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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. M:07-CV-01819-CW

MDL No. 1819

**NOTICE OF MOTION AND MOTION TO  
APPROVE PROPOSED FORMS OF NOTICE  
REGARDING CLASS ACTION AND  
PARTIAL SETTLEMENTS AND FOR  
PRELIMINARY APPROVAL OF  
SETTLEMENTS (MICRON, HYNIX,  
RENASAS-HITACHI-MITSUBISHI, ETRON,  
TOSHIBA, NEC)**

15  
16 This Document Relates to:  
17 ALL INDIRECT PURCHASER ACTIONS  
18

Hearing Date: June 3, 2010  
Time: 2:00 p.m.  
Courtroom: 2, 4<sup>th</sup> Floor  
21 Judge: Hon. Claudia Wilken  
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**NOTICE OF MOTION AND MOTION**

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

**PLEASE TAKE NOTICE** that on June 3, 2010, at 2:00 p.m. or at a time subject to the Court's calendar, before the Honorable Claudia Wilken, United States District Court, Northern District of California, 1301 Clay Street, Suite 400S, Oakland, California, Indirect Purchaser Plaintiffs ("IP Plaintiffs" or "Plaintiffs") will and hereby do move the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for an Order:

(i) granting preliminary approval of each of the settlement agreements Plaintiffs have executed on behalf of the class of indirect purchasers with the following Defendants (collectively the "Settling Defendants"):

- (a) Micron Technology, Inc. and Micron Semiconductor Products, Inc. (collectively "Micron");
- (b) Hynix Semiconductor Inc. and Hynix Semiconductor America Inc. (collectively "Hynix");
- (c) Renesas Technology Corp., Renesas Technology America, Inc. (collectively "Renesas"), Hitachi Ltd., Hitachi Semiconductor (America), Inc., (collectively "Hitachi"), Mitsubishi Electric Corporation, and Mitsubishi Electric & Electronics USA, Inc. (collectively "Mitsubishi") (together "Renesas-Hitachi-Mitsubishi");
- (d) Etron Technology, Inc. and Etron Technology America, Inc. (collectively "Etron"); and,
- (e) Toshiba Corporation and Toshiba America Electronic Components, Inc., (collectively "Toshiba");
- (f) NEC Electronics Corporation and NEC Electronics America, Inc. (collectively "NEC");

(ii) certifying a Settlement Class ("Settlement Class");

(iii) approving the manner and form for giving a single notice of the class certification and settlement agreements to class members; and

(iv) establishing a timetable for publishing the class notice, lodging objections, if any, to the terms of the settlement agreements and holding a hearing regarding final approval of the

1 settlement agreements.

2 This motion is based upon this Notice of Motion and Motion, the following Memorandum of  
 3 Law, the Declaration of Francis O. Scarpulla in Support of Plaintiffs' Motion to Approve Proposed  
 4 Forms of Notice Regarding Class Action and Partial Settlements and for Preliminary Approval of  
 5 Class Action Settlements (Micron, Hynix, Renesas-Hitachi-Mitsubishi, Etron, Toshiba, NEC), and  
 6 the Proposed Order Approving Proposed Forms of Notice Regarding Class Action and Partial  
 7 Settlements and Granting Preliminary Approval of Settlements (Micron, Hynix, Renesas-Hitachi-  
 8 Mitsubishi, Etron, Toshiba, NEC), the complete files and records in this action, and such other  
 9 written or oral arguments that may be presented to the Court.<sup>1</sup>

## 10 MEMORANDUM OF LAW

### 11 I. INTRODUCTION

12 On November 25, 2009, this Court granted Plaintiffs' Motion for Class Certification and  
 13 certified: (1) pursuant to Rule 23(b)(2), a nationwide injunctive class of all persons who indirectly  
 14 purchased SRAM (a memory device used in, *inter alia*, smart phones, servers, routers, and other  
 15 electronic devices) from the Defendants for their own use and not for resale during the relevant time  
 16 period; and (2) pursuant to Rule 23(b)(3), classes of all persons in the states of Arizona, Arkansas,  
 17 California, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana,  
 18 Nevada, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South  
 19 Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, Puerto Rico, and the District of  
 20 Columbia who indirectly purchased SRAM<sup>2</sup> from the Defendants for their own use and not for  
 21 \_\_\_\_\_

22 <sup>1</sup>The settlement agreements are attached to the Declaration of Francis O. Scarpulla in Support of  
 23 Plaintiffs' Motion to Approve Proposed Forms of Notice Regarding Class Action and Partial  
 24 Settlements and for Preliminary Approval of Class Action Settlements (Micron, Hynix, Renesas-  
 25 Hitachi-Mitsubishi, Etron, Toshiba, NEC) ("Scarpulla Decl."). The settlement agreement with  
 26 Micron is attached as Exhibit A. The settlement agreement with Hynix is attached as Exhibit B.  
 The settlement agreement with Renesas-Hitachi-Mitsubishi is attached as Exhibit C. The settlement  
 agreement with Etron and the individual releases of certain Etron employees is attached as Exhibit  
 D. The settlement agreement with Toshiba and amendment thereto is attached as Exhibit E. The  
 settlement agreement with NEC is attached as Exhibit F.

27 <sup>2</sup> Pursuant to a Stipulation and Order Amending Order Granting IP Plaintiffs' Motion for Class  
 Certification, "products containing SRAM," for purposes of litigation, are defined as: "handheld  
 28 \_\_\_\_\_

1 resale, during the relevant time period (collectively, the “Litigation Classes”). Pursuant to Rule  
 2 23(c), class members must be notified of the class certification and their right to opt out if they so  
 3 choose.

4 In addition, Plaintiffs have, on behalf of the class of indirect purchasers, entered into separate  
 5 settlement agreements (“Settlement(s)”) with Defendants: (a) Micron; (b) Hynix; (c) Renesas-  
 6 Hitachi-Mitsubishi; (d) Etron; (e) Toshiba; and (f) NEC for a combined amount totaling  
 7 \$25,422,000. In return for a release of the class members’ claims, Micron has agreed to pay  
 8 \$1,550,000; Hynix has agreed to pay \$950,000; Renesas, on behalf of Renesas-Hitachi-Mitsubishi,  
 9 has agreed to pay \$4,497,000;<sup>3</sup> Etron has agreed to pay \$2,000,000; Toshiba has agreed to pay  
 10 \$1,525,000; and NEC has agreed to pay \$14,900,000. In addition, the amounts of Settling  
 11 Defendants’ sales remain in the case for purposes of computing the treble damages claims against  
 12 non-settling Defendants, and the Settling Defendants have agreed, as provided in the Settlements, to  
 13 provide cooperation that Plaintiffs believe will assist in the prosecution of the case against the  
 14 remaining Defendants Cypress Semiconductor Corporation and the Samsung Defendants (Samsung  
 15 Electronics Company, Ltd., Samsung Electronics America, Inc. and Samsung Semiconductor, Inc.)  
 16 (collectively the “Non-Settling Defendants”).<sup>4</sup>

17 The Settlements, which represent significant recoveries for the IP Plaintiffs, were achieved  
 18 through extensive, arm’s-length negotiations, with the initial assistance of Court-appointed mediator  
 19 Hon. Daniel Weinstein (Ret.), that took place only after substantial discovery had occurred –  
 20 including Plaintiffs’ review of millions of pages of documents. The Settlements also took place at  
 21 various points after Plaintiffs were successful in overcoming Defendants’ several *Twombly*-based

22 \_\_\_\_\_  
 23 computer devices (also known as personal digital assistants (‘PDAs’) and smart phones), desktop  
 24 computers (with separate level 2 cache memory), servers, mainframes, Voice-Over Internet Protocol  
 Systems, routers, switches, modems, storage area networks and firewalls.” See Docket Entry (“DE”)  
 981.

