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9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **OAKLAND DIVISION**

13 IN RE STATIC RANDOM ACCESS  
MEMORY (SRAM) ANTITRUST  
14 LITIGATION

Case No. 4:07-md-1819 CW  
MDL No. 1819

15 **NOTICE OF MOTION AND MOTION FOR**  
**PRELIMINARY APPROVAL OF**  
**SETTLEMENT (CYPRESS)**

16 This Document Relates to:  
17 ALL INDIRECT PURCHASER ACTIONS

Hearing Date: March 10, 2011  
Time: 2:00 p.m.  
Courtroom: 2, 4<sup>th</sup> Floor  
18 Judge: Hon. Claudia Wilken

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**MEMORANDUM OF LAW**

**I. INTRODUCTION**

Plaintiffs have, on behalf of the class of indirect purchasers, entered into a settlement agreement (“Settlement”) with the last remaining defendant in their case, Cypress. In return for a release of the class members’ claims, Cypress has agreed to pay \$1,000,000. Together with settlements with the other seven sets of defendants—six of which the Court granted final approval and final dismissals with prejudice in October 2010 (*see* Docket Entries (“DE”) 1141, 1143-1148) and one (Plaintiffs’ settlement with the Samsung defendants) which is currently before the Court for preliminary approval—the combined settlements to date with Cypress and the other defendants (collectively the “Settling Defendants”) total \$41,322,000.<sup>2</sup>

The Settlement, which represents a significant recovery for the class, was achieved through extensive, arm’s-length negotiations, with the assistance of Court-appointed mediator Hon. Daniel Weinstein (Ret.). The negotiations took place only after the close of discovery, and following rulings on summary judgment, class certification, decertification, and a motion to dismiss for lack of subject matter jurisdiction pursuant to the Foreign Trade Antitrust Improvements Act (“FTAIA”). The Settlement also occurred during the pendency of a motion to decertify 15 of the state indirect purchaser classes, and was reached just a few weeks before the commencement of trial on February 7, 2011. The settlement negotiations were conducted by Plaintiffs’ counsel who are sufficiently experienced in similar litigation such that they can accurately assess whether the Settlement is indeed fair and reasonable.

Through this motion, Plaintiffs seek preliminary approval of the Settlement. At this time, the Court is not being asked to determine whether the Settlement is fair, reasonable or adequate. Rather, the question is simply whether the Settlement is sufficiently within the range of possible approval to

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<sup>2</sup> In addition to Cypress and the Samsung defendants (Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., and Samsung Electronics America, Inc.), the Settling Defendants include Etron Technology, Inc. and Etron Technology America, Inc.; Hynix Semiconductor Inc. and Hynix Semiconductor America Inc.; Micron Technology, Inc. and Micron Semiconductor Products, Inc.; NEC Electronics Corporation and NEC Electronics America, Inc.; Renesas Technology Corp., Renesas Technology America, Inc., Hitachi Ltd., Hitachi Semiconductor (America), Inc., Mitsubishi Electric Corporation, and Mitsubishi Electric & Electronics USA, Inc.; Toshiba Corporation and Toshiba America Electronic Components, Inc.

1 justify future publication of notice of the Settlements to class members and future scheduling of a  
 2 final approval hearing.<sup>3</sup> See *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980)  
 3 (overruled on different grounds in *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998)); accord *In*  
 4 *re M.L. Stern Overtime Litig.*, No. 07-CV-0118-BTM (JMA), 2009 U.S. Dist. LEXIS 31650, at \*\*9-  
 5 10 (S.D. Cal. Apr. 13, 2009) (citing *Armstrong*); see also *Manual for Complex Litigation (Fourth)*  
 6 § 13.14 (“First, the judge reviews the proposal preliminarily to determine whether it is sufficient to  
 7 warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.”).  
 8 The Court should grant preliminary approval unless the Settlement contains “obvious deficiencies”  
 9 which raise serious doubts about its fairness. See *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH),  
 10 1999 U.S. Dist. LEXIS 21963, at \*\*29-30 (D.D.C. Nov. 23, 1999) (quoting *Manual for Complex*  
 11 *Litigation (Third)* § 30.41); see also *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080  
 12 (N.D. Cal. 2007) (“[t]he court may find that the settlement proposal contains some merit, is within  
 13 the range of reasonableness required for a settlement offer, or is presumptively valid.”) (citing 2  
 14 *Newberg on Class Actions (“Newberg”)* § 11.25 (3d ed. 1992)).

15 Accordingly, Plaintiffs seek an order: (i) granting preliminary approval of the Settlement;  
 16 (ii) provisionally certifying the Settlement Class; and (iii) deferring publication of notice to class  
 17 members regarding the Settlement and final approval proceedings until a distribution plan and fee  
 18 application have been prepared, or such other time as counsel may request and the Court approves.

