-0027, List of Customer ECOs

DEFINITIONS

Customer: That with whom a Statement of Work has been signed.
Project: Work to be performed by Open-Silicon for such a customer

GENERAL POLICY PROCEDURE

ECO Description

Scope of work to be performed by Open-Silicon is dictated by the Statement of Work document signed between Open-Silicon representative and Customer. Any change to this scope of work which could result in change in effort and cost shall be deemed as an Engineering Change Order (ECO) from the customer. Such additional tasks shall only be undertaken by Open-Silicon after customer has submitted a signed ECO Form provided by Open-Silicon.

ECO Types

ECOs can be filed for a variety of reasons. Some of the most common reasons for filing an ECO are listed below:

- Customer may want to change the scope of work being performed. For example, a customer may decide to retain Open-Silicon to undertake Part Qualification which may not be included in the current SOW.
- Customer may decide to change the package of the device.
- Customer may have a need to change the IP being used in the design.
- Customer may want to move out the schedule due to their internal project delays.
- Customer may want to change the architecture of their device. This includes changes to device interfaces
- Customer may want to change the design center and/or design team working on the design

ECO parameters

All ECOs must be measurable. The ECO form shall have the following measurable parameters (among other parameters):

- Number of lines of code changed

- Number of gates modified
- Number of nets touched
- Number of memory elements (including registers) impacted
- Levels of Netlist hierarchy traversed for the ECO
- Time to implement changes
- Cost in dollars to implement and verify
- Impact to schedule to implement
- List of IPs whose performance/characterization could be impacted
- Die size impact to implement
- Impact to package size and performance
- Expected design performance impact to implement
- ECO approval

ECO Forms shall be approved by Engineering and APM office for execution. APM shall update schedule based on ECO impact and publish new date as POR to all.

Standard ECO Form

Project Name: _____
Dated: _____
ECO Number: _____

ECO Description

Table 1: Type of ECO

Type	Description	Items Impacted
Change in scope of work		{SOW, Ts&Cs, Cost, etc.}
Change in design center		{Schedule, Cost, etc.}
Change in design team		{Schedule, Cost, etc.}
Change in design schedule		{Schedule, Cost, etc.}
Change in IP agreements		{SOW, Schedule, Cost, Ts&Cs, etc.}
Change in design architecture		{SOW, Schedule, Cost, etc.}
Change in package		{SOW, Schedule, Cost, etc.}

Table 2: Design Change Details

Object	Details	Items Impacted
Additional Tasks being requested		{Characterization, Qual, SHL, etc.}
Lines of Code modified		{rtl, tests, test-benches, scripts etc.}
Gates modified/added/removed		{netlists, modules, verification scripts, etc.}
Nets touched		{netlists, modules, verification scripts, etc.}
Memory Elements (including registers) modified/added/removed		{netlists, modules, verification scripts, etc.}
Levels of netlist hierarchy traversed		{netlists, modules, verification scripts, etc.}
IPs whose performance/characterization could be impacted		{instance names, modes in which impact is observed, netlist}
Design performance impact		{timing, area, power, IR drop, EM etc.}

Table 3: Design ECO related Tasks

Task	Owner	Completed	Comments
Modified RTL Functionally Verified			
RTL to Netlist Formally Verified			
Modified design checked for performance deviation			
Verified impact of modified design on IP			
Verified impact of modified design on die size			
Verified impact of modified design on package			

Table 4: Cost of ECO

Function	Cost	Comments
Man Days required to Implement the ECO		
Monetary Impact to existing agreement		
Schedule Impact		

This ECO is being approved for execution by the following representatives of Open-Silicon and its Customer:

OPEN-SILICON, INC. **(“OPEN-SILICON”)**	**(“CUSTOMER”)**
By: _____	By: _____
Print Name: _____	Print Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

EXHIBIT D
MILESTONE ACKNOWLEDGEMENT LETTER

[[CUSTOMER LETTERHEAD]]

Chief Financial Officer
Open-Silicon, Inc.
490 N. McCarthy Blvd., Suite 220
Milpitas, CA 95035

Dear Sir or Madam:

We acknowledge completion of milestone XX and all prior milestones.

Sincerely,

/s/_____

Officer of Customer

Exhibit E
(“ **Die Banking** ”)

Open-Silicon will build and hold Product in a die bank for Customer under the following additional terms and conditions:

1. Open-Silicon will hold Products in a die bank in a quantity equal to the greater of (a) the then-current Forecast, and (b) the cumulative volume of wafers ordered that are produced into Production Units in the preceding three (3) months.

2. Customer will pay Open-Silicon for wafers to be held in die bank (but not delivered to Customer), and for the completion of production of die bank wafers (for delivery to Customer) according to the table set forth below:

Per wafer deposited to die bank	Per Production Unit from die banked wafer
1/2 of part price as specified in SOW or any subsequent amendment that modifies the part price stated therein times the number of expected yielded parts from such deposited wafers	1/2 of part price as specified in SOW or any subsequent amendment that modifies the part price stated therein; when all die banked wafers from a deposit have been built out and shipped, any difference between the amounts invoiced and the value of the part price times Production Units shipped shall be either invoiced, or (if the invoices are in excess of such value) refunded.

3. Open-Silicon will invoice Customer for die banked material at the time such material is deposited into die bank, and for the completion of production of die bank wafers at the same time that Production Units would be invoiced under the Agreement.

4. **[***].**

5. After completion, Production Units made from die banked material are not treated differently under the Agreement.

6. No material shall remain in die bank longer than [***] without the parties’ express agreement. In the event that the parties make such agreement, Customer acknowledges that [***] and extended warranty [***].

7. Die bank inventory shall be handled on [***] basis, and to facilitate this Open-Silicon may complete production of any and all wafers in die bank to fulfill any Purchase Order for Production Units and deposit any and all newly-fabricated wafers in die bank.

8. Purchase Orders specifically for die bank material [***].

Exhibit 10.3

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

TOSHIBA

Toshiba America Electronic Components, Inc.
2950 Orchard Parkway, San Jose, CA 95131

Design and Production Agreement

Netlist Inc.

This Design and Production Agreement ("DPA") effective July 31, 2008 (the "Effective Date") is between Toshiba America Electronic Components, Inc., with a principal place of business at 19900 MacArthur Boulevard, Suite 400, Irvine, CA 92612 ("TAEC") and Netlist Inc with a place of business at 51 Discovery, Suite 150, Irvine, CA 92618 ("Customer") and sets out the terms and conditions under which TAEC will design the product identified herein for Customer.

1. Project Name

Register ASIC

2. Summary

This DPA is for the development of Register ASIC for Customer. The quote is based on TAEC's initial die size estimation.

3. Design Specification

[***]

4. Schedule

MAJOR PROJECT MILESTONES

Event	Target Date/Completed
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**

Production turnaround time: **[***]** working weeks

Schedule will be finalized in the SOW upon Design Decision. See Section 13.5.

5. Technology

[***]

6. Package and Die Size Option

Package	Ball Pitch	Body Size	Substrate Layers	Die Size
[***]	**[***]**	**[***]**	**[***]**	**[***]**

7. Internal/External IP

Internal IP :
[***]

External IP :
None

8. Price

First	**[***]** pieces: US$ **[***]**	* **[***]**
Next	**[***]** pieces: US$ **[***]**	
Next	**[***]** pieces: US$ **[***]**	
After first	**[***]** pieces: US$ **[***]**	

*Prices for 01Mpcs represent an addition of US$ **[***]** per unit in amortized Total NRE cost. See Section 10.

Changes in die size will affect the price quoted.

Prices do not include and are subject to any applicable sales tax.

9. Non-Recurring Engineering Charges ("NRE")

9.1 Total NRE Charges (not including re-spin charges as set out in Section 9.2): US$ **[***]**

9.2 Additional NRE Charges in the event of Re-spin

Metal Layer Re-spin Charges:	US$ **[***]**
All-Layer Re-spin Charges (base and metal layers):	US$ **[***]**

In the event a re-spin involving only metal layers is required, TAEC will provide a firm quote for additional re-spin NRE charges, which will be calculated on a cost per layer basis including required engineering effort. In the event the implementation of design changes affects all metal layers, including contact and vias, the additional NRE cost will not exceed the Metal Layer Re-spin Charges amount stated above.

In the event an all-layer re-spin is required, the All-Layer Re-spin Charges will apply as stated above.

The charges set forth in this Section 9.2 are based on the assumptions that (1) no Material Changes would be needed and (2) no changes whatsoever to the package design would be required, whether Material Changes or not. If either of these assumptions is incorrect, costs may vary.

9.3 Internal IP Defects/Bugs

Should Internal IP be found to have a Defect/Bug, as defined in the attached SLI Terms and Conditions, TAEC will be responsible for the additional NRE re-spin charges required to repair such Defect/Bug, subject to Section 9.4,

9.4 Customer Design Changes During Re-spin for Internal IP Defects/Bugs

If Customer requests design changes during a re-spin to correct Internal IP Defects/Bugs, a portion of the additional re-spin cost will be shared by Customer.

For a metal re-spin, this cost will be calculated on the basis of the number of layers required for Customer changes and whether those layers are implicated by the Internal IP repairs. If the Customer-requested design changes require the same metal arid via layers as would be necessary for the Internal IP Defect/Bug fix, the cost to Customer will not exceed 50% of the additional re-spin NRE charges. If the Customer-requested changes require additional mask layer changes, the NRE cost associated with the additional layers will be solely the financial responsibility of Customer.

If an all-layer re-spin is required in order to fix Internal IP Defects/Bugs, and Customer requests additional design changes at that time, Customer will not he charged more than 50% of the All-Layer Re-spin Charges.

10. NRE Payment Schedule

[***] :	US$ **[***]**
[***] :	US$ **[***]**
[***] :	US$ **[***]**
Amortized NRE:*	US$ **[***]**

* TAEC agrees to charge and Customer agrees to pay US$ **[***]** in NRE amortized over the first **[***]** production units, at the additional price of US$ **[***]** per piece (see Section 8). In the even t that Customer has not paid the total owed sum of US$ **[***]** through the amortized sales process within **[***]** months of the date of **[***]** , then Customer agrees

to pay the entire balance owing upon invoice by TAEC. For the avoidance of doubt, Amortized NRE is considered part of NRE for all purposes including Sections 9 and 10 of the attached SLI Terms and Conditions.

- **[***]** Prototypes are included in NRE.
- A prototype lot charge of $ **[***]** is included in the **[***]** payment. Prototype lot charge is subject to any applicable sales tax.

11. NRE Services included

Engineering activities
[***]

Manufacturing activities
[***] *

*Any additional qualifications requested by Customer beyond the standard Toshiba qualification are not covered by the Total NRE Charges and may incur additional fees.

12. Extra Engineering Samples

[***] pieces:	**[***]** unit price of US$ **[***]**
[***] pieces:	**[***]** unit price of US$ **[***]**
[***] pieces:	**[***]** unit price of US$ **[***]**

All extra engineering samples are sold as Prototypes and are subject to, without limitation, Articles 18.2 and 19.1 of the Terms and Conditions.

13. Project Specific Conditions

13.1 Final package selection to be based on **[***]** . **[***]** analysis may lead to changes in **[***]** or **[***]** . Details of the **[***]** and **[***]** analysis and the **[***]** need to be defined and mutually agreed in the Statement of Work ("SOW").

13.2 Details on the **[***]** to be finalized in the SOW prior to **[***]** .

13.3 Customer may order a commercially reasonable number of **[***]** pieces, as determined by **[***]** in its sole discretion. **[***]** goods are subject to, without limitation, Articles **[***]** of the attached Design and Production Agreement Terms and Conditions ("Terms and Conditions"). In the event that Customer wishes to order any **[***]** pieces, such order shall be placed no later than the date of **[***]** .

13.4 For the avoidance of doubt, the Specifications as agreed upon by the parties and incorporated into the SOW shall be based upon the defined load models provided by Customer.

13.5 Upon **[***]** , TAEC will discuss the results of its tests assuring a path delay of **[***]** for the **[***]** provided by Customer (“ **[***]** ”). On or before **[***]** , Customer agrees to inform TAEC whether Customer intends to proceed with the ID design (“Design Decision”). If Customer chooses to proceed with the design, Customer agrees to accept **[***]** , provide a waiver, or alter its specifications to accommodate such results, and TAEC will **[***]** according to Section 10 of this Agreement. If Customer chooses to cancel the design upon completion of the **[***]** , Customer may terminate this Agreement **[***]** and **[***]** .

14. General Conditions

14.1 Pricing stated in this DPA is based on Toshiba America Electronic Components Inc. selling production parts directly to Customer.

14.2 Full specifications and responsibilities to be defined and agreed in a SOW. Customer and TAEC will work in good faith to finalize and sign the SOW within thirty (30) days of design initiation.

14.3 Schedule is provisional. Final schedule is still to be agreed.

14.4 TAEC reserves the right to make extra charges up to **[***]** of the total NRE if Customer submits **[***]** Engineering Change Orders (ECOs) or changes to the layout constraints file(s) after the acceptance of final netlist, unless these ECOs/changes are attributed to problems of TAEC implementing the design.

14.5 TAEC may, in its sole discretion, share a copy of this DPA, and any applicable SOW with Toshiba Corporation Semiconductor Company and other Toshiba affiliates, on a need-to-know basis in order to implement or further Customer’s project.

14.6 TAEC may, upon written notice to Customer, share Customer’s information as it pertains to their design kit, library and user documentation with a supplier of EDA Tools for the sole purpose of resolving any debugging issues that may arise during the term of this Agreement.

14.7 This DPA shall be governed by the attached Terms and Conditions, which are incorporated herein by reference.

14.9 In the event of any conflict between the provisions set forth in this DPA and the Terms and Conditions to which it is attached, the contents of the DPA shall control.

14.10 This Agreement (as defined in the Terms and Conditions) is the entire agreement between the parties and supersedes any prior communications, representations, or agreements as to the subject matter hereof, whether written or oral.

14.11 Any changes to the DPA and/or the Terms and Conditions after the execution of the DPA must be mutually agreed upon in the form of a written amendment signed by both parties.

Toshiba America Electronic Components, Inc.	**NetList Inc.**
/s/ Takeshi Iwamoto Signature	*/s/ James P. Perrott* Signature
Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit, System LSI Printed Name and Title	James P. Perrott, SVP Sales & Marketing Printed Name and Title
8/22/08 Date	8/15/08 Date

Toshiba America Electronic Components, Inc.
Design and Production Agreement Terms and Conditions

These Terms and Conditions set out the terms and conditions under which TAEC will de these terms are attached.

1. DEFINITIONS

1.1 "Agreement" shall refer to the agreement comprising the DPA (as hereinafter defined), the Terms and Conditions, the SOW, and any other addenda specifically noted therein (all as defined herein).

1.2 "CEM " means a contract manufacturer engaged by Customer to purchase Product(s) from TAEC, which are then assembled into products sold to Customer.

1.3 "Customer" means the customer identified on Page 1 of the DPA.

1.4 "Defect/Bug" means a failure of any intellectual property to meet the mutually agreed upon chip level and system level specifications as provided at the time of development. Such failure or nonconformance includes, but is not limited to, the inability of the logic or interface portion of either Internal and External IP to meet mutually agreed upon chip level and system level specifications.

1.5 "Design Initiation" means Customer has placed and TAEC has accepted a Development PO to proceed with Customer's design.

1.6 "Development PO " is the purchase order created by the Customer to signify they have accepted the Specifications and have agreed to proceed with the development of Customer's design.

1.7 "DPA" means the Design And Production Agreement to which these terms and conditions are attached.

1.8 "Effective Date" shall mean the date reflected on the first page of the DPA, its date of execution notwithstanding.

1.9 "External IP" shall mean intellectual property acquired from a third party IP provider by TAEC or Customer for use in Customer's design, which is so identified in the SOW and/or in the DPA.

1.10 "Internal IP " means intellectual property owned and/or provided by TAEC for use in Customer's design, which is so identified in the SOW and/or in the DPA.

1.11 "Mask Work" means a series of related images, however fixed or encoded; having or representing the predetermined, three dimensional pattern of metallic, insulating or semiconductor material present or removed from the layers of a semiconductor chip product; and in which series the relation of the images to one another is that each image represents a pattern of the surface of one form of the resulting semiconductor chip product.

1.12 "Material Changes" means any changes in Customer-provided specification or netlist that (1) lead to an increase in block size or die size of 1% or more; (2) increase the nominal performance of the block or chip or both by 1 % or more; (3) alter the testing requirements after the Second Signoff; (4) in the case of I/O limited designs, lead to any increase in pin out; or (5) in the case of non-I/O limited designs, lead to an increase in pin out of 1 % or more.

1.13 "NRE " means the non-recurring engineering fees charged for specific phases of work as set forth in the DPA.

1.14 "Product" means the resulting product based on the design specified in the DPA and shall be defined by mutually agreed upon specifications embodied in the documents contained within the Customer Part Number File and TAEC published Quality and Reliability Standards

1.15 "Prototype" means pre-production engineering samples of Products, which have been manufactured before the completion of the Prototype Approval Signoff by both parties. Prototypes are provided for evaluation purposes only. Prototypes may also be called "Engineering Samples" or "KS," "ES, " or "HS " for invoicing or other purposes, but other types of reference to a Prototype shall not change the status as the Prototype.

1.16 "Prototype Approval Signoff" shall mean the form signed by the Customer when the Prototype meets the required Specification and the design is suitable for transfer in to production.

1.17 "Risk Production" means TAEC's commencing production of goods before the completion of the Prototype Approval Signoff by both parties.

1.18 "Second Signoff" means the form signed by both parties indicating the design is ready for Tape-out.

1.19 "SOW " means the Statement of Work attached to the DPA, or which is executed separately by the parties if not attached thereto. The parties expressly agree that the SOW may be modified from time to time on their mutual agreement, and that the project schedule and other records of the TAEC Program Manager shall be the record of the parties' modifications to the SOW.

1.20 "Specifications" means the specifications agreed by the parties for the Product and Prototype, as applicable and incorporated into the SOW.

1.21 "System Level Verification " shall mean the performance of the External IP on the silicon in varying Customer application systems as stated on the third party IP provider specification.

1.22 "TAEC " means Toshiba America Electronic Components, Inc.

1.23 "Tape-out" means TAEC has released final database to Japan to begin the prototype fabrication (mask making and wafer fabrication).

1.24 "Terms and Conditions" means these Design and Production Agreement Terms and Conditions.

2. DEVELOPMENT WORK

2.1 Details of the development are set forth in the SOW. Design requirements may be changed by mutual written agreement of the Parties; however, Customer understands and agrees that such changes may result in additional charges.

2.2 The development shall be completed when Customer notifies TAEC that the Prototype received by Customer meets the Specifications, when Customer executes the Prototype Approval Signoff.

2.3 If the Prototypes do not conform to the agreed specification and TAEC agrees that the nonconformance is due to TAEC's error, TAEC will make all commercially-reasonable efforts to expedite delivery of conforming Prototypes.

2.4 If Customer requests any modifications to the Specifications, TAEC agrees to complete the modification as soon as is reasonably practicable after TAEC has agreed to the modification. For the avoidance of doubt, the parties expressly agree that TAEC shall have no obligation to commence a modification unless and until the parties have agreed on adjustments in schedule, costs, or other applicable provisions.

2.5 If TAEC assembles and manufactures any goods at Customer's request before Customer has issued its written approval via Prototype Approval Signoff, Customer understands and agrees that they will be done on a Risk Production order basis, with Customer responsible for all assembly and production costs.