25 <sup>3</sup> Before April 2003, Hitachi and Mitsubishi manufactured and sold SRAM. In April 2003, Renesas,  
 26 a joint venture of Hitachi and Mitsubishi, took over those companies’ manufacture and sale of  
 SRAM. Renesas, Hitachi and Mitsubishi are represented by the same counsel in this action.

27 <sup>4</sup> See Micron Settlement ¶ 23; Hynix Settlement ¶ 23; Renesas-Hitachi-Mitsubishi Settlement ¶ 23;  
 Etron Settlement ¶ 23; Toshiba Settlement ¶ 23; NEC Settlement ¶ 23.

1 motions to dismiss and Defendants' vigorous opposition to class certification. Finally, the  
2 settlement negotiations were conducted by Plaintiffs' counsel who are sufficiently experienced in  
3 ///  
4 similar litigation such that they can accurately assess whether the Settlements are indeed fair and  
5 reasonable.

6 Through this motion, Plaintiffs seek preliminary approval of each of the Settlements. At this  
7 time, the Court is not being asked to determine whether the Settlements are fair, reasonable and  
8 adequate. Rather, the question is simply whether the Settlements are sufficiently within the range of  
9 possible approval to justify sending and publishing notice of the Settlements to class members and to  
10 schedule a final approval hearing. *See Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir.  
11 1980) (overruled on different grounds in *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998));  
12 *accord In re M.L. Stern Overtime Litig.*, No. 07-CV-0118-BTM (JMA), 2009 U.S. Dist. LEXIS  
13 31650, at \*\*9-10 (S.D. Cal. Apr. 13, 2009) (*citing Armstrong*); *see also* Manual for Complex  
14 Litigation (Fourth) § 13.14 ("First, the judge reviews the proposal preliminarily to determine  
15 whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is  
16 made after the hearing."). Accordingly, the Court should grant preliminary approval here, unless the  
17 Settlements contain "obvious deficiencies" which raise serious doubts about their fairness. *See In re*  
18 *Vitamins Antitrust Litig.*, No. 99-197 (TFH), 1999 U.S. Dist. LEXIS 21963, at \*\*29-30 (D.D.C.  
19 Nov. 23, 1999) (*quoting* Manual for Complex Litigation (Third) § 30.41); *see also In re Tableware*  
20 *Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("[t]he court may find that the  
21 settlement proposal contains some merit, is within the range of reasonableness required for a  
22 settlement offer, or is presumptively valid.") (*citing 2 Newberg on Class Actions* § 11.25 (3d ed.  
23 1992)).

24 If preliminary approval is granted, the members of the IP Plaintiff class will be notified of the  
25 terms of the Settlements and informed of their rights in connection therewith, including their right to  
26 object and be heard at the final approval hearing. In addition, pending the Court's approval of IP  
27 Plaintiffs' proposed forms of notice regarding class action and partial settlements, IP Plaintiffs

1 intend to disseminate the approved Short and Long forms of notice to class members. Because  
 2 providing multiple notices to members of the Litigation Classes (of the class certification and  
 3 Settlements) would likely confuse the class and cause Plaintiffs to incur unnecessary and duplicative  
 4 expenses, Plaintiffs request that a single, comprehensive notice be disseminated regarding both the  
 5 Litigation and the Settlement Classes, and propose the following schedule:

<u>Date</u>	<u>Event</u>
June 3, 2010	Hearing on motion for preliminary approval of settlements
June 4, 2010	Commence published notice program
June 11, 2010	Deadline for completing mailed notice
July 6, 2010	Deadline for completing published notice in national publications, regional publications and on the internet
Aug. 10, 2010	Deadline for opting out of Litigation Classes, Settlement Class or objecting to Settlements;
Sept. 3, 2010	Deadline for filing briefs in support of Settlements, etc.
Sept. 30, 2010	Hearing on final approval of Settlements

16 Accordingly, Plaintiffs seek an order: (i) granting preliminary approval of each of the  
 17 Settlements; (ii) provisionally certifying a Settlement Class; (iii) approving the manner and form of  
 18 giving a single notice to all IP Plaintiffs (*i.e.*, the proposed notice) regarding the Litigation class  
 19 certification order and of the Settlements; and, (iv) establishing the timetable set forth above for the  
 20 notice and for final approval proceedings.

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

22 A. Whether the Settlements are sufficiently within the range of possible approval to  
 23 justify publishing notice of the Settlements and scheduling final approval proceedings.

24 B. Whether the proposed Settlement Class should be certified for settlement purposes;

25 C. Whether the proposed program of notice, including the dissemination of a single  
 26 notice to the IP Plaintiffs regarding the Litigation Class certification order and the Settlements,  
 27 satisfies the requirements of Federal Rule of Civil Procedure 23(c)(2)(A), (c)(2)(B) and (e)(1) of

1 providing the best practicable notice under the circumstances to all class members who would be  
2 bound by the certification and Settlements.

3 ///

4 ///

5 ///

### 6 **III. FACTUAL AND PROCEDURAL BACKGROUND**

#### 7 **A. Allegations**

8 This action alleges that Defendants conspired to fix the price of SRAM. Plaintiffs are  
9 individuals and entities that indirectly purchased SRAM during the period November 1, 1996  
10 through December 31, 2006. Defendants are domestic and foreign entities that manufactured, sold  
11 or distributed SRAM in the United States during the Class Period. *See* Fourth Consolidated  
12 Amended Class Action Complaint (“*Compl.*”) ¶¶ 110-129. Plaintiffs allege injuries incurred as a  
13 result of Defendants’ conduct and seek: (i) injunctive relief pursuant to Section 16 of the Clayton  
14 Act, 15 U.S.C. § 16, for Defendants’ violations of Section 1 of the Sherman Act, 15 U.S.C. § 1; and  
15 (ii) damages or restitution under relevant state antitrust, consumer protection and unjust enrichment  
16 laws.

17 Defendants have denied and continue to deny each and all of the claims and contentions  
18 alleged in the Complaint and have asserted and continue to assert many defenses, and have expressly  
19 denied any legal liability arising out of the conduct alleged in the litigation. Nevertheless, Settling  
20 Defendants have concluded that it is desirable that this action be settled in the manner and on the  
21 terms and conditions set forth in the Settlement Agreements in order to avoid the expense,  
22 inconvenience and burden of further protracted legal proceedings throughout the country and the  
23 uncertainties inherent in any litigation.

#### 24 **B. Discovery and Class Certification**

25 In Spring 2007, actions initially commenced throughout the nation were transferred and  
26 centralized before the District Court. *See* DE 1, 5, 34. Following the U.S Department of Justice’s  
27 (“DOJ”) 2007 motion to intervene and to stay discovery, the District Court entered an order staying

1 all deposition and interrogatory discovery until June 1, 2008. DE 208. During this time, Plaintiffs  
2 served limited document discovery on Defendants, much of which Defendants objected to,  
3 necessitating motions to compel before the Court-appointed Special Master.<sup>5</sup> Plaintiffs, however,  
4 were allowed access to the millions of pages of documents that Defendants had produced to the  
5 DOJ, as well as the millions of pages of documents previously produced in the DRAM antitrust  
6 litigation (*In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, Case No. M-02-1486  
7 PJH (N.D. Cal.)) (“DRAM Production”).

