

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

FORM 10-Q/A

Amendment No. 1

(Mark One)

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

For the quarterly period ended April 3, 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

State or other jurisdiction of incorporation or organization

95-4812784

(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

Smaller reporting company

(Do not check if a 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
25,266,327 shares outstanding at April 30, 2010

EXPLANATORY NOTE

The registrant has prepared this Amendment No. 1 to its Quarterly Report on Form 10-Q for the quarterly period ended April 3, 2010 (the "Form 10-Q") for the purpose of re-filing Exhibits 10.3 - 10.11 to the Form 10-Q. No other changes have been made to the Form 10-Q. This Amendment No. 1 to the Form 10-Q speaks as of the original filing date and has not been updated to reflect events occurring after the original filing date.

PART II. OTHER INFORMATION

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 March 24, 2010, by and between Silicon Valley Bank and Netlist, Inc., a Delaware Corporation.
10.2(2)	Form of Restricted Stock Award issued pursuant to the 2006 Equity Incentive Plan of Netlist, Inc.
10.3(3)*	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(3)*	Amendment #1 to the Production Register Agreement, dated May 22, 2009, by and between Netlist, Inc. and Toshiba.
10.5(3)*	Amendment #1 to the Production Register Agreement, dated January 28, 2010, by and between Netlist, Inc. and Toshiba.
10.6(3)*	Amendment #2 to the Production Register Agreement, dated March 10, 2010, by and between Netlist, Inc. and Toshiba.
10.7(3)*	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(3)*	Amendment #1 to the Production ID Agreement, dated January 28, 2010, by and between Netlist, Inc. and Toshiba.
10.9(3)*	Amendment #2 to the Production ID Agreement, dated March 10, 2010, by and between Netlist, Inc. and Toshiba.
10.10(3)*	Development and Supply Agreement, dated as of September 10, 2008, by and between Netlist, Inc. and Diablo Technologies, Inc. ("Diablo").
10.11(3)*	Settlement Agreement and Amendment to Development and Supply Agreement, dated January 12, 2010, between Netlist, Inc. and Diablo.
31.1(3)	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(3)	Certification of Chief Financial Officer pursuant to Rule 13a-14(a) and Rule 15d-14(a) of the Securities Exchange Act, as Amended.
32(2)	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) Incorporated by reference to the corresponding exhibit number of the quarterly report on Form 10-Q of the registrant filed with the Securities and Exchange Commission on May 17, 2010.
 - (3) Filed herewith.

* 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: April 1, 2011

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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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

<u>Event</u>	<u>Target Date/Completed</u>
Development PO released & Design Initiation	[**]
Completion of Feasibility Study	[**]
Design Decision	[**]
Package selection finalized	[**]
Early netlist for “pipecleaning”	[**]
Final netlist (functionally correct)	[**]
Tapeout — Second Signoff GDSII transfer)	[**]
Delivery of Prototypes	[**]
System compliance phase — start	[**]
System compliance phase — complete	[**]
1st Risk Production shipment	[**]

Production turnaround time: 16 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	1M pieces: US\$ [***] * [***]
Next	2M pieces: US\$ [***]
Next	2M pieces: US\$ [***]
After first	5M 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 be charged more than 50% of the All-Layer Re-spin Charges.

10. NRE Payment Schedule

Design Decision:	US\$ [***]
Tape-out:	US\$ [***]
Delivery of Prototypes:	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 event that Customer has not paid the total owed sum of US\$ [***] through the amortized sales process within 15 months of the date of Delivery of Prototypes, 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 Delivery of Prototypes 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

1-100 pieces:	**** unit price of US\$ ****
101-500 pieces:	**** unit price of US\$ ****
501- 1000 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.

/s/ Takeshi Iwamoto

Signature

Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit,
System LSI

Printed Name and Title

8/22/08

Date

NetList Inc.

/s/ James P. Perrott

Signature

James P. 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 four (4) 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:

<u>Time</u>	<u>Cancellation Fee</u>
[***]	[***] % 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.

<u>Days from scheduled shipment</u>	<u>Cancellation Fees</u>
0 - 30 days	[***]
31- 60 days	[***]
61- 90 days	[***]
91-120 days	[***]

11.2 Re-schedule requests must be made in writing sixty (60) days before the original delivery date. Any order may be re-scheduled only once. Requests to delay shipments may not exceed ninety (90) 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.