## 19 **II. STATEMENT OF ISSUES TO BE DECIDED**

20 1. Whether the Settlement is sufficiently within the range of possible approval to justify  
 21 future publication of the Settlement to class members and future scheduling of final approval  
 22 proceedings.

23 2. Whether the Settlement Class should be provisionally certified by the Court.

24 ///

25 ///

26 \_\_\_\_\_  
 27 <sup>3</sup> As discussed below, Plaintiffs seek to defer publication and mailing of notice of the Cypress and  
 28 Samsung Settlements until a plan of distribution and fee application have been prepared in order to  
 avoid, if possible, needless duplication of those costs. See *supra* § VI.

1 **III. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Allegations**

3 This action alleges that Defendants conspired to fix the price of SRAM. Plaintiffs are  
4 individuals and entities that indirectly purchased SRAM during the period November 1, 1996  
5 through December 31, 2006 (the “Class Period”). Defendants are domestic and foreign entities that  
6 manufactured, sold or distributed SRAM in the United States during the Class Period. *See* Fifth  
7 Consolidated Amended Class Action Complaint (“Compl.”) ¶¶ 110-128 (DE 1067). Plaintiffs allege  
8 injuries incurred as a result of Defendants’ conduct and seek: (i) injunctive relief pursuant to Section  
9 16 of the Clayton Act, 15 U.S.C. § 16, for Defendants’ violations of Section 1 of the Sherman Act,  
10 15 U.S.C. § 1; and (ii) damages or restitution under relevant state antitrust, consumer protection and  
11 unjust enrichment laws.

12 Cypress has denied and continues to deny each and all of the claims and contentions alleged  
13 in the Complaint, has asserted and continues to assert many defenses, and has expressly denied any  
14 legal liability arising out of the conduct alleged in the litigation. Nevertheless, Cypress has  
15 concluded that it is desirable that this action be settled in the manner and on the terms and conditions  
16 set forth in the Settlement Agreement in order to avoid the expense, inconvenience and burden of  
17 further protracted legal proceedings and the uncertainties inherent in any litigation.

18 **B. Discovery, Class Certification, and Summary Judgment Proceedings**

19 In Spring 2007, actions initially commenced throughout the nation were transferred and  
20 centralized before the District Court. *See* DE 1, 5, 34. Following the U.S. Department of Justice’s  
21 (“DOJ”) 2007 motion to intervene and to stay discovery, the Court entered an order staying all  
22 deposition and interrogatory discovery until June 1, 2008. DE 208. During this time, Plaintiffs  
23 served limited document discovery on Defendants, much of which Defendants objected to,  
24 necessitating motions to compel before the Court-appointed Special Master.<sup>4</sup> Plaintiffs, however,  
25 were allowed access to the millions of pages of documents that Defendants had produced to the

26 \_\_\_\_\_  
27 <sup>4</sup> *See, e.g.*, May 20, 2008 Order (DE 442) (ordering Defendants to produce non U.S. transactional  
28 SRAM sales data); Jan. 5, 2009 Order (DE 624) (ordering Defendants to produce, *inter alia*,  
documents from foreign defendants, documents prepared for investigative entities and additional  
foreign transactional sales data).

1 DOJ, as well as the millions of pages of documents previously produced in the DRAM antitrust  
2 litigation (*In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486 PJH  
3 (N.D. Cal.)) (the “DRAM Production”).

4 After the parties entered into a Stipulation and Protective Order concerning the disclosure of  
5 confidential and highly confidential information (granted on December 21, 2007), the Defendants  
6 began producing copies of documents and sales data in addition to the documents that Defendants  
7 initially turned over in connection with the DOJ’s SRAM investigation, as well as the DRAM  
8 Production. The Defendants’ productions took place on a rolling basis. To date, the Defendants  
9 have produced over *eleven million pages* from both domestic and foreign entities – in addition to the  
10 millions of pages in the DRAM Production. Many of the documents are in Korean, Japanese and  
11 Chinese, and have been translated in addition to being indexed and analyzed. *See* Scarpulla Decl.  
12 ¶ 2.

13 Counsel for Plaintiffs dedicated numerous lawyers and paralegals, and considerable other  
14 resources (including third-party vendors and technical staff) to the translation, analysis, and  
15 electronic coding of the documents produced by Defendants. During the document review  
16 (Defendants continued producing documents to Plaintiffs on a rolling basis until at least June 2009),  
17 teams of attorneys electronically reviewed the documents produced by Defendants and continually  
18 inputted and coded the relevant subjective and objective data from documents into a document  
19 review database. The database provided Plaintiffs’ counsel the ability to run sophisticated queries  
20 regarding the documents and significant issues in the case. *Id.* ¶¶ 3, 4.