8 After the parties entered into a Stipulation and Protective Order concerning the disclosure of  
9 confidential and highly confidential information (granted on December 21, 2007), the Defendants  
10 began producing copies of documents and sales data in addition to the documents that Defendants  
11 initially turned over in connection with the DOJ’s SRAM investigation, as well as the DRAM  
12 Production. The Defendants’ productions took place on a rolling basis. To date, the Defendants  
13 have produced over *eleven million pages* from both domestic and foreign entities – in addition to the  
14 millions of pages in the DRAM Production. Many of the documents are in Korean, Japanese and  
15 Chinese, and have been translated in addition to being indexed and analyzed. *See* Scarpulla Decl.,  
16 ¶ 2.

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

25 \_\_\_\_\_  
26 <sup>5</sup> *See, e.g.*, May 20, 2008 Order (DE 442) (ordering Defendants to produce non U.S. transactional  
27 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 In addition to reviewing the content of the produced documents, Plaintiffs' counsel organized  
2 certain critical documents by subject-matter category, and documents relating to more than 50  
3 potential deponents that were compiled in preparation for depositions. These efforts were vital to  
4 Plaintiffs' preparation of motions, damages analyses, and ability to timely respond to complex legal  
5 and factual issues that arose during this litigation. Their preparation and organization also enhanced  
6 Plaintiffs' counsel's negotiations with Settling Defendants as Plaintiffs' counsel were armed with a  
7 full understanding of the strengths and weaknesses of their case. *See* Scarpulla Decl. ¶ 5.

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

20 Plaintiffs' counsel has worked extensively with consultants and experts in preparation for  
21 trial and future motions. In particular, Plaintiffs' counsel spent considerable time working with  
22 expert antitrust economists Michael J. Harris, Ph.D. and Mark Dwyer, Ph.D., especially in  
23 connection with the class certification proceedings. *See* Scarpulla Decl. ¶ 10.

24 On January 29, 2009, Plaintiffs filed a motion for class certification, and on November 25,  
25 2009, over Defendants' opposition, the Court certified the Litigation Classes. Class certification was  
26 by no means guaranteed, and Plaintiffs were successful in overcoming a petition to the Ninth Circuit,  
27

1 pursuant to Fed. R. Civ. P. 23(f), to review the Court's class certification order. *See* Scarpulla Decl.  
2 ¶ 11.

### 3 C. Settlement Negotiations

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

9 Only after a substantial amount of discovery and analysis, including as described above, and  
10 only after thorough consideration of applicable law, did Plaintiffs' counsel begin settlement  
11 negotiations with the first Settling Defendant, Micron.<sup>6</sup> The result of these communications and  
12 ensuing negotiations with other defendants are six separate Settlements between Plaintiffs and six  
13 groups of Settling Defendants. The first agreement, with Micron, was reached in March 2009, after  
14 the mediation before Judge Weinstein, and protracted arm's-length negotiations. *See* Scarpulla Decl.  
15 ¶ 14. Negotiations with Toshiba, Hynix and Renesas-Hitachi-Mitsubishi occurred during the Spring  
16 and Summer of 2009 and were similarly protracted and difficult; they occurred over many months  
17 and involved both meetings and telephone discussions. Agreements in principle were reached with  
18 those Defendants prior to the hearing on Plaintiffs' motion for class certification in early September  
19 2009 (including one on the eve of that hearing), with executed Settlement Agreements being  
20 finalized by December 2009. *See* Scarpulla Decl. ¶¶ 16, 18, 22. Negotiations with Etron and NEC

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21  
22 <sup>6</sup> As an initial matter, the parties retained former state Judge Daniel Weinstein, now of JAMS in San  
23 Francisco, as a neutral mediator. A mediation session was held in California on February 17, 2009,  
24 and, in anticipation of mediation, all parties submitted confidential mediation briefs to Judge  
25 Weinstein. During that session, counsel for the parties and Judge Weinstein discussed the facts of  
26 the cases, the strengths, weaknesses and procedural postures of the federal and state law claims and  
27 the defenses to all of the cases. The parties and the mediator also discussed the size and scope of the  
class, the amount of sales of SRAM, Plaintiffs' demands for damages and restitution, and  
Defendants' position on damages. Thereafter, extensive, vigorous and non-collusive, arm's-length  
negotiations ensued between Defendants' numerous counsel and counsel for the Plaintiffs (primarily  
Francis Scarpulla), including meetings, exchanges of information as well as presentations by the  
parties about their views of the case. *See* Scarpulla Decl. ¶ 13.

1 were similarly extensive, necessitating both meetings and telephone discussions. *See* Scarpulla  
 2 Decl. ¶¶ 20, 24. There were extensive negotiations with those Defendants following the class  
 3 certification hearing, including a further mediation session before Judge Weinstein vis-à-vis Etron.  
 4 An agreement in principle was reached with Etron in late November 2009, and the Settlement  
 5 Agreement was finalized in December 2009. *See* Scarpulla Decl. ¶ 20. After the Court’s class  
 6 certification ruling, hard-fought settlement negotiations with NEC were pursued in December 2009  
 7 and January 2010. Plaintiffs and NEC reached an agreement in principle in January 2010 and the  
 8 Settlement Agreement was finalized in March 2010. *See* Scarpulla Decl. ¶ 24. Despite the  
 9 Settlements, Settling Defendants maintain that they have meritorious defenses to Plaintiffs’ claims.

#### 10 **IV. NOTICE TO CLASS**

11 Class Members are entitled to the “best notice practicable under the circumstances” of an  
 12 order granting class certification, as well as any “reasonable notice” of proposed settlements before  
 13 the settlements are finally approved by the Court. Fed. R. Civ. P. 23(c)(2), 23(e)(1). The notice  
 14 must state in plain, easily understood language:

- 15 • the nature of the action,
- 16 • the definition of the class certified,
- 17 • the class claims, issues or defenses,
- 18 • that a class member may enter an appearance through counsel if the member so  
 19 desires,
- 20 • that the court will exclude from the class any member who requests exclusion, stating  
 21 when and how members may elect to be excluded, and
- 22 • the binding effect of a class judgment on class members under Rule 23(c)(3).

23 *Id.*

24 The certified Litigation Classes consist of all persons and entities who purchased products  
 25 containing SRAM indirectly, for their own use and not for resale, from Defendants.<sup>7</sup> The  
 26 \_\_\_\_\_

27 <sup>7</sup> The Settlement Class is defined in Section V below.

