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8

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

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

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

15 **NOTICE OF MOTION AND MOTION FOR**
PRELIMINARY APPROVAL OF
DISTRIBUTION PLAN AND NOTICE PLAN
AND SETTING FAIRNESS HEARING

16 This Document Relates to:

17 ALL INDIRECT PURCHASER ACTIONS

Hearing Date: July 7, 2011*
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

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20 *Pursuant to stipulation, the parties request an
earlier hearing date

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1 **NOTICE OF MOTION AND MOTION**

2 **TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on July 7, 2011, at 2:00 p.m. or at such earlier or other date
4 and time subject to the Court’s calendar, before the Honorable Claudia Wilken, United States
5 District Court, Northern District of California, 1301 Clay Street, Suite 400S, Oakland, California,
6 Indirect Purchaser Plaintiffs (“IP Plaintiffs”) will and hereby do move the Court, pursuant to Rule
7 23(e) of the Federal Rules of Civil Procedure, for an Order:

- 8 (i) granting preliminary approval of the distribution plan proposed by IP Plaintiffs
9 pertaining to the settlements entered with Defendants;
- 10 (ii) approving the forms of notice and notice plan proposed by IP Plaintiffs; and
- 11 (iii) setting a hearing date on final approval of the Samsung and Cypress settlements, the
12 plan of distribution, and such other matters that are presented for the Court’s decision.

13 The parties have entered a stipulation seeking an earlier hearing date on this motion, and
14 request that the Court hear the motion as soon as is practicable. This motion is based upon this
15 Notice of Motion, the following Memorandum of Law, the Declaration of Christopher T. Micheletti
16 in Support of Plaintiffs’ Motion for Preliminary Approval of Distribution Plan and Notice Plan, the
17 Proposed Order Granting Preliminary Approval of Distribution Plan and Notice Plan, the
18 Declaration of Dennis Gilardi Re Dissemination of Notice to Class Members, the complete files and
19 records in this action, and such other written or oral arguments that may be presented to the Court.

20 **MEMORANDUM OF LAW**

21 **I. INTRODUCTION**

22 IP Plaintiffs, on behalf of the class of indirect purchasers, have entered into settlement
23 agreements with eight sets of Defendants¹ in this action for sums totaling \$41,322,000 (the
24 _____

25 ¹ The defendants are Samsung Electronics Co., Ltd., Samsung Electronics America, Inc. and
26 Samsung Semiconductor, Inc. (collectively “Samsung”); Cypress Semiconductor Corporation
27 (“Cypress”); Micron Technology, Inc. and Micron Semiconductor Products, Inc. (collectively
28 “Micron”); Hynix Semiconductor Inc. and Hynix Semiconductor America Inc. (collectively
“Hynix”); Renesas Technology Corp., Renesas Technology America, Inc. (collectively “Renesas”),
Hitachi Ltd., Hitachi Semiconductor (America), Inc., (collectively “Hitachi”), and Mitsubishi

1 “Settlement Fund”). The Court previously finally approved settlements with six sets of
2 defendants—Micron, Hynix, Etron, Renesas-Hitachi-Mitsubishi, Toshiba and NEC, dismissed those
3 defendants with prejudice and entered judgment. *See* Docket Entries (“DE”) 1141, 1143-1148. The
4 latter settlements provided for payment of \$25,422,000, are final, and their fairness, adequacy and
5 reasonableness cannot be challenged. The additional settlements with Cypress and Samsung, valued
6 at the combined sum of \$15,900,000, have been granted preliminary approval; thus, the Court has
7 already determined that those settlements are within the range of possible approval such that notice
8 may be given and a final approval hearing set. *See* Order Granting Preliminary Approval of
9 Settlement With Samsung, dated Feb. 11, 2011 (DE 1324); Order Granting Preliminary Approval of
10 Settlement With Cypress, dated March 11, 2011 (DE 1329).

11 By this motion, IP Plaintiffs now seek preliminary approval of the plan of distribution of the
12 settlement funds, approval of the proposed forms of notice and notice plan, and a date for a hearing
13 on final approval of the Cypress and Samsung settlements and the plan of distribution pertaining to
14 the Settlement Fund.²

15 As detailed below, IP Plaintiffs propose a plan of distribution that (1) allocates the net
16 Settlement Fund between the “Reseller” and “End-User” members of the Settlement Class; (2)
17 provides for a claims process to enable qualified Resellers to make claims against the portion of the
18 Settlement Fund allocated to them; and (3) provides for a *cy pres* distribution of the portion of the
19 Settlement Fund allocated to the End-Users, and of any unclaimed portion of the amount allocated to
20 the Resellers. This plan is within the range of possible approval as fair, adequate and reasonable for
21 numerous reasons.

22 _____
23 Electric Corporation, and Mitsubishi Electric & Electronics USA, Inc. (collectively “Mitsubishi”)
24 (together “Renesas-Hitachi-Mitsubishi”); Etron Technology, Inc. and Etron Technology America,
25 Inc. (collectively “Etron”); Toshiba Corporation and Toshiba America Electronic Components, Inc.,
(collectively “Toshiba”); and NEC Electronics Corporation and NEC Electronics America, Inc.
(collectively “NEC”).

26 ² IP Plaintiffs’ motion for attorneys’ fees and reimbursement of costs and incentive payments, which
27 will be filed shortly, will request the same hearing date as the final approval hearing date requested
28 herein. IP Plaintiffs’ request for attorneys’ fees, cost reimbursement and incentive payments is
referenced in the proposed forms of notice addressed herein, and will be posted on the settlement
website shortly after filing.

1 First, there is an allocation of 63.3 percent of the net Settlement Fund to End-Users and 36.7
2 percent to the Resellers. The decision to allocate the Settlement Fund and the percentage of
3 allocation was the product of vigorous, non-collusive negotiations between court-appointed counsel
4 for the Resellers and End-Users, and was mediated by a respected retired jurist. This allocation
5 strikes a fair balance between End Users claiming full pass-through and Resellers asserting
6 substantial absorption of Defendants' alleged price-fixing overcharges.

7 Second, IP Plaintiffs have developed a Reseller claims process that is fair, adequate and
8 reasonable because it provides a simplified claims process for smaller claims, and a more detailed
9 claim submission required for larger claims. The payment amounts utilize the SRAM overcharge
10 percentages determined by IP Plaintiffs' experts during the litigation, as well as other SRAM market
11 information and data to estimate overcharges imposed on Reseller claimants, and then apply the
12 agreed-to allocation percentages to the claimant's purchases of relevant SRAM products.
13 Additionally, the proposed claim form is straightforward to complete, but requires claimants to
14 substantiate sufficiently their claims.

15 Finally, the proposed *cy pres* distribution to the End Users is within the range of possible
16 approval because it is the most practical and effective method of providing benefits to End User
17 members of the Settlement Class. Attempting to make direct cash payments to End User claimants
18 is impractical due to the extremely large class size, the relatively small payments that would be
19 received, the time and effort associated with consumers establishing that they purchased Defendants'
20 SRAM, and the substantial cost of processing such claims. A *cy pres* distribution, however, that
21 provides payments to nonprofit charitable entities that benefit persons and entities that are, as nearly
22 as practicable, representative of the interests of class members, and to other nonprofit charitable
23 entities that benefit the needy, will more efficiently and significantly benefit End Users in the
24 Settlement Class. Through payments to nonprofit charities that provide nationwide services as well
25 as those that provide services within specified states, the *cy pres* distribution plan accounts for, *inter*
26 *alia*, the procedural and substantive differences between claims asserted by End Users in states that
27 obtained certified classes versus those that did not and for varying state populations.