21 In addition to reviewing the content of the produced documents, Plaintiffs’ counsel organized  
22 certain critical documents by subject-matter category, and documents relating to more than 50  
23 potential deponents that were compiled in preparation for depositions. These efforts were vital to  
24 Plaintiffs’ preparation of motions, damages analyses, and ability to timely respond to complex legal  
25 and factual issues that arose during this litigation. Their preparation and organization also enhanced  
26 Plaintiffs’ counsel’s negotiations with Cypress as Plaintiffs’ counsel were armed with a full  
27 understanding of the strengths and weaknesses of their case. *Id.* ¶ 5.

28

1 In addition to the review of documents produced in connection with the DOJ's SRAM  
2 investigation (and the DRAM Production), Plaintiffs propounded separate Document Requests and  
3 Interrogatories to all Defendants. *Id.* ¶ 6. Plaintiffs' counsel participated in numerous negotiations  
4 regarding discovery disputes and inadequacies in Defendants' document productions. *Id.* ¶ 7.  
5 Further, Plaintiffs served approximately 80 subpoenas on third parties, and frequently met and  
6 conferred with counsel for the third-parties regarding the production of this information. *Id.* ¶ 8.  
7 Through the diligent analysis of all of the documents and other evidence produced, Plaintiffs  
8 identified numerous current and former employees of the Defendants with knowledge of the relevant  
9 issues in this case and participated with the Direct Purchaser Plaintiffs in taking the depositions of  
10 approximately 35 witnesses. Plaintiffs also noticed and took the Rule 30(b)(6) depositions of  
11 Cypress and Samsung in February, 2010. *Id.* ¶ 9.

12 Plaintiffs' counsel has worked extensively with consultants and experts in preparation for  
13 trial and future motions. In particular, Plaintiffs' counsel spent considerable time working with  
14 expert antitrust economists Michael J. Harris, Ph.D. and Mark Dwyer, Ph.D., especially in  
15 connection with class certification and summary judgment proceedings. *Id.* ¶ 10.

16 On November 25, 2009, over Defendants' opposition, the Court certified the Litigation  
17 Classes. Class certification was by no means guaranteed, and Plaintiffs were successful in  
18 overcoming Defendants' petition to the Ninth Circuit, pursuant to Fed. R. Civ. P. 23(f), to review the  
19 Court's class certification order. Since then, the parties completed merits discovery and engaged in  
20 and completed expert discovery—including the exchange of several expert merits reports regarding,  
21 *inter alia*, liability and damages as well as depositions of their respective experts. *Id.* ¶ 11.

22 In July, 2010, Samsung and Cypress filed summary judgment and numerous other motions,  
23 including a motion to decertify the state indirect purchaser classes, and a motion to dismiss for lack  
24 of subject matter jurisdiction pursuant to the FTAIA. On December 7, 2010, the Court denied the  
25 motion to decertify as to all state indirect purchaser classes except Tennessee. DE 1191 at 34-35. In  
26 its ruling on the motion for decertification, the Court determined that a number of class  
27 representatives lacked standing to represent their respective classes, but denied the motion as to  
28 those classes because other class representatives—whose standing was not challenged on similar

1 bases—were available to represent those classes. *See id.* at 25-33. On December 8, 2010, the Court  
2 entered an order granting summary judgment to Samsung and Cypress on multiple claims asserted  
3 by Plaintiffs, including summary judgment or partial summary judgment on one or more of  
4 Plaintiffs’ claims under Arkansas, Kansas, Maine, Montana, New York, Pennsylvania, Puerto Rico,  
5 Utah and Wyoming law. DE 1200. By order dated December 31, 2010, the Court also found that  
6 Plaintiffs’ claims were subject to the jurisdictional limits imposed by the FTAIA, noting that if  
7 Plaintiffs “are unable to present sufficient evidence [to satisfy the ‘domestic effects’ test of the  
8 FTAIA], and are unable to segregate foreign from domestic transactions, all of their damage claims  
9 would fail.” DE 1231 at 16. Cypress also filed, in late December 2010, a further motion to decertify  
10 15 indirect purchaser state classes on the grounds that the appointed class representatives lacked  
11 standing—relying upon certain findings in the Court’s December 7 Order. The latter motion was  
12 pending at the time the Settlement was reached. Most recently, on January 14, 2011, the Court  
13 entered an order granting Cypress’s motion for separate trials, such that the trial of the direct  
14 purchaser class against Samsung would be held separately from the trial of Plaintiffs’ indirect  
15 purchaser claims against Cypress. DE 1282.

### 16 C. Settlement Negotiations

17 At each stage in this case, Defendants have strenuously contested Plaintiffs’ claims.  
18 Defendants not only filed several *Twombly*-based motions to dismiss and vigorously opposed  
19 Plaintiffs’ motion to certify the Class, but they also opposed virtually all of Plaintiffs’ discovery  
20 requests, forcing Plaintiffs to engage in extensive meet and confer discussions and ultimately file  
21 motions to compel. *See* Scarpulla Decl. ¶ 12.