1 Defendants have informed Plaintiffs' counsel that they do not have any lists of class members. *See*  
2 Scarpulla Decl. ¶ 26. Therefore, since there does not exist any list that can identify Litigation Class  
3 members through reasonable efforts in order to provide individual notice, notice to the majority of  
4 the Litigation and Settlement Classes by publication and via the internet is the only practicable and  
5 reasonable method of informing indirect purchasers of the Litigation Class certification order and the  
6 above-described Settlements.<sup>8</sup> *See generally* Manual for Complex Litigation (Fourth) § 21.311  
7 (“*Manual*”) (“Publication in magazines, newspapers, or trade journals may be necessary if class  
8 members are not identifiable after reasonable effort....”); *see also* Alba Conte & Herbert Newberg, 3  
9 *Newberg on Class Actions* § 8:2 (4th ed. 2002) (quoting *Manual*). Furthermore, posting notice on  
10 dedicated Internet sites is considered a “useful supplement” and “will become increasingly useful as  
11 the percentage of the population that regularly relies on the Internet for information increases.”  
12 *Manual* § 21.311. Indeed, “[m]any courts include the Internet as a component of class certification  
13 and class settlement notice programs.” *Manual* § 21.311. With regard to the Settlement Class,  
14 because it includes resellers, Plaintiffs do intend to send written notice to companies that are likely  
15 to have purchased SRAM indirectly from Defendants for use in products that they resold in another  
16 form. Indeed, many of these resellers likely also purchased products containing SRAM for their  
17 own use and are likely members of one of the Litigation Classes as well.

18 Plaintiffs propose dissemination of a Short Form Notice (“Summary”) (attached as Exhibit A  
19 to the Proposed Order submitted contemporaneously herewith) to be published in national  
20 newspapers and magazines, and on the internet. These magazines have been identified as reasonably  
21 likely to reach those class members most likely to have indirectly purchased SRAM products from  
22 the Defendants. The Summary will provide potential class members with the information listed  
23 above along with a toll-free phone number to call for information and a website that will provide  
24  
25

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26  
27 <sup>8</sup> The determination of whether the proposed notification is reasonable under circumstances of the  
case is discretionary. *Manual* § 21.311.

1 potential class members with lengthier and complete notice.<sup>9</sup> Plaintiffs also propose a Long Form  
 2 Notice (attached as Exhibit B to the Proposed Order submitted contemporaneously herewith) to be  
 3 provided by direct mail to identifiable resellers of SRAM, as well as to all class members who  
 4 request written notice, and available on a dedicated website.

5 The schedule for dissemination of notice is as follows:

<u>Date</u>	<u>Event</u>
6 June 3, 2010	Hearing on motion for preliminary approval of settlements
7 June 4, 2010	Commence published notice program
8 June 11, 2010	Deadline for completing mailed notice
9	
10	
11 July 6, 2010	Deadline for publication of notice in national publications, regional 12 publications and on the internet;
13 Aug. 10, 2010	Deadline for opting out of Litigation Classes, Settlement Class or 14 objecting to Settlement;
15 Sept. 3, 2010	Deadline for filing briefing in support of final approval of Settlement; 16 and
17 Sept. 30, 2010	Hearing on final approval of Settlement.

## 18 **V. THE TERMS OF THE SETTLEMENTS**

### 19 **A. The Settlement Class**

20 Each of the Settlements provides for the following Settlement Class:

21 All persons and entities residing in the United States who, from November 1,  
 22 1996 through December 31, 2006, purchased SRAM in the United States  
 23 indirectly from Defendants. The class excludes the following persons and  
 24 entities: the Defendants; the officers, directors or employees of any Defendant;  
 any entity in which any Defendant has a controlling interest; any affiliate, legal

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25 <sup>9</sup> The content of the proposed Summary and Long Form notices comply with the requirements of  
 26 Rule 23(c)(2)(A) and (B). The notices clearly and concisely explain the nature of the action; provide  
 27 a clear description of who is a member of the class and the binding effects of class membership; and  
 explain how to exclude oneself from the class, how to obtain copies of papers filed in the case and  
 how to contact Class counsel.

1 representative, heir or assign of any Defendant; any federal, state or local  
2 governmental entities; and any judicial officer presiding over this action and the  
3 members of her immediate family and judicial staff.

4 See Micron Settlement, ¶ 1; Hynix Settlement ¶ 1; Renesas-Hitachi-Mitsubishi Settlement  
5 ¶ 1; Etron Settlement ¶ 1; Toshiba Settlement ¶ 1; NEC Settlement ¶ 1.<sup>10</sup>

## 6 **B. The Financial Terms of Each Settlement**

### 7 **1. The Micron Settlement**

8 Micron has agreed to pay \$1,550,000 to the Class in exchange for a dismissal with prejudice  
9 and a release of all claims asserted in the Complaint. Micron made the Settlement payment to an  
10 interest-bearing escrow account on January 10, 2010. *See* Micron Settlement ¶¶ 16, 17.

11 Additionally, the Micron Settlement authorizes the use of \$200,000 of the Settlement payment for  
12 notice and administrative purposes, and the use of \$200,000 of the Settlement Payment for expenses  
13 incurred in prosecuting the case against the Non-Settling Defendants. *See* Micron Settlement ¶ 19.

14 ///

### 15 **2. The Hynix Settlement**

16 Hynix has agreed to pay \$950,000 to the Class in exchange for a dismissal with prejudice and  
17 a release of all claims asserted in the Complaint, and as otherwise stated in the Settlement  
18 Agreement. Hynix made the Settlement Payment to an interest-bearing escrow account on January  
19 10, 2010. *See* Hynix Settlement ¶¶ 16, 17. Additionally, the Settlement authorizes the use of  
20 \$200,000 of the Settlement payment for notice and administrative purposes, and the use of \$200,000  
21 of the Settlement payment for expenses incurred in prosecuting the case against the Non-Settling  
22 Defendants. *See* Hynix Settlement ¶ 19.

### 23 **3. The Renesas-Hitachi-Mitsubishi Settlement**

24 Renesas-Hitachi-Mitsubishi have agreed to pay \$4,497,000 to the Class in exchange for a  
25 dismissal with prejudice and a release of all claims asserted in the Complaint. Renesas-Hitachi-  
26 Mitsubishi made the Settlement payment to an interest-bearing escrow account on December 14,

27 <sup>10</sup> The definition of SRAM in each of the Settlement Agreements includes “Pseudo SRAM” or  
28 “PSRAM”.

1 2009. *See* Renesas-Hitachi-Mitsubishi Settlement ¶¶ 16, 17. Additionally, the Settlement  
2 authorizes the use of \$580,000 of the Settlement payment for notice and administrative purposes,  
3 and the use of \$580,000 of the Settlement payment for expenses incurred in prosecuting the case  
4 against the Non-Settling Defendants. *See* Renesas-Hitachi-Mitsubishi Settlement ¶ 19.

5 **4. The Etron Settlement**

6 Etron has agreed to pay \$2,000,000 to the Class in exchange for a dismissal with prejudice  
7 and a release of all claims asserted in the Complaint. Etron made the Settlement payment to an  
8 interest-bearing escrow account on January 11, 2010. *See* Etron Settlement ¶¶ 16, 17. Additionally,  
9 the Settlement authorizes the use of \$260,000 of the Settlement payment for notice and  
10 administrative purposes, and the use of \$260,000 of the Settlement payment for expenses incurred in  
11 prosecuting the case against the Non-Settling Defendants. *See* Etron Settlement ¶ 19.

12 **5. The Toshiba Settlement**

13 Toshiba has agreed to pay \$1,525,000 to the Class in exchange for a dismissal with prejudice  
14 and a release of all claims asserted in the Complaint. Toshiba made the Settlement Payment to an  
15 interest-bearing escrow account on January 10, 2010. *See* Toshiba Settlement ¶¶ 16, 17.  
16 Additionally, the Settlement authorizes the use of \$320,000 of the Settlement payment for notice and  
17 administrative purposes, and the use of \$320,000 of the Settlement payment for expenses incurred in  
18 prosecuting the case against the Non-Settling Defendants. *See* Toshiba Settlement ¶ 19.