1 At this time, the Court is not being asked to determine whether the Plan of Distribution is
 2 fair, reasonable or adequate. Rather, the question is simply whether the Plan of Distribution is
 3 sufficiently within the range of possible approval to justify publication of notice to class members
 4 and scheduling of a final approval hearing.³

5 The notice plan proposed by IP Plaintiffs should also be approved. The Notice Plan is
 6 essentially the same as the notice plan approved by the Court when IP Plaintiffs provided notice of
 7 the prior settlements with the other six sets of defendants. It includes published notice, mailed notice
 8 to potential indirect purchasers of SRAM (including Resellers), press releases and an internet-based
 9 notice campaign. The forms of notice follow the format of the notices previously approved by the
 10 Court in connection with the prior settlements. Just as the Court did so in connection with the 2010
 11 Settlements, it should approve the notice plan proposed here.

12 **II. STATEMENT OF ISSUES TO BE DECIDED**

13 1. Whether the Plan of Distribution is sufficiently within the range of possible approval
 14 to justify publication thereof to Settlement Class members and scheduling of final approval
 15 proceedings.

16 2. Whether the proposed program of notice satisfies the requirements of Federal Rule of
 17 Civil Procedure 23(c)(2)(A), (c)(2)(B) and (e)(1) of providing the best notice practicable under the
 18 circumstances to all class members who would be bound by the Settlements.

19 **III. FACTUAL AND PROCEDURAL BACKGROUND**

20 **A. Allegations**

21 This action alleges that Defendants conspired to fix the price of SRAM. IP Plaintiffs are
 22 individuals and entities that indirectly purchased SRAM during the period November 1, 1996
 23 through December 31, 2006 (the "Class Period"). Defendants are domestic and foreign entities that
 24 manufactured, sold or distributed SRAM in the United States during the Class Period. *See* Fifth
 25

26 ³ As noted above, the Court has already determined that the amounts of the Samsung and Cypress
 27 settlements are sufficiently within the range of possible approval to justify publication of notice of
 28 the settlements to class members and scheduling of a final approval hearing. *See* Samsung and
 Cypress Preliminary Approval Orders, DE 1324, 1329, ¶4 thereto.

1 Consolidated Amended Class Action Complaint (“Compl.”) ¶¶ 110-128 (DE 1067). IP Plaintiffs
 2 allege injuries incurred as a result of Defendants’ conduct and seek: (i) nationwide injunctive relief
 3 pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, for Defendants’ violations of Section 1 of
 4 the Sherman Act, 15 U.S.C. § 1; and (ii) damages or restitution under certain specified state antitrust,
 5 consumer protection and unjust enrichment laws.

6 **B. Class Certification**

7 On November 25, 2009, this Court certified a nationwide injunctive relief class pursuant to
 8 Fed. R. Civ. P. 23(a) and (b)(2) for injunctive and declaratory relief defined as follows: All persons
 9 and entities residing in the United States who, during the Class Period, purchased SRAM in the
 10 United States indirectly from the Defendants for their own use and not for resale (the “Nationwide
 11 Injunctive Relief Class”). *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D.
 12 603, 617 (N.D. Cal. 2009). The Court also certified 27 plaintiff classes for certain states, the District
 13 of Columbia and Puerto Rico pursuant to Fed. R. Civ. P. 23(a) and (b)(3) generally defined as
 14 follows: All persons and entities in the relevant state⁴ (hereinafter collectively “Certified States”)
 15 who indirectly purchased SRAM and/or products containing SRAM,⁵ for end use and not for resale,
 16 that was manufactured and/or sold by one or more of the Defendants during the Class Period. *Id.* at
 17 617-22. The foregoing classes are referred to herein as the “State Damages Classes”. The Court
 18 appointed 45 named plaintiffs as class representatives for the State Damages Classes. *Id.* at 622.

19 **C. Final Approval of Settlements With Micron, Renesas-Hitachi-Mitsubishi, Hynix,
 20 Etron, Toshiba and NEC**

21 Between March 2009 and March 2010, Class Counsel negotiated separate settlements with
 22 six of the eight sets of Defendants – Micron, Renesas-Hitachi-Mitsubishi, Hynix, Etron, Toshiba,
 23 _____

24 ⁴ The Certified States are Arizona, Arkansas, California, Florida, Hawaii, Iowa, Kansas, Maine,
 25 Massachusetts, Michigan, Minnesota, Montana, Nevada, New Mexico, New York, North Carolina,
 North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Washington, West
 Virginia, Wisconsin, Puerto Rico and the District of Columbia.

26 ⁵ “Products containing SRAM” are defined as handheld computer devices (also known as personal
 27 digital assistants (“PDAs”) and smart phones), desktop computers (with separate level 2 cache
 memory), servers, mainframes, Voice-Over Internet Protocol Systems, routers, switches, modems,
 storage area networks and firewalls.

1 and NEC. In April of 2010, IP Plaintiffs sought preliminary approval of those settlements (*see* DE
 2 985), which was granted in June of 2010 (DE 1013). At that time, the Court provisionally certified
 3 the Settlement Class and ordered that notice be provided to the class. DE 1013, ¶8. The Court,
 4 having provisionally certified the Settlement Class, and having also certified the Nationwide
 5 Injunctive Relief Class and the State Damages Classes for litigation purposes, directed that one
 6 notice be issued to all members of the Settlement and litigation classes informing them of the
 7 Settlements and informing them of the litigation Classes proceeding to trial. *Id.* The Court reasoned
 8 that “[a]llowing one notice will eliminate the possibility of confusion in two simultaneous and
 9 overlapping notices and will avoid unnecessary and duplicative expenses.” *Id.* Notice was provided
 10 to the classes by publication and by mail. *Id.* ¶9. The published notice advised Settlement Class
 11 members that

12 Money will not be distributed to Class Members yet. The lawyers will pursue the
 13 lawsuit against the Non-Settling Defendants, to see if any future settlements or
 14 judgments can be obtained in the case and then distribute the funds together to
 15 reduce expenses. It is possible that money will be distributed to charities who are,
 as nearly practicable, representative of the interests of indirect purchasers of
 SRAM, instead of Class Members themselves if the cost to process claims will
 result in small payments to Class Members. (*Id.* DE 1013-1 (short form notice))

16 On October 6, 2010, this Court granted final approval of the six settlements (hereinafter the
 17 “2010 Settlements”), finally certified the Settlement Class, and entered final judgments of dismissal
 18 with prejudice as to each of the defendants Micron, Renesas-Hitachi-Mitsubishi, Hynix, Etron,
 19 Toshiba, and NEC. DE 1141 ¶¶3-8; DE 1143-48. Only three persons/entities opted-out of those
 20 settlements. *See* DE 1141, ¶5. While objections were filed, they were overruled and no appeal was
 21 taken by any objector. As such, the 2010 Settlements, which total \$25,422,000, are final, and their
 22 fairness, adequacy and reasonableness cannot be challenged.