22 Only after the close of discovery and multiple rounds of summary judgment and related  
23 briefing, including as described above, and only after thorough consideration of applicable law, did  
24 Plaintiffs’ counsel reach settlement with Cypress. Negotiations with Cypress were protracted and  
25 difficult, much like the negotiations with the other Settling Defendants. *Id.* ¶ 13. The settlement  
26 discussions took place from Fall, 2010 to January, 2011, beginning during the course of a mediation  
27 session with Samsung and Cypress before the Court-appointed mediator, the Hon. Daniel Weinstein,  
28 on September 27, 2010. Negotiations continued until the Cypress Settlement was concluded and

1 entered on January 27, 2011. The negotiations were vigorous and non-collusive, and included the  
2 involvement of Judge Weinstein, considerable meetings, exchanges of information as well as  
3 presentations by the parties about their views of the case. *Id.* ¶ 14.

4 Despite the Settlement, Cypress maintains that it has meritorious defenses to Plaintiffs'  
5 claims.

#### 6 **IV. NOTICE TO CLASS**

7 While Plaintiffs seek preliminary approval at this time, Plaintiffs also seek to defer giving  
8 notice of the Cypress and Samsung Settlements to the Class until Plaintiffs submit a proposed plan  
9 of distribution and application for attorneys' fees, so that information related to the settlements, the  
10 proposed distribution plan, and any fee application may be included in a single notice plan. A court  
11 may postpone giving notice if there exists a reason for delay and such delay would not prejudice  
12 absent class members. *Cf. Fischer v. Kletz*, 41 F.R.D. 377, 386 (S.D.N.Y. 1966) (notice of class  
13 certification would be "premature" where there was "no evidence that a delay would presently harm  
14 any of the security holders" and absent class members "already received substantially the notice  
15 called for by Rule 23(c)(2). . . calling attention to, inter alia, the existence of these very suits.").  
16 Here, Plaintiffs' contemplated published and mailed notice plan will cost in excess of \$1 million. In  
17 order to avoid incurring those costs twice—once now and then again when a plan of distribution and  
18 fee application has been prepared and presented to the Court for approval—at this time, Plaintiffs  
19 seek to defer publication of notice and scheduling a final approval hearing. Plaintiffs seek  
20 preliminary approval now, however, because they are preparing a distribution plan and would like to  
21 confirm that the settlement is within the "range of possible approval" before finalizing any plan. As  
22 such, Plaintiffs (and Cypress) would like to obtain preliminary approval of the Settlement at this  
23 time in order to at least provisionally confirm that the Settlement is within the range of possible  
24 approval, contains no obvious deficiencies, and that IP Plaintiffs should proceed to develop a  
25 distribution plan.

#### 26 **V. THE TERMS OF THE SETTLEMENT**

27 Cypress has agreed to pay \$1,000,000 to the Class in exchange for a dismissal with prejudice  
28 and a release of all claims asserted in the Complaint. Pursuant to the Settlement, Cypress will make

1 the Settlement payment to an interest-bearing escrow account within 15 days from the date of the  
2 Court's preliminary approval of the Settlement. *See* Settlement ¶¶ 16-17. For the Settlement, the  
3 Class is defined as follows:

4 [A]ll persons and entities residing in the United States who, from November 1,  
5 1996 through December 31, 2006 (the "Class Period"), purchased SRAM (as  
6 defined in paragraph 2) in the United States indirectly from the Defendants. The  
7 class excludes the following persons and entities: the Defendants; the officers,  
8 directors or employees of any Defendant; any entity in which any of the  
9 Defendants has a controlling interest; any affiliate, legal representative, heir or  
assign of any Defendant; any federal, state or local governmental entities; and any  
judicial officer presiding over the Action and the members of her immediate  
family and judicial staff.

10 *Id.* ¶ 1. Paragraph 2 of the Settlement defines "SRAM" as "all types of static random  
11 access memory (including pseudo static random access memory known as "PSRAM"), whether or  
12 not packaged, and any parts and modules thereof." *Id.* ¶ 2.

13 When the Settlement becomes final, Plaintiffs and the Class members will release any claims  
14 that they may have against Cypress based, in whole or in part, on the matters alleged or that might  
15 have been alleged relating to the manufacture, sale, pricing, etc. of SRAM up through the last date of  
16 the Class Period. *Id.* ¶ 13. The release does not include claims for product liability, breach of  
17 contract, direct purchaser claims, or indirect purchaser claims for SRAM purchased outside the  
18 United States. *Id.* ¶¶ 15, 29. The Settlement becomes final upon: (i) the Court entering a final order  
19 of approval of the Settlement under Federal Rule of Civil Procedure 23(e) and a final judgment  
20 dismissing the case with prejudice as to Cypress; and (ii) expiration of the time to appeal the Court's  
21 final approval and judgment, or, if an appeal is taken, affirmance of the Court's final approval and  
22 judgment with no possibility of further review. *Id.* ¶ 11.