19 **6. The NEC Settlement**

20 NEC has agreed to pay \$14,900,000<sup>11</sup> to the Class in exchange for a dismissal with prejudice  
21 and a release of all claims asserted in the Complaint. NEC shall make the Settlement payment to an  
22 interest-bearing escrow account on April 19, 2010. *See* NEC Settlement ¶¶ 16(a), 17. Additionally,  
23 the Settlement authorizes the use of \$4,660,000 of the Settlement payment for notice and  
24 administrative purposes, and the use of \$4,660,000 of the Settlement payment for expenses incurred  
25 in prosecuting the case against the Non-Settling Defendants. *See* NEC Settlement ¶ 19.

26 \_\_\_\_\_  
27 <sup>11</sup> This sum is subject to reduction under certain circumstances related to future settlements, if any,  
with the non-Settling Defendants. *See* NEC Settlement ¶ 16(b)-(c).

1           **C. Other Common Settlement Provisions**

2           When the Settlements become final, Plaintiff and the Class members will release any claims  
3 that they may have against each of the Settling Defendants based, in whole or in part, on the matters  
4 alleged or that might have been alleged relating to the manufacture, sale, pricing, etc. of SRAM up  
5 through the last date of the Class Period. *See* Micron Settlement ¶¶ 13-15; Hynix Settlement ¶¶ 13-  
6 15; Renesas-Hitachi-Mitsubishi Settlement ¶¶ 13-15; Etron Settlement ¶¶ 13-15; Toshiba Settlement  
7 ¶¶ 13-15; NEC Settlement ¶¶ 13-15. The release does not include claims for product liability,  
8 breach of contract, direct purchaser claims, or indirect purchaser claims for SRAM purchased  
9 outside the United States. *See* Micron Settlement ¶¶ 15, 30; Hynix Settlement ¶¶ 15, 30; Renesas-  
10 Hitachi-Mitsubishi Settlement ¶¶ 15, 30; Etron Settlement ¶¶ 15, 30; Toshiba Settlement ¶¶ 15, 30;  
11 NEC Settlement ¶¶ 15, 30. The Settlement becomes final upon: (i) the Court entering a final order  
12 of approval of the Settlement under Federal Rule of Civil Procedure 23(e) and a final judgment  
13 dismissing the case with prejudice as to each of the Settling Defendants; and (ii) expiration of the  
14 time to appeal the Court’s final approval and judgment, or, if an appeal is taken, affirmance of the  
15 Court’s final approval and judgment with no possibility of further review. *See* Micron Settlement  
16 ¶ 11; Hynix Settlement ¶ 11; Renesas-Hitachi-Mitsubishi Settlement ¶ 11; Etron Settlement ¶ 11;  
17 Toshiba Settlement ¶ 11; NEC Settlement ¶ 11.

18           The Settlement also requires each of the Settling Defendants to provide cooperation that  
19 Plaintiffs believe will assist in prosecuting this action against the Non-Settling Defendants. The  
20 cooperation that each Settling Defendant is required to provide includes producing sales and pricing  
21 documents and meeting and conferring on making employees available for deposition and trial,  
22 including to testify about the authenticity and admissibility of documents. *See* Micron Settlement ¶  
23 23; Hynix Settlement ¶ 23; Renesas-Hitachi-Mitsubishi Settlement ¶ 23; Etron Settlement ¶¶ 13, 23  
24 and Individual Releases of Hsun-Feng (“Steven”) Li, Chao-Chun (“Nicky”) Lu, and Y.C. Chu;  
25 Toshiba Settlement ¶ 23; NEC Settlement ¶ 23.

26           Subject to the approval and direction of the Court, the total amount of the Settlements, plus  
27 accrued interest, will be: (i) distributed in accordance with a plan to be submitted to and approved by

1 the Court at the appropriate time; (ii) used to pay Class Counsel’s attorneys’ fees, costs and expenses  
 2 as they may be awarded by the Court; and (iii) used to pay costs and expenses incurred in the  
 3 prosecution of the action, as well as the administration and distribution of the Settlement payments.  
 4 See Micron Settlement ¶¶ 19, 21, 22, 24; Hynix Settlement ¶¶ 19, 21, 22, 24; Renesas-Hitachi-  
 5 Mitsubishi Settlement ¶¶ 19, 21, 22, 24; Etron Settlement ¶¶ 19, 21, 22, 24; Toshiba Settlement  
 6 ¶¶ 19, 21, 22, 24; NEC Settlement ¶¶ 19, 21, 22, 24.<sup>12</sup>

## 7 VI. THE SETTLEMENTS SHOULD BE PRELIMINARILY APPROVED

8 Through this motion, Plaintiffs seek preliminary approval of each of the Settlements. The  
 9 approval of class action settlements required by Federal Rule of Civil Procedure 23(e) is a two-step  
 10 process. The first step, preliminary approval, requires only that the terms of the proposed settlement  
 11 fall within the “range of possible approval.” See *Armstrong v. Bd. of School Dirs.*, 616 F.2d 305,  
 12 314 (7th Cir. 1980) (overruled on different grounds in *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir.  
 13 1998)); accord *In re M.L. Stern Overtime Litig.*, 2009 U.S. Dist. LEXIS 31650, at \*940 (S.D. Cal.  
 14 Apr. 13, 2009) (citing *Armstrong*); see also *Manual* § 13.14 (“First, the judge reviews the proposal  
 15 preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the  
 16 final decision on approval is made after the hearing.”). Granting preliminary approval amounts to a  
 17 determination that the terms of the proposed settlement warrant consideration by members of the  
 18 class and a full examination at a final approval hearing. *Manual* § 13.14. It is at the second step,  
 19 final approval (which takes place after preliminary approval and after notice to the class of the  
 20 settlement has been provided), that there is a full review by the Court as to the fairness of the  
 21 settlement. It is at final approval that, if appropriate, the Court makes a finding that a settlement is  
 22 “fair, reasonable and adequate.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

23  
 24  
 25 <sup>12</sup> As discussed below, Class Counsel do not intend to submit to the Court either a plan of  
 26 distribution or a request for attorneys’ fees at this time. They intend to do so at the conclusion of the  
 27 case because Plaintiffs are continuing to litigate against the Non-Settling Defendants and the total  
 recovery may impact the nature of the plan of distribution, and a piecemeal approach to plans of  
 distribution of settlements would be expensive, time consuming, and can confuse Class members.

1 Because preliminary approval is provisional, courts grant preliminary approval where the  
2 proposed settlement lacks “obvious deficiencies” that raise doubts about the fairness of the  
3 settlement. *See In re Vitamins Antitrust Litig.*, 1999 U.S. Dist. LEXIS 21963, at \*29-30 (D.D.C.  
4 Nov. 23, 1999) (quoting *Manual* § 30.41); *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d  
5 1078, 1080 (N.D. Cal. 2007) (“[t]he court may find that the settlement proposal contains some merit,  
6 is within the range of reasonableness required for a settlement offer, or is presumptively valid.”)  
7 (citing 2 *Newberg on Class Actions* § 11.25 (3d ed. 1992)). In ruling on a motion for preliminary  
8 approval, many courts have:

9 established an initial presumption of fairness by conducting a preliminary review of a  
10 settlement’s terms and considering (1) whether the negotiations occurred at arm’s  
11 length; (2) whether there was sufficient discovery; (3) whether the parties or their  
12 counsel are sufficiently experienced in similar litigation to be able to accurately  
13 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.