2.6 Products will be tested to the developed test program resulting from the simulation database. Changes to the test program after sample or production initiation may result in production lead-time delays.

2.7 Each delivery of Products shall be initiated by Customer's written or electronic notification that a Purchase Order ("Purchase Order") will be forthcoming. Customer shall send a written Purchase Order to TAEC within five (5) working days of the verbal notice. Each Purchase Order shall identify the Products ordered; indicate the requested quantity and a mutually agreed upon price; and specify the requested delivery date.

2.8 Design initiation shall commence when Customer issues a Purchase Order for the NRE charge. The Purchase Order shall refer to the applicable DPA, and shall include the words: "This Purchase Order represents acceptance of the terms and conditions in the Design And Production Agreement between the issuer and Toshiba America Electronic Components, Inc."

2.9 TAEC shall supply Products to Customer based on production Purchase Orders that support a six (6) month rolling forecast.

3. DEVELOPMENT TERM

[***]

4. COMPENSATION

4.1 **[***]**

4.2 **[***]**

4.3 **[***]**

5. RE-SPIN NRE CHARGES

Re-spin NRE charges will be based on engineering and manufacturing services as well as on the extent of the modification, which may be done as either a metallization or a diffusion change. Metallization changes may be implemented by regenerating the metal and via masks only. Diffusion modifications, on the other hand, require the regeneration of all masks. The extent of the engineering and manufacturing services required for re-design shall be considered in determining total charges for a re-spin of the design which shall be specified in the DPA or an Amendment thereto.

6. ACKNOWLEDGMENT

6.1 TAEC shall process Customer's Purchase Orders submitted in accordance with Article 2.7 within ten (10) working days of TAEC's receipt thereof. Purchase Orders shall only be binding as of the date of TAEC's acknowledgment and acceptance thereof.

6.2 TAEC shall only accept Purchase Orders with requested delivery dates no more than six (6) months from the Purchase Order date. Any requests for a shipment beyond that six-month period shall be reviewed and acknowledged only after the requested delivery date moves within the six (6) month period.

7. PRODUCT LEADTIME

7.1 Prototypes: TAEC will use all commercially reasonable efforts to provide Prototypes within the total turnaround time defined in the appropriate DPA and expressed as working weeks from Tape-out.

7.2 Production: TAEC will use all commercially reasonable efforts to provide production lead-time as defined in the appropriate DPA or other document issued by TAEC, from the date of TAEC's acknowledgment and acceptance of a Purchase Order.

8. SHIPMENT AND DELIVERY

8.1 Shipments shall be F.C.A. shipping point. Risk of loss or damage shall pass from TAEC to Customer upon delivery of the Products to the common carrier for shipment to Customer; title to all Products released hereunder shall pass to Customer upon full payment by Customer therefor.

8.2 Unless otherwise specified by Customer, TAEC shall ship Products according to TAEC's standard method. Freight and insurance will be prepaid by TAEC and invoiced to Customer.

8.3 TAEC shall not be liable for any damages or penalties for delay in delivery, or for failure to give notice of delay when such delay is due to an act of Customer or any cause beyond the reasonable control of TAEC, including, but not limited to, the causes specified in Article 28. FORCE MAJEURE clause herein. For any delay excusable under Article 28, the delivery date shall be deemed extended for the duration of the force majeure event.

9. PAYMENT TERMS

9.1 Customer shall pay to TAEC all amounts due hereunder within thirty (30) days of the date of TAEC's invoice therefor.

9.2 Customer may have a third party distributor or other entity (each, a "Designated Payor") pay the NRE charges on Customer's behalf subject to the following conditions:

a. Customer will so inform TAEC and will give TAEC instructions on to whom and where the NRE invoice(s) should be sent;

b. Upon TAEC's request, Customer will provide reasonable evidence to TAEC of such Designated Payor s agreement to pay the NRE charges;

c. Customer remains primarily liable for the payment of the NRE charges, and understands and agrees that it shall be fully responsible therefor if the Designated Payor fails to pay such charges within thirty (30) days of the date of TAEC's invoice; and

d. The payment of the NRE charges by a Designated Payor shall not affect any of the rights and obligations of the parties hereunder, and such Designated Payor shall not be deemed a third party beneficiary of this Agreement, nor shall the Designated Payor have any rights in or to Products, Prototypes, Mask Works, or any other item relating to the subject matter hereof or any right to place or enforce a lien against TAEC relating to the subject matter of this Agreement, and Customer shall indemnify and hold harmless TAEC from any damages or claims TAEC may suffer as a result of Customer's engagement of a Designated Payor.

9.3 TAEC may withhold or suspend shipment or other performance hereunder, in whole or in part, if Customer or its Designated Payor, as applicable, fails to make any payment in accordance with Article 9.1, or otherwise fails to perform its obligations under these Terms and Conditions.

9.4 TAEC reserves the right to monitor Customer's or the Designated Payor's creditworthiness periodically during the course of the work. If, in TAEC's reasonable opinion, Customer's or the Designated Payor's, creditworthiness declines, TAEC shall so notify Customer or the Designated Payor, and as a condition to the performance of any obligation under this Agreement, TAEC reserves the right in its sole discretion to require Customer or the Designated Payor to provide security for payment of any amounts due under this Agreement, including, but not limited to, opening an irrevocable letter of credit to support Customer's payment obligations hereunder, or such other means as TAEC may determine appropriate.

10. CANCELLATION/DELAY OF DEVELOPMENT:

10.1 In the event that Customer unilaterally delays a design milestone for longer than **[***]** weeks beyond the schedule specified in the SOW, TAEC reserves the right to charge Customer up to a total of **[***]** of the Total NRE charge specified in the DPA.

10.2 If Customer wishes to discontinue the project after TAEC has accepted the Development PO from Customer, the Customer or the Designated Payor shall be responsible to pay TAEC for the NRE charges as set forth below ("Cancellation Fee"), unless otherwise agreed in writing between TAEC and the Customer:

Time	Cancellation Fee
[***]	**[***]** % of NRE
[***]	**[***]** % of NRE
[***]	**[***]** % of NRE
[***]	**[***]** % of NRE

10.3 In the event that Customer unilaterally delays a design milestone for longer than **[***]** beyond the schedule specified in the SOW, TAEC reserves the right to deem the design cancelled and assess the Cancellation Fee specified in Section 10.2. In such case, the Agreement will terminate upon payment of the Cancellation Fee.

10.4 For the avoidance of doubt, NRE already invoiced to Customer per the milestones and NRE payment schedule set forth in the DPA ("Paid NRE") shall offset the Cancellation Fee assessed in Sections 10.2 and 10.3 above. To the extent that the Paid NRE exceeds the Cancellation Fee as assessed, TAEC shall not charge an additional Cancellation Fee; however, Paid NRE will not be refunded upon cancellation of the design.

11. CANCELLATION/RESCHEDULE OF PRODUCTION ORDERS

11.1 Requests for cancellation must be made in writing, and the following terms shall apply unless otherwise agreed in writing between TAEC and the Customer. Cancellation fees will be assessed based on the length of time from the date a written notice is received by TAEC to the first scheduled shipment date.

Days from scheduled shipment	Cancellation Fees
[***] days	**[***]**
[***] days	**[***]**
[***] days	**[***]**
[***] days	**[***]**

11.2 Re-schedule requests must be made in writing **[***]** days before the original delivery date. Any order may be re-scheduled only once. Requests to delay shipments may not exceed **[***]** days from the original committed delivery date. The re-scheduled order may not be canceled or further modified, and Customer will be liable for full payment of the selling price.

Days before Shipment	Terms
Within next **[***]** days	**[***]**
Within **[***]** days	**[***]**
Over **[***]** days	**[***]**

12. INTELLECTUAL PROPERTY RIGHTS AND OWNERSHIP

12.1 Customer retains all right, title and interest in and to all proprietary rights, including without limitation, patent, copyright, trade secrets, mask work rights, in and to: (i) all designs and design features of the Products, and (ii) all patterns, drawings, and other data concerning the Products' design features including, but not limited to, the Products' database, and (iii) all Mask Work produced by TAEC for the manufacturing of Products.

12.2 Notwithstanding the above provision, TAEC retains all right, title and interest in and to its **[***]** and all **[***]** and other **[***]** rights therein, and any associated **[***]** and **[***]** . For the purposes of this Agreement, **[***]** shall mean **[***]** , including, but not limited to the process control monitor contained in the **[***]** . TAEC reserves the right to perform similar work for its other customers.

12.3 Both parties understand that any and all Mask Works produced by TAEC for the manufacturing of the Products contain both parties' Confidential Information (as hereinafter defined), and that such Mask Works shall not be used in any manner except as necessary for the performance of this Agreement.

12.4 The party who desires to assert its Mask Work rights against any third party for infringement (the "Asserting Party") shall give prior written notice to the other party to allow such other party to decide whether or not to participate in such dispute. If the other party decides not to participate, it shall provide all commercially reasonable assistance to the Asserting Party in connection with such dispute, at the Asserting Party's expense.

12.5 If an invention is made solely by the employees of either party in connection with the development of the Prototype or Products, all right, title, and interest in and to such items shall belong solely to the party whose employees made such invention. If an invention is jointly made by the employees of both Customer and TAEC, Customer and TAEC shall jointly own all right, title, and interest thereto. Each party shall be entitled to use and exploit such jointly owned invention and intellectual property rights without notice or accounting to the other party.

13. MASK WORKS REGISTRATION

13.1 If Customer desires to register the Mask Work for the Products under the Semiconductor Chip Protection Act of 1984 (the "Act"), Customer shall make registration by itself; however, Customer shall include TAEC's name in such registration. Customer shall have sole responsibility for obtaining registrations for the Mask Work. Upon Customer's request, TAEC agrees to supply Customer or its designee with any reasonable identifying material required for deposit under the Act in order to register a Mask Work in the names of Customer and TAEC. All expenses and charges for registration and upkeep on Mask Work shall be borne by Customer.

13.2 Customer shall use its best efforts to comply with all semiconductor protection laws and applicable regulations in connection with such application. If possible, Customer shall expressly identify in the "nature of contribution" column of the U.S. mask work registration form (and applicable columns of the application form of other countries) that the portion of the Mask Work for the Products and any intellectual property rights including Mask Work related thereto remain the sole and exclusive property of TAEC.

13.3 Customer shall furnish TAEC with a copy of the application form of Mask Work for TAEC's prior to filing, and shall give TAEC reasonable time and opportunity to suggest changes and edits.

14. MASK WORK NOTICE

Upon written request by Customer, and subject to packaging constraints, TAEC will place a Mask Work notice on the outside package of the Product which shall consist of the letter M in a circle and the names of Customer and TAEC.

15. BUSINESS RELATIONSHIPS

15.1 Except as may be specifically provided in this Agreement, no right or license either expressed or implied is granted to either party under any patent, patent application or any other intellectual property right as a result of this Design Agreement. The rights and obligations of the parties to these Terms and Conditions are limited to those expressly set forth herein.

15.2 This Design Agreement is not intended to constitute or create a joint venture, partnership or formal business entity of any kind. Customer and TAEC shall be independent contractors and neither party shall act as the agent for or partner of the other party without prior written agreement.

15.3 Nothing in these terms and conditions shall give either party the right to use the other's name, trademark or logo except where specifically authorized in writing by such other party.

15.4 Customer understands and agrees that a CEM's purchases and other information relating to its business relationship with TAEC are confidential information that TAEC may not disclose without the CEM's express permission (the "CEM Information"). Consequently, if Customer requests TAEC to provide such CEM Information, TAEC shall do so only if:

a. Customer provides to TAEC proof of the CEM's permission; or

b. Customer defends, indemnifies, and holds TAEC harmless from and against any and all claims and damages that TAEC may suffer as a result of such disclosure of CEM Information.

16. SUBCONTRACTING

16.1 TAEC may subcontract all or part of the development of the Products to Toshiba Corporation or one or more of TAEC's affiliates or subcontractors, provided that each such subcontracting party agrees in writing to comply with provisions of these terms and conditions.

16.2 Customer may subcontract all or part of its obligations hereunder with respect to the Products to one of its affiliates or subcontractors (each, a "Permitted Party"), provided that (a) each such Permitted Party agrees in writing to comply with provisions of these terms and conditions, (b) the Permitted Party is not a semiconductor competitor to TAEC, and (c) Customer has given TAEC permission to share information with such Permitted Party as may be required for Permitted Party to carry out its duties.

17. CONFIDENTIAL INFORMATION

17.1 "Confidential Information" as used in this Agreement will mean any and all technical and non-technical information including patent, copyright, trade secret, and proprietary information, techniques, models, inventions, know-how, processes, apparatus, equipment, algorithms, software programs, and formulae related to the current, future and proposed products and services of each of the parties and/or its customers and/or vendors, including, without limitation, information concerning product or process research and development, design details and specifications, engineering, financial data, manufacturing, customer lists, business forecasts, sales and merchandising, and marketing plans.

17.2 The parties agree that Confidential Information exchanged by them under this Agreement shall be protected by the provisions of the Nondisclosure Agreement ("NDA") signed between them, and made effective as of , mutatis mutandis.

17.3 Notwithstanding the expiration or termination of the NDA, the provisions of this Article 17 shall remain in effect for a period of ten (10) years from the date of this Agreement.

18. WARRANTY

18.1 Customer acknowledges and agrees that the success of the development of the custom product contemplated by this Agreement cannot be assured. TAEC gives no representation or warranty that it will be successful in developing a design for such custom product or that the development will progress according to the milestones set forth in the Statement of Work. TAEC will under no circumstances be liable for any damages arising from its failure to develop a design for such custom product or for failing to meet the milestones set forth in the SOW. Any expenditures or commitments by Customer in anticipation of TAEC's success in developing such custom product or meeting the milestones set forth in the SOW will be at Customer's sole risk and expense.

18.2 PROTOTYPES/RISK PRODUCTION-NO WARRANTY CUSTOMER ACKNOWLEDGES AND AGREES THAT ANY PROTOTYPE AND/OR RISK PRODUCTION GOODS DELIVERED HEREUNDER ARE DELIVERED ON AN "AS IS " BASIS WITH ALL FAULTS AND WITH NO WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED.

18.3 PRODUCT WARRANTY

a. TAEC warrants that:

i] for a period of one (1) year from the date of the delivery of each Product, the Product shall: (a) conform to the Specifications; (b) be free from defects in material or workmanship under normal use and service; and

ii] at the time of delivery, the Products will be free and clear of all liens, encumbrances, and other claims except for TAEC's reservation of a security interest in the Products prior to receipt of payment in full therefor.

b. TAEC's responsibility and the sole and exclusive remedy of Customer under this warranty is, at TAEC's option, to repair, replace, or credit Customer's account for any defective Products which are returned by Customer during the applicable warranty period set forth above in sub-

Article 18.3a.i], provided that: (a) Customer promptly notifies TAEC in writing with a detailed description of any alleged deficiencies upon discovery by Customer that such Products fail to conform to the specifications; (b) such Products are returned to TAEC, F.C.A. TAEC's plant; and (c) TAEC's examination of such Products establishes to TAEC's satisfaction that such alleged deficiencies actually existed and were not caused by Customer's misuse, neglect, alteration, improper installation, repair, or improper testing of the Product(s).

c. TAEC SHALL WARRANT EXTERNAL IP SOLELY TO THE EXTENT SET FORTH IN THE APPLICABLE SOW. IF THE SOW IS SILENT ON WARRANTY, VERIFICATION, TESTING OR MAINTENANCE OF THE EXTERNAL IP, CUSTOMER UNDERSTANDS AND AGREES THAT TAEC SHALL NOT WARRANT ANY EXTERNAL IP, EXPRESSLY OR IMPLIEDLY, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

18.4 FOR THE AVOIDANCE OF DOUBT, THE PARTIES EXPRESSLY AGREE THAT THE WARRANTIES SET FORTH IN THIS ARTICLE SHALL NOT APPLY TO (i) ANY EXTERNAL IP, AND (ii) NON-CONFORMANCE CAUSED BY (A) IMPROPER USE, INSTALLATION, MISUSE, NEGLECT, MODIFICATION, ALTERATION, REPAIR, OR IMPROPER TESTING OF THE PROTOTYPES OR PRODUCTS BY CUSTOMER OR ANY PARTY; (B) THE PROTOTYPES OR PRODUCTS HAVING BEEN SUBJECTED TO UNUSUAL PHYSICAL OR ELECTRICAL STRESS; OR (C) INTERFERENCE FROM APPLICATIONS, SOFTWARE, OR OTHER PRODUCTS PROVIDED BY THIRD PARTIES.

18.5 EXCEPT AS EXPRESSLY PROVIDED IN THIS ARTICLE, TAEC DISCLAIMS AND CUSTOMER WAIVES ALL OTHER WARRANTIES OR LIABILITIES OF TAEC, EXPRESS, IMPLIED, OR ARISING OUT OF COMMON LAW OR COURSE OF DEALING, RELATING TO TAEC's PERFORMANCE HEREUNDER, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE. THIS WARRANTY IS FOR THE SOLE BENEFIT OF CUSTOMER AND NOT FOR ANY THIRD PARTY.

19. PROTOTYPES/RISK PRODUCTION

19.1 Customer acknowledges that any Prototype will be provided for evaluation purposes only and not for any other purposes and shall not be offered to any of its customers, directly or indirectly, for purposes other than evaluation. Customer shall defend, indemnify, and hold TAEC and its affiliates harmless from and against all damages, obligations, causes of action, suits, or injuries of any kind arising from or in relation to Customer's use or other disposition of the Products in violation of this Agreement and/or Customer's supply of the Prototype to any of its customers.

19.2 Customer acknowledges that Risk Production goods are provided prior to Prototype Approval Signoff. Customer agrees to defend, indemnify, and hold TAEC and its affiliates harmless from and against all damages, obligations, causes of action, suits, or injuries of any kind arising from or in relation to Customer's supply of the Risk Production goods to any of its customers.

20. PRODUCT APPLICATION

20.1 This design is intended for general commercial applications such as but not limited to telecommunications, information technology equipment, computer equipment, office equipment, test and measurement instrumentation, or domestic appliances. The design is not intended for use in, nor is it intended to be incorporated into the Product for use in, nor will TAEC knowingly sell such items for use in equipment which requires extraordinarily high quality or reliability, and/or in equipment which may involve life threatening, life support, life sustaining, or life critical applications, including, but not limited to such uses as atomic energy controls, airplane or spaceship instrumentation, traffic signals, biomedical or medical instrumentation, combustion control, offensive weapon systems, or safety devices.

20.2 TAEC DOES NOT ACCEPT, AND HEREBY DISCLAIMS, LIABILITY FOR ANY DAMAGES, WHICH MAY ARISE FROM THE USE OF TAEC PRODUCTS USED IN SUCH EQUIPMENT OR APPLICATION AS SET FORTH HEREINABOVE. CUSTOMER SHALL DEFEND, INDEMNIFY, AND HOLD TAEC FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, PROCEEDINGS, COSTS, LOSSES, DAMAGES, AND EXPENSES OF EVERY KIND AND NATURE WHATSOEVER ARISING OUT OF OR IN CONNECTION WITH USE OF PRODUCTS IN ANY SUCH EQUIPMENT OR APPLICATION.