23 **D. Preliminary Approval of Settlements With Samsung and Cypress**

24 After final approval of the six settlements, IP Plaintiffs continued to litigate their case against
 25 Samsung and Cypress. Shortly before trial was to commence in early February 2011, Class Counsel
 26 reached separate settlements with Samsung and Cypress, for the combined sum of \$15.9 million.
 27 The Court granted preliminary approval of those settlements in February and March 2011,
 28

1 respectively. DE 1324, 1329. In total, the eight settlements with Defendants provide for the
2 payment of \$41,322,000 to the Settlement Class.

3 **E. Proposed Settlement Allocation**

4 As noted above, the Court certified the Settlement Class in connection with the 2010
5 Settlements, and provisionally certified that same class in connection with the recent Samsung and
6 Cypress settlements. The Settlement Class here—like the Settlement Class certified for the 2010
7 Settlements—includes all indirect purchasers of SRAM (not just end-users) and therefore includes
8 (1) persons and entities that indirectly purchased SRAM for their own use and not for resale (*e.g.*,
9 end-user consumers and businesses) (“End Users”); and (2) persons and entities that indirectly
10 purchased SRAM for resale (*e.g.*, retailers and value-added resellers that indirectly purchase SRAM
11 or SRAM-containing products and resell them others) (“Resellers”). As noted above, the State
12 Damages Classes, which are represented by Lead Counsel Zelle Hofmann, include only persons and
13 entities which indirectly purchased SRAM for their own use and not for resale.

14 To address any potential disparate interests as between Resellers and End-Users in the
15 Settlement Class in connection with the allocation and distribution of settlement proceeds, IP
16 Plaintiffs sought to designate, and requested that the Court appoint, a separate Settlement Class
17 member and counsel to represent the interests of Resellers in connection with the allocation and
18 distribution. *See* Indirect Purchaser Plaintiffs’ Motion For Administrative Relief Requesting
19 Appointment Of Settlement Class Reseller Representative And Reseller Counsel, DE 1326, filed
20 Feb. 23, 2011. On March 14, 2011, the Court granted the motion, and appointed Granite
21 Communications, Inc. as the Reseller representative and the Berman DeValerio firm as counsel for
22 Resellers in the Settlement Class. *See* Order Granting IP Plaintiffs’ Motion for Appointment, DE
23 1340. Class Counsel adopted this additional structural protection because similar approaches had
24 been used and approved by district courts in other antitrust proceedings. *See, e.g., In re Relafen*
25 *Antitrust Litig.*, 231 F.R.D 52, 62, 67-68 (D. Mass. 2005) (approving similar structural protections
26 implemented by lead counsel, including designation of certain counsel to represent groups of class
27 members within a nationwide settlement class).

1 During March, April and May of 2011, Class Counsel conferred and negotiated with the
2 Reseller representative and counsel regarding allocation of settlement proceeds as between Resellers
3 and End Users in the Settlement Class, and regarding an appropriate Plan of Distribution of the
4 settlement proceeds. Declaration of Christopher T. Micheletti In Support of Motion for Preliminary
5 Approval of Distribution Plan and Notice Plan and Setting Fairness Hearing (“Micheletti Decl.”) ¶3.

6 On April 12, 2011, the Honorable Alfred Chiantelli (Ret.) mediated the negotiations between
7 the End-Users and Resellers in connection with the allocation and distribution of the settlement
8 proceeds in these actions. Prior to the April 12 mediation session, Judge Chiantelli received and
9 reviewed mediation briefs submitted by each group, setting forth their respective positions regarding
10 allocation of the Settlement Fund, and communicated with each group regarding their positions and
11 arguments. Each group presented separate expert analyses, including econometric regression
12 analyses, related to the issue of whether indirect purchasers of SRAM that resold the SRAM passed-
13 through to End-Users all or a portion of any alleged overcharges made by the Defendants.

14 Declaration of The Honorable Alfred Chiantelli (Ret.) Regarding Allocation Mediation (“Chiantelli
15 Decl.”) ¶5 (attached as Exhibit A to the Micheletti Decl.). During the April 12 mediation, the parties
16 engaged in vigorous, arms-length negotiations regarding allocation of the Settlement Fund. After
17 extensive negotiations, an agreement was reached allocating 63.3 percent of the net Settlement Fund
18 to the End-Users and 36.7 percent thereof to the Resellers. This allocation was reached through
19 vigorous, non-collusive negotiations, is fair, adequate and reasonable, and is in the best interests of
20 the Settlement Class members. *Id.* ¶6; *see also* Micheletti Decl. ¶3.

21 **F. Proposed Plan of Distribution**

22 1. Overview

23 Following negotiation of the allocation, the parties (including the Reseller representative and
24 Reseller Counsel) then proceeded to design and develop a plan to distribute the settlement proceeds.
25 The Plan of Distribution is set out in detail in Exhibit 1 to the Proposed Order Granting Preliminary
26 Approval of Distribution Plan and Notice Plan and Setting Fairness Hearing (“Proposed Order”)
27 submitted herewith. The total Settlement Fund from all settlements is \$41,322,000. The Net
28

1 Settlement Fund (the Settlement Fund minus court-approved costs, attorneys' fees and incentive
2 awards)⁶, will be distributed as follows: (1) 36.7% of the Net Settlement Fund will distributed to
3 qualified Resellers through a court-approved claims process; and (2) 63.3% of the Net Settlement
4 Fund will be distributed via a Court-approved *cy pres* plan to nonprofit charities for the benefit of
5 End Users. Unclaimed funds from the Reseller claims process, if any, will be added to the latter *cy*
6 *pres* distribution. Proposed Order Ex. 1 at 1.

7 2. Reseller Plan of Distribution.

8 As detailed in the Plan of Distribution, Resellers may make claims against the Settlement
9 Fund based on their indirect purchases of Defendants' SRAM. Reseller claimants will be required
10 to, *inter alia*, execute a sworn statement stating that the Reseller purchased the products described in
11 the claim form; that the Reseller is informed and believes such products contained Defendants'
12 SRAM; that the Reseller purchased the products with the intent to resell them; that to the best of the
13 Reseller's knowledge, information and belief such products were resold; and, that none of the
14 products described in the claim form were purchased by the Reseller for its own use and not for
15 resale. *See id.* at 1-2 (Plan of Distribution), Ex. 2 (Reseller Claim Form at 2-3).

16 Only Resellers that made purchases of Defendants' SRAM in states that obtained class
17 certification for damages claims in this action, *i.e.*, the State Damages Classes identified above, will
18 be eligible for payments. A Reseller that has its principal place of business in or is incorporated in a
19 Certified State shall be deemed to have made its purchases of SRAM in that state. A Reseller that
20 made its purchases in a non-certified state is not entitled payment from the Net Settlement Fund, but
21 will receive benefits through the *cy pres* distributions to national nonprofits in recognition of its
22 released claims. *See* Proposed Order, Ex. 1 at 2. As explained in more detail below, these
23 adjustments to the distribution of settlement benefits are reasonable and justified by procedural and
24 substantive differences between Settlement Class member claims.

25
26 _____
27 ⁶ Class Counsel will request attorneys' fees in the amount of one-third of the Settlement Fund,
28 reimbursement of their costs and expenses, and incentive payments for the court-appointed class
representatives.