23 The Settlement also authorizes the use of \$200,000 of the Settlement Payment for notice and  
24 administrative purposes. *Id.* ¶ 19(a).

25 Subject to the approval and direction of the Court, the Settlement Payment, plus accrued  
26 interest, will be: (i) distributed in accordance with a plan to be submitted to and approved by the  
27 Court at the appropriate time; (ii) used to pay Class Counsel's attorneys' fees, costs and expenses as  
28 they may be awarded by the Court; and (iii) used to pay costs and expenses incurred in the

1 prosecution of the action, as well as the administration and distribution of the Settlement Payment.  
2 *Id.* ¶¶ 21-23.

### 3 **VI. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

4 Through this motion, Plaintiffs seek preliminary approval of the Settlement. The approval of  
5 class action settlements required by Federal Rule of Civil Procedure 23(e) is a two-step process. The  
6 first step, preliminary approval, requires only that the terms of the proposed settlement fall within  
7 the “range of possible approval.” *See Armstrong*, 616 F.2d at 314; *accord In re M.L. Stern*, 2009  
8 U.S. Dist. LEXIS 31650, at \*940 (citing *Armstrong*); *see also Manual* § 13.14 (“First, the judge  
9 reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a  
10 hearing. If so, the final decision on approval is made after the hearing.”). Granting preliminary  
11 approval amounts to a determination that the terms of the proposed settlement warrant consideration  
12 by members of the class and a full examination at a final approval hearing. *Manual* § 13.14. It is at  
13 the second step, final approval (which takes place after preliminary approval and after notice to the  
14 class of the settlement has been provided), that there is a full review by the Court as to the fairness of  
15 the settlement. It is at final approval that, if appropriate, the Court makes a finding that a settlement  
16 is “fair, reasonable and adequate.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

17 Because preliminary approval is provisional, courts grant preliminary approval where the  
18 proposed settlement lacks “obvious deficiencies” that raise doubts about the fairness of the  
19 settlement. *See In re Vitamins*, 1999 U.S. Dist. LEXIS 21963, at \*29-30 (quoting *Manual* § 30.41);  
20 *see also In re Tableware*, 484 F. Supp. 2d at 1080 (“[t]he court may find that the settlement proposal  
21 contains some merit, is within the range of reasonableness required for a settlement offer, or is  
22 presumptively valid.”) (citing *Newberg* § 11.25). In ruling on a motion for preliminary approval,  
23 many courts have:

24 established an initial presumption of fairness by conducting a preliminary  
25 review of a settlement’s terms and considering (1) whether the  
26 negotiations occurred at arm’s length; (2) whether there was sufficient  
27 discovery; (3) whether the parties or their counsel are sufficiently  
28 experienced in similar litigation to be able to accurately assess what is and  
is not a reasonable settlement; and (4) whether the number of actual or  
anticipated objections to the settlement will be small when compared to  
the class size.

1 *Moore's Federal Practice – Civil* § 23.165[2].

2 Further, it is well recognized that there is strong public policy in favor of settlement of  
 3 complex class action disputes, and that rulings on such settlement are committed to the sound  
 4 discretion of the Court. “Voluntary out of court settlement of disputes is ‘highly favored in the law’  
 5 and approval of class action settlements will be generally left to the sound discretion of the trial  
 6 judge.” *Wellman v. Dickinson*, 497 F. Supp. 824, 830 (S.D.N.Y. 1980) (citation omitted); *see also*  
 7 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S.  
 8 1217 (1983) (“voluntary conciliation and settlement are the preferred means of dispute resolution.  
 9 This is especially true in complex class action litigation. . . .”); *Class Plaintiffs v. City of Seattle*, 955  
 10 F.2d 1268, 1276 (9th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *Speed Shore Corp. v. Denda*,  
 11 605 F.2d 469, 473 (9th Cir. 1979) (“It is well recognized that settlement agreements are judicially  
 12 favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit  
 13 expensive litigation.”); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also*  
 14 *Churchill Village, L.L.C. v. Gen Elec.*, 361 F.3d 566, 576 (9th Cir. 2004).

15 When applying the above cited standards and considerations, it is clear that the Cypress  
 16 Settlement of \$1,000,000, like the previously approved Settlements with the other Settling  
 17 Defendants totaling \$40,322,000,<sup>5</sup> warrants preliminary approval.

18 First, the consideration for the Settlement is substantial – Cypress has agreed to pay  
 19 \$1,000,000, which, given the additional risks faced by the IP Plaintiffs in these cases, is an excellent  
 20 settlement.<sup>6</sup> The Settlement is also generally comparable to the settlements finally approved in other  
 21 price-fixing cases. *See, e.g., In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 627 (E.D. Pa.  
 22 2004); *Fisher Bros. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985). After this

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 24 <sup>5</sup> Plaintiffs’ motion for preliminary approval of settlement with the Samsung defendants (DE 985) is  
 25 currently pending before the Court. If approved, the total amount of settlement payments from the  
 26 seven sets of settling defendants would be \$40,322,000.