21. INSPECTION

Customer shall inspect Products at its own expense in accordance with the inspection standard agreed upon by the parties. Unless Customer provides TAEC with written notice of rejection within thirty (30) days after TAEC's delivery of the Products to the carrier, together with sufficient evidence of the cause thereof, Products shall be deemed finally and irrevocably accepted. If TAEC receives notice of rejection within that thirty (30) days, then TAEC shall, at its option, repair or replace the defective Products or credit Customer's account, if TAEC has breached its warranty under Article 18.

22. ISSUANCE OF RETURN MATERIAL AUTHORIZATION NUMBER

22.1 All Products which Customer returns to TAEC must be accompanied by a Return Material Authorization (RMA) number. Unless further verification is required by TAEC, TAEC shall provide Customer with an RMA number within three (3) working days of Customer's request for return of the nonconforming Product to TAEC.

22.2 If it is determined that the failure is electrical, mechanical, or of any other nature requiring further verification by TAEC, Customer shall return to TAEC an agreed upon number of data-logged samples of the Product lot, whereupon TAEC shall issue a Failure Analysis (FA) number. Customer may, at its option, suspend the processing of invoices through Customer's accounting system for such nonconforming Product, pending resolution of the investigation. TAEC shall analyze the samples and report its findings to Customer within thirty (30) days after receipt of the samples and shall advise Customer of a schedule to complete the failure analysis and take corrective action.

22.3 An RMA shall be issued within three (3) working days following verification of the failure, if, after testing, the sample has been found to be nonconforming. Upon mutual agreement, TAEC shall replace, repair, or credit the purchase price of any Product which has been found to be nonconforming. If the returned Product is subsequently determined by Customer and TAEC to be in conformance, Customer shall immediately complete payment.

22.4 Transportation charges for Products returned from Customer to TAEC or from TAEC to Customer under this Article shall be at TAEC's expense, provided that Customer shall reimburse TAEC for any transportation charges paid by TAEC for returned Products which are subsequently found to be conforming.

23. MATERIAL AVAILABILITY

23.1 TAEC shall give Customer reasonable advance notice of its intent to discontinue the manufacture of those Products included in this Agreement. Such notice shall be no less than twelve (12) months in advance of the last order date. Customer shall have a twelve (12) month order placement period and must take receipt of the Products within eighteen (18) months of notification of the discontinuance.

23.2 After receipt of such notice of discontinuance, Customer may determine its Life Time Buy (LTB) quantity under the following conditions: (a) the quantity shall be by mutual agreement and (b) the price shall be negotiated at the time TAEC gives notice of the discontinuance.

24. LIABILITY

TAEC WILL UNDER NO CIRCUMSTANCES BE LIABLE FOR INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, SECONDARY, PUNITIVE OR EXEMPLARY LOSS OR DAMAGES OR ECONOMIC LOSS ARISING OUT OF OR RELATING TO THE TRANSACTIONS CONTEMPLATED IN THIS AGREEMENT FOR ANY REASON WHATSOEVER REGARDLESS OF THE FORM OF ACTION, EVEN IF TAEC HAD BEEN ADVISED OF THE LIKELIHOOD OF SUCH LOSS OR DAMAGES OCCURRING AND EVEN IF AN EXCLUSIVE REMEDY FAILS OF ITS ESSENTIAL PURPOSES. TAEC SHALL NOT BE LIABLE FOR ANY DAMAGES OR CLAIMS ARISING MORE THAN ONE (1) YEAR PRIOR TO THE INSTITUTION OF A LEGAL PROCEEDING THEREON. IN NO EVENT WILL TAEC's LIABILITY TO CUSTOMER FOR ANY ACTION OR CLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT EXCEED THE AMOUNT ACTUALLY PAID BY CUSTOMER TO TAEC FOR THE PROTOTYPES OR PRODUCTS THAT ARE THE SUBJECT OF SUCH CLAIM.

25. INTELLECTUAL PROPERTY RIGHTS INDEMNIFICATION

25.1 Subject to the provisions set forth hereinafter and in Article 26. NON-INFRINGEMENT OF RIGHTS clause herein, TAEC shall defend, indemnify, and hold Customer harmless from and against all damages, obligations, causes of action, suits, or injuries of any kind arising from any actual or claimed infringement of United States, Canada, Mexico, Japan and European Community patents, mask work rights, or copyrights with respect to TAEC's design or TAEC's manufacturing of the Prototypes or Products; provided that:

a. Customer shall promptly notify TAEC in writing of any claim of infringement; and

b. TAEC shall have sole control of both the defense of any action on such claim and all negotiations for its settlement or compromise; and

c. Customer shall provide all reasonably necessary authority, information, and assistance to TAEC and its counsel for the defense of such claim.

25.2 Notwithstanding the foregoing, TAEC shall have no liability or obligation to Customer with respect to any intellectual property results infringement or claims thereof based on:

a. TAEC's compliance with designs, plans, specifications, or other information provided by Customer;

b. Use of the Prototypes or Products in combination with devices or products not purchased hereunder where the Products would not in themselves be infringing;

c. Use of the Prototypes or Products in an application or environment for which such Products were not designed or contemplated;

d. Modifications or additions to Prototypes or Products by Customer;

e. Any claims of infringement of a patent in which Customer, or any affiliate or customer of Customer, has an interest or a license; or

f. Should the owner of such intellectual property rights wish to grant a license to Customer with respect to a claim of patent infringement when the claimant declines to offer a license to TAEC but insists upon dealing only with Customer, notwithstanding TAEC's good faith efforts to resolve the claim.

25.3 If any Product is held to constitute an infringement or its use is enjoined, TAEC, at its option and at its own expense, may:

a. Procure for Customer the right to continue using such Product royalty-free; or

b. Replace such Product to Customer's reasonable satisfaction with non-infringing product of equivalent quality and performance; or

c. If (a) and/or (b) above are impracticable, accept the return of such Product for credit, allowing for a reasonable deduction for depreciation.

26. NON-INFRINGEMENT OF RIGHTS

Customer represents and warrants that the circuit design and other information furnished by Customer to TAEC, with respect to the design portion of the Prototypes or Products does not infringe any copyright, trade secret, United States, Canada, Mexico, Japan and European Community patent or other intellectual property right of any third party. Customer shall defend, indemnify and hold harmless TAEC against any claims, damages, and expense (including attorney fees), arising out of or in connection with Customer's breach of the foregoing representation and warranty.

27. TERMINATION

27.1 This Agreement will become effective on the Effective Date and will remain in full force and effect for a period of three (3) years from the Effective Date, unless terminated pursuant to this Article 27.

27.2 Either party may terminate any development or Purchase Order, effective upon written notice to the other party should any of the following events occur:

a. The other party files a voluntary petition in bankruptcy;

b. The other party is adjudicated bankrupt;

c. The other party makes an assignment for the benefit of its creditors;

d. A court assumes jurisdiction of the assets of the other party under any bankruptcy; or

e. A party is unable to pay its debts as they become due.

27.3 Either party shall have the right to terminate any development or Purchase Order for breach of a material term or condition of this Agreement, if such breach continues for a period of thirty (30) days after written notice thereof to the other.

27.4 If Customer defaults in the payment of any sum due under this Agreement and does not cure such default within thirty (30) days of written notice thereof from TAEC, then TAEC shall, without further notice, have the immediate right to repossess and remove the Product. Customer's obligation to pay all charges which shall have accrued and compensation, if any, which covers the actual costs incurred by TAEC as a result of such termination, shall survive any termination of this Agreement.

28. FORCE MAJEURE

Neither party shall be responsible or liable in any way for failure or delay in performing its obligations under these terms and conditions, other than obligations to make payment, when such failure or delay is directly or indirectly due to an act of God, war, threat of war, war-like conditions, hostilities, sanctions, mobilization, blockade, embargo, detention, revolution, riot, looting, striking, lockout, accident, fire, explosion, flood, inability to obtain fuel, power, raw materials, labor, container or transportation facilities, breakage of machinery or apparatus, government order or regulations, or any other cause beyond its reasonable control.

29. GOVERNMENT INTERVENTION

TAEC reserves the right to adjust prices or quantities to equitably compensate for increases in tariffs or similar charges, or for other government actions resulting in curtailment, prevention, or taxation of imports. Unless otherwise required by law, all prices will be quoted and billed exclusive of Federal, state, and local excise, sales, and similar taxes, but inclusive of import duties.

30. EXPORT REGULATIONS

This Agreement involves products and/or technical data that may be controlled under the U.S. Export Administration Regulations and that may be subject to the approval of the United States Department of Commerce prior to export. Any export or re-export by either party, directly or indirectly in contravention of the U.S. Export Administration Regulations, is prohibited.

31. GENERAL

31.1 Neither party shall assign its rights and obligations under this Agreement without the prior written consent of the other party, except that TAEC may assign the performance of any of its obligations, including the manufacture of Prototypes or Products, to Toshiba Corporation or its affiliates.

31.2 These Terms and Conditions shall be interpreted and governed by the laws of the State of California without regard for its conflicts of laws principles, regardless of where any action may be brought. The parties agree to submit to the exclusive jurisdiction of the state and federal courts of the State of California. The parties expressly agree that the UN Convention for the International Sale of Goods shall not apply hereto.

31.3 All modifications to this Agreement must be in writing and signed by both parties. Failure or delay of either party to exercise any right or remedy hereunder shall not constitute a waiver of rights or remedies under this Agreement.

31.4 This Agreement is the exclusive statement of the Terms and Conditions between the parties with respect to the matters set forth herein, and supersedes all other prior or contemporaneous agreements, negotiations, representations, tender documents, and proposals, written and oral. Any additional or conflicting provisions contained in Customer's purchase order, or any purchase order acknowledgment issued by TAEC shall not apply.

31.5 If any provision of this Agreement is held unenforceable or inoperative by any court of competent jurisdiction, either in whole or in part, the remaining provisions shall be given full force and effect to the extent not inconsistent with the original terms of this Agreement.

31.6 Any notice given hereunder shall be sent in writing to the other party's business address set forth on the cover page hereof, or to such other party and address as such part shall have designated most recently in writing. Notices directed to TAEC shall be sent "Attention: Legal Department."

31.7 This Agreement may be executed in several identical counterparts, each of which when executed by the parties hereto and delivered shall be an original, but all of which together shall constitute a single instrument.

31.8 Articles 9, 12, 13, 15, 17, 19, 20, 24, 25, 26, 30 and 31 shall survive the termination or expiration of this Agreement.

Exhibit 10.4

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

TOSHIBA

Toshiba America Electronic Components, Inc.
2950 Orchard Parkway, San Jose, CA 95131

Design and Production Agreement

Amendment #1

Netlist Inc.

This Design and Production Agreement Amendment effective May 22, 2009 (the "Effective Date") is between Toshiba America Electronic Components, Inc., with a principal place of business at 19900 MacArthur Boulevard, Suite 400, Irvine, CA 92612 ("TAEC") and Netlist Inc. with a place of business at 51 Discovery, Suite 150 Irvine, CA 92618 ("Customer") and sets out the terms and conditions under which TAEC will design the product identified herein for Customer.

1. Project Name

Register ASIC

2. Summary

This Amendment #1 to the Register ASIC Design and Production Agreement, dated July 31, 2008, (TAEC#27N1242613) is hereby amended to remove the Major Project Milestones in section 4. Schedule and replace with the following Major Project Milestones as follows:

4. Schedule

Major Project Milestones

Event	Target Date/Completed
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]

Except as modified herein, all other terms and conditions of the Design and Production Agreement shall remain in full force and effect per their terms.

Toshiba America Electronic Components, Inc.

/s/ Takeshi Iwamoto
Signature

Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit
Printed Name and Title

5-22-09
Date

NetList Inc.

/s/ James P. Perrott
Signature

James P. Perrott, SVP Sales & Marketing
Printed Name and Title

5-22-09
Date

Exhibit 10.5

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

TOSHIBA

Toshiba America Electronic Components, Inc.
2950 Orchard Parkway, San Jose, CA 95131

Design and Production Agreement

Amendment #1

Netlist Inc.

This Amendment #1 ("Amendment") to the Register ASIC Design and Production Agreement, dated July 31, 2008, (TAEC#27N1242613) ("Agreement") is between Toshiba America Electronic Components, Inc., with a principal place of business at 19900 MacArthur Boulevard, Suite 400, Irvine, CA 92612 ("TAEC") and Netlist Inc. with a place of business at 51 Discovery, Suite 150 Irvine, CA 92618 ("Customer") and sets out the terms and conditions under which TAEC will design the product identified herein for Customer. This Amendment is effective as of the date finally executed below ("Effective Date").

1. Project Name

Register ASIC

2. New Schedule

The parties agree to delete the contents of Section 4 of the Agreement, Schedule, and replace it with the following:

Major Project Milestones

Event	Target Date/Completed
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	TBD
[***]	TBD
[***]	TBD
[***]	TBD

Production turnaround time: **[***]** working weeks.

Schedule is provisional.

3. New Package and Die Size Option

The parties agree to delete the contents of Section 6 of the Agreement, Package and Die Size Option, and replace it with the following:

Package	Ball Pitch	Body Size	Substrate Layers	Die Size
[***]	**[***]**	**[***]**	**[***]**	**[***]**

4. New Price

The parties agree to delete the contents of Section 8 of the Agreement, Price, and replace it with the following:

First	**[***]** pieces:	US$ **[***]**	* **[***]**
Next	**[***]** pieces:	US$ **[***]**	
Next	**[***]** pieces:	US$ **[***]**	
After first	**[***]** pieces:	US$ **[***]**	

* Prices for first 1 Mpcs represent an addition of US$ **[***]** per unit in amortized Total NRE cost. See Section 10.

Changes in die size will affect the price quoted.

The prices quoted herein for mass production are based on the assumption of adequate yield. TAEC reserves the right to adjust pricing based on mutual agreement in the event that adequate yield figures, in TAEC's reasonable opinion, are not achieved by the start of mass production despite reasonable commercial efforts by both parties. TAEC will provide Netlist with timely data such that Netlist can reasonably assess yield.

Prices do not include and are subject to any applicable sales tax.

5. New Engineering Sample and Risk Production Pricing

The parties agree to delete Section 13.3 of the Agreement. The parties agree to delete the contents of Section 12 of the Agreement, Extra Engineering Samples, and replace it with the following:

All extra engineering samples and Risk Production parts shall be sold at US$ **[***]** each (**[***]** the unit price of US **[***]**).

All extra engineering samples are sold as Prototypes and are subject to, without limitation, Articles 18.2 and 19.1 of the Design and Production Agreement Terms and Conditions ("Terms and Conditions"). All Risk Production parts are subject to, without limitation, Articles 18.2 and 19.2 of the Terms and Conditions. TAEC reserves the right in its sole discretion to determine whether to accept extra engineering sample or Risk Production orders.

6. Additional Non-Recurring Engineering Charges and Payment Schedule

Customer agrees to pay additional non-recurring engineering charges of US$ **[***]** ("Additional NRE") to TAEC for design support. The Additional NRE will be due and payable as follows:

1. US$ **[***]** upon **[***]** .

2. US$ **[***]** upon **[***]** together with test logs showing successful completion of the mutually agreed-upon tests.

For the avoidance of doubt, the Additional NRE payable under this Amendment is in addition to and does not replace the NRE payable under the Agreement.

7. Cancellation

7.1 If Customer wishes to discontinue the project after execution of this Amendment, then in addition to the provisions set Forth in Section 10 of the Terms and Conditions, the Customer shall be responsible to pay TAEC for the NRE charges as set forth below ("Additional Cancellation Fee"), unless otherwise agreed in writing between TAEC and the Customer:

Time	Additional Cancellation Fee
[***]	**[***]** % of Additional NRE
[***]	**[***]** % of Additional NRE
[***]	**[***]** % of Additional NRE

7.2 For the avoidance of doubt, NRE already invoiced to Customer per the milestones and NRE payment schedule set forth herein and in the DPA ("Paid NRE") shall offset the Additional Cancellation Fee assessed in Article 7.1 above. To the extent that the Paid NRE exceeds the Additional Cancellation Fee and the Cancellation Fee set forth in Section 10 of the Terms and Conditions of the Agreement, TAEC shall not charge further Additional Cancellation Fee; however, Paid NRE will not be refunded upon cancellation of the design.

8. Additional Terms

8.1 **[***]**

Except as modified herein, all other terms and conditions of the Agreement shall remain in full force and effect per their terms.

Toshiba America Electronic Components, Inc.

/s/ Takeshi Iwamoto
Signature

Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit
Printed Name and Title

1-28-10
Date

NetList Inc.

/s/ Gail Itow
Signature

Gail Itow, CFO
Printed Name and Title

1-28-10
Date

Exhibit 10.6

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

TOSHIBA

Toshiba America Electronic Components, Inc.
2950 Orchard Parkway, San Jose, CA 95131

Design and Production Agreement

Amendment #2

Netlist Inc.

This Amendment #2 ("Amendment #2") to the Register ASIC Design and Production Agreement, dated July 31, 2008, as amended (TAEC#27N1242613) ("Agreement") is between Toshiba America Electronic Components, Inc., with a principal place of business at 19900 MacArthur Boulevard, Suite 400, Irvine, CA 92612 ("TAEC") and Netlist Inc. with a place of business at 51 Discovery, Suite 150 Irvine, CA 92618 ("Customer") and sets out the terms and conditions under which TAEC will design the product identified herein for Customer, This Amendment is effective as of the date finally executed below ("Effective Date").

1. Project Name

Register ASIC

2. New Schedule

The parties agree to delete the contents of Section 4 of the Agreement, Schedule, and replace it with the following

Major Project Milestones

Event	Target Date/Completed
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	TBD
[***]	TBD
[***]	TBD
[***]	TBD

Production turnaround time: **[***]** working weeks.

Schedule is provisional.

3. New Internal/External IP

The parties agree to delete the contents of Section 7 of the Agreement, Internal/External IP and replace it with the following:

Internal IP :
[***]

External IP :
[***]

Testing of Internal and External IP will proceed as set forth in the Product Testing Agreement between the parties (TAEC# 121ANN311)

Customer will he responsible for any and all support, Defect/Bug fixes, upgrades and/or maintenance that may be required for the External IP.

Customer is responsible for validating the External IP as used in the design. TAEC will generate test vectors for manufacturing testing of External IP as described in the Register DFT specification.

4. Addition to Section 9, Non-Recurring Engineering Charges ("NRE")

The parties agree to add the following provision to Section 9 of the Agreement, Non-Recurring

Engineering Charges ("NRE"):

9.5 **[***]**

TAEC will be responsible **[***]** and **[***]** verification of any **[***]** . Customer agrees that **[***]** of **[***]** is Customer's responsibility and TAEC does not assume any portion of financial cost incurred by Customer in **[***]** or **[***]** any **[***]** . In the event any **[***]** is identified in the **[***]** after TAEC has procured such **[***]** , then TAEC will communicate in writing to Customer such **[***]** provider notification along with any **[***]** associated with fixing such **[***]** , Customer may choose to **[***]** this **[***]** at its own discretion. TAEC will not undertake to **[***]** until Customer so requests in writing and the parties have agreed on a **[***]** for such work. If Customer requests TAEC to repair the **[***]** in the **[***]** , **[***]** will be calculated as set forth in Section 9.2. **[***]** , at its sole discretion, may choose to **[***]** for additional **[***]** resulting from any **[***]** which **[***]** believes has occurred as a result of **[***]** actions and which was not present in the **[***]** upon receipt from the **[***]** .