1 If Reseller claims exceed their allocated share of the net Settlement Fund, allowed claims
 2 will be reduced and paid on a pro-rata basis. However, no claim which would result in an aggregate
 3 payment of less than \$25 to any one Reseller claimant will be distributed, and if pro-rata reduction of
 4 a claim amount decreases the claim to less than \$25, it will not be paid. Any residue following
 5 reasonable efforts to distribute the Reseller portion of the settlement proceeds shall be included in
 6 the End User *cy pres* (charitable) distribution. See Proposed Order, Ex. 1 at 2.

7 Resellers may make a “Simplified Claim” or a “Detailed Claim”. A “Simplified Claim” is a
 8 claim for a payment of \$1,000 or less; it requires claimants’ averments under oath, but does not
 9 require any separate, supporting documentation. A “Detailed Claim” is a claim for more than \$1,000
 10 and Resellers seeking such payments are required to submit detailed documentation and other
 11 information supporting their claim. See Proposed Order, Ex. 1 at 2-4. The more streamlined process
 12 for “Simplified Claims” is designed to encourage Resellers that have purchased smaller amounts of
 13 SRAM to submit claims. The more rigorous process for “Detailed Claims” is designed to ensure
 14 that Resellers seeking larger payments clearly show that they purchased what they claim they
 15 purchased and are entitled to the larger payments. As noted above, both claim methods require
 16 statements under oath that the Reseller purchased Defendants’ SRAM indirectly.

17 The Reseller claim calculation methods are set out in detail in the Plan of Distribution and in
 18 the Claim Form. See Proposed Order, Ex. 1 at 2-4, Ex. 2. The following will briefly summarize the
 19 key elements. Under Formula A, Resellers that are able to specifically identify indirect purchases of
 20 SRAM from Defendants and the cost of that SRAM apply an “SRAM Overcharge Calculation”⁷ to

21 _____
 22 ⁷ The “SRAM Overcharge Calculation” uses the weighted average of the direct overcharge amounts
 23 for fast SRAM, slow SRAM and PSRAM that were calculated by IP Plaintiffs’ experts in the
 24 litigation, *i.e.*, 39.5%. See Reply Report of Mark Dwyer, Exh. 3a, dated June 28, 2010 (“Dwyer
 25 Report”) (attached as Exh. 5 to the Declaration of Christopher T. Micheletti In Support of
 26 Oppositions to Dispositive Motions (submitted to the Court on Aug. 24, 2010 (hereinafter
 27 “Micheletti Dispos. Mot. Decl.”)) (listing Fast SRAM, slow SRAM and PSRAM overcharge
 28 percentages on “but for” prices for each SRAM type); see also Micheletti Decl. ¶4. Note that the
 direct overcharge percentages prepared by the experts were estimated overcharges on “but for”
 pricing. See Dwyer Report, Ex. 3a. Thus, the SRAM Overcharge Calculation is adjusted to account
 for the fact that Reseller claims are based on estimated “actual” purchases of SRAM, not “but for”
 purchases of SRAM. Use of the following formula (SRAM Purchases – SRAM Purchases/1.395)
 determines the SRAM overcharge. See Reply Report of Michael J. Harris, Ph.D, ¶5, dated June 28,
 2010 (attached as Ex. 4 to Micheletti Dispos. Mot. Decl.).

1 the dollar value of their Defendant SRAM purchases, and multiply that amount by “Allocation
2 Percentage”⁸ to calculate their claim amount. For example, assume a Reseller purchased \$5,000
3 worth of Defendants’ SRAM. The Reseller’s Claim amount is $(\$5,000 - 5000/1.395) = \$1,416$
4 $(\text{SRAM Overcharge Calculation}) \times .367 (\text{Allocation Percentage}) = \519.67 .⁹

5 Under Formula B, Resellers that are not able to specifically identify indirect purchases of
6 SRAM from Defendants and the cost of that SRAM, but are able to identify purchases of certain
7 products containing Defendants’ SRAM, will first estimate the dollar amount of their purchases of
8 Defendants’ SRAM, and will then apply Formula A above to calculate their claim amount. *See*
9 Proposed Order, Ex. 1 at 3-4. This formula works as follows: Units Purchased x Percentage
10 Products Containing SRAM x Defendants’ Market Share x Estimated Cost of SRAM = Estimated
11 Purchases of Defendants’ SRAM.¹⁰ Formula A above is then applied to the Estimated Purchases of
12 Defendants’ SRAM to determine the Claim Amount. Formula B may only be utilized for Reseller
13 purchases of the following products: Desktops, servers, routers, switches, modems, smartphones
14 and PDAs. This Formula is limited to the latter products for several reasons. First, these are among
15 the highest volume SRAM-containing products in the market and are the end product applications
16 that drove much of the SRAM sales during the Class Period. *See e.g.*, Expert Report of Michael J.
17 Harris, dated January 29, 2009, ¶¶14-18 (DE 645-8). Second, they are the products for which IP

18 _____
19 ⁸ The “Allocation Percentage” is the Reseller negotiated percentage of 36.7 percent (.367).

20 ⁹ Note, however, that if a pro-rata distribution is required due to the amount of allowed claims
21 exceeding the total available funds, this amount will be smaller; and if such pro-rata distribution
22 reduces a claim to less than \$25, no payment will be made to the Reseller claimant.

23 ¹⁰ In this Formula, the “Units Purchased” is the number of each type of product purchased (*e.g.*,
24 1000 routers). The “Percentage Products Containing SRAM” is the estimated percentage of the
25 product type (*e.g.*, all routers sold in the U.S.) that contains SRAM. This percentage is used to avoid
26 compensating Resellers for purchases of products that do not contain SRAM, and is derived from
27 averaging the percentages applicable to each product type as used by IP Plaintiffs’ experts to
28 calculate damages in the IP litigation. *See* Micheletti Decl. ¶5. “Defendants’ Market Share” is the
estimated percentage of Defendants’ Market Share of all SRAM sales during 1998 to 2005. This
estimate is derived from weighted averages of the market share numbers used by IP Plaintiffs’
experts to calculate damages in the IP litigation. *See* Micheletti Decl. ¶6. This is used in the
calculation to eliminate from the claim the percentage of the Reseller’s product type purchases that
did not contain Defendants’ SRAM. The “Estimated Cost of SRAM” is the estimated cost of SRAM
in the relevant product type (*e.g.*, estimated cost of SRAM in a router). This estimate is derived
from averaging SRAM cost estimates for product types used by IP Plaintiffs’ experts to calculate
damages in the IP litigation. *See* Micheletti Decl. ¶7.

1 Plaintiffs were able to present damages calculations and also possess data and information from
2 which reasonable estimates of SRAM content may be made.¹¹

3 For Resellers that want to make claims for payments that exceed \$1,000, Formula A or B
4 above may be used, but the Reseller will also be required to (1) identify the specific Defendants'
5 whose SRAM was indirectly purchased, and (2) produce invoices, business records or other
6 documentary support clearly establishing its purchases of Defendants' SRAM and the dollar value of
7 Defendants' SRAM. Such support may include, for example, invoices or other records showing
8 purchases of specific components, or specific end-products (*e.g.*, model numbers) that are shown
9 through one or more additional records (*e.g.*, specification sheets, Bill of Materials or other
10 evidence) to contain Defendants' SRAM. All invoices or other business records showing all specific
11 product purchases are required to be submitted with the claim form to the Claims Administrator.
12 Proposed Order, Ex. 1 at 4.