14 Moore’s Federal Practice § 23.165[2].

15 Further, it is well recognized that there is strong public policy in favor of settlement of  
16 complex class action disputes, and that rulings on such settlement are committed to the sound  
17 discretion of the Court. “Voluntary out of court settlement of disputes is ‘highly favored in the law’  
18 and approval of class action settlements will be generally left to the sound discretion of the trial  
19 judge.” *Wellman v. Dickinson*, 497 F. Supp. 824, 830 (S.D.N.Y. 1980) (citation omitted); *see also*  
20 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S.  
21 1217 (1983) (“voluntary conciliation and settlement are the preferred means of dispute resolution.  
22 This is especially true in complex class action litigation. . . .”); *Class Plaintiffs v. City of Seattle*, 955  
23 F.2d 1268, 1276 (9th Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *Speed Shore Corp. v. Denda*,  
24 605 F.2d 469, 473 (9th Cir. 1979) (“It is well recognized that settlement agreements are judicially  
25 favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit  
26 expensive litigation.”); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also*  
27 *Churchill Village, L.L.C. v. Gen Elec.*, 361 F.3d 566, 576 (9th Cir. 2004).

1           When applying the above cited standards and considerations, it is clear that the Settlements  
2 totaling \$25,422,000 that are now before the Court, warrant preliminary approval.

3           First, the consideration for each Settlement is substantial – Micron has agreed to pay  
4 \$1,550,000, Hynix \$950,000, Renesas-Hitachi-Mitsubishi \$4,497,000, Etron \$2,000,000, Toshiba  
5 \$1,525,000, and NEC \$14,900,000. The Settlements are generally comparable to the settlements  
6 finally approved in other price fixing cases. *See, e.g., In re Linerboard Antitrust Litig.*, 321 F. Supp.  
7 2d 619, 627 (E.D. Pa. 2004); *Fisher Bros. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa.  
8 1985). At the conclusion of the case, Class Counsel will submit a plan of distribution to the Court  
9 that will either provide for distribution of all amounts recovered in the litigation, plus interest, minus  
10 court-approved attorneys’ fees, costs, expenses, and incentive awards, to (1) Settlement Class  
11 Members through a Court-approved claims process; and/or to (2) eligible charitable organizations in  
12 the United States who are, as nearly practicable, representative of the interests of indirect purchasers  
13 of SRAM. If the *cy pres* method of distribution is chosen, it will be due to the reality that, given the  
14 class size, and geographical diversity, and the small volume of purchases made by individual Class  
15 members, it would not be practical to distribute products or cash directly to each and every member  
16 of the Class. *See Conroy v. 3M Corp.*, No. C-00-2810 CW (N.D. Cal. April 21, 2006) (approving *cy*  
17 *pres* settlement in a case involving transparent tape purchases by consumers).

18           Second, in addition to these payments, the Settlements provide that the few remaining Non-  
19 Settling Defendants remain jointly and severally liable for damages caused by the alleged  
20 conspiracy, including those from sales by the Settling Defendants. *See* Micron Settlement ¶ 29;  
21 Hynix Settlement ¶ 29; Renesas-Hitachi-Mitsubishi Settlement ¶ 29; Etron Settlement ¶ 29; Toshiba  
22 Settlement ¶ 29; NEC Settlement ¶ 29. The Settlements, therefore, provide a significant and certain  
23 recovery for Plaintiffs before trial and before motions for summary judgment, but do not reduce the  
24 total amount of damages that may be recovered in the case. *See In re Corrugated Container*  
25 *Antitrust Litig.*, M.D.L. 310, 1981 U.S. Dist. LEXIS 9687, at \*51 (S.D. Tex. June 4, 1981).

26           Third, all of the Settlements require Settling Defendants to provide cooperation that Plaintiffs  
27 believe will assist in the prosecution of this case against the Non-Settling Defendants. This is a

1 valuable benefit to class members because it will save time, reduce costs, and provide access to  
2 information and documents to which they might not otherwise have access. *See In re Initial Public*  
3 *Offering (IPO) Sec. Litig.*, 226 F.R.D. 186, 198 (S.D.N.Y. 2005); *In re Mid Atlantic Toyota Antitrust*  
4 *Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983) (cooperation is an appropriate factor for a court to  
5 consider in approving a settlement).

6 Fourth, the Settlements were the product of intense and thorough arm's-length negotiations  
7 that were conducted by experienced and informed counsel. Each of the negotiations occurred over a  
8 span of months and involved numerous meetings. The negotiations were contested, conducted in the  
9 utmost good faith, and Plaintiffs did not accept settlement offers that were not appropriate in light of  
10 the market share and position of, and evidence against, each Settling Defendant.

11 Fifth, Plaintiffs' counsel was able to make informed evaluations of proposed settlement  
12 offers because Plaintiffs' counsel only negotiated the Settlements on behalf of the Class after  
13 extensive discovery and motion practice, including a review and analysis of millions of pages of  
14 Defendants' documents and the taking of numerous depositions, as well as after Plaintiffs' counsel  
15 conducted their own substantial investigations and considered the analysis of expert consultants.  
16 Together, these steps provided counsel with insight as to both the strengths and weaknesses of the  
17 case, including as against each Defendant. *See Scarpulla Decl.* ¶¶ 10, 12-25.

18 Plaintiffs and their counsel recognize the expense and length of numerous trials in these  
19 actions against Defendants through possible appeals, which could take several years. Plaintiffs and  
20 their counsel believe that the claims asserted have merit and are supported by the available evidence.  
21 Plaintiffs' decision to submit the proposed Settlements for Court approval reflects their consideration  
22 of the very real benefits conferred on the Class by the proposed Settlements weighed against the very  
23 real risks of continued litigation. Based upon their evaluation of these issues, Class Counsel, who  
24 are experienced in antitrust and consumer class actions, have determined that the Settlements are in  
25 the best interest of the Class.

26 Moreover, experienced plaintiffs' counsel's judgment that settlements are fair and reasonable  
27 is entitled to great weight. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528

1 (C.D. Cal. 2004) (“‘Great weight’ is accorded to the recommendation of counsel, who are most  
 2 closely acquainted with the facts of the underlying litigation.”); *accord Bellows v. NCO Fin. Sys.*,  
 3 No. 3:07-cv-01413-W-AJB, 2008 U.S. Dist. LEXIS 103525, at \*22 (S.D. Cal. Dec. 2, 2008); *Ellis v.*  
 4 *Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (court accorded “considerable weight”  
 5 to settlement being reached after hard-fought negotiations by experienced counsel); *Rutter &*  
 6 *Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *Wilkerson v. Martin Marietta*  
 7 *Corp.*, 171 F.R.D. 273, 288 89 (D. Colo. 1997). In fact, “the trial judge, absent fraud, collusion, or  
 8 the like, should be hesitant to substitute its own judgment for that of counsel.” *Nat’l Rural*  
 9 *Telecomm.*, 221 F.R.D. at 528 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). In  
 10 other words, there is generally “an initial presumption of fairness when a proposed class settlement,  
 11 which was negotiated at arms’ length by counsel for the class, is presented for court approval.”  
 12 *Newberg on Class Actions* § 11.41 (3d ed. 1992).