5. Additional Features Non-Recurring Engineering Charges and Payment Schedule

5.1 Customer agrees to pay non-recurring engineering charges ("Additional Features NRE") to TAEC for support of design changes. Support includes:

[***]

5.2 The Additional Features WE will be calculated according to the resources expended by TAEC. Which will be charged at the rate of US$ **[***]** per full-time-equivalent person per week. TAEC will provide a weekly update to Customer regarding resources expended.

TAEC estimates that the Additional Features NRE for this Register design will be US$ **[***]** or **[***]** . This estimate is subject to change.

5.3 The Additional Features NRE will be payable as fellows:

1. US$ **[***]** (**[***]** % of estimated Additional Features NRE) upon **[***]** or **[***]** , whichever is earlier.

2. The balance (total person-weeks actually expended, less US$ **[***]**), upon **[***]** together with test lugs showing successful completion of the Toshiba Testing as defined in the Product Testing Agreement between the parties.

For the avoidance of doubt, the Additional Features NM: payable under this Amendment #2 is in addition to and does not replace the NRE payable under the Agreement and/or Amendment #1.

6. Cancellation

6.1 If Customer wishes to discontinue the project set forth in this Amendment #2 prior to tapeout, then Customer shall pay TAEC US$ **[***]** ("Additional Features Cancellation Fee"). In addition, TALC reserves the right to invoice Customer for any resources expended by TAEC prior to cancellation in excess of 14.88 person-weeks. The Additional Features Cancellation Fee shall be offset by any amount of the Additional Features NRE already paid to TAEC by Customer.

6.2 In the event that Customer unilaterally fails to provide information, data, or approvals necessary for TAEC to proceed with the project for a period of **[***]** from TAEC's initial request for such information, data, or approvals, TAEC reserves the right to deem the project set forth in this Amendment #2 cancelled and assess the Additional Features Cancellation Fee.

Except as modified herein, all other terms and conditions of the Agreement shall remain in full force and effect per their terms.

Toshiba America Electronic Components, Inc.	**NetList Inc.**
/s/ Takeshi Iwamoto Signature	*/s/ Gail Itow* Signature
Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit Printed Name and Title	Gail Itow, CFO Printed Name and Title
3/10/10 Date	3/5/10 Date

Exhibit 10.7

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

TOSHIBA

Toshiba America Electronic Components, Inc.
2950 Orchard Parkway, San Jose, CA 95131

Design and Production Agreement

Netlist Inc.

This Design and Production Agreement ("DPA") effective July 31, 2008 (the "Effective Date") is between Toshiba America Electronic Components, Inc., with a principal place of business at 19900 MacArthur Boulevard, Suite 400, Irvine, CA 92612 ("TAEC") and Netlist Inc with a place of business at 51 Discovery, Suite 150, Irvine, CA 92618 ("Customer") and sets out the terms and conditions under which TAEC will design the product identified herein for Customer.

1. Project Name

ID ASIC

2. Summary

This DPA is for the development of ID ASIC for Customer. The quote is based on TAEC's initial die size estimation.

3. Design Specification

[***]

4. Schedule

MAJOR PROJECT MILESTONES

Event	Target Date/Completed
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**

Production turnaround time: **[***]** working weeks

Schedule will be finalized in the SOW upon Design Decision. See Section 13.5.

5. Technology

[***]

6. Package and Die Size Option

Package	Ball Pitch	Body Size	Substrate Layers	Die Size
[***]	**[***]**	**[***]**	**[***]**	**[***]**

7. Internal/External IP

Internal IP :
[***]

External IP :
[***]

8. Price

First	[***] pieces: US$[***]
Next	**[***]** pieces: US$ **[***]**
Next	**[***]** pieces: US$ **[***]**
After first	**[***]** pieces: US$ **[***]**

Changes in die size will affect the price quoted.

Prices do not include and are subject to any applicable sales tax.

9. Non-Recurring Engineering Charges ("NRE")

9.1 Total NRE Charges (not including re-spin charges as set out in Section 9.2): US$ **[***]**

9.2 Additional NRE Charges in the event of Re-spin

Metal Layer Re-spin Charges:	US$ **[***]**
All-Layer Re-spin Charges (base and metal layers):	US$ **[***]**

In the event a re-spin involving only metal layers is required, TAEC will provide a firm quote for additional re-spin NRE charges, which will be calculated on a cost per layer basis including required engineering effort. In the event the implementation of design changes affects all metal layers, including contact and vias, the additional NRE cost will not exceed the Metal Layer Re-spin Charges amount stated above.

In the event an all-layer re-spin is required, the All-Layer Re-spin Charges will apply as stated above.

The charges set forth in this Section 9.2 are based on the assumptions that (1) no Material Changes would be needed and (2) no changes whatsoever to the package design would be required, whether Material Changes or not. If either of these assumptions is incorrect, costs may vary.

9.3 Internal IP Defects/Bugs

Should Internal IP be found to have a Defect/Bug, as defined in the attached SLI Terms and Conditions, TAEC will be responsible for the additional NRE re-spin charges required to repair such Defect/Bug, subject to Section 9.4,

9.4 Customer Design Changes During Re-spin for Internal IP Defects/Bugs

If Customer requests design changes during a re-spin to correct Internal IP Defects/Bugs, a portion of the additional re-spin cost will be shared by Customer.

For a metal re-spin, this cost will be calculated on the basis of the number of layers required for Customer changes and whether those layers are implicated by the Internal IP repairs. If the Customer-requested design changes require the same metal arid via layers as would be necessary for the Internal IP Defect/Bug fix, the cost to Customer will not exceed 50% of the additional re-spin NRE charges. If the Customer-requested changes require additional mask layer changes, the NRE cost associated with the additional layers will be solely the financial responsibility of Customer.

If an all-layer re-spin is required in order to fix Internal IP Defects/Bugs, and Customer requests additional design changes at that time, Customer will not he charged more than 50% of the All-Layer Re-spin Charges.

10. NRE Payment Schedule

[***] : US$ **[***]**
[***] : US$ **[***]**
[***] : US$ **[***]**

- **[***]** Prototypes are included in NRE.
- A prototype lot charge of $ **[***]** is included in the **[***]** payment. Prototype lot charge is subject to any applicable sales tax.

11. NRE Services included

Engineering activities

[***]

Manufacturing activities

[***] *

*Any additional qualifications requested by Customer beyond the standard Toshiba qualification are not covered by the Total NRE Charges and may incur additional fees.

12. Extra Engineering Samples

[***] pieces:	**[***]** unit price of US$ **[***]**
[***] pieces:	**[***]** unit price of US$ **[***]**
[***] pieces:	**[***]** unit price of US$ **[***]**

All extra engineering samples are sold as Prototypes and are subject to, without limitation, Articles 18.2 and 19.1 of the Terms and Conditions.

13. Project Specific Conditions

13.1 Final package selection to be based on **[***]** . **[***]** analysis may lead to changes in **[***]** or **[***]** . Details of the **[***]** and **[***]** analysis and the **[***]** need to be defined and mutually agreed in the Statement of Work (“SOW”).

13.2 Details on the **[***]** and associated **[***]** to be finalized in the SOW prior to **[***]**

13.3 Customer may order a commercially reasonable number of **[***]** pieces, as determined by **[***]** in its sole discretion. **[***]** goods are subject to, without limitation, Articles 18.2 and 19.2 of the attached Design and Production Agreement Terms and Conditions (“Terms and Conditions”). In the event that Customer wishes to order any **[***]** pieces, such order shall be placed no later than the date of **[***]** .

13.4 For the avoidance of doubt, the Specifications as agreed upon by the parties and incorporated into the SOW shall be based upon the defined load models provided by Customer.

13.5 Upon **[***]** , TAEC will discuss the results of its tests assuring a path delay of **[***]** for the **[***]** provided by Customer (“ **[***]** ”). On or before **[***]** , Customer agrees to inform TAEC whether Customer intends to proceed with the ID design (“Design Decision”). If Customer chooses to proceed with the design, Customer agrees to accept **[***]** , provide a waiver, or alter its specifications to accommodate such results, and TAEC will **[***]** according to Section 10 of this Agreement. If Customer chooses to cancel the design upon completion of the **[***]** , Customer may terminate this Agreement **[***]** and **[***]** .

14. General Conditions

14.1 Pricing stated in this DPA is based on Toshiba America Electronic Components Inc. selling production parts directly to Customer.

14.2 Full specifications and responsibilities to be defined and agreed in a SOW. Customer and TAEC will work in good faith to finalize and sign the SOW within thirty (30) days of design initiation.

14.3 Schedule is provisional. Final schedule is still to be agreed.

14.4 TAEC reserves the right to make extra charges up to **[***]** % of the total NRE if Customer submits **[***]** Engineering Change Orders (ECOs) or changes to the layout constraints file(s) after the acceptance of final netlist, unless these ECOs/changes are attributed to problems of TAEC implementing the design.

14.5 TAEC may, in its sole discretion, share a copy of this DPA, and any applicable SOW with Toshiba Corporation Semiconductor Company and other Toshiba affiliates, on a need-to-know basis in order to implement or further Customer's project.

14.6 TAEC may, upon written notice to Customer, share Customer's information as it pertains to their design kit, library and user documentation with a supplier of EDA Tools for the sole purpose of resolving any debugging issues that may arise during the term of this Agreement.

14.7 This DPA shall be governed by the attached Terms and Conditions, which are incorporated herein by reference.

14.9 In the event of any conflict between the provisions set forth in this DPA and the Terms and Conditions to which it is attached, the contents of the DPA shall control.

14.10 This Agreement (as defined in the Terms and Conditions) is the entire agreement between the parties and supersedes any prior communications, representations, or agreements as to the subject matter hereof, whether written or oral.

14.11 Any changes to the DPA and/or the Terms and Conditions after the execution of the DPA must be mutually agreed upon in the form of a written amendment signed by both parties.

Toshiba America Electronic Components, Inc.

/s/ Takeshi Iwamoto
Signature

Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit, Systems LSI
Printed Name and Title

8/22/08
Date

NetList Inc.

/s/ James P. Perrott
Signature

James Perrott, SVP Sales & Marketing
Printed Name and Title

8/15/08
Date

Toshiba America Electronic Components, Inc.
Design and Production Agreement Terms and Conditions

These Terms and Conditions set out the terms and conditions under which TAEC will de these terms are attached.

1. DEFINITIONS

1.1 "Agreement" shall refer to the agreement comprising the DPA (as hereinafter defined), the Terms and Conditions, the SOW, and any other addenda specifically noted therein (all as defined herein).

1.2 "CEM " means a contract manufacturer engaged by Customer to purchase Product(s) from TAEC, which are then assembled into products sold to Customer.

1.3 "Customer" means the customer identified on Page 1 of the DPA.

1.4 "Defect/Bug" means a failure of any intellectual property to meet the mutually agreed upon chip level and system level specifications as provided at the time of development. Such failure or nonconformance includes, but is not limited to, the inability of the logic or interface portion of either Internal and External IP to meet mutually agreed upon chip level and system level specifications.

1.5 "Design Initiation" means Customer has placed and TAEC has accepted a Development PO to proceed with Customer's design.

1.6 "Development PO " is the purchase order created by the Customer to signify they have accepted the Specifications and have agreed to proceed with the development of Customer's design.

1.7 "DPA" means the Design And Production Agreement to which these terms and conditions are attached.

1.8 "Effective Date" shall mean the date reflected on the first page of the DPA, its date of execution notwithstanding.

1.9 "External IP" shall mean intellectual property acquired from a third party IP provider by TAEC or Customer for use in Customer's design, which is so identified in the SOW and/or in the DPA.

1.10 "Internal IP " means intellectual property owned and/or provided by TAEC for use in Customer's design, which is so identified in the SOW and/or in the DPA.

1.11 "Mask Work" means a series of related images, however fixed or encoded; having or representing the predetermined, three dimensional pattern of metallic, insulating or semiconductor material present or removed from the layers of a semiconductor chip product; and in which series the relation of the images to one another is that each image represents a pattern of the surface of one form of the resulting semiconductor chip product.

1.12 "Material Changes" means any changes in Customer-provided specification or netlist that (1) lead to an increase in block size or die size of 1% or more; (2) increase the nominal performance of the block or chip or both by 1 % or more; (3) alter the testing requirements after the Second Signoff; (4) in the case of I/O limited designs, lead to any increase in pin out; or (5) in the case of non-I/O limited designs, lead to an increase in pin out of 1 % or more.

1.13 "NRE " means the non-recurring engineering fees charged for specific phases of work as set forth in the DPA.

1.14 "Product" means the resulting product based on the design specified in the DPA and shall be defined by mutually agreed upon specifications embodied in the documents contained within the Customer Part Number File and TAEC published Quality and Reliability Standards

1.15 "Prototype" means pre-production engineering samples of Products, which have been manufactured before the completion of the Prototype Approval Signoff by both parties. Prototypes are provided for evaluation purposes only. Prototypes may also be called "Engineering Samples" or "KS," "ES, " or "HS " for invoicing or other purposes, but other types of reference to a Prototype shall not change the status as the Prototype.

1.16 "Prototype Approval Signoff" shall mean the form signed by the Customer when the Prototype meets the required Specification and the design is suitable for transfer in to production.

1.17 "Risk Production" means TAEC's commencing production of goods before the completion of the Prototype Approval Signoff by both parties.

1.18 "Second Signoff" means the form signed by both parties indicating the design is ready for Tape-out.

1.19 "SOW " means the Statement of Work attached to the DPA, or which is executed separately by the parties if not attached thereto. The parties expressly agree that the SOW may be modified from time to time on their mutual agreement, and that the project schedule and other records of the TAEC Program Manager shall be the record of the parties' modifications to the SOW.

1.20 "Specifications" means the specifications agreed by the parties for the Product and Prototype, as applicable and incorporated into the SOW.

1.21 "System Level Verification " shall mean the performance of the External IP on the silicon in varying Customer application systems as stated on the third party IP provider specification.

1.22 "TAEC " means Toshiba America Electronic Components, Inc.

1.23 "Tape-out" means TAEC has released final database to Japan to begin the prototype fabrication (mask making and wafer fabrication).

1.24 "Terms and Conditions" means these Design and Production Agreement Terms and Conditions.

2. DEVELOPMENT WORK

2.1 Details of the development are set forth in the SOW. Design requirements may be changed by mutual written agreement of the Parties; however, Customer understands and agrees that such changes may result in additional charges.

2.2 The development shall be completed when Customer notifies TAEC that the Prototype received by Customer meets the Specifications, when Customer executes the Prototype Approval Signoff.

2.3 If the Prototypes do not conform to the agreed specification and TAEC agrees that the nonconformance is due to TAEC's error, TAEC will make all commercially-reasonable efforts to expedite delivery of conforming Prototypes.

2.4 If Customer requests any modifications to the Specifications, TAEC agrees to complete the modification as soon as is reasonably practicable after TAEC has agreed to the modification. For the avoidance of doubt, the parties expressly agree that TAEC shall have no obligation to commence a modification unless and until the parties have agreed on adjustments in schedule, costs, or other applicable provisions.

2.5 If TAEC assembles and manufactures any goods at Customer's request before Customer has issued its written approval via Prototype Approval Signoff, Customer understands and agrees that they will be done on a Risk Production order basis, with Customer responsible for all assembly and production costs.

2.6 Products will be tested to the developed test program resulting from the simulation database. Changes to the test program after sample or production initiation may result in production lead-time delays.

2.7 Each delivery of Products shall be initiated by Customer's written or electronic notification that a Purchase Order ("Purchase Order") will be forthcoming. Customer shall send a written Purchase Order to TAEC within five (5) working days of the verbal notice. Each Purchase Order shall identify the Products ordered; indicate the requested quantity and a mutually agreed upon price; and specify the requested delivery date.

2.8 Design initiation shall commence when Customer issues a Purchase Order for the NRE charge. The Purchase Order shall refer to the applicable DPA, and shall include the words: "This Purchase Order represents acceptance of the terms and conditions in the Design And Production Agreement between the issuer and Toshiba America Electronic Components, Inc."

2.9 TAEC shall supply Products to Customer based on production Purchase Orders that support a six (6) month rolling forecast.

3. DEVELOPMENT TERM

[***]

4. COMPENSATION

4.1 **[***]**

4.2 **[***]**

4.3 **[***]**

5. RE-SPIN NRE CHARGES

Re-spin NRE charges will be based on engineering and manufacturing services as well as on the extent of the modification, which may be done as either a metallization or a diffusion change. Metallization changes may be implemented by regenerating the metal and via masks only. Diffusion modifications, on the other hand, require the regeneration of all masks. The extent of the engineering and manufacturing services required for re-design shall be considered in determining total charges for a re-spin of the design which shall be specified in the DPA or an Amendment thereto.

6. ACKNOWLEDGMENT

6.1 TAEC shall process Customer's Purchase Orders submitted in accordance with Article 2.7 within ten (10) working days of TAEC's receipt thereof. Purchase Orders shall only be binding as of the date of TAEC's acknowledgment and acceptance thereof.

6.2 TAEC shall only accept Purchase Orders with requested delivery dates no more than six (6) months from the Purchase Order date. Any requests for a shipment beyond that six-month period shall be reviewed and acknowledged only after the requested delivery date moves within the six (6) month period.

7. PRODUCT LEADTIME

7.1 Prototypes: TAEC will use all commercially reasonable efforts to provide Prototypes within the total turnaround time defined in the appropriate DPA and expressed as working weeks from Tape-out.

7.2 Production: TAEC will use all commercially reasonable efforts to provide production lead-time as defined in the appropriate DPA or other document issued by TAEC, from the date of TAEC's acknowledgment and acceptance of a Purchase Order.

8. SHIPMENT AND DELIVERY

8.1 Shipments shall be F.C.A. shipping point. Risk of loss or damage shall pass from TAEC to Customer upon delivery of the Products to the common carrier for shipment to Customer; title to all Products released hereunder shall pass to Customer upon full payment by Customer therefor.

8.2 Unless otherwise specified by Customer, TAEC shall ship Products according to TAEC's standard method. Freight and insurance will be prepaid by TAEC and invoiced to Customer.

8.3 TAEC shall not be liable for any damages or penalties for delay in delivery, or for failure to give notice of delay when such delay is due to an act of Customer or any cause beyond the reasonable control of TAEC, including, but not limited to, the causes specified in Article 28. FORCE MAJEURE clause herein. For any delay excusable under Article 28, the delivery date shall be deemed extended for the duration of the force majeure event.

9. PAYMENT TERMS

9.1 Customer shall pay to TAEC all amounts due hereunder within thirty (30) days of the date of TAEC's invoice therefor.

9.2 Customer may have a third party distributor or other entity (each, a "Designated Payor") pay the NRE charges on Customer's behalf subject to the following conditions:

a. Customer will so inform TAEC and will give TAEC instructions on to whom and where the NRE invoice(s) should be sent;

b. Upon TAEC's request, Customer will provide reasonable evidence to TAEC of such Designated Payor s agreement to pay the NRE charges;

c. Customer remains primarily liable for the payment of the NRE charges, and understands and agrees that it shall be fully responsible therefor if the Designated Payor fails to pay such charges within thirty (30) days of the date of TAEC's invoice; and

d. The payment of the NRE charges by a Designated Payor shall not affect any of the rights and obligations of the parties hereunder, and such Designated Payor shall not be deemed a third party beneficiary of this Agreement, nor shall the Designated Payor have any rights in or to Products, Prototypes, Mask Works, or any other item relating to the subject matter hereof or any right to place or enforce a lien against TAEC relating to the subject matter of this Agreement, and Customer shall indemnify and hold harmless TAEC from any damages or claims TAEC may suffer as a result of Customer's engagement of a Designated Payor.