13 All claims submitted will be decided by the Claims Administrator and will be subject to
14 review by Class Counsel and Reseller Counsel (collectively "Claim Review Counsel") to determine
15 if there is any reason to believe that an accepted claim is fraudulent or otherwise invalid or does not
16 contain the proper documentation. IP Plaintiffs' propose that Gilardi & Co. serve as the Claims
17 Administrator in this action. If a claim submitted by a Reseller claimant is rejected or otherwise
18 denied, and the Reseller Claimant disputes the denial, Claim Review Counsel will meet and confer
19 with the Reseller claimant in an effort to resolve the dispute. To the extent they are unable to resolve
20 any dispute by meeting and conferring, the rejected claim will be submitted to a Special Master,
21 whose determination shall be final and binding. The IP Plaintiffs have designated the Honorable
22 Alfred Chiantelli (Ret.) of ADR Services, Inc. to serve in this capacity. The costs associated with

23 _____
24 ¹¹ Formula B works as follows: Assume the Reseller bought 1000 routers. The estimated dollar
25 value of Defendants' SRAM actually purchased by the Reseller is calculated as follows: 1000 x
26 82% (average percentage of all routers sold in the U.S. that contain SRAM) x 69.2% (Defendants'
27 weighted average total SRAM market share 98-05) x \$12.04 (average SRAM cost in routers) =
28 \$6,831.98. The Reseller's claim amount is $(\$6,832 - (6,832/1.395)) = \$1,935$ (SRAM overcharge) x
0.367 (Allocation Percentage) = \$710.14. Again, if a pro-rata distribution is required due to the
number of claims, this amount will be smaller; and if such pro-rata distribution reduces a claim to
less than \$25, no payment will be made to the Reseller claimant. Proposed Order, Ex. 1 at 4.

1 the use of the Special Master in this regard shall be borne equally by the Reseller Claimant and the
2 Settlement Fund. Proposed Order, Ex. 1 at 5.

3 3. End User Plan of Distribution.

4 The End User portion of the Settlement Class likely comprises many thousands, if not
5 millions, of class members. Because of the size of the class compared to the amount of funds
6 available to the End Users, and due to the high cost of processing claims and making direct cash
7 payments to many thousands or millions of potential claimants relative to the average likely award to
8 those claimants, all funds allocated to the End User members of the Settlement Class will be
9 distributed *cy pres* to Court-approved nonprofit, charitable organizations. The proposed *cy pres*
10 candidates include those that serve the needy and/or those capable of providing the *cy pres* funds to
11 the needy. The proposed recipients also include nonprofit, charitable organizations that serve groups
12 that are, as nearly practicable, representative of the End Users in the Settlement Class, as well as
13 other court-approved nonprofit, charitable organizations. *See* Proposed Order, Ex. 1 at 5, Ex. 3
14 (listing proposed *cy pres* candidates); *see also* Micheletti Decl. ¶9 (regarding 501(c)(3) status and
15 mission statements). For example, the proposed *cy pres* candidates include nonprofits that refurbish
16 old or acquire new computers, cell phones and other IT equipment and distribute them to the needy,
17 schools, youths and others; nonprofits that assist small business; nonprofits that assist other
18 nonprofits, schools and others in improving their network systems and related IT infrastructure;
19 among other technology assistance-related charities. *See id.*

20 For the release given by End Users members of the Settlement Class in all states, and to
21 provide benefits to End User members of the Settlement Class in states that are not Certified States
22 (defined above), approximately 25 percent of the End User allocated portion of the Net Settlement
23 Fund will be distributed to nonprofit, charitable organizations that provide benefits throughout the
24 United States. The proposed national *cy pres* candidates include those that provide benefits to
25 persons and entities that are, as nearly as practicable, representative of the interests of class
26 members, as well as other nonprofits that generally provide benefits to the needy, and whose
27 beneficiaries necessarily include class members as well. *See* Proposed Order, Ex. 3 at 1-2.

1 To provide benefits to End Users in the Certified States, approximately 75 percent of the
2 End-User portion of the Net Settlement Fund will be divided among the Certified States and
3 distributed to nonprofit, charitable organizations within those states. For purposes of dividing the
4 funds among the nonprofits in the Certified States, pro-rata distribution based on the population of
5 the state will be used as a guideline. Again, the proposed state-specific *cy pres* candidates include
6 those that provide benefits to persons and entities that are, as nearly as practicable, representative of
7 the interests of class members, as well as other nonprofits that generally provide benefits to the
8 needy, and whose beneficiaries necessarily include class members. *See id.*, Ex. 3 at 3-19.

9 4. Timing of Distributions.

10 Distributions of allowed claims to Resellers and *cy pres* distributions shall be made as soon
11 as is reasonably practicable after all settlement agreements have become “final” (as defined therein).
12 Class Counsel and the Claims Administrator shall take reasonable steps to make the distribution
13 process more efficient in order to reduce expenses. Proposed Order, Ex. 1 at 6.

14 With regard to the *cy pres* distributions, as soon as is practicable after the Net Settlement
15 Fund is determined and the Reseller claim distributions are made, and the unused portion of the
16 Reseller-allocated portion of the Net Settlement Fund is determined (if any), Plaintiffs shall submit
17 to the Court for approval specific proposed distributions to the national and state-specific *cy pres*
18 candidates. Said payments shall be made as soon as is practicable after Court approval is obtained.
19 Proposed Order, Ex. 1 at 6.

20 **IV. NOTICE TO CLASS**

21 IP Plaintiffs’ Notice Plan is detailed in the Declaration of Dennis Gilardi Re Dissemination
22 of Notice to Class Members (“Gilardi Decl.”) filed concurrently herewith. *See* Gilardi Decl. ¶¶8-9.
23 The Notice Plan is very similar to the notice plan approved by the Court and utilized in connection
24 with the 2010 Settlements involving the same class definition. The proposed short and long forms of
25 notice are also modeled after those previously approved by the Court and used in connection with
26 the 2010 Settlements.

1 The Settlement Class consists of all persons and entities who purchased products containing
2 SRAM indirectly from Defendants. The Defendants have informed Plaintiffs' counsel that they do
3 not have any lists of class members. *See* Micheletti Decl. ¶8. Since there does not exist any list that
4 can identify Settlement Class members through reasonable efforts in order to provide individual
5 notice, notice to the majority of the Settlement Class by publication and via the internet is the only
6 practicable and reasonable method of informing indirect purchasers of the above-described
7 Settlements. *See generally* Manual for Complex Litigation (Fourth) § 21.311 (“Manual”)
8 (“Publication in magazines, newspapers, or trade journals may be necessary if class members are not
9 identifiable after reasonable effort....”); *see also* Alba Conte & Herbert Newberg, 3 Newberg on
10 Class Actions § 8:2 (4th ed. 2002) (quoting Manual). Posting notice on dedicated Internet sites is
11 considered a “useful supplement” and “will become increasingly useful as the percentage of the
12 population that regularly relies on the Internet for information increases.” Manual § 21.311. Indeed,
13 “[m]any courts include the Internet as a component of class certification and class settlement notice
14 programs.” Manual § 21.311. Because the Settlement Class also includes Resellers, however—and
15 as was done in connection with the 2010 Settlements—Plaintiffs have also proposed sending written
16 notice to companies that are likely to have purchased SRAM indirectly from Defendants for use in
17 products that they resold in another form.