13 In light of the above, it is plain that the \$25,422,000 in cash payments guaranteed by the  
 14 Settlements presented here are worthy of preliminary approval. They provide substantial and  
 15 certain benefits and they avoid – at least with regard to the Settling Defendants – the risks, delay and  
 16 expense of further litigation. And while Plaintiffs believe their case is strong, and the Court has  
 17 entered the class certification order after vigorous opposition from all Defendants, Settling  
 18 Defendants have not conceded liability and they would vigorously defend themselves at trial.

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

20 Prior to granting preliminary approval of a settlement, the Court should determine that the  
 21 proposed Settlement Class is a proper class. *See Manual* § 21.632; *Amchem Products v. Windsor*,  
 22 521 U.S. 591, 620 (1997). The Court can certify a settlement class where plaintiffs demonstrate that  
 23 the proposed class and proposed class representatives meet the four prerequisites in Rule 23(a) –  
 24 numerosity, commonality, typicality and adequacy of representation – and one of the three  
 25 requirements of Rule 23(b). *See Fed. R. Civ. P. 23; Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019  
 26 (9th Cir. 1998). Certification of a class action for damages requires a showing that “questions of law  
 27 and fact common to the members of the class predominate over any questions affecting only

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

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

12 As set forth in the proposed Settlements, Plaintiffs and their counsel have reached the  
13 proposed Settlements on behalf of the following Class: “All persons and entities residing in the  
14 United States who, from November 1, 1996 through December 31, 2006, purchased SRAM in the  
15 United States indirectly from Defendants,” with exceptions as specified in the Settlements. *See*  
16 *Micron Settlement* ¶1; *Hynix Settlement* ¶1; *Renesas-Hitachi-Mitsubishi Settlement* ¶1; *Etron*  
17 *Settlement* ¶1; *Toshiba Settlement* ¶1; *NEC Settlement* ¶1. The Settlement Class encompasses  
18 indirect purchases of “Pseudo SRAM” or “PSRAM.” *Id.*

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

20 The Court should find that it may provisionally certify the proposed Settlement Class for  
21 settlement purposes under Rule 23(a) and (b) of the Federal Rules of Civil Procedure. It is  
22 undisputed that hundreds of thousands of people purchased SRAM products during the class period;  
23 therefore, the Class is so numerous that joinder of all Class members in the action is impracticable.  
24 *See* Fed. R. Civ. P. 23(a)(1); *see also Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-  
25 14 (9th Cir. 1964) (“impracticability does not mean ‘impossibility,’ but only the difficulty or  
26 inconvenience of joining all members of the class”). Thus, the proposed Class readily satisfies the  
27 numerosity requirements of Rule 23. *See In re Static Random Access Memory (SRAM) Antitrust*

1 *Litig.*, No. 07-CV-1819-CW, 2009 WL 4263524, at \*4 (N.D. Cal. Nov. 25, 2009). There are  
2 questions of law and fact common to the Class that predominate over any individual questions,  
3 including whether Defendants conspired to inflate and fix the prices of SRAM; how long  
4 Defendants' conspiracy lasted; whether Defendants' conduct violated Section 1 of the Sherman Act  
5 as well as the state antitrust and unfair competition laws identified in the Complaint; the extent to  
6 which Defendants' conduct injured the class members; the appropriate measure of damages; and  
7 whether the class members are entitled to injunctive relief. "Antitrust, price fixing conspiracy cases,  
8 by their nature, deal with common legal and factual questions about the existence, scope and effect  
9 of the alleged conspiracy. Whether defendants participated in the actions alleged is a common  
10 question." *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 206 (E.D. Pa. 2001) (citation and  
11 quotation marks omitted). The issues constitute a common core of questions focusing on the central  
12 issue of the existence of the alleged conspiracy and plainly satisfy the commonality requirement of  
13 Rule 23(a)(2). *Estate of Jim Garrison v. Warner Bros., et al.*, 1996 WL 407849 at \*2 (C.D. Cal.  
14 1996) (Plaintiffs' allegations "which constitute the classic hallmark of antitrust class actions under  
15 Rule 23 ... are more than sufficient to satisfy the commonality requirements.").

16 Plaintiffs' claims are typical of those of the Settlement Class. Like all other Settlement Class  
17 members, Plaintiffs each indirectly purchased SRAM products during the relevant time period, and  
18 allege that Defendants engaged in an anti-competitive conspiracy. As the Court recognized when it  
19 certified the Direct Purchaser and Indirect Purchaser Litigation Classes, here "the overarching price  
20 fixing scheme is the linchpin of [Plaintiffs'] complaint, 'regardless of the product purchased, the  
21 market involved or the price ultimately paid.'" *In re SRAM*, 2009 WL 4263524, at \*5. This Court  
22 also held that Plaintiffs' claims are typical although they might have used different purchasing  
23 procedures, purchased different quantities or a different mix of products, or received different prices  
24 than other class members. *Id.* Because the same is true here, the typicality requirement is met.  
25 Furthermore, as evidenced by the history of the litigation, Plaintiffs and their counsel have fairly and  
26 adequately represented and protected the interests of all Class members. *See* Fed. R. Civ. P. 23(a)(3)  
27 and (a)(4).

1 In addition to the prerequisites of Rule 23(a), the Settlement Class must also satisfy the  
2 prerequisites of Rule 23(b)(3), namely: (1) questions of law or fact common to Class members must  
3 predominate over any questions affecting only individual members; and (2) the class action must be  
4 superior to other available methods for the fair and efficient adjudication of the matter. The Rule  
5 23(b) predominance inquiry is “readily met in certain cases alleging ... violations of the antitrust  
6 laws.” *Amchem*, 521 U.S. at 625; *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and*  
7 *Composites, Inc.*, 209 F.R.D. 159, 167 (C.D. Cal. 2002). “The ... inquiry tests whether proposed  
8 classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at  
9 623. Predominance is satisfied “unless it is clear that individual issues will overwhelm the common  
10 questions and render the class action valueless.” *In re NASDAQ Market-Makers Antitrust Litig.*, 169  
11 F.R.D. 493, 517-18 (S.D.N.Y. 1996). Individual issues in this case will not overwhelm the common  
12 questions of law or fact, because the central question is whether the Defendants conspired to  
13 improperly raise the prices of SRAM products, and, if so, how. *In re SRAM*, 2009 WL 4263524, at  
14 \*8. There is no doubt that Plaintiffs would present common evidence regarding the existence and  
15 scope of the alleged conspiracy and illegal activities at any trials of this matter. Similarly, although  
16 a wide range of SRAM products are potentially involved, common proof of sales and marketing  
17 practices, as well common pricing practices will apply to many claims. Moreover, the fact that  
18 individual Class members’ damages may vary due to quantity of purchases or types of SRAM  
19 products purchased does not defeat predominance. *See, e.g., In re Master Key Antitrust Litig.*, 528  
20 F.2d 5, 12 n.11 (2d Cir. 1975); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383  
21 (S.D.N.Y. 1996) (citing cases). Finally, Plaintiffs have presented plausible methodologies that  
22 would be used to perform quantitative analysis to demonstrate classwide injury. *In re SRAM*, 2009  
23 WL 4263524, at \*12.