9.3 TAEC may withhold or suspend shipment or other performance hereunder, in whole or in part, if Customer or its Designated Payor, as applicable, fails to make any payment in accordance with Article 9.1, or otherwise fails to perform its obligations under these Terms and Conditions.

9.4 TAEC reserves the right to monitor Customer's or the Designated Payor's creditworthiness periodically during the course of the work. If, in TAEC's reasonable opinion, Customer's or the Designated Payor's, creditworthiness declines, TAEC shall so notify Customer or the Designated Payor, and as a condition to the performance of any obligation under this Agreement, TAEC reserves the right in its sole discretion to require Customer or the Designated Payor to provide security for payment of any amounts due under this Agreement, including, but not limited to, opening an irrevocable letter of credit to support Customer's payment obligations hereunder, or such other means as TAEC may determine appropriate.

10. CANCELLATION/DELAY OF DEVELOPMENT:

10.1 In the event that Customer unilaterally delays a design milestone for longer than **[***]** weeks beyond the schedule specified in the SOW, TAEC reserves the right to charge Customer up to a total of **[***]** of the Total NRE charge specified in the DPA.

10.2 If Customer wishes to discontinue the project after TAEC has accepted the Development PO from Customer, the Customer or the Designated Payor shall be responsible to pay TAEC for the NRE charges as set forth below ("Cancellation Fee"), unless otherwise agreed in writing between TAEC and the Customer:

Time	Cancellation Fee
[***]	**[***]** % of NRE
[***]	**[***]** % of NRE
[***]	**[***]** % of NRE
[***]	**[***]** % of NRE

10.3 In the event that Customer unilaterally delays a design milestone for longer than **[***]** beyond the schedule specified in the SOW, TAEC reserves the right to deem the design cancelled and assess the Cancellation Fee specified in Section 10.2. In such case, the Agreement will terminate upon payment of the Cancellation Fee.

10.4 For the avoidance of doubt, NRE already invoiced to Customer per the milestones and NRE payment schedule set forth in the DPA ("Paid NRE") shall offset the Cancellation Fee assessed in Sections 10.2 and 10.3 above. To the extent that the Paid NRE exceeds the Cancellation Fee as assessed, TAEC shall not charge an additional Cancellation Fee; however, Paid NRE will not be refunded upon cancellation of the design.

11. CANCELLATION/RESCHEDULE OF PRODUCTION ORDERS

11.1 Requests for cancellation must be made in writing, and the following terms shall apply unless otherwise agreed in writing between TAEC and the Customer. Cancellation fees will be assessed based on the length of time from the date a written notice is received by TAEC to the first scheduled shipment date.

Days from scheduled shipment	Cancellation Fees
[***] days	**[***]**
[***] days	**[***]**
[***] days	**[***]**
[***] days	**[***]**

11.2 Re-schedule requests must be made in writing **[***]** days before the original delivery date. Any order may be re-scheduled only once. Requests to delay shipments may not exceed **[***]** days from the original committed delivery date. The re-scheduled order may not be canceled or further modified, and Customer will be liable for full payment of the selling price.

Days before Shipment	Terms
Within next **[***]** days	**[***]**
Within **[***]** days	**[***]**
Over **[***]** days	**[***]**

12. INTELLECTUAL PROPERTY RIGHTS AND OWNERSHIP

12.1 Customer retains all right, title and interest in and to all proprietary rights, including without limitation, patent, copyright, trade secrets, mask work rights, in and to: (i) all designs and design features of the Products, and (ii) all patterns, drawings, and other data concerning the Products' design features including, but not limited to, the Products' database, and (iii) all Mask Work produced by TAEC for the manufacturing of Products.

12.2 Notwithstanding the above provision, TAEC retains all right, title and interest in and to its **[***]** and all **[***]** and other **[***]** rights therein, and any associated **[***]** and **[***]** . For the purposes of this Agreement, **[***]** shall mean **[***]** , including, but not limited to the process control monitor contained in the **[***]** . TAEC reserves the right to perform similar work for its other customers.

12.3 Both parties understand that any and all Mask Works produced by TAEC for the manufacturing of the Products contain both parties' Confidential Information (as hereinafter defined), and that such Mask Works shall not be used in any manner except as necessary for the performance of this Agreement.

12.4 The party who desires to assert its Mask Work rights against any third party for infringement (the "Asserting Party") shall give prior written notice to the other party to allow such other party to decide whether or not to participate in such dispute. If the other party decides not to participate, it shall provide all commercially reasonable assistance to the Asserting Party in connection with such dispute, at the Asserting Party's expense.

12.5 If an invention is made solely by the employees of either party in connection with the development of the Prototype or Products, all right, title, and interest in and to such items shall belong solely to the party whose employees made such invention. If an invention is jointly made by the employees of both Customer and TAEC, Customer and TAEC shall jointly own all right, title, and interest thereto. Each party shall be entitled to use and exploit such jointly owned invention and intellectual property rights without notice or accounting to the other party.

13. MASK WORKS REGISTRATION

13.1 If Customer desires to register the Mask Work for the Products under the Semiconductor Chip Protection Act of 1984 (the "Act"), Customer shall make registration by itself; however, Customer shall include TAEC's name in such registration. Customer shall have sole responsibility for obtaining registrations for the Mask Work. Upon Customer's request, TAEC agrees to supply Customer or its designee with any reasonable identifying material required for deposit under the Act in order to register a Mask Work in the names of Customer and TAEC. All expenses and charges for registration and upkeep on Mask Work shall be borne by Customer.

13.2 Customer shall use its best efforts to comply with all semiconductor protection laws and applicable regulations in connection with such application. If possible, Customer shall expressly identify in the "nature of contribution" column of the U.S. mask work registration form (and applicable columns of the application form of other countries) that the portion of the Mask Work for the Products and any intellectual property rights including Mask Work related thereto remain the sole and exclusive property of TAEC.

13.3 Customer shall furnish TAEC with a copy of the application form of Mask Work for TAEC's prior to filing, and shall give TAEC reasonable time and opportunity to suggest changes and edits.

14. MASK WORK NOTICE

Upon written request by Customer, and subject to packaging constraints, TAEC will place a Mask Work notice on the outside package of the Product which shall consist of the letter M in a circle and the names of Customer and TAEC.

15. BUSINESS RELATIONSHIPS

15.1 Except as may be specifically provided in this Agreement, no right or license either expressed or implied is granted to either party under any patent, patent application or any other intellectual property right as a result of this Design Agreement. The rights and obligations of the parties to these Terms and Conditions are limited to those expressly set forth herein.

15.2 This Design Agreement is not intended to constitute or create a joint venture, partnership or formal business entity of any kind. Customer and TAEC shall be independent contractors and neither party shall act as the agent for or partner of the other party without prior written agreement.

15.3 Nothing in these terms and conditions shall give either party the right to use the other's name, trademark or logo except where specifically authorized in writing by such other party.

15.4 Customer understands and agrees that a CEM's purchases and other information relating to its business relationship with TAEC are confidential information that TAEC may not disclose without the CEM's express permission (the "CEM Information"). Consequently, if Customer requests TAEC to provide such CEM Information, TAEC shall do so only if:

a. Customer provides to TAEC proof of the CEM's permission; or

b. Customer defends, indemnifies, and holds TAEC harmless from and against any and all claims and damages that TAEC may suffer as a result of such disclosure of CEM Information.

16. SUBCONTRACTING

16.1 TAEC may subcontract all or part of the development of the Products to Toshiba Corporation or one or more of TAEC's affiliates or subcontractors, provided that each such subcontracting party agrees in writing to comply with provisions of these terms and conditions.

16.2 Customer may subcontract all or part of its obligations hereunder with respect to the Products to one of its affiliates or subcontractors (each, a "Permitted Party"), provided that (a) each such Permitted Party agrees in writing to comply with provisions of these terms and conditions, (b) the Permitted Party is not a semiconductor competitor to TAEC, and (c) Customer has given TAEC permission to share information with such Permitted Party as may be required for Permitted Party to carry out its duties.

17. CONFIDENTIAL INFORMATION

17.1 "Confidential Information" as used in this Agreement will mean any and all technical and non-technical information including patent, copyright, trade secret, and proprietary information, techniques, models, inventions, know-how, processes, apparatus, equipment, algorithms, software programs, and formulae related to the current, future and proposed products and services of each of the parties and/or its customers and/or vendors, including, without limitation, information concerning product or process research and development, design details and specifications, engineering, financial data, manufacturing, customer lists, business forecasts, sales and merchandising, and marketing plans.

17.2 The parties agree that Confidential Information exchanged by them under this Agreement shall be protected by the provisions of the Nondisclosure Agreement ("NDA") signed between them, and made effective as of , mutatis mutandis.

17.3 Notwithstanding the expiration or termination of the NDA, the provisions of this Article 17 shall remain in effect for a period of ten (10) years from the date of this Agreement.

18. WARRANTY

18.1 Customer acknowledges and agrees that the success of the development of the custom product contemplated by this Agreement cannot be assured. TAEC gives no representation or warranty that it will be successful in developing a design for such custom product or that the development will progress according to the milestones set forth in the Statement of Work. TAEC will under no circumstances be liable for any damages arising from its failure to develop a design for such custom product or for failing to meet the milestones set forth in the SOW. Any expenditures or commitments by Customer in anticipation of TAEC's success in developing such custom product or meeting the milestones set forth in the SOW will be at Customer's sole risk and expense.

18.2 PROTOTYPES/RISK PRODUCTION-NO WARRANTY CUSTOMER ACKNOWLEDGES AND AGREES THAT ANY PROTOTYPE AND/OR RISK PRODUCTION GOODS DELIVERED HEREUNDER ARE DELIVERED ON AN "AS IS " BASIS WITH ALL FAULTS AND WITH NO WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED.

18.3 PRODUCT WARRANTY

a. TAEC warrants that:

i] for a period of one (1) year from the date of the delivery of each Product, the Product shall: (a) conform to the Specifications; (b) be free from defects in material or workmanship under normal use and service; and

ii] at the time of delivery, the Products will be free and clear of all liens, encumbrances, and other claims except for TAEC's reservation of a security interest in the Products prior to receipt of payment in full therefor.

b. TAEC's responsibility and the sole and exclusive remedy of Customer under this warranty is, at TAEC's option, to repair, replace, or credit Customer's account for any defective Products which are returned by Customer during the applicable warranty period set forth above in sub-

Article 18.3a.i], provided that: (a) Customer promptly notifies TAEC in writing with a detailed description of any alleged deficiencies upon discovery by Customer that such Products fail to conform to the specifications; (b) such Products are returned to TAEC, F.C.A. TAEC's plant; and (c) TAEC's examination of such Products establishes to TAEC's satisfaction that such alleged deficiencies actually existed and were not caused by Customer's misuse, neglect, alteration, improper installation, repair, or improper testing of the Product(s).

c. TAEC SHALL WARRANT EXTERNAL IP SOLELY TO THE EXTENT SET FORTH IN THE APPLICABLE SOW. IF THE SOW IS SILENT ON WARRANTY, VERIFICATION, TESTING OR MAINTENANCE OF THE EXTERNAL IP, CUSTOMER UNDERSTANDS AND AGREES THAT TAEC SHALL NOT WARRANT ANY EXTERNAL IP, EXPRESSLY OR IMPLIEDLY, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

18.4 FOR THE AVOIDANCE OF DOUBT, THE PARTIES EXPRESSLY AGREE THAT THE WARRANTIES SET FORTH IN THIS ARTICLE SHALL NOT APPLY TO (i) ANY EXTERNAL IP, AND (ii) NON-CONFORMANCE CAUSED BY (A) IMPROPER USE, INSTALLATION, MISUSE, NEGLECT, MODIFICATION, ALTERATION, REPAIR, OR IMPROPER TESTING OF THE PROTOTYPES OR PRODUCTS BY CUSTOMER OR ANY PARTY; (B) THE PROTOTYPES OR PRODUCTS HAVING BEEN SUBJECTED TO UNUSUAL PHYSICAL OR ELECTRICAL STRESS; OR (C) INTERFERENCE FROM APPLICATIONS, SOFTWARE, OR OTHER PRODUCTS PROVIDED BY THIRD PARTIES.

18.5 EXCEPT AS EXPRESSLY PROVIDED IN THIS ARTICLE, TAEC DISCLAIMS AND CUSTOMER WAIVES ALL OTHER WARRANTIES OR LIABILITIES OF TAEC, EXPRESS, IMPLIED, OR ARISING OUT OF COMMON LAW OR COURSE OF DEALING, RELATING TO TAEC's PERFORMANCE HEREUNDER, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE. THIS WARRANTY IS FOR THE SOLE BENEFIT OF CUSTOMER AND NOT FOR ANY THIRD PARTY.

19. PROTOTYPES/RISK PRODUCTION

19.1 Customer acknowledges that any Prototype will be provided for evaluation purposes only and not for any other purposes and shall not be offered to any of its customers, directly or indirectly, for purposes other than evaluation. Customer shall defend, indemnify, and hold TAEC and its affiliates harmless from and against all damages, obligations, causes of action, suits, or injuries of any kind arising from or in relation to Customer's use or other disposition of the Products in violation of this Agreement and/or Customer's supply of the Prototype to any of its customers.

19.2 Customer acknowledges that Risk Production goods are provided prior to Prototype Approval Signoff. Customer agrees to defend, indemnify, and hold TAEC and its affiliates harmless from and against all damages, obligations, causes of action, suits, or injuries of any kind arising from or in relation to Customer's supply of the Risk Production goods to any of its customers.

20. PRODUCT APPLICATION

20.1 This design is intended for general commercial applications such as but not limited to telecommunications, information technology equipment, computer equipment, office equipment, test and measurement instrumentation, or domestic appliances. The design is not intended for use in, nor is it intended to be incorporated into the Product for use in, nor will TAEC knowingly sell such items for use in equipment which requires extraordinarily high quality or reliability, and/or in equipment which may involve life threatening, life support, life sustaining, or life critical applications, including, but not limited to such uses as atomic energy controls, airplane or spaceship instrumentation, traffic signals, biomedical or medical instrumentation, combustion control, offensive weapon systems, or safety devices.

20.2 TAEC DOES NOT ACCEPT, AND HEREBY DISCLAIMS, LIABILITY FOR ANY DAMAGES, WHICH MAY ARISE FROM THE USE OF TAEC PRODUCTS USED IN SUCH EQUIPMENT OR APPLICATION AS SET FORTH HEREINABOVE. CUSTOMER SHALL DEFEND, INDEMNIFY, AND HOLD TAEC FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, PROCEEDINGS, COSTS, LOSSES, DAMAGES, AND EXPENSES OF EVERY KIND AND NATURE WHATSOEVER ARISING OUT OF OR IN CONNECTION WITH USE OF PRODUCTS IN ANY SUCH EQUIPMENT OR APPLICATION.

21. INSPECTION

Customer shall inspect Products at its own expense in accordance with the inspection standard agreed upon by the parties. Unless Customer provides TAEC with written notice of rejection within thirty (30) days after TAEC's delivery of the Products to the carrier, together with sufficient evidence of the cause thereof, Products shall be deemed finally and irrevocably accepted. If TAEC receives notice of rejection within that thirty (30) days, then TAEC shall, at its option, repair or replace the defective Products or credit Customer's account, if TAEC has breached its warranty under Article 18.

22. ISSUANCE OF RETURN MATERIAL AUTHORIZATION NUMBER

22.1 All Products which Customer returns to TAEC must be accompanied by a Return Material Authorization (RMA) number. Unless further verification is required by TAEC, TAEC shall provide Customer with an RMA number within three (3) working days of Customer's request for return of the nonconforming Product to TAEC.

22.2 If it is determined that the failure is electrical, mechanical, or of any other nature requiring further verification by TAEC, Customer shall return to TAEC an agreed upon number of data-logged samples of the Product lot, whereupon TAEC shall issue a Failure Analysis (FA) number. Customer may, at its option, suspend the processing of invoices through Customer's accounting system for such nonconforming Product, pending resolution of the investigation. TAEC shall analyze the samples and report its findings to Customer within thirty (30) days after receipt of the samples and shall advise Customer of a schedule to complete the failure analysis and take corrective action.

22.3 An RMA shall be issued within three (3) working days following verification of the failure, if, after testing, the sample has been found to be nonconforming. Upon mutual agreement, TAEC shall replace, repair, or credit the purchase price of any Product which has been found to be nonconforming. If the returned Product is subsequently determined by Customer and TAEC to be in conformance, Customer shall immediately complete payment.

22.4 Transportation charges for Products returned from Customer to TAEC or from TAEC to Customer under this Article shall be at TAEC's expense, provided that Customer shall reimburse TAEC for any transportation charges paid by TAEC for returned Products which are subsequently found to be conforming.

23. MATERIAL AVAILABILITY

23.1 TAEC shall give Customer reasonable advance notice of its intent to discontinue the manufacture of those Products included in this Agreement. Such notice shall be no less than twelve (12) months in advance of the last order date. Customer shall have a twelve (12) month order placement period and must take receipt of the Products within eighteen (18) months of notification of the discontinuance.

23.2 After receipt of such notice of discontinuance, Customer may determine its Life Time Buy (LTB) quantity under the following conditions: (a) the quantity shall be by mutual agreement and (b) the price shall be negotiated at the time TAEC gives notice of the discontinuance.

24. LIABILITY

TAEC WILL UNDER NO CIRCUMSTANCES BE LIABLE FOR INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, SECONDARY, PUNITIVE OR EXEMPLARY LOSS OR DAMAGES OR ECONOMIC LOSS ARISING OUT OF OR RELATING TO THE TRANSACTIONS CONTEMPLATED IN THIS AGREEMENT FOR ANY REASON WHATSOEVER REGARDLESS OF THE FORM OF ACTION, EVEN IF TAEC HAD BEEN ADVISED OF THE LIKELIHOOD OF SUCH LOSS OR DAMAGES OCCURRING AND EVEN IF AN EXCLUSIVE REMEDY FAILS OF ITS ESSENTIAL PURPOSES. TAEC SHALL NOT BE LIABLE FOR ANY DAMAGES OR CLAIMS ARISING MORE THAN ONE (1) YEAR PRIOR TO THE INSTITUTION OF A LEGAL PROCEEDING THEREON. IN NO EVENT WILL TAEC's LIABILITY TO CUSTOMER FOR ANY ACTION OR CLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT EXCEED THE AMOUNT ACTUALLY PAID BY CUSTOMER TO TAEC FOR THE PROTOTYPES OR PRODUCTS THAT ARE THE SUBJECT OF SUCH CLAIM.

25. INTELLECTUAL PROPERTY RIGHTS INDEMNIFICATION

25.1 Subject to the provisions set forth hereinafter and in Article 26. NON-INFRINGEMENT OF RIGHTS clause herein, TAEC shall defend, indemnify, and hold Customer harmless from and against all damages, obligations, causes of action, suits, or injuries of any kind arising from any actual or claimed infringement of United States, Canada, Mexico, Japan and European Community patents, mask work rights, or copyrights with respect to TAEC's design or TAEC's manufacturing of the Prototypes or Products; provided that:

a. Customer shall promptly notify TAEC in writing of any claim of infringement; and

b. TAEC shall have sole control of both the defense of any action on such claim and all negotiations for its settlement or compromise; and

c. Customer shall provide all reasonably necessary authority, information, and assistance to TAEC and its counsel for the defense of such claim.