26 <sup>6</sup> At the time of settlement, IP Plaintiffs faced, among others, the following risks unique to the  
 27 indirect purchaser action: Cypress’s pending motion for decertification of 15 classes; new  
 28 arguments by Cypress that all other classes should be decertified for new reasons stemming from the  
 Court’s ruling on FTAIA; a potential reduction in or elimination of IP Plaintiffs’ damages due to the  
 Court’s ruling on FTAIA; and the need to prove pass-through of SRAM overcharges through the  
 chain of distribution to end-user consumers of products containing SRAM.

1 settlement (and the Samsung settlement) are preliminarily approved, Class Counsel will submit a  
2 plan of distribution to the Court that will either provide for distribution of amounts recovered in the  
3 litigation, plus interest, minus court-approved attorneys' fees, costs, expenses, and incentive awards,  
4 to (1) Settlement Class Members through a Court-approved claims process; and/or to (2) eligible  
5 charitable organizations in the United States who are, as nearly practicable, representative of the  
6 interests of indirect purchasers of SRAM. If the *cy pres* method of distribution is chosen, it will be  
7 due to the reality that, given the class size, and geographical diversity, and the small volume of  
8 purchases made by individual Class members, it would not be practical to distribute products or cash  
9 directly to each and every member of the Class. *See Conroy v. 3M Corp.*, No. C-00-2810 CW (N.D.  
10 Cal. April 21, 2006) (approving *cy pres* settlement in a case involving transparent tape purchases by  
11 consumers).

12 Second, the Settlement was the product of intense and thorough arm's-length negotiations  
13 that were conducted by experienced and informed counsel. The negotiation occurred over a span of  
14 months and involved numerous meetings. The negotiation was contested, conducted in the utmost  
15 good faith, and Plaintiffs did not accept a settlement offer that was not appropriate in light of the  
16 risks faced and evidence against Cypress.

17 Third, Plaintiffs' counsel was able to make informed evaluations of proposed settlement  
18 offers because Plaintiffs' counsel only negotiated the Settlement on behalf of the Class after  
19 extensive discovery and motion practice, including a review and analysis of millions of pages of  
20 Defendants' documents and the taking of numerous depositions, as well as after Plaintiffs' counsel  
21 conducted their own substantial investigations and considered the analysis of expert consultants.  
22 Together, these steps provided counsel with insight as to both the strengths and weaknesses of the  
23 case, including as against Cypress. *See Scarpulla Decl.* ¶¶ 3, 10, 14.

24 Plaintiffs and their counsel recognize the expense and length of numerous trials in these  
25 actions against Cypress through possible appeals, which could take several years. Plaintiffs and their  
26 counsel believe that the claims asserted have merit and are supported by the available evidence.  
27 Plaintiffs' decision to submit the proposed Settlement for Court approval reflects their consideration  
28 of the very real benefits conferred on the Class by the proposed Settlement, weighed against the very

1 real risks of continued litigation. Based upon their evaluation of these issues, Class Counsel, who  
2 are experienced in antitrust and consumer class actions, have determined that the Settlement is in the  
3 best interest of the Class. *Id.* ¶ 15.

4 Moreover, experienced plaintiffs' counsel's judgment that settlements are fair and reasonable  
5 is entitled to great weight. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528  
6 (C.D. Cal. 2004) ("Great weight" is accorded to the recommendation of counsel, who are most  
7 closely acquainted with the facts of the underlying litigation."); *accord Bellows v. NCO Fin. Sys.*,  
8 No. 3:07-cv-01413-W-AJB, 2008 U.S. Dist. LEXIS 103525, at \*22 (S.D. Cal. Dec. 2, 2008); *Ellis v.*  
9 *Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (court accorded "considerable weight"  
10 to settlement being reached after hard-fought negotiations by experienced counsel); *Rutter &*  
11 *Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *Wilkerson v. Martin Marietta*  
12 *Corp.*, 171 F.R.D. 273, 288 89 (D. Colo. 1997). In fact, "the trial judge, absent fraud, collusion, or  
13 the like, should be hesitant to substitute its own judgment for that of counsel." *Nat'l Rural*  
14 *Telecomm.*, 221 F.R.D. at 528 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). In  
15 other words, there is generally "an initial presumption of fairness when a proposed class settlement,  
16 which was negotiated at arms' length by counsel for the class, is presented for court approval."  
17 *Newberg* § 11.41.

18 In light of the above, it is plain that the \$1,000,000 in cash payments guaranteed by the  
19 Settlement presented here is worthy of preliminary approval. It provides substantial and certain  
20 benefits and avoids the risks, delay and expense of further litigation against Cypress. And while  
21 Plaintiffs believe their case has merit, Cypress has not conceded liability and would vigorously  
22 defend itself at trial.