<u>Days before Shipment</u>	<u>Terms</u>
Within next 60 days	[***]
Within 60-120 days	[***]
Over 120 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 processes and all patent, trade secret, and other intellectual property rights therein, and any associated technology and know-how. For the purposes of this Agreement, "processes" shall mean TAEC's manufacturing processes, including, but not limited to the process control monitor contained in the Mask Work. 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.
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- 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.
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- 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, NEGLIGENCE, 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.
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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.
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- 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;
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- 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

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
Development PO Released	[***]
Preliminary Feasibility Study	[***]
Design Decision	[***]
Design Initiation	[***]
Package Selection Finalized	[***]
Early Netlist for Pipecleaning	[***]
Final Netlist (functionally correct)	[***]
Tape Out — Second Sign off (GDSII transfer)	[***]
Delivery of prototypes	[***]
System compliance phase - start	[***]
System compliance phase - complete	[***]
1st Risk Production shipment	[***]

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.

NetList Inc.

/s/ Takeshi Iwamoto

Signature

/s/ James P. Perrott

Signature

Takeshi Iwamoto VP, Customer SoC &
Foundry Business Unit

Printed Name and Title

James P. Perrott, SVP Sales & Marketing

Printed Name and Title

5-22-09

Date

5-22-09

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.**

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

<u>Event</u>	<u>Target Date/Completed</u>
Development PO Released	[***]
Preliminary Feasibility Study	[***]
Design Decision	[***]
Design Initiation	[***]
Package Selection Finalized	[***]
Early RTL for Pipecleaning	[***]
Final RTL (functionally correct)	[***]
Tapeout — Second Signoff (GDSII transfer)	[***]
Delivery of Prototypes	TBD
System compliance phase - start	TBD
System compliance phase - complete	TBD
1st Risk Production shipment	TBD

Production turnaround time: 16 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:

<u>Package</u>	<u>Ball Pitch</u>	<u>Body Size</u>	<u>Substrate Layers</u>	<u>Die Size</u>
[***]	[***]	[***]	[***]	[***]

4. New Price

The parties agree to delete the contents of Section 8 of the Agreement, Price, and replace it with the following:

First	1M pieces:	US\$ [***]	* [***]
Next	2M pieces:	US\$ [***]	
Next	2M pieces:	US\$ [***]	
After first	5M 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 (2X 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 Tapeout.
2. US\$ [***] upon Delivery of Prototypes 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 Customer acknowledges that it is solely responsible for performing [***] to screen [***] on all Products, and Customer agrees to perform such [***] prior to [***] to its customers.

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

/s/ Gail Itow

Signature

Signature

Takeshi Iwamoto VP, Customer SoC &
Foundry Business Unit

Gail Itow, CFO
Printed Name and Title

Printed Name and Title

1-28-10

Date

1-28-10

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.**

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

<u>Event</u>	<u>Target Date/Completed</u>
Development PO Released	***
Preliminary Feasibility Study	***
Design Decision	***
Design Initiation	***
Package Selection Finalized	***
Early RTL for Pipecleaning	***
Final RTL (functionally correct)	***
Tapeout — Second Signoff (GDSII transfer)	***
Delivery of Prototypes	TBD
System compliance phase — start	TBD
System compliance phase — complete	TBD
1 st Risk Production shipment	TBD

Production turnaround time: 16 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 be 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 External IP Defects/Bugs

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 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 Delivery of Prototypes 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

/s/ Gail Itow

Signature

Signature

Takeshi Iwamoto VP, Customer SoC & Foundry Business Unit

Gail Itow, CFO

Printed Name and Title

Printed Name and Title

3/5/10

Date

3/10/10

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.**

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
Development PO released & Design Initiation	[**]
Completion of Feasibility Study	[**]
Design Decision	[**]
Package selection finalized	[**]
Early netlist for “pipecleaning”	[**]
Final netlist (functionally correct)	[**]
Tapeout — Second Signoff GDSII transfer)	[**]
Delivery of Prototypes	[**]
System compliance phase - start	[**]
System compliance phase - complete	[**]
1st Risk Production shipment	[**]

Production turnaround time: 16 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	10M pieces: US\$ [***]
Next	20M pieces: US\$ [***]
Next	20M pieces: US\$ [***]
After first	50M 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

Decision:	US\$[***]
Tape-out:	US\$ [***]
Delivery of Prototypes:	US\$ [***]

- [***] Prototypes are included in NRE.
- A prototype lot charge of \$ [***] is included in the Delivery of Prototypes 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

1-100 pieces:	[***] unit price of US\$[***]
101-500 pieces:	[***] unit price of US\$ [***]
501- 1000 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 a maximum of [***] % of the total NRE if Customer submits more than [***] 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.
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- 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 four (4) 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:

<u>Time</u>	<u>Cancellation Fee</u>
[***]	[***] % 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.

<u>Days from scheduled shipment</u>	<u>Cancellation Fees</u>
0 - 30 days	[***]
31- 60 days	[***]
61- 90 days	[***]
91-120 days	[***]

11.2 Re-schedule requests must be made in writing sixty (60) days before the original delivery date. Any order may be re-scheduled only once. Requests to delay shipments may not exceed ninety (90) 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.