25.2 Notwithstanding the foregoing, TAEC shall have no liability or obligation to Customer with respect to any intellectual property results infringement or claims thereof based on:

a. TAEC's compliance with designs, plans, specifications, or other information provided by Customer;

b. Use of the Prototypes or Products in combination with devices or products not purchased hereunder where the Products would not in themselves be infringing;

c. Use of the Prototypes or Products in an application or environment for which such Products were not designed or contemplated;

d. Modifications or additions to Prototypes or Products by Customer;

e. Any claims of infringement of a patent in which Customer, or any affiliate or customer of Customer, has an interest or a license; or

f. Should the owner of such intellectual property rights wish to grant a license to Customer with respect to a claim of patent infringement when the claimant declines to offer a license to TAEC but insists upon dealing only with Customer, notwithstanding TAEC's good faith efforts to resolve the claim.

25.3 If any Product is held to constitute an infringement or its use is enjoined, TAEC, at its option and at its own expense, may:

a. Procure for Customer the right to continue using such Product royalty-free; or

b. Replace such Product to Customer's reasonable satisfaction with non-infringing product of equivalent quality and performance; or

c. If (a) and/or (b) above are impracticable, accept the return of such Product for credit, allowing for a reasonable deduction for depreciation.

26. NON-INFRINGEMENT OF RIGHTS

Customer represents and warrants that the circuit design and other information furnished by Customer to TAEC, with respect to the design portion of the Prototypes or Products does not infringe any copyright, trade secret, United States, Canada, Mexico, Japan and European Community patent or other intellectual property right of any third party. Customer shall defend, indemnify and hold harmless TAEC against any claims, damages, and expense (including attorney fees), arising out of or in connection with Customer's breach of the foregoing representation and warranty.

27. TERMINATION

27.1 This Agreement will become effective on the Effective Date and will remain in full force and effect for a period of three (3) years from the Effective Date, unless terminated pursuant to this Article 27.

27.2 Either party may terminate any development or Purchase Order, effective upon written notice to the other party should any of the following events occur:

a. The other party files a voluntary petition in bankruptcy;

b. The other party is adjudicated bankrupt;

c. The other party makes an assignment for the benefit of its creditors;

d. A court assumes jurisdiction of the assets of the other party under any bankruptcy; or

e. A party is unable to pay its debts as they become due.

27.3 Either party shall have the right to terminate any development or Purchase Order for breach of a material term or condition of this Agreement, if such breach continues for a period of thirty (30) days after written notice thereof to the other.

27.4 If Customer defaults in the payment of any sum due under this Agreement and does not cure such default within thirty (30) days of written notice thereof from TAEC, then TAEC shall, without further notice, have the immediate right to repossess and remove the Product. Customer's obligation to pay all charges which shall have accrued and compensation, if any, which covers the actual costs incurred by TAEC as a result of such termination, shall survive any termination of this Agreement.

28. FORCE MAJEURE

Neither party shall be responsible or liable in any way for failure or delay in performing its obligations under these terms and conditions, other than obligations to make payment, when such failure or delay is directly or indirectly due to an act of God, war, threat of war, war-like conditions, hostilities, sanctions, mobilization, blockade, embargo, detention, revolution, riot, looting, striking, lockout, accident, fire, explosion, flood, inability to obtain fuel, power, raw materials, labor, container or transportation facilities, breakage of machinery or apparatus, government order or regulations, or any other cause beyond its reasonable control.

29. GOVERNMENT INTERVENTION

TAEC reserves the right to adjust prices or quantities to equitably compensate for increases in tariffs or similar charges, or for other government actions resulting in curtailment, prevention, or taxation of imports. Unless otherwise required by law, all prices will be quoted and billed exclusive of Federal, state, and local excise, sales, and similar taxes, but inclusive of import duties.

30. EXPORT REGULATIONS

This Agreement involves products and/or technical data that may be controlled under the U.S. Export Administration Regulations and that may be subject to the approval of the United States Department of Commerce prior to export. Any export or re-export by either party, directly or indirectly in contravention of the U.S. Export Administration Regulations, is prohibited.

31. GENERAL

31.1 Neither party shall assign its rights and obligations under this Agreement without the prior written consent of the other party, except that TAEC may assign the performance of any of its obligations, including the manufacture of Prototypes or Products, to Toshiba Corporation or its affiliates.

31.2 These Terms and Conditions shall be interpreted and governed by the laws of the State of California without regard for its conflicts of laws principles, regardless of where any action may be brought. The parties agree to submit to the exclusive jurisdiction of the state and federal courts of the State of California. The parties expressly agree that the UN Convention for the International Sale of Goods shall not apply hereto.

31.3 All modifications to this Agreement must be in writing and signed by both parties. Failure or delay of either party to exercise any right or remedy hereunder shall not constitute a waiver of rights or remedies under this Agreement.

31.4 This Agreement is the exclusive statement of the Terms and Conditions between the parties with respect to the matters set forth herein, and supersedes all other prior or contemporaneous agreements, negotiations, representations, tender documents, and proposals, written and oral. Any additional or conflicting provisions contained in Customer's purchase order, or any purchase order acknowledgment issued by TAEC shall not apply.

31.5 If any provision of this Agreement is held unenforceable or inoperative by any court of competent jurisdiction, either in whole or in part, the remaining provisions shall be given full force and effect to the extent not inconsistent with the original terms of this Agreement.

31.6 Any notice given hereunder shall be sent in writing to the other party's business address set forth on the cover page hereof, or to such other party and address as such part shall have designated most recently in writing. Notices directed to TAEC shall be sent "Attention: Legal Department."

31.7 This Agreement may be executed in several identical counterparts, each of which when executed by the parties hereto and delivered shall be an original, but all of which together shall constitute a single instrument.

31.8 Articles 9, 12, 13, 15, 17, 19, 20, 24, 25, 26, 30 and 31 shall survive the termination or expiration of this Agreement.

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

Toshiba America Electronic Components, Inc.
2950 Orchard Parkway, San Jose, CA 95131

TOSHIBA

Design and Production Agreement
Amendment #1
Netlist Inc.

This Amendment #1 ("Amendment") to the ID ASIC Design and Production Agreement, dated July 31, 2008 (TAEC#'51N12402I25) ("Agreement") is between Toshiba America Electronic Components, Inc., with a principal place of business at 19900 MacArthur Boulevard, Suite 400, Irvine, CA 92612 ("TAEC") and Netlist Inc. with a place of business at 51 Discovery, Suite 150 Irvine, CA 92618 ("Customer") and sets out the terms and conditions under which TAEC will design the product identified herein for Customer. This Amendment is effective as of the date finally executed below ("Effective Date").

1. Project Name

ID ASIC

2. New Schedule

The parties agree to delete the contents of Section 4 of the Agreement, Schedule, and replace it with the following:

Major Project Milestones

Event	Target Date/Completed
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	TBD
[***]	TBD
[***]	TBD
[***]	TBD

Production turnaround time: **[***]** working weeks.

Schedule is provisional.

3. New Package and Die Size Option

The parties agree to delete the contents of Section 6 of the Agreement, Package and Die Size Option, and replace it with the following:

Package	Ball Pitch	Body Size	Substrate Layers	Die Size
[***]	**[***]**	**[***]**	**[***]**	**[***]**

4. New Price

The parties agree to delete the contents of Section 8 of the Agreement, Price, and replace it with the following:

First	**[***]** pieces:	US$ **[***]**
Next	**[***]** pieces:	US$ **[***]**
Next	**[***]** pieces:	US$ **[***]**
After first	**[***]** pieces:	US$ **[***]**

Changes in die size will affect the price quoted.

The prices quoted herein for mass production are based on the assumption of adequate yield. TAEC reserves the right to adjust pricing based on mutual agreement in the event that adequate yield figures, in TAEC's reasonable opinion, are not achieved by the start of mass production despite reasonable commercial efforts by both parties. TAEC will provide Netlist with timely data such that Netlist can reasonably assess yield.

Prices do not include and are subject to any applicable sales tax.

5. New Engineering Sample and Risk Production Pricing

The parties agree to delete Section 13.3 of the Agreement. The parties agree to delete the contents of Section 12 of the Agreement, Extra Engineering Samples, and replace it with the following:

All extra engineering samples and Risk Production parts shall be sold at US$ **[***]** each (**[***]** the unit price of US$ **[***]**).

All extra engineering samples are sold as Prototypes and are subject to, without limitation, Articles 18.2 and 19.1 of the Design and Production Agreement Terms and Conditions ("Terms and Conditions"). All Risk Production parts are subject to, without limitation, Articles 18.2 and 19.2 of the Terms and Conditions. TAEC reserves the right in its sole discretion to determine whether to accept extra engineering sample or Risk Production orders.

6. Additional Non-Recurring Engineering Charges and Payment Schedule

Customer agrees to pay additional non-recurring engineering charges of US$ **[***]** ("Additional NRE") to TAEC for package and design support. The Additional NRE will be due and payable as follows.

1. US$ **[***]** upon **[***]** .

2. US$ **[***]** upon **[***]** together with test logs showing successful completion of the mutually agreed-upon tests.

For the avoidance of doubt, the Additional NRE payable under this Amendment is in addition to and does not replace the NRE payable under the Agreement.

7. Cancellation

7.1 If Customer wishes to discontinue the project after execution of this Amendment, then in addition to the provisions set forth in Section 10 of the Terms and Conditions, the Customer shall be responsible to pay TAEC for the NRE charges as set forth below ("Additional Cancellation Fee"), unless otherwise agreed in writing between TAEC and the Customer:

Time	Additional Cancellation Fee
[***]	**[***]** % of Additional NRE
[***]	**[***]** % of Additional NRE
[***]	**[***]** % of Additional NRE

7.2 For the avoidance of doubt, NRE already invoiced to Customer per the milestones and NRE payment schedule set forth herein and in the DPA ("Paid NRE") shall offset the Additional Cancellation Fee assessed in Article 7.1 above. To the extent that the Paid NRE exceeds the Additional Cancellation Fee and the Cancellation Fee set forth in Section 10 of the Terms and Conditions, TAEC shall not charge further Additional Cancellation Fee; however, Paid NRE will not be refunded upon cancellation of the design.

8. Additional Terms

8.1 **[***]**

Except as modified herein, all other terms and conditions of the Agreement shall remain in full force and effect per their terms.

Toshiba America Electronic Components, Inc.	**Netlist Inc.**
/s/ Takeshi Iwamoto *Signature*	*/s/ Gail Itow* *Signature*
Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit *Printed name and title*	Gail Itow, CFO *Printed name and title*
1-28-10 *Date*	1-28-10 *Date*

Exhibit 10.9

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

Toshiba America Electronic Components, Inc.
2950 Orchard Parkway, San Jose, CA 95131

TOSHIBA

Design and Production Agreement
Amendment #2
Netlist Inc.

This Amendment #2 (''Amendment #2") to the ID ASIC Design and Production Agreement, dated July 31, 2008, as amended (TAEC# 51N12402125) ("Agreement") is between Toshiba America Electronic Components, Inc., with a principal place of business at 19900 MacArthur Boulevard, Suite 400, Irvine, CA 92612 ("TAEC") and Netlist Inc., with a place of business at 51 Discovery, Suite 150 Irvine, CA 92618 ("Customer") and sets out the terms and conditions under which TAEC will design the product identified herein for Customer. This Amendment is effective as of the date finally executed below ("Effective Date").

1. Project Name

ID ASIC

2. New Schedule

The parties agree to delete the contents of Section 4 of the Agreement, Schedule, and replace it with the following:

Major Project Milestones .

Event	Target Date/Completed
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	**[***]**
[***]	TBD
[***]	TBD
[***]	TBD
[***]	TBD

Production turnaround time: **[***]** working weeks.

Schedule is provisional.

3. New Internal/External IP

The parties agree to delete the contents of Section 7 of the Agreement, Internal/External IP, and replace it with the following:

Internal IP:

[***]

External IP:

[***]

4. Additional Features Non-Recurring Engineering Charges and Payment Schedule:

4.1 Customer agrees to pay non-recurring engineering charges ("Additional Features NRE") to TAEC for support of the following design changes:

[***]

4.2 The Additional Features NRE will he calculated according to the resources expended by TAEC, which will be charged at the rate of US$ **[***]** per full-time-equivalent person per week. TAEC will provide a weekly update to Customer regarding resources expended.

TAEC estimates that the Additional Features NRE for this ID design will be US$ **[***]** , or **[***]** . This estimate is subject to change.

4.3 The Additional Features NRE will be payable as follows:

1. US$ **[***]** (**[***]** % of estimated Additional Features NRE) upon tapeout or **[***]** , whichever is earlier.

2. The balance (total person-weeks actually expended, less US$ **[***]**) upon **[***]** together with test logs showing successful completion of the Toshiba Testing as defined in the Product Testing Agreement between the parties.

For the avoidance of doubt, the Additional Features. NRE payable under this Amendment #2 is in addition to and does not replace the NRE payable under the Agreement and/or Amendment #1.

5. Cancellation

5.1 If Customer wishes to discontinue the project set forth in this Amendment #2 prior to tapeout, then Customer shall pay TAEC US$ **[***]** ("Additional Features Cancellation Fee"), In addition, TAEC reserves the right to invoice Customer for any resources expended by TAEC prior to cancellation in excess of 19 person-weeks. The Additional Features Cancellation Fee shall be offset by any amount of the Additional Features NRE already paid to TAEC by Customer.

5.2 In the event that Customer unilaterally fails to provide information, data, or approvals necessary for TAEC to proceed with the project for a period of **[***]** from TAEC's initial request for such information, data, or approvals, TAEC reserves the right to deem the project set forth in this Amendment #2 cancelled and assess the Additional Features Cancellation Fee.

Except as modified herein, all Other terms and conditions of the. Agreement shall remain in lull force and effect pet their terms

Toshiba American Electronic Components, Inc.	Netlist Inc,
/s/ Takeshi Iwamoto *Signature*	*/s/ Gail Itow* *Signature*
Takeshi Iwamoto VP, Customer SoC Foundry Business Unit *Printed name and title*	Gail Itow, CFO *Printed name and title*
3/10/10 *Date*	3/5/10 *Date*

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

MKT-DSA-VTB-001

Diablo Technologies, Inc.
Development And Supply Agreement

This Development and Supply Agreement (" Agreement ") is made this 10th day of September 2008 (" Effective Date ") between Diablo Technologies, Inc,, a Canadian corporation having a principal place of business at 290 St. Joseph, Suite 200, Gatineau, Quebec J8Y 3Y3 (" Diablo ") and Netlist, Inc., a Delaware corporation having a principal place of business at 51 Discovery, Irvine, CA 92618 (" Netlist ").

RECITALS

Whereas, Netlist desires to have certain products designed and manufactured by Diablo for sale to Netlist; and Diablo has the capability of designing and manufacturing such products and desires to do so for sale to Netlist.

Now, therefore, in consideration of the promises and the mutual agreements hereinafter set forth, and intending to be legally bound, the parties hereto agree as follows:

AGREEMENT

1. **Definitions** . The following terms shall have the meanings set forth below.

" Confidential Information " of a party shall mean any information disclosed by that party to the other pursuant to this Agreement which is in written, graphic, machine readable or other tangible form and is marked "Confidential," "Proprietary" or in some other manner to indicate its confidential nature. Confidential Information may also include oral information disclosed by one party to the other pursuant to this Agreement, provided that such information is designated as confidential at the time of disclosure and is reduced to writing by the disclosing party within a reasonable time (not to exceed thirty (30) days) after its oral disclosure, and such writing is marked in a manner to indicate its confidential nature and delivered to the receiving party.

" Cost " shall mean Diablo's full standard cost basis including without limitation any applicable license royalties.

" Intellectual Property Rights " shall mean all intellectual property rights including, but not limited to, patents, copyrights, authors' rights, trademarks, tradenames, know-how and trade secrets, irrespective of whether such rights arise under U.S. or international intellectual property, unfair competition or trade secret laws.

" Inventory " shall mean raw materials and supplies necessary for the manufacture of Products pursuant to this Agreement.

" Market Share " shall mean the number of Netlist Chipsets shipped, invoiced or sold by Netlist to any third party.

" Netlist Technology " shall mean Netlist's patented and trade secret-protected Rank Multiplication/Load Rank Multiplication technology ("DxD/LRD"), including without limitation its "know-how" and database design technology, developed prior to the Effective Date and provided to Diablo.

" Netlist Chipset " shall mean a DDR3 proprietary chip set solution consisting of a DDR3 standard register (with DxD/LRD physically enabled) and set of isolation devices utilizing the Netlist Technology for use in Netlist RDIMM products implemented in OEM server systems developed under this Agreement in accordance with the Specification.

" Diablo Standard Register " or " Register " shall mean a DDR3 industry standard register derivative of Netlist Chipset with either or both of DxD/LRD functionality physically disabled.

" Products " shall include both Netlist Chipset and Diablo Standard Register.

" Specifications " shall mean the logic diagram, schematics, test requirements and definition, plots, and electric related requirements and "know-how" and revised or modified to produce the initial prototypes, and, to the extent necessary, modifications thereto, to produce the Product set forth in Exhibit A.

2. Development and Design.

(a) **Development and Design** . Netlist agrees to pay a NRE (Non-Recurring Engineering) Payment (set forth in Exhibit D) to Diablo for the design and development of the Netlist Chipset and the delivery of the initial prototypes, all meeting the Specifications, as defined in the Statement of Work set forth in Exhibit A ("SOW") and on the dates specified in the NRE Payment Schedule. Diablo shall use its commercially reasonable efforts to design and develop the Product as defined in the SOW and to meet the Development Schedule (set forth in Exhibit B). Netlist agrees to promptly respond to inquiries, make personnel available to discuss any changes or concerns of Diablo and to generally cooperate in assisting Diablo in the design and development of the Product.

(b) **Changes** . Netlist may, at any time during the term of this Agreement, request changes to the Specification and any other functional or performance specifications agreed to between Diablo and Netlist. Such request shall be submitted by Netlist to Diablo in writing. Diablo will then estimate, using industry established reasonable and customary rates, the amount of work necessary, the additional development time and cost that would be incurred, and shall request Netlist's approval of such additional cost and development time. Upon written receipt of such approval, implementation of such changes will proceed. The Specification, Development Schedule, NRE Payment Schedule and Production Price will be updated in writing and signed by both parties to reflect any such changes.

(c) **Engineering Resources** . Each party will designate a project manager in the SOW who shall act as that party's liaison and administrator of the project provided pursuant to the SOW. Diablo hereby agrees to submit to the Netlist project manager the names and other pertinent information requested by Netlist prior to utilization of any personnel of Diablo. Netlist reserves the right to interview Diablo's personnel prior to such utilization. Netlist reserves the right to request the reasonable replacement of any of Diablo's personnel assigned to this project, and Diablo shall as soon as possible consider such request and may remove same and secure replacement(s) reasonably acceptable to Netlist.

(d) **Joint Tasks** .

(i) The parties agree to **[***]** for both the **[***]** and the **[***]** to ensure Diablo is developing a competitive solution. Diablo and Netlist will establish a **[***]** schedule of **[***]** that will provide both organizations the greatest confidence of program success.

(ii) Bring-up; Integration Testing . Netlist will provide Diablo with its **[***]** validation platform and Diablo will provide Netlist with a requirements document ensuring **[***]** in **[***]** the devices and **[***]** .