## 23 **VII. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES**

24 Prior to granting preliminary approval of a settlement, the Court should determine that the  
25 proposed Settlement Class is a proper class. *See Manual* § 21.632; *Amchem Products v. Windsor*,  
26 521 U.S. 591, 620 (1997). The Court can certify a settlement class where plaintiffs demonstrate that  
27 the proposed class and proposed class representatives meet the four prerequisites in Rule 23(a) –  
28 numerosity, commonality, typicality and adequacy of representation – and one of the three

1 requirements of Rule 23(b). *See* Fed. R. Civ. P. 23; *Hanlon*, 150 F.3d at 1019. Certification of a  
 2 class action for damages requires a showing that “questions of law and fact common to the members  
 3 of the class predominate over any questions affecting only individual members, and that a class  
 4 action is superior to other available methods for the fair and efficient adjudication of the  
 5 controversy.” Fed. R. Civ. P. 23(b)(3). In certifying a settlement class, the Court is not required to  
 6 determine whether the action, if tried, would present intractable management problems, “for the  
 7 proposal is that there be no trial.” *Amchem*, 521 U.S. at 620. As Judge Posner has explained,  
 8 manageability concerns that might preclude certification of a litigated class may be disregarded with  
 9 a settlement class “because the settlement might eliminate all the thorny issues that the court would  
 10 have to resolve if the parties fought out the case.” *Carnegie v. Household Int’l., Inc.*, 376 F.3d 656,  
 11 660 (7th Cir. 2004) (*citing Amchem*, 521 U.S. at 620); *see also In re IPO Sec. Litig.*, 226 F.R.D. 186,  
 12 190, 195 (S.D.N.Y. 2005) (settlement class may be broader than litigated class because settlement  
 13 resolves manageability and predominance concerns).

14 This Court previously determined that the exact same class proposed herein warranted, for  
 15 settlement purposes, certification pursuant to Fed. R. Civ. P. 23(a) and (b)(3). *See* Order Granting  
 16 Final Approval of Settlements (Micron, Hynix, Renesas-Hitachi-Mitsubishi, Etron, Toshiba, NEC)  
 17 at ¶ 3 (DE 1141). For the reasons described below, certification of the instant Settlement Class is  
 18 similarly warranted.

19 **A. The Class Is Ascertainable And Precisely Defined**

20 As set forth in the proposed Settlement, Plaintiffs and their counsel have reached the  
 21 proposed Settlement on behalf of the following Class: “all persons and entities residing in the  
 22 United States who, from November 1, 1996 through December 31, 2006, purchased SRAM in the  
 23 United States indirectly from Defendants,” with exceptions as specified in the Settlement. *See*  
 24 Settlement ¶ 1. The Settlement Class encompasses indirect purchases of “Pseudo SRAM” or  
 25 “PSRAM.” *Id.* ¶ 2.

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1           **B.       The Class Meets The Standards For Certification Under Rule 23(a) and (b)**

2           The Court should find that it may provisionally certify the proposed Settlement Class for  
3 settlement purposes under Rule 23(a) and (b) of the Federal Rules of Civil Procedure. It is  
4 undisputed that hundreds of thousands of people purchased SRAM products during the class period;  
5 therefore, the Class is so numerous that joinder of all Class members in the action is impracticable.  
6 *See* Fed. R. Civ. P. 23(a)(1); *see also Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-  
7 14 (9th Cir. 1964) (“impracticability does not mean ‘impossibility,’ but only the difficulty or  
8 inconvenience of joining all members of the class”). Thus, the proposed Class readily satisfies the  
9 numerosity requirements of Rule 23. *See In re Static Random Access Memory (SRAM) Antitrust*  
10 *Litig.*, 264 F.R.D. 603, 608 (N.D. Cal. 2009). There are questions of law and fact common to the  
11 Class that predominate over any individual questions, including whether Defendants conspired to  
12 inflate and fix the prices of SRAM; how long Defendants’ conspiracy lasted; whether Defendants’  
13 conduct violated Section 1 of the Sherman Act as well as the remaining state antitrust and unfair  
14 competition laws at issue; the extent to which Defendants’ conduct injured the class members; the  
15 appropriate measure of damages; and whether the class members are entitled to injunctive relief.  
16 “Antitrust, price fixing conspiracy cases, by their nature, deal with common legal and factual  
17 questions about the existence, scope and effect of the alleged conspiracy. Whether defendants  
18 participated in the actions alleged is a common question.” *In re Linerboard Antitrust Litig.*, 203  
19 F.R.D. 197, 206 (E.D. Pa. 2001) (citation and quotation marks omitted). The issues constitute a  
20 common core of questions focusing on the central issue of the existence of the alleged conspiracy  
21 and plainly satisfy the commonality requirement of Rule 23(a)(2). *Estate of Jim Garrison v. Warner*  
22 *Bros., et al.*, 1996 WL 407849 at \*2 (C.D. Cal. 1996) (Plaintiffs’ allegations “which constitute the  
23 classic hallmark of antitrust class actions under Rule 23 ... are more than sufficient to satisfy the  
24 commonality requirements.”).