18 Plaintiffs propose dissemination of a Short Form Notice (“Summary”) (attached as Exhibit 4
19 to the Proposed Order and as Exhibit A to the Gilardi Decl.) to be published in national newspapers
20 and magazines, and on the internet. These magazines have been identified as reasonably likely to
21 reach those class members most likely to have indirectly purchased SRAM or SRAM containing
22 products from the Defendants. The Summary will advise potential class members of the nature of
23 the action; of the definition of the class certified; of the class claims, issues or defenses; that a class
24 member may enter an appearance through counsel if the member so desires; that the court will
25 exclude from the class any member who requests exclusion; of when and how members may elect to
26 be excluded; and of the binding effect of a class judgment on class members under Rule 23(c)(3).
27 The Summary also provides a toll-free phone number to call for information and a website that will
28

1 provide potential class members with lengthier and complete notice. Plaintiffs also propose a Long
 2 Form Notice (attached as Exhibit 5 to the Proposed Order) to be provided by direct mail to
 3 identifiable potential resellers of SRAM, as well as to all class members who request written notice,
 4 and to be made available on a dedicated website.

5 Set out below is a proposed schedule for dissemination of notice. If the Court is able to hear
 6 and decide this motion on or before June 9, the following dates may be entered into the Proposed
 7 Order.

<u>Date</u>	<u>Event</u>
June 9, 2011	Entry of order preliminary approving distribution plan and notice plan
June 16, 2011	Commence published notice program
June 23, 2011	Deadline for completing mailed notice
July 25, 2011	Deadline for completing all publication notice
August 25, 2011	Deadline for opting out of Settlement Class or filing objections;
September 15, 2011	Deadline for filing briefing in support of final approval of Settlements and for responding to any objections to attorneys fees request
October 6, 2011	Final Fairness Hearing
October 24, 2011	Deadline for Resellers to submit claims

18 **V. ARGUMENT**

19 **A. The Plan of Allocation and Distribution**

20 “Approval of a plan for the allocation of a class settlement fund is governed by the same
 21 legal standards that are applicable to approval of the settlement: the distribution plan must be ‘fair,
 22 reasonable and adequate.’” *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal.
 23 2001), *quoting In re Computron Software Inc.*, 6 F.Supp.2d 313, 321 (D.N.J. 1998) (*citing Class*
 24 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992)); *accord Rodriguez v. West*
 25 *Pub’g Corp.*, 2007 U.S. Dist. LEXIS 74849, at *76 (C.D. Cal. Sept. 10, 2007), *rev’d on other*
 26 *grounds*, 563 F.3d 948 (9th Cir. 2009). Here, IP Plaintiffs seek preliminary approval of the Plan of
 27 Distribution. Accordingly, at this time, the Court is not being asked to determine whether the Plan
 28

1 of Distribution is fair, reasonable or adequate. Rather, the question is simply whether the Plan of
 2 Distribution is sufficiently within the range of possible approval to justify publication of notice of
 3 the plan to class members and scheduling of a final approval hearing.¹² See *Armstrong v. Bd. of Sch.*
 4 *Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980) (overruled on different grounds in *Felzen v. Andreas*, 134
 5 F.3d 873, 875 (7th Cir. 1998)); accord *In re M.L. Stern Overtime Litig.*, No. 07-CV-0118-BTM
 6 (JMA), 2009 U.S. Dist. LEXIS 31650, at **9-10 (S.D. Cal. Apr. 13, 2009) (citing *Armstrong*); see
 7 also *Manual* § 13.14 (“First, the judge reviews the proposal preliminarily to determine whether it is
 8 sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after
 9 the hearing.”).

10 The Court should grant preliminary approval unless the settlement or plan contains “obvious
 11 deficiencies” which raise serious doubts about its fairness. See *In re Vitamins Antitrust Litig.*, No.
 12 99-197 (TFH), 1999 U.S. Dist. LEXIS 21963, at **29-30 (D.D.C. Nov. 23, 1999) (quoting *Manual*
 13 *for Complex Litigation (Third)* § 30.41); see also *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
 14 1078, 1080 (N.D. Cal. 2007) (“[t]he court may find that the settlement proposal contains some merit,
 15 is within the range of reasonableness required for a settlement offer, or is presumptively valid.”)
 16 (citing 2 *Newberg on Class Actions* (“*Newberg*”) § 11.25 (3d ed. 1992)).

17 “A plan of allocation that reimburses class members based on the type and extent of their
 18 injuries is generally reasonable.” *Citric Acid*, 145 F. Supp. 2d at 1154, citing, *inter alia*, *In re Ikon*
 19 *Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); accord *In re Vitamins*
 20 *Antitrust Litig.*, 2000 U.S. Dist. LEXIS 8931 (D.D.C. Mar. 31, 2000) (“Settlement distributions, such
 21 as this one, that apportion funds according to the relative amount of damages suffered by class
 22 members have repeatedly been deemed fair and reasonable.”), citing *Beecher v. Able*, 575 F.2d 1010,
 23 1013-14 (2d Cir. 1978); *In re Chicken Antitrust Litig.*, 669 F.2d 228, 240-42 (5th Cir. 1982).

24
 25
 26 ¹² As noted above, the Court has already determined that the amounts of the Samsung and Cypress
 27 settlements are sufficiently within the range of possible approval to justify publication of notice of
 28 the settlements to class members and scheduling of a final approval hearing. See Samsung and
 Cypress Preliminary Approval Orders, DE 1324, 1329, ¶4.

1 ““In evaluating the formula for apportioning the settlement fund, the Court keeps in mind that
2 district courts enjoy broad supervisory powers over the administration of class-action settlements to
3 allocate the proceeds among the claiming class members equitably.”” *Rodriguez*, 2007 U.S. Dist.
4 LEXIS 74849, at *76 (internal punctuation omitted), *quoting Hammon v Barry*, 752 F. Supp. 1087,
5 1095 (D.D.C. 1990).

6 Here, the Plan of Distribution outlined above is clearly within the range of possible approval
7 to justify publication of notice of the plan to class members and scheduling of a final approval
8 hearing. The allocation of the Net Settlement Fund as between Reseller and End User members of
9 the Settlement class is fair because it was reached after arms-length negotiations between court-
10 appointed counsel representing each such group of class members. The Resellers and their counsel
11 retained experts, analyzed pass-through issues and presented their positions vis-à-vis the End Users
12 before a well-respected neutral who oversaw and mediated the negotiations. The End Users,
13 similarly, utilized the pass-through-related work performed by their experts in connection with the
14 litigation. In the end, a fair allocation of 63.3% to the End Users and 36.7% to the Resellers was
15 agreed upon by the Settlement Class members, and as noted above (*see* §III.E, *supra*) the process
16 and result was approved by Judge Chiantelli (Ret.). As such, the allocation should be preliminarily
17 approved. *See Relafen*, 231 F.R.D. at 74 (approving similar “structural protections put in place by
18 class counsel” and holding that allocation was “fair and adequate”).