(iii) **[***]** agree to make **[***]** to support **[***]** and **[***]** requirements of the Products with Netlist's **[***]** .

(e) **License** . In partial consideration of the design and development of the Netlist Chipset, subject to Section 2(e)(ii), Netlist hereby grants Diablo a **[***]** under its Intellectual **[***]** to **[***]** to **[***]** and **[***]** the Products in accordance with the terms contained herein.

(i) Delivery . Upon execution of this Agreement, Netlist will provide to Diablo (A) a copy of the **[***]** to enable Diablo to design and manufacture the Products and (B) all necessary **[***]** to Diablo in support of the development of the Products.

(ii) Exclusivity . Subject to Section 2(e)(iii) below, the Netlist Chipset and Netlist Technology will be exclusive to Netlist in that Diablo shall not sell or manufacture any device constituting the Netlist Chipset or Netlist Technology to or for any party except Netlist; provided that Diablo will be **[***]** and **[***]** to any third party **[***]** .

(iii) JEDEC Standard . If for any reason Netlist decides to make available DxD/LRD to the market as an industry standard through JEDEC or other standards body; Diablo will be **[***]** under same terms and conditions as offered to other third parties. Netlist will provide Diablo with at least **[***]** notice of a possible release to any industry standard body.

(iv) Priority . Diablo hereby agrees that the **[***]** of the **[***]** shall not occur before the **[***]** of the **[***]** unless Netlist **[***]** or **[***]** .

3. Manufacture and Supply of Products.

(a) **Agreement to Manufacture** . Diablo agrees to make commercially reasonable efforts, pursuant to purchase orders or changes to purchase orders issued by Netlist and accepted in writing by Diablo (" Purchase Orders "), to procure Inventory, components and other supplies and to manufacture, test, assemble, and deliver the Netlist Chipset pursuant to the Specifications for each device of the Netlist Chipset and to deliver such Netlist Chipset to a location designated by Netlist. Except as set forth herein, this Agreement shall not constitute a requirements contract and Netlist shall not be obligated to order Products from Diablo.

(b) **Forecasts** . Netlist shall provide each **[***]** rolling forecast report (" Forecast ") of its Products requirements. The first **[***]** of each Forecast will be done on a **[***]** basis. Diablo will respond on a **[***]** basis with a plan for the delivery dates for the first **[***]** of a Forecast. The remaining **[***]** of each Forecast will be done on a **[***]** basis. Purchase Orders will be done by Netlist on the basis of the **[***]** Forecast.

(i) Netlist shall be committed to purchase all **[***]** contained within the first **[***]** of a Forecast on the delivery date that Diablo specified in the Forecast. Such purchase commitment (including the payment obligations) shall be **[***]** and any **[***]** of such Registers are **[***]** . For **[***]** contained in the **[***]** of a Forecast, Netlist shall **[***]** such **[***]** but will be entitled to **[***]** for such Netlist Chipset by up to **[***]** from the delivery date that Diablo had previously committed to meet.

(ii) Netlist shall be committed to purchase all Netlist Chipsets contained within the **[***]** of a Forecast on the delivery date that Diablo specified in the Forecast. Such purchase commitment (including the payment obligations) shall be **[***]** and any **[***]** of such Netlist Chipsets are **[***].** For Netlist Chipsets contained in the **[***]** of a Forecast, Netlist shall **[***]** such Netlist Chipsets but will be **[***]** for such Netlist Chipsets by up to **[***]** from the delivery date that Diablo had previously committed to meet.

(c) **Purchase Orders** . All orders for Netlist Chipset shall be submitted to Diablo in writing by mail, email or facsimile to the address set forth on the signature page to this Agreement, and shall conform to the binding Forecasts in accordance with Section 3(b). Netlist shall submit such Purchase Orders to Diablo at least ninety (90) days prior to the date of requested delivery (" Delivery Date ").

(d) **Terms and Conditions** . Any additional or different terms or conditions in any communication by Netlist (whether in a purchase order or otherwise) are hereby rejected and shall be null and void, irrespective of the means of Netlist's acceptance. Diablo's failure to object to any additional or different provisions proposed by Netlist shall not constitute a waiver of these terms and conditions, nor constitute acceptance of any such Netlist's terms and conditions. All orders or contracts must be approved and accepted by Diablo at its principal place of business. The terms and conditions of this Agreement shall be applicable whether or not they are attached to or enclosed with the Products sold hereunder.

(e) **Market Share Commitment** . **[***]**

(i) A minimum of **[***]** of Netlist Market Share for the Netlist Chipsets will be allocated to Diablo if Diablo delivers working engineering samples of the Product no later than **[***]** and production worthy devices no later than **[***]** . This minimum Market Share commitment will apply to the first year of production and will be maintained at least, but not necessarily limited to, **[***]** Market Share thereafter for the life of the Products provided that Diablo maintains a commercially reasonable continuity of supply sufficient to meet Netlist's Forecasts.

(ii) A minimum of **[***]** of Netlist Market Share for the Netlist Chipsets will be allocated to Diablo if Diablo delivers working engineering samples of the Product no later than **[***]** and production worthy devices no later than **[***]** . This minimum Market Share commitment will apply to the first year of production and will he maintained thereafter for the life of the Products provided that Diablo maintains a commercially reasonable continuity of supply sufficient to meet Netlist's Forecasts.

(iii) The **[***]** listed in (ii) above shall be reduced by **[***]** for every 2 months of delay in delivering production worthy devices of the Netlist Chipset to Netlist. Should Diablo be unable to deliver production worthy devices of the Netlist Chipset by **[***]** , Netlist will have no further obligations to Diablo, whether to purchase Netlist Chipset or to make any payments beyond the second payment under Exhibit D .

(iv) The parties hereby agree that the above Market Share commitments are contingent upon Netlist receiving qualification status on a major leading platform at one (1) OEM **[***]** for RDIMM(s) using the Netlist Chipset and Diablo's ability to maintain or reduce sell prices as outlined below in Exhibit C. If Netlist is not able to secure a major leading platform at one OEM and if Diablo delivers production devices of the Netlist Chipset by **[***]** , Netlist will commit to purchase **[***]** of the Products from Diablo over a period of one year.

(v) Audit . Netlist will maintain complete and accurate records for not less than three (3) years after this Agreement expires or is terminated. Diablo may audit Netlist's records in accordance with this Section; provided that a nationally recognized accounting firm retained by Diablo ("Auditor") will have access to such records solely for the purposes of confirming that Netlist has fulfilled its obligations under Sections (i) - (iv) above.

4. Product Shipment and Inspection.

(a) **Shipments** . Shipment will be F.O.B. Diablo's factory, at which time risk of loss and title will pass to Netlist. All freight, insurance and other shipping expenses, as well as any special packing expenses not included in the original price quotation for the Products will be paid by Netlist. The carrier shall be deemed Netlist's agent, and any claims for damages in shipment must be filed with the carrier. Diablo is authorized to designate a carrier pursuant to Diablo's standard shipping practices unless otherwise specified in writing by Netlist.

(b) **Product Inspection and Acceptance** . The Products delivered by Diablo will be inspected and tested as required by Netlist within thirty (30) days of receipt (the " Acceptance Period "). If Products are found to be defective in material or workmanship and/or fail to meet the Specifications, Netlist may reject such Products during the Acceptance Period. Products not rejected during the Acceptance Period will be deemed accepted. Netlist may return rejected Products pursuant to Section 10(c).

5. Payment Terms, Additional Costs and Price Changes.

(a) **Payment Terms** . Payment for any products, services or other costs to be paid by Netlist hereunder are due forty-five (45) days from the date of invoice for Products delivered to Netlist and shall be made in lawful U.S. currency. Any amounts not paid when due will accrue interest at the rate of 1 1/2% per month, or the maximum amount allowed by law, if lower. In the event that any payment is more than forty-five (45) days late, Diablo shall have the right to suspend performance until all payments are made current.

(b) **Additional Costs** .

(i) **Duties and Taxes** . All prices quoted are exclusive of federal, state and local excise, sales, use and similar duties and taxes, and Netlist shall be responsible for all such items.

(ii) **Expediting Charges** . Netlist shall be responsible for any expediting charges reasonably necessary because of a change in Netlist's requirements. Diablo shall obtain approval from Netlist for expediting charges prior to incurring any such charge.

(c) **Price** . The initial maximum average selling price for Products is set forth on Exhibit C hereto; which shall be subject to final order acknowledgment from Diablo at the time a Purchase Order is placed. Netlist and Diablo will agree to quarterly pricing sixty (60) days prior to the beginning of each quarter. The price guidelines set forth in Exhibit C will be the basis for establishing quarterly pricing such that the original metrics used to define this price structure remains reasonably intact. The average selling price is contingent upon Diablo receiving the minimum Market Share defined in Section 3e above, and maintaining market competitive selling prices to Netlist.

6. Marketing and Other Obligations

(a) Should Diablo meet the full specifications outlined by DxD/LRD within the designated and agreed to time schedules, Netlist will add Diablo to Netlist's approved vendor list for both the Netlist Chipset and Diablo Standard Register.

(b) **Joint Promotion and Marketing** .

(i) Netlist and Diablo will engage in a joint marketing effort providing introductions of each other to their respective customers. Netlist shall use best commercial efforts, in order to meet Netlist market share obligations to Diablo, by promoting, where possible, the use of Netlist products utilizing Diablo based products. Both parties shall provide appropriate recognition of the other party's contributions.

(ii) Joint Press Release . Netlist and Diablo will issue a joint press release announcing this relationship and both parties will agree to the content of the press release and specific timing. Any joint press releases will occur only after Netlist has fully **[***]** and **[***]** of Diablo's products in Netlist's applications.

(iii) Diablo shall be permitted to identify Netlist as its customer and Netlist shall provide a written endorsement for the incorporation into a Diablo press release announcing the availability of the Diablo Standard Register for mass production. Diablo may identify to its investors that Netlist is a customer, but will refrain from issuing any press releases identifying Netlist as a customer until Netlist has fully validated the full compliance and functionality of Diablo's products in Netlist's applications.

7. Intellectual Property Rights.

(a) **[***]** . All rights, title and interest in and to the design and development of the **[***]** and **[***]** of the **[***]** ; and any improvement, update, modification or additional parts thereof, and all of **[***]** embodied in the **[***]** , shall at all times remain the sole and exclusive property of **[***]** . For purposes of this Agreement, " **[***]** " shall mean the development of a silicon chip set using the **[***]** (including without limitation the packaging) which will meet **[***]** .

(b) **[***]** . All rights, title and interest in and to the design and development of the underlying **[***]** of the **[***]** , the **[***]** and all **[***]** embodied in the **[***]** , any improvement, update, modification or additional parts thereof, shall at all times remain the sole and exclusive property of **[***]** . For purposes of this Agreement, " **[***]** " shall mean **[***]** with regard to **[***]** and **[***]** .

8. Confidential Information.

(a) **Nondisclosure and Nonuse** . Each party shall treat as confidential all Confidential Information of the other party, shall not use such Confidential Information except as set forth in this Agreement, and shall use reasonable efforts not to disclose such Confidential Information to any third party. Without limiting the foregoing, each of the parties shall use at least the same degree of care which it uses to prevent the disclosure of its own confidential information of like importance to prevent the disclosure of Confidential Information disclosed to it by the other party under this Agreement. Each party shall disclose Confidential Information of the other party only to its directors, officers, employees, and consultants who are required to have such information in order for such party to carry out the transactions contemplated by this Agreement and who have signed nondisclosure agreements protecting the Confidential Information on substantially the same terms as this Agreement. Each party shall promptly notify the other party of any actual or suspected misuse or unauthorized disclosure of the other party's Confidential Information. For purposes of clarification, the Netlist Technology is the Confidential Information of Netlist and may not be used for any purpose other than as set forth in this Agreement, including without limitation use of such Netlist Technology to develop a chip competitive to the Netlist Chipset.

(b) **Exceptions** . Notwithstanding the above, neither party shall have liability to the other with regard to any Confidential Information of the other which the receiving party can prove (i) was in the public domain at the time it was disclosed or has entered the public domain through no fault of the receiving party; (ii) was known to the receiving party, without restriction, at the time of disclosure, as demonstrated by files in existence at the time of disclosure; (iii) is disclosed with the prior written approval of the disclosing party; (iv) was independently developed by the receiving party without any use of the Confidential Information, as demonstrated by files created at the time of such independent development; (v) is disclosed pursuant to the order or requirement of a court, administrative agency, or other governmental body; provided, however, that the receiving party shall provide prompt notice of such court order or requirement to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure.

(c) **Return of Confidential Information**. Upon expiration or termination of this Agreement and at the request of either party, the other party shall promptly return all Confidential Information of the other party.

(d) **Remedies**. Any breach of the restrictions contained in this Section is a breach of this Agreement which may cause irreparable harm to the nonbreaching party. Any such breach shall entitle the nonbreaching party to injunctive relief in addition to all legal remedies.

Confidentiality of Agreement. Each party shall be entitled to disclose the existence of this Agreement, but agrees that the terms and conditions of this Agreement shall be treated as Confidential Information and shall not be disclosed to any third party; provided, however, that each party may disclose the terms and conditions of this Agreement: (i) as required by any court or other governmental body; (ii) as otherwise required by law; (iii) to legal counsel of the parties; (iv) in confidence, to accountants, banks, and financing sources and their advisors; (v) in connection with the enforcement of this Agreement or rights under this Agreement or (vi) in confidence, in connection with an actual or proposed merger, acquisition, or similar transaction.

9. Indemnification.

(a) **Indemnification by Diablo**. Diablo agrees, at its own expense, to defend or at its option to settle any claim or action brought against Netlist on the issue of infringement of any patent, copyright, trademark, trade secret, mask work right or other intellectual property right of any third party by the Products as used or distributed within the scope of this Agreement, and to indemnify Netlist against any and all damages and costs, including legal fees, that a court awards against Netlist under any such claim or action; provided that Netlist provides Diablo with (i) prompt written notice of such claim or action, (ii) sole control and authority over the defense or settlement of such claim or action and (iii) proper and full information and reasonable assistance to defend and/or settle any such claim or action.

(i) **Injunctions**. In the event that any Product is, or in the Diablo's sole opinion is likely to be, enjoined due to the type of infringement described in Section (a) above, Diablo, at its option and expense, may either (i) modify the Netlist Chipset so that they become non-infringing, (ii) replace the Netlist Chipset with functionally equivalent non-infringing Products reasonably acceptable to Netlist or, if the foregoing alternatives are not reasonably available to Diablo, (iii) accept return of the Products and refund to Netlist the purchase price of the Products and portion of the NRE payment which shall be reduced over a four (4) year period under a straight line depreciation.

(ii) **Exceptions**. Diablo will have no liability to the extent that any such claim is based on the Netlist Technology or would have been avoided but for (i) use or combination of the Netlist Chipset with any other products not provided by Diablo or (ii) modification of the Netlist Chipset after delivery by Diablo, unless such use, combination and/or modification is authorized in advance in writing by Diablo.

(b) **Indemnification by Netlist** . Netlist agrees, at its own expense, to defend or at its option to settle any claim or action brought against Diablo on the issue of infringement of any patent, copyright, trademark, trade secret, mask work right or other intellectual property right of any third party by the Netlist Technology as used or distributed within the scope of this Agreement, and to indemnify Diablo against any and all damages and costs, including legal fees, that a court awards against Netlist under any such claim or action; provided that Diablo provides Netlist with (i) prompt written notice of such claim or action, (ii) sole control and authority over the defense or settlement of such claim or action and (iii) proper and full information and reasonable assistance to defend and/or settle any such claim or action.

(c) **Limitation** . THE FOREGOING PROVISIONS OF THIS SECTION STATE THE ENTIRE LIABILITY AND OBLIGATION OF EACH PARTY AND THE EXCLUSIVE REMEDY OF NETLIST, WITH RESPECT TO ANY ALLEGED OR ACTUAL INFRINGEMENT OF PATENTS, COPYRIGHTS, TRADE SECRETS, TRADEMARKS OR OTHER INTELLECTUAL PROPERTY RIGHTS BY THE PRODUCTS OR NETLIST TECHNOLOGY.

(d) **Mutual Indemnity** . The parties will indemnify each other against actions, liabilities, loss, damages and expenses resulting from injury or death of any person or loss of or damage to any tangible real or tangible personal property to the extent that such injury, death, loss or damage is proximately caused by the indemnifying party's negligent act or omission or intentional misconduct or that of its agents, employees or subcontractors in connection with the performance of its obligations under this Agreement, provided that the indemnifying party has been notified in writing as soon as practicable of any such claim. The indemnifying party will have the sole right to control the defense of all such claims and in no event will the indemnified party settle any claim without the indemnifying party's prior written approval.

(e) **No Other Liability** . IN NO EVENT SHALL DIABLO, ITS SUPPLIERS OR NETLIST BE LIABLE TO THE OTHER OR ANY THIRD PARTY FOR COSTS OF PROCUREMENT OF SUBSTITUTE PRODUCTS OR SERVICES, LOST PROFITS, DATA OR BUSINESS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY (WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE). EXCEPT FOR LIABILITY INDER SECTIONS 8 and 9(a), NEITHER PARTIES TOTAL AND CUMULATIVE LIABILITY ARISING OUT OF OR IN CONNECTION WITH ANY PRODUCTS PURCHASED BY NETLIST HEREUNDER SHALL IN NO EVENT EXCEED THE PURCHASE PRICE PAID BY NETLIST FOR SUCH PRODUCTS. THE LIMITATIONS SET FORTH IN THIS SECTION SHALL APPLY EVEN IF DIABLO OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

10. Warranty and Disclaimer.

(a) **Warranty** . Diablo warrants that, for a period of twelve (12) months from the date of shipment of the Products from Diablo (the " Warranty Period "), the Products will conform to the Specification in effect as of the date of manufacture. Diablo SPECIFICALLY DISCLAIMS ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING LOST PROFITS) WHICH MAY RESULT FROM THE USE OF PRODUCTS PURCHASED HEREUNDER. This limited warranty extends only to Netlist as original purchaser unless otherwise agreed upon in writing by Diablo.

(b) **Exclusions**. The foregoing warranty shall not apply if the defective Products (i) has been subjected to abuse, misuse, neglect, negligence, accident, improper testing, improper installation, improper storage, improper handling or use contrary to any instructions issued by Diablo, (ii) has been repaired or altered by persons other than Diablo, (iii) has not been installed, operated, repaired and maintained in accordance with the documentation or (iv) is attributable to the Netlist Technology. In addition, the foregoing warranty shall not apply to Product (i) marked or identified as "sample," (ii) loaned or provided to Netlist at no cost, or (iii) which are sold "as is."

(c) **Remedies**. If during the Warranty Period or Acceptance Period: (i) Diablo is notified promptly in writing upon discovery of any defect in the Products, including a detailed description of such alleged defect, (ii) such Products are returned, transportation charges prepaid, to Diablo's designated manufacturing facility in accordance with Diablo's then-current return procedures, as set forth by Diablo from time to time, and (iii) Diablo's inspections and tests determine that the Products are indeed defective and the Products have not been subjected to any of the conditions set forth in this Section, then, as Netlist's sole remedy and Diablo's sole obligation under the foregoing warranty, Diablo will replace without charge the defective Products at the earliest commercially reasonable time. Any Products that have been replaced under this warranty shall have the same warranty coverage as outlined in 10 (a) above.