25           Plaintiffs’ claims are typical of those of the Settlement Class. Like all other Settlement Class  
26 members, Plaintiffs each indirectly purchased SRAM products during the relevant time period, and  
27 allege that Defendants engaged in an anti-competitive conspiracy. As the Court recognized when it  
28 certified the direct and indirect purchaser classes, here “the overarching price fixing scheme is the

1 linchpin of [Plaintiffs'] complaint, 'regardless of the product purchased, the market involved or the  
2 price ultimately paid.'" *In re SRAM*, 264 F.R.D. 609. This Court also held that Plaintiffs' claims are  
3 typical although they might have used different purchasing procedures, purchased different  
4 quantities or a different mix of products, or received different prices than other class members. *Id.*  
5 Because the same is true here, the typicality requirement is met. Furthermore, as evidenced by the  
6 history of the litigation, Plaintiffs and their counsel have fairly and adequately represented and  
7 protected the interests of all Class members. *See* Fed. R. Civ. P. 23(a)(3) and (a)(4).

8 In addition to the prerequisites of Rule 23(a), the Settlement Class must also satisfy the  
9 prerequisites of Rule 23(b)(3), namely: (1) questions of law or fact common to Class members must  
10 predominate over any questions affecting only individual members; and (2) the class action must be  
11 superior to other available methods for the fair and efficient adjudication of the matter. The Rule  
12 23(b) predominance inquiry is "readily met in certain cases alleging ... violations of the antitrust  
13 laws." *Amchem*, 521 U.S. at 625; *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and*  
14 *Composites, Inc.*, 209 F.R.D. 159, 167 (C.D. Cal. 2002). "The ... inquiry tests whether proposed  
15 classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at  
16 623. Predominance is satisfied "unless it is clear that individual issues will overwhelm the common  
17 questions and render the class action valueless." *In re NASDAQ Market-Makers Antitrust Litig.*, 169  
18 F.R.D. 493, 517-18 (S.D.N.Y. 1996).

19 Individual issues in this case will not overwhelm the common questions of law or fact,  
20 because the central question is whether the Defendants conspired to improperly raise the prices of  
21 SRAM products, and, if so, how. *In re SRAM*, 264 F.R.D. at 611. There is no doubt that Plaintiffs  
22 would present common evidence regarding the existence and scope of the alleged conspiracy and  
23 illegal activities at any trials of this matter. Similarly, although a wide range of SRAM products are  
24 potentially involved, common proof of sales and marketing practices, as well common pricing  
25 practices will apply to many claims. Moreover, the fact that individual Class members' damages  
26 may vary due to quantity of purchases or types of SRAM products purchased does not defeat  
27 predominance. *See, e.g., In re Master Key Antitrust Litig.*, 528 F.2d 5, 12 n.11 (2d Cir. 1975); *In re*  
28 *Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996) (citing cases). Finally,

1 Plaintiffs have presented plausible methodologies that would be used to perform quantitative  
2 analysis to demonstrate classwide injury. *In re SRAM*, 264 F.R.D. at 613-15.

3 With respect to the superiority requirement, a court must consider the following factors: (A)  
4 the interest of members of the class in individually controlling the prosecution or defense of separate  
5 actions; (B) the extent and nature of any litigation concerning the controversy already commenced  
6 by or against members of the class; (C) the desirability or undesirability of concentrating the  
7 litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the  
8 management of a class action. Fed. R. Civ. P. 23(b)(3). The damages of most individual Class  
9 members are relatively small compared to the cost of litigation. *Id.* There is no problem in  
10 consolidating the litigation here, nor will any unusual difficulties be encountered. Members of the  
11 Class, therefore, have no real interest in controlling the prosecution of individual actions, and  
12 effectively would be unable to adjudicate their claims individually. Even if they were able to do so,  
13 the court system would be overwhelmed by the burden of hundreds of thousands of separate actions.  
14 Further, it is highly desirable to concentrate these claims in this court and given the proposed  
15 nationwide settlement of the claims, no management difficulties will affect the class. *In re SRAM*,  
16 264 F.R.D. at 615.

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1 **VIII. CONCLUSION**

2 For the reasons set forth herein, the Court should enter an order: (i) granting preliminary  
3 approval of the Cypress Settlement; (ii) provisionally certifying the Settlement Class; and (iii)  
4 deferring notice to class members and the scheduling of the final approval hearing until after  
5 Plaintiffs submit a proposed plan of distribution and fee application, so that information related to  
6 the Samsung and Cypress settlements, the proposed distribution plan and fee application can be  
7 included in a single notice plan.

8 Dated: February 3, 2011

Respectfully submitted,

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