

Exhibit 2

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NETLIST INC.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO.,
LTD.,

Defendant.

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

**ORDER RE: MOTIONS IN LIMINE
(ECF NOS. 200, 202-04, 211) AND
PROCEEDINGS AT FINAL
PRETRIAL CONFERENCE**

1 Plaintiff Netlist Inc. moves in limine: (1) to exclude argument and evidence of
2 Netlist’s intent to terminate the Joint Development and Licensing Agreement
3 (“JDLA”); (2) to exclude argument and evidence of Netlist’s creditworthiness and
4 payment history with Defendant Samsung Electronics Co., Ltd.; (3) to exclude
5 argument and evidence of impracticability or impossibility due to industry shortages
6 and other market conditions; (4) to exclude argument and evidence of sales practices
7 between the parties before and after the effective period of the JDLA; and (5) to exclude
8 the testimony of Samsung’s industry practices expert, Joseph McAlexander. (Pl.’s
9 MILs, ECF No. 211.) Samsung opposes the motions. (Opp’n to Pl.’s MILs, ECF No.
10 221.)

11 Samsung moves in limine: (1) to exclude the testimony of Plaintiff’s damages
12 expert, Dr. Michael Akemann, (Def.’s MIL No. 1, ECF No. 202);¹ and (2) to exclude
13 evidence and argument on consequential damages, (Def’s MIL No. 2, ECF No. 203.)²
14 Netlist opposes the motions. (Opp’n to Def.’s MIL No. 1, ECF No. 217; Opp’n to Def.’s
15 MIL No. 2, ECF No. 218.)

16 The parties’ pretrial filings presented a dispute over whether Samsung’s
17 affirmative defenses may proceed to trial. (*E.g.*, Proposed FPTCO 7–8, 16, ECF No.
18 225-1.) The Court ordered supplemental briefing on the issue. (Order Requiring
19 Briefing, ECF No. 227.) The parties submitted responses. (Pl.’s Br., ECF No. 234;
20 Def.’s Br., ECF No. 233.)

21 The Court heard argument on the motions and the affirmative defenses at the final
22 pretrial conference on November 15, 2021.

23 _____
24 ¹ Samsung filed an application to seal Akemann’s unredacted expert report, which
25 Netlist designated as confidential. (Appl., ECF No. 200.) For the compelling reasons
26 stated in Netlist’s response to the application, (LaMagna Decl., ECF No. 216), the
27 application is granted. Samsung shall file the expert report under seal pursuant to Local
28 Rule 79-5.2.2(c). In the interest of judicial economy, the Court has considered the
provisionally sealed expert report in deciding the motion.

² Samsung filed a third motion in limine, (ECF No. 204), which it subsequently
withdrew, (ECF No. 235).

1 **I. BACKGROUND**

2 This is a contract dispute between two sophisticated parties. On November 12,
3 2015, the parties entered the JDLA, which obliges Samsung to “supply NAND and
4 DRAM products to Netlist on Netlist’s request at a competitive price,” to pay Netlist \$8
5 million in nonrefundable, non-recurring engineering (“NRE”) fees less any withholding
6 taxes due or payable under the laws of Korea, and to “reasonably cooperate with Netlist
7 in any lawful efforts to claim a credit or refund or exemption with respect to any such
8 withholding taxes.”

9 After entering the JDLA, Samsung deducted \$1.32 million (16.5%) of the NRE
10 fees to pay to the Korean tax authority. The parties dispute whether Samsung reasonably
11 cooperated with Netlist in its efforts to seek a refund of the withheld amount from the
12 Korean tax authority. The tax authority ultimately determined that the NRE fees were
13 not subject to tax withholding. Beginning in 2017, Samsung declined to fulfill all of
14 Netlist’s forecasts, requests, and orders for NAND and DRAM products, putting some
15 on backlog and rejecting others. On May 27, 2020, Netlist sent a letter to Samsung
16 claiming Samsung materially breached the JDLA. On July 15, 2020, Netlist sent another
17 letter to Samsung terminating the JDLA.

18 Netlist alleged three claims: (1) breach of Samsung’s NAND and DRAM supply
19 obligation; (2) breach of Samsung’s obligations to (a) pay the NRE fees without
20 withholding taxes and (b) reasonably cooperate with Netlist’s efforts to recover the
21 withheld amount from the Korean tax authority; and (3) declaratory relief confirming
22 Netlist terminated the JDLA. The Court granted summary judgment in Netlist’s favor
23 on Claim 3, and partial summary judgment as to liability on Claims 1 and 2(a). (*See*
24 *generally* XMSJ Order, ECF No. 186.)

25 Samsung asserts four affirmative defenses: (1) acquiescence, (2) estoppel,
26 (3) waiver, and (4) failure to mitigate. (Proposed FPTCO 7; Def.’s Br. 1–4.)³

27 _____
28 ³ The Court deems any other affirmative defenses abandoned. (*See* Def.’s MCFL 7, ECF

1 **II. AFFIRMATIVE DEFENSES**

2 The parties dispute whether Samsung’s acquiescence, estoppel, and waiver
3 affirmative defenses may be presented at trial. (See Proposed FPTCO 7–8, 16; see also
4 Pl.’s Br. 14 n.6 (acknowledging that Samsung’s failure-to-mitigate defense may be
5 presented at trial).) Samsung did not assert these affirmative defenses in response to
6 Netlist’s motion for partial summary judgment as to liability on the breach claims or in
7 its own motion for summary judgment. (See PMSJ Opp’n, ECF No. 168.)⁴

8 There is no binding law from the Ninth Circuit as to whether an affirmative
9 defense timely asserted in an answer but omitted in a summary judgment opposition
10 may be allowed to proceed to trial. Nonetheless, the Court finds persuasive the analysis
11 of several courts that “allowing . . . defenses to lay dormant and then resurface at trial,
12 after liability has been determined, would undermine judicial economy, efficiency, and
13 fairness to the opposing party.” *Duarte Nursery, Inc. v. U.S. Army Corps of Eng’rs*, No.
14 2:13-cv-02095-KJM-DB, 2017 U.S. Dist. LEXIS 128182, at *8–9 (E.D. Cal. Aug. 10,
15 2017); accord, e.g., *Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1353 (Fed. Cir.
16 1999) (“[A]n affirmative defense must be raised in response to a summary judgment
17 motion, or it is waived.”); *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App’x 879,
18 884 (Fed. Cir. 2017) (citing *Diversey Lever* with approval for the proposition that “a
19 party cannot revisit theories that it raises but abandons at summary judgment” (quoting
20 *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994))); *Groves*
21 *v. Am. Family Mut. Ins. Co., S.I.*, 479 F. Supp. 3d 796, 802 (E.D. Wis. 2020) (“Summary
22 judgment is the ‘put up or shut up’ moment in a lawsuit. [Defendant h]aving failed to
23 raise such a defense or explain its inability to do so, [the defense] must be considered
24 waived.” (citation omitted)); *Kaffaga v. Steinbeck*, No. CV 14-08699 TJH (FFMx),

25 _____
26 No. 208 (asserting laches defense); Pl.’s MCFL 4, ECF No. 209 (indicating Samsung
27 identified other affirmative defenses at Local Rule 16-2 conference of counsel.)

28 ⁴ Samsung asserted waiver as a defense to the declaratory judgment claim only. (PMSJ
Opp’n 30–31; DMSJ 32–33.)

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