(d) **Disclaimer**. EXCEPT FOR THE WARRANTIES SET FORTH IN THIS SECTION, DIABLO MAKES NO OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT TO ANY PRODUCTS PROVIDED IN CONNECTION WITH THIS AGREEMENT, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE.

11. Term and Termination.

(a) **Term**. This Agreement shall become effective on the Effective Date of this Agreement and shall continue for a period of three years (" Initial Term "). This Agreement shall be extended automatically at the end of the initial term or subsequent terms for an additional one (1) year terms, unless terminated in accordance with this Agreement.

(b) **Termination for Cause**. Either party may terminate this Agreement at any time (i) if the other party breaches any term hereof and fails to cure such breach within sixty (60) days after notice of such breach or (ii) if the other party shall be or becomes insolvent, or if either party makes an assignment for the benefit of creditors, or if there are instituted by or against either party proceedings in bankruptcy or under any insolvency or similar law or for reorganization, receivership or dissolution which proceeding is not dismissed within ninety (90) days.

(c) **Termination for Technical Reasons** . In the event that after exercising commercially reasonable efforts, Diablo is unable to deliver production worthy Netlist Chipsets due to technical changes created or requested by Netlist, after the establishment of this agreement, either Netlist or Diablo shall have the right to terminate this agreement.

(d) **Obligations Upon Termination** . The termination or expiration of this Agreement shall in no way relieve either party from its obligations to pay the other any sums accrued hereunder prior to such termination or expiration.

(e) **Survival of Certain Provisions** . Notwithstanding anything to the contrary in this Agreement, the following sections shall survive termination of this Agreement: 1, 2e, 5, 7, 8, 9, 10, 11(d), 12 and 13.

12. **Standby Manufacturing Rights** . At Netlist's expense, Diablo agrees to deposit into a third party escrow account, pursuant to the terms of an Escrow Agreement (which shall be mutually agreed by the parties), all engineering drawings, manufacture documents and instructions and other written materials (including lists of suppliers and their addresses), including database tapes necessary to enable Netlist to manufacture, assemble, test and/or maintain the Products (" Escrow Materials "); which Escrow Materials shall be the Confidential Information of Diablo. Such Escrow Agreement shall be executed within thirty (30) days after the Effective Date and shall authorize the release of the Escrow Materials to Netlist solely for use in accordance with the terms and conditions of this Agreement in the event of a Release Condition as described and to be negotiated in the Escrow Agreement.

13. **Miscellaneous.**

(a) **Amendments and Waivers** . Any term of this Agreement may be amended or waived only with the prior written consent of the parties or their respective successors and assigns, in a document signed in ink by authorized representatives of the parties. Any amendment or waiver made in accordance with this Section shall be binding upon the parties and their respective successors and assigns.

(b) **Successors and Assigns** . The rights and obligations of each party under this Agreement shall not be assignable without the prior written consent of the other party and any attempt to assign them without that consent will be void. Notwithstanding the foregoing, either party may assign, upon written notice to the other, both the rights and obligations of this Agreement to the surviving corporation in any merger or consolidation to which it is a party or to any person who acquires all or substantially all of its capital stock or assets. Any purported transfer, assignment or delegation in, violation of the foregoing will be null and void and of no force or effect.

(c) **Governing Law; Attorney Fees and Costs** . This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of California, without giving effect to principles of conflicts of law.

(d) **Titles and Subtitles** . The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

(e) **Notices**. Any notice required or permitted by this Agreement shall be in writing and shall be deemed sufficient upon receipt, when delivered personally or by courier, overnight delivery service or confirmed facsimile, or forty-eight (48) hours after being deposited in the regular mail as certified or registered mail (airmail if sent internationally) with postage prepaid, if such notice is addressed to the party to be notified at such party's address or facsimile number as set forth below, or as subsequently modified by written notice.

(f) **Severability**. If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith, in order to maintain the economic position enjoyed by each party as close as possible to that under the provision rendered unenforceable. In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (i) such provision shall be excluded from this Agreement, (ii) the balance of the Agreement shall be interpreted as if such provision were so excluded and (iii) the balance of the Agreement shall be enforceable in accordance with its terms.

(g) **Entire Agreement**. This Agreement, including the Exhibits attached hereto, constitutes the entire agreement between such parties pertaining to the subject matter hereof, and merges all prior negotiations and drafts of the parties with regard to the transactions contemplated herein. Any and all other written or oral agreements existing between the parties hereto regarding such transactions are expressly canceled.

(h) **Independent Contractors**. The relationship of Diablo and Netlist established by this Agreement is that of independent contractors, and nothing contained in this Agreement will be construed (i) to give either party the power to direct and control the day-to-day activities of the other, (ii) to constitute the parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking, or (iii) to allow either party to create or assume any obligation on behalf of the other for any purpose whatsoever.

(i) **Force Majeure**. If the performance of this Agreement or any obligations hereunder is prevented, restricted or interfered with by reason of fire or other casualty or accident, strikes or labor disputes, war or other violence, any law, order, proclamation, regulation, ordinance, demand or requirement of any government agency, or any other act or condition beyond the reasonable control of the parties hereto, the party so affected upon giving prompt notice to the other parties shall be excused from such performance during such prevention, restriction or interference.

(j) **Export Control**. Netlist acknowledges and agrees that the Products purchased under this Agreement may be subject to restrictions and controls imposed by the United States Export Administration Act and the regulations thereunder. Netlist warrants that it will not export or re-export any products purchased, or SoftWare licensed, under this Agreement into any country in violation of such controls or any other laws, rules or regulations of any country, state or jurisdiction.

(k) **Counterparts**. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the Effective Date.

Netlist, Inc.

By: */s/ James P. Perrott*
Name: James P. Perrott
Title: SVP Sales & Marketing

Diablo Technologies, Inc.

By: */s/ Ricardo Badalone*
Name: Ricardo Badalone
Title: C.E.O.

[SIGNATURE PAGE TO
DEVELOPMENT AND SUPPLY AGREEMENT]

Exhibit A

Statement of Work See

SOW Document Number MKT-SOW-VTB-001

Exhibit B

Development Schedule

See SOW Document Number MKT-SOW-VTB-001

Exhibit C

Production Price Schedule

Netlist Chipset	2009	2010	2011	2012
[***]	US$ **[***]**	US$ **[***]**	US$ **[***]**	US$ **[***]**
[***]	US$ **[***]**	US$ **[***]**	US$ **[***]**	US$ **[***]**

Exhibit D

NRE Payment Schedule

Milestone	Payment ($)
[***]	$ **[***]**
[***]	$ **[***]**
[***]	$ **[***]**
[***]	$ **[***]**
Total NRE Payment:	$ **[***]**

CERTAIN INFORMATION (INDICATED BY "[***]") IN THIS EXHIBIT HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION. CONFIDENTIAL TREATMENT HAS BEEN REQUESTED WITH RESPECT TO THE OMITTED PORTIONS.

Settlement Agreement and Amendment to
Development And Supply Agreement

This Settlement Agreement and Amendment to the Development and Supply Agreement (" Amendment ") is made this 12 th day of January 2010 (" Amendment Effective Date ") between Diablo Technologies, Inc., a Canadian corporation having a principal place of business at 290 St. Joseph, Suite 200, Gatineau, Quebec J8Y 3Y3 (" Diablo ") and Netlist, Inc., a Delaware corporation having a principal place of business at 51 Discovery, Irvine, CA 92618 (" Netlist ").

RECITALS

Whereas, Netlist entered into a Development and Supply Agreement with Diablo to have certain products designed and manufactured by Diablo on September 10, 2008 (" Agreement "); and

Whereas, in the course of performing this Agreement, the parties have had disputes regarding the obligations and performance under this Agreement, including the breaches thereof;

WHEREAS, the parties have agreed to compromise, settle and resolve all past disputes, liabilities and obligations between them concerning or regarding the alleged breaches of the Agreement;

WHEREAS, the parties agree that the settlement and amendments embodied in this Agreement are made in good faith and shall not constitute an admission of liability or other admission against interest by any party hereto.

Now, therefore, in consideration of the promises and the mutual agreements hereinafter set forth, and intending to be legally bound, the parties hereto agree as follows:

AGREEMENTS

1. Purchase and Payment Obligations . Within five (5) business days of the Amendment Effective Date, Netlist shall:

(a) Receive a certificate of conformance from Diablo stating **[***]** as per the **[***]** depicted in **[***]** between Diablo and Netlist. Make a payment of US$ **[***]** to Diablo as the NRE Payment milestone " **[***]** " agreed in Exhibit D;

(b) Issue a purchase order to Diablo for **[***]** aligned with previously provided forecasts, which shall be accompanied by an **[***]** ;

(c) Provide to Diablo a delivery schedule for all devices between now and September 2010;

(d) Agree to provide Diablo a budget of $ **[***]** US dollars for each Netlist Chipset qualification in each Netlist density configuration added to the plan of record. Diablo shall use these funds solely to 1) purchase DIMMs from Netlist and 2) to purchase Netlist customer target systems for in-system validation of the Netlist Chipset.

(e) Agree to jointly initiate a cost benefit analysis for development of a **[***]** . Should this analysis conclude a development is necessary, Netlist shall initiate said development.

(f) Receive from Diablo the items requested below or a plan including a schedule to address the items requested below

1. Return of all **[***]** as previously requested (Diablo may request to change the quantity to allow for **[***]**)
2. **[***]** for both RD and ID devices (**[***]**). In addition, Netlist requests specific test results and engineering assessment for the following parameters: **[***]**
3. **[***]** for **[***]**
4. Progress report on **[***]** and Reliability **[***]**
5. Errata List of **[***]** for both RD and ID
6. Review and finalize the Phase Definition and phase exit criteria (**[***]**) including **[***]** phase plan and schedule as well as Production readiness status
7. Latest encrypted **[***]** for both RD and ID I/O
8. On an ongoing basis Diablo will provide any and all available information and data which is essential for Netlist's qualification efforts for Diablo Chipsets.

2. Release and Covenant Not to Sue .

(i) Diablo hereby fully releases and forever discharges Netlist, and its respective past, present and future officers, directors, representatives, employees, agents, principals, shareholders, attorneys, assigns, predecessors, successors, affiliates, and subsidiaries, from any and all claims, causes of action, debts, liabilities, rights to damages, collection, reimbursement, costs, expenses, attorneys' fees, and rights to injunctive relief, known or unknown, relating to any alleged breach of this Agreement, by such party prior to the Amendment Effective Date, including but not limited to any allegation by Diablo that Netlist made improper use of any Diablo Confidential Information or any other technology encompassed within Diablo's Intellectual Property Rights.

(ii) Diablo further covenants and agrees that it will not assert any claim or take any action against Netlist or any customer or business partner of Netlist, or claim that Netlist is not entitled to ship products using chips procured from other suppliers, now or in the future, based on Netlist's marketing or sale of products that utilize chips procured from companies other than Diablo, only with respect to the followings claims: 1) any claim that Netlist or any customer or business partner of Netlist is using any Confidential Information of Diablo, provided that Netlist and Netlist's customers and business partners undertake reasonable precautions to maintain the confidentiality of Diablo's Confidential Information; 2) any claim for patent infringement based on an invention arising as a consequence of work performed under this Agreement; or 3) that Netlist or its customers or business partners are otherwise using technology developed by Diablo as a consequence of worked performed under this Agreement. Diablo hereby expressly waives and releases any rights it may have at law or in equity to take any legal action or other action as described in this paragraph against Netlist, its customers or its business partners. The term "business partner" as used in this paragraph refers to third parties working with Netlist in connection with Netlist products, and such third parties are only entitled to the protections of this paragraph to the extent of their work with Netlist.

(iii) Diablo acknowledges that there is a risk that subsequent to the execution of this Amendment, it may discover, incur or suffer facts and/or claims which were unknown or unanticipated at the time this Amendment is executed. Diablo acknowledges and agrees that by reason of the releases and covenants contained herein, it is assuming the risk of such unknown facts and/or claims and agrees that this Amendment applies thereto. In connection therewith, Diablo expressly waives the benefits of Section 1542 of the California Civil Code, which section provides as follows, and any laws of similar affect applicable in any jurisdiction:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

(iv) Release and Covenant Not to Sue by Netlist

Netlist hereby fully releases, forever discharges and covenants not to sue Diablo and its respective past, present and future officers, directors, representatives, employees, agents, principals, shareholders, attorneys, assigns, predecessors, successors, affiliates, and subsidiaries, from any and all claims, causes of action, debts, liabilities, rights to damages, collection, reimbursement, costs, expenses, attorneys' fees, and rights to injunctive relief, known or unknown, relating to any alleged breach of this Agreement by such party prior to the Amendment Effective Date.

(v) The foregoing Releases and Covenants Not to Sue are not intended to and do not alter or affect the obligations of either Netlist or Diablo with respect to the Agreement or this Amendment, including but not limited to Diablo's obligations to provide an escrow deposit or to indemnify Netlist pursuant to the terms of the Agreement.

AMENDMENTS

9. Market Share Commitment . The following Section 3(e) is hereby amended in its entirety to read as follows:

"3(e) Market Share Commitment . **[***]**

"Netlist Market Share": shall mean the number of Netlist Chipsets shipped, invoiced or sold, as part of a qualified memory module using Diablo supplied Netlist Chipsets or separately as individual components, by Netlist to any third party.

The Market Share Commitment shall **[***]** indicated below. Netlist shall cooperate and disclose the status of and any feedback (whether positive or negative) to Diablo in connection with Netlists's qualification with any customers of the Netlist Chipset.

Netlist agrees not to renegotiate the purchase price of the Products to achieve or maintain this percentage:

(i) **[***]** of Netlist Production: **[***]** ;
Between **[***]** months of Netlist Production: **[***]** ;
After **[***]** month of Netlist Production: **[***]** .

(ii) In addition, all quantities of Netlist Chipsets set forth in any Purchase Order issued by Netlist to Diablo and confirmed by Diablo in accordance with this Agreement, but which Diablo is completely unable to fulfill, shall be deemed to have been allocated to Diablo.

(iii) Audit . Netlist will maintain complete and accurate records for not less than three (3) years after this Agreement expires or is terminated. Diablo may audit Netlist's records in accordance with this Section, twice per year, at its expense; provided that a nationally recognized accounting firm retained by Diablo (" Auditor ") will pursuant to a confidentiality agreement have access to such records solely for the purposes of confirming that Netlist has fulfilled its obligations under Section (i) above.

(iv) If qualification requirements change in the 12 months following signing this Amendment, Netlist will give Diablo notice as soon as possible to allow Diablo to propose a remedy. During this period, if the product does not meet the customer requirements, Netlist shall make commercially reasonable efforts to maintain Diablo's market share by increasing shipments to other customers.

9.1 Guaranteed Minimum Allocation

Notwithstanding section 3(e), Netlist shall allocate to Diablo a minimum of **[***]** % of the Netlist total annual consumption of **[***]** provided however such allocation shall be limited to a maximum of 100% of the Netlist Market Share.

10. Production Incentive .

- **[***]**

[***]

11. Term . Section 11(a) is hereby amended in its entirety to read as follows:

"(a) **Term** . This Agreement shall become effective on the Effective Date of this Agreement and shall continue for a period of three (3) years (" Initial Term "). This Agreement shall be extended automatically at the end of the initial term or subsequent terms for an additional one (1) year term, unless terminated in accordance with this Agreement or unless either party notifies the other party in writing of its intent not to renew at least ninety (90) days prior to the expiration of the Initial Term or subsequent term."

16. Section II (e) shall be amended to include:

The obligations of Diablo under Section 2 of this Amendment will survive, in accordance with the terms hereof, the term and termination of this Agreement, and will remain in full force and effect regardless of the cause of any termination and be binding on any successors or assigns.

GENERAL

17. Except as set forth herein, all terms and conditions of the Agreement shall remain in full force and effect. Unless otherwise defined in this Amendment, capitalized terms used in this Amendment shall have the same meaning as set forth in the Agreement. This Amendment, together with the Agreement, constitute the entire agreement of the parties with respect to the subject matter hereof, and supersedes any other agreements, promises, representations or discussions, written or oral, concerning such subject matter.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment effective as of the Amendment Effective Date.

Netlist, Inc.

By: */s/ Chun K. Hong*
Name: Chun K. Hong
Title: President, CEO

Diablo Technologies, Inc.

By: */s/ Richard Badalone*
Name: Richard Badalone
Title: President, CEO

EXHIBIT 31.1

CERTIFICATION PURSUANT TO RULE 13A-14(A) AND RULE 15D-14(A) OF THE SECURITIES EXCHANGE ACT AS ADOPTED PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, Chun K. Hong, certify that:

1. I have reviewed this quarterly report on Form 10-Q of Netlist, Inc., a Delaware corporation (the "Registrant");

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the Registrant as of, and for, the periods presented in this report;

4. The Registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the Registrant and we have:

a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the Registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles:

c) evaluated the effectiveness of the Registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) disclosed in this report any change in the Registrant's internal control over financial reporting that occurred during the Registrant's most recent fiscal quarter (the Registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the Registrant's internal control over financial reporting; and

5. The Registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the Registrant's auditors and the audit committee of the Registrant's board of directors (or persons performing the equivalent functions):

a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the Registrant's ability to record, process, summarize and report financial information; and

b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Registrant's internal control over financial reporting.

November 16, 2010

/s/ Chun K. Hong
Chun K. Hong
President, Chief Executive Officer and Chairman of the Board
(Principal Executive Officer)

EXHIBIT 31.2

CERTIFICATION PURSUANT TO RULE 13A-14(A) AND RULE 15D-14(A) OF THE SECURITIES EXCHANGE ACT AS ADOPTED PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, Gail M. Sasaki, certify that:

1. I have reviewed this quarterly report on Form 10-Q of Netlist, Inc., a Delaware corporation (the "Registrant");

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the Registrant as of, and for, the periods presented in this report;

4. The Registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f) for the Registrant and we have:

a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the Registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles:

c) evaluated the effectiveness of the Registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) disclosed in this report any change in the Registrant's internal control over financial reporting that occurred during the Registrant's most recent fiscal quarter (the Registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the Registrant's internal control over financial reporting; and

5. The Registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the Registrant's auditors and the audit committee of the Registrant's board of directors (or persons performing the equivalent functions):

a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the Registrant's ability to record, process, summarize and report financial information; and

b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Registrant's internal control over financial reporting.

November 16, 2010

/s/ Gail M. Sasaki
Gail M. Sasaki
Vice President and Chief Financial Officer
(Principal Financial Officer)

Exhibit 32

CERTIFICATIONS PURSUANT TO 18 U.S.C. SECTION 1350
AS ADOPTED PURSUANT TO SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002

In connection with the Quarterly Report on Form 10-Q of Netlist, Inc., a Delaware corporation ("Netlist") for the quarter ended October 2, 2010 (the "Report"), Chun K. Hong, president, chief executive officer and chairman of the board of Netlist, and Gail M. Sasaki, vice president and chief financial officer of Netlist, each hereby certifies, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to his or her knowledge:

(1) the Report fully complies with the requirements of Section 13(a) of the Securities Exchange Act of 1934; and

(2) the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of Netlist, Inc.

November 16, 2010

/s/ Chun K. Hong
Chun K. Hong
President, Chief Executive Officer and Chairman of the Board
(Principal Executive Officer)

November 16, 2010

/s/ Gail M. Sasaki
Gail M. Sasaki
Vice President and Chief Financial Officer
(Principal Financial Officer)