19 Second, the plan of distribution of the Net Settlement Fund to the Resellers and End Users is
20 also within the range of possible approval to justify publication of notice. The claims process for
21 Resellers is simple and straightforward. It is simplified for those making relatively small claims
22 (\$1,000 or less) (*i.e.*, “Simplified Claims”) and requires a more rigorous showing for those seeking
23 larger payments (*i.e.*, “Detailed Claims”). Requiring a heightened burden of proof on Detailed
24 Claims is reasonable because they may exceed \$1,000 and could result in large payments to
25 Resellers (*i.e.*, \$10,000, \$50,000 or more). In sum, Resellers submitting claims for larger portions of
26 the available Net Settlement Fund reasonably should present stronger proof of the amount of their
27 purchases of Defendants’ SRAM. The formulas used to calculate Reseller claim amounts are
28

1 reasonable because they are based on SRAM market information and data that was developed from
2 market data and Defendants' data, and importantly, was used by IP Plaintiffs' experts' in the
3 litigation. As such, they provide a reasonably accurate estimation of the Reseller's damages without
4 demanding exact or nearly-exact calculations that are neither necessary nor feasible under the
5 circumstances.

6 The \$25 floor on payments to Resellers is proper as it seeks to reduce administrative costs by
7 reducing the number of small payments that will need to be made to Resellers. Given the significant
8 costs of evaluating and administering claims, preparing payments to Resellers and transmitting same
9 to them, setting this payment floor is warranted. Additionally, unlike End Users, Reseller members
10 of the Settlement Class are not consumers; thus, it is likely that they will have made larger purchases
11 of SRAM and thus will be seeking payments in excess of \$25.

12 As noted above, undistributed funds, if any, from the Reseller portion of the Net Settlement
13 Fund shall be included in the *cy pres* distribution. While the *cy pres* distribution is primarily geared
14 towards providing benefits to End Users, such distribution will also benefit Resellers in two ways.
15 First, the distribution will benefit Resellers in their capacities as End Users of SRAM-containing
16 products because Resellers necessarily purchase SRAM-containing products (such as desktops,
17 routers and switches) for their own use and not for resale. Indeed, among the proposed *cy pres*
18 candidates are entities that provide technical and other assistance to small businesses, which will
19 undoubtedly include some Reseller/End Users of SRAM-containing products.¹³ Second, the *cy pres*
20 distributions will also benefit Resellers through encouraging purchases of products they sell as many
21 of the proposed *cy pres* candidates purchase or refurbish and provide desktops, networking
22 equipment, cellular phones and other information technology-related products to those in need.¹⁴

23 _____
24 ¹³ Examples include national organizations such as SCORE, which provides resources, templates and
25 tools to assist entrepreneurs in developing tools and plans they need to succeed, as well as regional
26 organizations such as ACCION, an award-winning New Mexico, Arizona, and Colorado nonprofit
27 that increases access to business credit, makes loans and provides training, for the benefit of
28 emerging entrepreneurs and small businesses. See Proposed Order, Ex. 3.

¹⁴ Examples include national organizations such as Computers For Schools, which refurbishes
computer systems and provides them to schools for a fraction of the cost of new products, and
regional organizations such as the Alameda County Computer Resource Center, which refurbishes

1 The Reseller claim form is also worthy of preliminary approval. It is simple and easy to
 2 complete, requires only information needed to evaluate and present the Reseller's claim, but also
 3 requires that the Reseller make the necessary representations to show that it is entitled to payment.
 4 The Reseller portion of the Distribution Plan also allows Reseller Claimants to challenge a denial of
 5 their claim. In sum, the claims process for Resellers strikes a reasonable balance between requiring
 6 proof of purchase of specific amounts of Defendants' SRAM and related showings, while not
 7 burdening claimants so greatly so as to unreasonably reduce or otherwise discourage claims.

8 With regard to the *cy pres* distributions to be made for the benefit of the End User members
 9 of the Settlement Class, as with the Reseller distribution process, this portion of the Plan of
 10 Distribution is within the range of possible approval to warrant publication of notice. The End User
 11 members of the Settlement Class include every consumer or business that purchased a desktop
 12 computer, server, router, switch, modem, smartphone, PDA and many, many other end products¹⁵
 13 that contained Defendants' SRAM from 1996 to 2006; and therefore comprise thousands if not
 14 millions of class members. The payment amount each End User—assuming the claimant
 15 investigated and determined that he or she purchased Defendants' SRAM—would be quite small.¹⁶
 16 Thus, after deducting administrative costs for processing the claims and distributing the funds, each
 17 individual award would be too small to justify the effort. Rather than providing a negligible benefit
 18 to a large number of people at a disproportionate administrative cost, use of a *cy pres* distribution to
 19 provide great benefits to court-approved nonprofit charities is preferred. As a result, use of a *cy pres*
 20 distribution is reasonable. *See* 4 Newberg §11:20 at 28 (“In a settlement context, when an aggregate
 21 class recovery cannot economically be distributed to individual class members . . . the parties,

22 _____
 23 computers and provides them to local community organizations, schools, nonprofit organizations,
 24 and individuals with disabilities or hardships where it is demonstrated that the computer would
 25 enhance the person's life. *See* Proposed Order, Ex. 3.

26 ¹⁵ These include voice-over-internet-protocol devices, firewalls, storage area networks, set-top
 27 boxes, video-gaming consoles, military applications such as radar, sonar and other communications
 28 devices, as well as automobiles, including multi-media controllers and power-train control modules
 used therein. *See* Harris Report dated January 29, 2009, ¶14-¶18.

¹⁶ The estimated cost of SRAM in a modem, for example, is less than \$3. *See* Micheletti Decl. ¶7.
 With an average overcharge of 39.5%, an End User's potential recovery on that purchase would be
 about \$0.85.

1 subject to court approval, may agree that undistributed funds will be distributed or disposed of for
2 the indirect benefit if the class”).

3 The propriety of the *cy pres* plan is further supported by the fact that IP Plaintiffs have
4 identified numerous *cy pres* candidates that are representative of the interests of End User members
5 of the Settlement Class. As noted above, many of the *cy pres* candidates are nonprofits that are
6 involved in providing personal computers, cellular phones, networking and other information
7 technology equipment to children, schools, the needy, disabled persons, small businesses, other
8 nonprofits that serve the needy, and many others. To further broaden the reach of these distributions
9 and ensure that a vast cross-section of class members benefit from them, other *cy pres* candidates
10 that provide food, shelter, social services and other support services to the needy are also included.
11 During the Class Period, SRAM was used in a wide variety of products, everything from
12 automobiles to basic cell phones to gaming consoles. As a result, making distributions to nonprofits
13 beyond those that are IT-related is reasonable.¹⁷

14 As noted above, a Reseller must have made its purchases of SRAM in one of the Certified
15 States to be eligible to make a claim. While Resellers that made purchases in a non-certified state
16 are not entitled to payments from the Net Settlement Fund, they will nevertheless receive benefits
17 through the *cy pres* distributions to national nonprofits that will provide benefits in both Certified
18 and noncertified states. A similar distinction is drawn with regard to End Users. The *cy pres*
19 distribution provides for a greater proportion of the Net Settlement Fund allocated to End Users to be
20 made to nonprofit charities in Certified States, as opposed to the nonprofit charities providing
21 benefits throughout the United States. These distinctions in the claims process and *cy pres*
22 distribution drawn between the Settlement Class members in Certified States and other states are
23 reasonable. They are based upon the classes certified during the course of the litigation and the

24 _____
25 ¹⁷ The Court suggested that counsel consider the Department of Education’s “Race to the Top”
26 program as a potential *cy pres* recipient. Class Counsel reviewed and considered that program but
27 found no mechanism for making private donations to that federally-funded program. Numerous
28 nonprofits on the proposed *cy pres* list, however, focus on improving educational opportunities for
underserved students and provide assistance to schools. See *e.g.* Breakthrough Collaborative;
Computers for Schools; Minnesota Computers for Schools; Public Education Foundation, among
others. Proposed Order Ex. 3.