24 With respect to the superiority requirement, a court must consider the following factors: (A)  
25 the interest of members of the class in individually controlling the prosecution or defense of separate  
26 actions; (B) the extent and nature of any litigation concerning the controversy already commenced  
27 by or against members of the class; (C) the desirability or undesirability of concentrating the

1 litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the  
2 management of a class action. Fed. R. Civ. P. 23(b)(3). The damages of most individual Class  
3 members are relatively small compared to the cost of litigation. *Id.* There is no problem in  
4 consolidating the litigation here, nor will any unusual difficulties be encountered. Members of the  
5 Class, therefore, have no real interest in controlling the prosecution of individual actions, and  
6 effectively would be unable to adjudicate their claims individually. Even if they were able to do so,  
7 the court system would be overwhelmed by the burden of hundreds of thousands of separate actions.  
8 Further, it is highly desirable to concentrate these claims in this court and given the proposed  
9 nationwide settlement of the claims, no management difficulties will affect the class. *In re SRAM*,  
10 2009 WL 4263524, at \*12-13.

#### 11 **VIII. THE PROPOSED NOTICE TO CLASS MEMBERS IS ADEQUATE**

12 In this case, the Litigation Classes have already been certified under Rules 23(b)(2) and  
13 23(b)(3) of the Federal Rules of Civil Procedure. As set forth above, Plaintiffs wish to combine the  
14 class action pendency notice with the class action settlement notice. Because providing multiple  
15 notices to the Class Members regarding the litigated classes and regarding the settlement class would  
16 likely confuse the Class Members and cause unnecessary and duplicative expense, a single,  
17 combined notice should be utilized. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078,  
18 1080 (N.D. Cal. 2007).

19 Class members are entitled to the “best practicable notice under the circumstances” of an  
20 order granting class certification, Rule 23(c)(2), and to have the court “direct notice in a reasonable  
21 manner to all class members who would be bound by” a proposed settlement before it is finally  
22 approved by the Court. Fed. R. Civ. P. 23(e)(1). The settlement notice should announce the terms  
23 of a proposed settlement and state that, if approved, it will bind all class members. *Manual*  
24 § 21.312. Further, the settlement notice should be delivered or communicated to class members in a  
25 manner similar to that as provided with class certification notices – with individual notice being  
26 provided, where practicable, in Rule 23(b)(3) actions, and with the posting of notices on the Internet,  
27 in newspapers, etc. as a substitute and/or supplement to individual notice. *See id.*

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

12 The content of the proposed Short and Long Form notices (“the Notices”) complies with the  
13 requirements of Rules 23(c)(2) and 23(e). The Notices clearly and concisely explain the nature of the  
14 action, the Litigation Classes, the Settlement Class and the terms of the Settlements. They provide a  
15 clear description of the members of the classes and the binding effect of class membership. The  
16 Notices also explain how to exclude oneself from the class, how to object to the Settlement, how to  
17 obtain copies of the notices and settlement agreements, and how to contact class counsel. *See*  
18 *Scarpulla Decl.* ¶ 26; *see also Declaration of Dennis Gilardi Re: Dissemination of Notice to Class*  
19 *Members* (“Gilardi Decl.”) ¶¶ 16-17.

20 Class Counsel propose a notice plan that will maximize the opportunity for members of the  
21 classes to understand the nature of the case, the settlements and to respond appropriately if they so  
22 choose. *See Gilardi Decl.* ¶ 12. Class Counsel has retained Gilardi & Co. LLC and Larkspur Design  
23 Group (collectively “Gilardi”) to implement this notice plan. Gilardi has designed a multi-pronged  
24 notification effort that includes published notices in national newspapers and magazines, an online  
25 internet campaign and press releases. *Id.* at ¶¶ 13, 18-29, 31. In addition, a neutral information  
26 website will be established where class members can obtain additional information about the case.  
27 *Id.* at ¶ 30. Finally, the notice plan includes mailed notice to potential indirect purchasers of SRAM

1 that are likely resellers of finished products containing SRAM, as well as end users of SRAM. *Id.* at  
2 ¶¶ 13, 31.

3         Gilardi estimates that the multi-pronged publication and notice effort described above will  
4 reach approximately 85% of all Class members. *See* Gilardi Decl. ¶¶ 33. In addition to the reach of  
5 the published and mailed notices, the notice program will reach an additional percentage of the class  
6 members through (1) the internet banner notices (which will be displayed on popular websites); (2)  
7 the press releases (which will be published by various print and internet media); and (3) the  
8 informational website (which will be located via various search engines by class members who  
9 search for topics related to the settlement). The costs of notice will be paid out of the Settlement  
10 Fund. Plaintiffs have endeavored to secure the most efficient notice program possible, taking into  
11 consideration the desire to reach a broad cross-section of class members while not spending an  
12 inappropriate amount of the Fund on notice. The estimated cost of the multi-pronged publication  
13 and notice effort described above is approximately \$1.15 million. Gilardi Decl. ¶ 35. This sum is  
14 reasonable and Plaintiffs request that the Court approve use of Settlement Funds for this purpose.

15         Plaintiffs propose that the Summary Notice substantially in the form attached as Exhibit A to  
16 the Proposed Order be utilized in the published notice. In addition, the internet website  
17 ([www.indirectsramcase.com](http://www.indirectsramcase.com)) shall post the Class Action Complaint filed in this litigation, the  
18 Settlement Agreements, the Order Granting Motion for Class Certification, the Order Granting  
19 Preliminary Approval and the forms of notice, as well as a toll-free information number. Links to  
20 the foregoing website will also be accessible to Class members on the websites of class counsel. The  
21 internet domain name and toll-free number will be identified on the Notices. Such notice plans are  
22 commonly used in class actions like this one and constitute valid, due and sufficient notice to class  
23 members, and satisfy both Rule 23(c)(2)(B)'s "best notice practicable" standard and Rule 23(e)(1)'s  
24 "notice in a reasonable manner" standard. *See, e.g., Moore's Federal Practice* § 23.102[3][a]-[c]; *see*  
25 *also Tableware*, 484 F. Supp. 2d at 1080.

26         Class Counsel currently plan to defer any request for Court approval of a final plan of  
27 distribution of the Settlement proceeds, minus court-approved attorneys' fees, costs, expenses, and

1 incentive awards, until the resolution of Plaintiffs' claims against Defendants Cypress and Samsung.  
 2 At that time, Class Counsel will submit a plan of distribution to the Court that will either provide for  
 3 distribution of all amounts recovered in the litigation, plus interest, minus court-approved attorneys'  
 4 fees, costs, expenses, and incentive awards, to (1) Settlement Class Members through a Court-  
 5 approved claims process and/or (2) eligible charitable organizations in the United States who are, as  
 6 nearly practicable, representative of the interests of indirect purchasers of SRAM. If only the second  
 7 plan described above is chosen, it will be due, among other factors, to the high cost of processing  
 8 claims and making direct cash payments to millions of class members relative to the average likely  
 9 award to claimants. Under the second plan, payments will not be made to individual Settlement  
 10 Class Members.

11 The proposed notice program, including the contents of the notices, fulfills the requirements  
 12 of Rule 23 and due process. *See Torris v. Tuscan Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir.  
 13 1993). Accordingly, the Court should approve the Notices.

#### 14 **IX. CONCLUSION**

15 For the reasons set forth herein, the Court should enter an order: (i) granting preliminary  
 16 approval of each of the Settlements; (ii) provisionally certifying a Settlement Class; (iii) approving  
 17 the manner and form of giving notice to class members; and, (iv) establishing the timetable set forth  
 18 herein for final approval proceedings.

19 Dated: April 15, 2010

Respectfully submitted,

20 /s/ Francis O. Scarpulla

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