<u>Days before Shipment</u>	<u>Terms</u>
Within next 60 days	[***]
Within 60-120 days	[***]
Over 120 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 processes and all patent, trade secret, and other intellectual property rights therein, and any associated technology and know-how. For the purposes of this Agreement, "processes" shall mean TAEC's manufacturing processes, including, but not limited to the process control monitor contained in the Mask Work. 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.
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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, NEGLIGENCE, 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.**
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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.
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- 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
Development PO Released	[***]
Preliminary Feasibility Study	[***]
Design Decision	[***]
Design Initiation	[***]
Package Selection Finalized	[***]
Early Database for Pipecleaning	[***]
Final Database (functionally correct)	[***]
Tapeout - Second Signoff (GDSII transfer)	[***]
Delivery of Prototypes	TBD
System compliance phase - start	TBD
System compliance phase - complete	TBD
1 st Risk Production shipment	TBD

Production turnaround time: 16 working weeks.
Schedule is provisional.

Toshiba Confidential

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	10M pieces:	US\$ ***
Next	20M pieces:	US\$ ***
Next	20M pieces:	US\$ ***
After first	50M 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 (2X 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 Tapeout.
2. US\$ *** upon Delivery of Prototypes 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 Customer acknowledges that it is solely responsible for performing [***] to screen [***] on all Products, and Customer agrees to perform such [***] prior to [***] to its customers.

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



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
Development PO Released	[**]
Preliminary Feasibility Study	[**]
Design Decision	[**]
Design Initiation	[**]
Package Selection Finalized	[**]
Early RTL for Pipecleaning	[**]
Final RTL (functionally correct)	[**]
Tapeout - Second Signoff (GDSII transfer)	[**]
Delivery of Prototypes	TBD
System compliance phase - start	TBD
System compliance phase - complete	TBD
1 st Risk Production shipment	TBD

Production turnaround time: 16 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:

Toshiba Confidential

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 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 ID design will be US\$ [***] , or thirty-two (32) person-weeks. 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 Delivery of Prototypes 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 full force and effect per their terms

Toshiba American Electronic Components, Inc.

Netlist Inc,

/s/ Takeshi Iwamoto

/s/ Gail Itow

Signature

Signature

Takeshi Iwamoto VP, Customer SoC Foundry Business Unit

Gail Itow, CFO

Printed name and title

Printed name and title

3/10/10

3/5/10

Date

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 jointly participate in the [***] 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 non-exclusive, [***] license under its Intellectual Property Rights to use the Netlist Technology 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 the Diablo Standard Register.

(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.** Netlist shall also make the following commitment to Diablo in terms of percentage of Netlist Market Share for the Netlist Chipsets. Netlist Market Share calculation will exclude shipments for use in [***] and shall not be capped at the percentages indicated below.

(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 be 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 Market Share guarantees 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 (IBM, RP, or Dell) 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 UNDER 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

<u>Milestone</u>	<u>Payment (\$)</u>
Specification sign-off of the Product	\$ [***]
Tape-out of Product	\$ [***]
Engineering sample shipment of Product	\$ [***]
Production status of Product	\$ [***]
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 12th 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:

A G R E E M E N T S

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 shall allocate to Diablo the following percentages of Netlist Market Share for the Netlist Chipsets unless Netlist Product using Netlist Chipsets supplied by Diablo do not successfully complete required third party qualification. Netlist shall not bias third party qualifications against Netlist Product using Diablo supplied Netlist Chipsets.

“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 not be capped at the minimum percentages 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) 1st 6 Months of Netlist Production: [***] ; Between 6th and 18th months of Netlist Production: [***] ; After 18 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** .

Netlist shall place a [***] pre-paid Purchase Order for [***] chipsets [***] at a [***] price of [***] when [***] .

[***] is defined as Netlist [***] and (a) unless waived by Netlist, the [***] has [***] and (b) Netlist has received [***] .

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

CERTIFICATION

I, Chun K. Hong, certify that:

1. I have reviewed this Amendment No.1 to Quarterly Report on Form 10-Q of Netlist, Inc.; and
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.

Date: April 1, 2011

/s/ Chun K. Hong

Chun K. Hong

President, Chief Executive Officer and Chairman of the Board

CERTIFICATION

I, Gail M. Sasaki, certify that:

1. I have reviewed this Amendment No.1 to Quarterly Report on Form 10-Q of Netlist, Inc.; and
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.

Date: April 1, 2011

/s/ Gail M. Sasaki

Gail M. Sasaki
Vice President and Chief Financial Officer