1 timing of the settlements with the Defendants, and provide for a reasonable division of benefits as
2 between Settlement Class members who litigated damages claims and those that sought only
3 injunctive relief. The claims pursued by the State Damages Classes in the Certified States exposed
4 the Defendants to significant monetary liability during this litigation, primarily facilitated the
5 settlements obtained, and generated the Settlement Fund now being distributed. As such, it is well
6 within the Court's discretion, and is therefore appropriate to adjust the distribution of settlement
7 benefits to reflect these procedural and substantive differences between class member claims. *See In*
8 *re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 529-30 and 539-40 (3rd Cir. 2004) (holding
9 that district court did not abuse discretion in certifying a nationwide settlement class despite
10 potential variations in state law claims and upholding allocation plan that treated groups of class
11 members with the settlement class differently); *see also Relafen*, 231 F.R.D. at 71-72 (rejecting
12 objection that allocation plan was unfair because it established "differential percentage levels of
13 recovery dependent on state law", reasoning that the "structural protections put in place by class
14 counsel were sufficient under all of the circumstances and that the allocation in light of state law is
15 fair and adequate")

16 For all of the foregoing reasons, the Plan of Distribution is within the range of possible
17 approval such that notice should be given to Settlement Class members.

18 **B. The Proposed Notice to the Class is Adequate**

19 Class Members are entitled to the "best notice practicable under the circumstances" of an
20 order granting class certification, as well as any "reasonable notice" of proposed settlements before
21 the settlements are finally approved by the Court. Fed. R. Civ. P. 23(c)(2), 23(e)(1). The notice
22 must state in plain, easily understood language: the nature of the action; the definition of the class
23 certified; the class claims, issues or defenses; that a class member may enter an appearance through
24 counsel if the member so desires; that the court will exclude from the class any member who
25 requests exclusion, stating when and how members may elect to be excluded; and the binding effect
26 of a class judgment on class members under Rule 23(c)(3). *Id.*

1 Class members are entitled to have the court “direct notice in a reasonable manner to all class
2 members who would be bound by” a proposed settlement before it is finally approved by the Court.
3 Fed. R. Civ. P. 23(e)(1). The settlement notice should announce the terms of a proposed settlement
4 and state that, if approved, it will bind all class members. Manual § 21.312. Further, the settlement
5 notice should be delivered or communicated to class members in a manner similar to that as
6 provided with class certification notices – with individual notice being provided, where practicable,
7 in Rule 23(b)(3) actions, and with the posting of notices on the Internet, in newspapers, etc. as a
8 substitute and/or supplement to individual notice. *See id.*

9 Here, the Settlement Class encompasses all persons and businesses who indirectly purchased
10 SRAM sold by Defendants from November 1, 1996 through December 31, 2006. Defendants have
11 already indicated that they do not possess lists of members of the Settlement Class. As such, there is
12 no feasible way to identify all indirect purchasers of these products. Where a class includes
13 “millions of ... unidentified purchasers during the class period, individual notice was not possible”
14 and notice by print, broadcast and/or electronic means is appropriate. *In re Compact Disc Minimum*
15 *Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203 (D. Me. 2003); *see also In re Tableware*
16 *Antitrust Litigation*, 484 F.Supp. 2d at 1080 (approving notice by publication to a nationwide class
17 of tableware purchases where “defendants do not have a list of potential class members”).

18 The content of the proposed Short and Long Form notices (“the Notices”) complies with the
19 requirements of Rules 23(c)(2) and 23(e). The Notices clearly and concisely explain the nature of the
20 action, the Settlement Class and the terms of the Settlements. They provide a clear description of the
21 members of the classes and the binding effect of class membership. The Notices also explain how to
22 exclude oneself from the class, how to object to the Settlement, how to obtain copies of the notices
23 and settlement agreements, how to make a claim, and how to contact class counsel. *See Declaration*
24 *of Dennis Gilardi Re: Dissemination of Notice to Class Members (“Gilardi Decl.”) ¶¶16-17, Ex. A.*

25 Class Counsel propose a notice plan that will maximize the opportunity for members of the
26 classes to understand the nature of the case, the settlements and to respond appropriately if they so
27 choose. *See Gilardi Decl. ¶ 12.* Class Counsel has retained Gilardi & Co. LLC and Larkspur Design
28

1 Group (collectively “Gilardi”) to implement this notice plan. Gilardi has designed a multi-pronged
 2 notification effort that includes published notices in national newspapers and magazines, an online
 3 internet campaign and press releases. *Id.* at ¶¶ 13, 18-29, 31. In addition, a neutral information
 4 website has already been established where class members can obtain additional information about
 5 the case. *Id.* at ¶ 30. Finally, the notice plan includes mailed notice to potential indirect purchasers
 6 of SRAM that are likely resellers of finished products containing SRAM, as well as end users of
 7 SRAM. *Id.* at ¶¶ 13, 31.

8 Gilardi estimates that the multi-pronged publication and notice effort described above will
 9 reach approximately 85% of all Class members. *See* Gilardi Decl. ¶¶ 33. In addition to the reach of
 10 the published and mailed notices, the notice program will reach an additional percentage of the class
 11 members through (1) the internet banner notices (which will be displayed on popular websites); (2)
 12 the press releases (which will be published by various print and internet media); and (3) the
 13 informational website (which will be located via various search engines by class members who
 14 search for topics related to the settlement). The costs of notice will be paid out of the Settlement
 15 Fund. Plaintiffs have endeavored to secure the most efficient notice program possible, taking into
 16 consideration the desire to reach a broad cross-section of class members while not spending an
 17 inappropriate amount of the Fund on notice. The estimated cost of the multi-pronged publication
 18 and notice effort described above is approximately \$1,208,090.00. Gilardi Decl. ¶ 35. This sum is
 19 reasonable and Plaintiffs request that the Court approve use of Settlement Funds for this purpose.

20 Plaintiffs propose that the Summary Notice substantially in the form attached as Exhibit 4 to
 21 the Proposed Order be utilized in the published notice. In addition, the internet website currently in
 22 use in this case (www.indirectsramcase.com) shall post, in addition to the extensive case- and
 23 settlement-related materials already on the site,¹⁸ the Order Granting Preliminary Approval and the
 24 forms of notice, the Claim Form, as well as a toll-free information number. Links to the foregoing
 25

26 ¹⁸ The following items, among many others, are already posted on the www.indirectsramcase.com
 27 internet website: The Class Action Complaints filed in this litigation; all settlements with all
 28 defendants; the Order Granting Motion for Class Certification; all preliminary approval orders
 entered to date; all preliminary approval papers that have previously been filed.

