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

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

Case No.
MDL No. 1819

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

16 This Document Relates to:
17 ALL INDIRECT PURCHASER ACTIONS

Hearing Date: January 27, 2011
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
18 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 January 27, 2011, 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 (“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 the settlement agreement Plaintiffs have executed on behalf of the class of indirect purchasers with Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., and Samsung Electronics America, Inc. (collectively “Samsung” or the “Samsung Defendants”);

(ii) provisionally certifying the Settlement Class (defined below); and

(iii) deferring publication of class notice and a final approval hearing until final resolution of the case or until such other time as Plaintiffs may request and that the Court may, in its discretion, approve.

This motion is based upon this Notice of Motion and Motion, the following Memorandum of Law, the Declaration of Francis O. Scarpulla in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement with Samsung, and the Proposed Order Granting Preliminary Approval of Settlement with Samsung, the complete files and records in this action, and such other written or oral arguments that may be presented to the Court.¹

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¹The settlement agreement with Samsung is attached as Exhibit A to the Declaration of Francis O. Scarpulla in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement with Samsung (“Scarpulla Decl.”).

MEMORANDUM OF LAW**I. INTRODUCTION**

Plaintiffs have, on behalf of the class of indirect purchasers, entered into a settlement agreement (“Settlement”) with the Samsung Defendants. In return for a release of the class members’ claims, Samsung has agreed to pay \$14,900,000. Together with separate settlements with six other sets of defendants—to which settlements the Court granted final approval and final dismissals with prejudice (Dkt. Nos. 1141, 1143-1148)—the combined settlements to date with Samsung and other defendants (collectively the “Settling Defendants”) total \$40,322,000.² Like the prior settlements, Samsung’s sales remain in the case for purposes of computing the treble damages claims against the non-settling defendant, Cypress Semiconductor Corporation (“Cypress”), and Samsung has agreed to provide cooperation that Plaintiffs believe will assist in the prosecution of the case against Cypress.³

The Settlement, which represents a significant recovery for the class, was achieved through extensive, arm’s-length negotiations, with the initial assistance of Court-appointed mediator Hon. Daniel Weinstein (Ret.), that took place only after the close of discovery – including Plaintiffs’ review of millions of pages of documents. The Settlement also took place after Plaintiffs successfully overcame defendants’ several *Twombly*-based motions to dismiss and their vigorous opposition to class certification (as well as their petition to the Ninth Circuit to review the Court’s order granting certification). The settlement occurred during the pendency of summary judgment motions and related *Daubert*, decertification, and Foreign Trade Antitrust Improvements Act (FTAIA) motions. Finally, the settlement negotiations were conducted by Plaintiffs’ counsel who are sufficiently experienced in similar litigation such that they can accurately assess whether the Settlement is indeed fair and reasonable.

² The Settling Defendants are Etron Technology, Inc. and Etron Technology America, Inc.; Hynix Semiconductor Inc. and Hynix Semiconductor America Inc.; Micron Technology, Inc. and Micron Semiconductor Products, Inc.; NEC Electronics Corporation and NEC Electronics America, Inc.; Renesas Technology Corp., Renesas Technology America, Inc., Hitachi Ltd., Hitachi Semiconductor (America), Inc., , Mitsubishi Electric Corporation, and Mitsubishi Electric & Electronics USA, Inc.; and Toshiba Corporation and Toshiba America Electronic Components, Inc.

³ See Scarpulla Decl. Ex. A ¶ 23.

1 Through this motion, Plaintiffs seek preliminary approval of the Settlement. At this time, the
 2 Court is not being asked to determine whether the Settlement is fair, reasonable or adequate. Rather,
 3 the question is simply whether the Settlement is sufficiently within the range of possible approval to
 4 justify future publication of notice of the Settlements to class members and future scheduling of a
 5 final approval hearing.⁴ See *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980)
 6 (overruled on different grounds in *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998)); accord *In*
 7 *re M.L. Stern Overtime Litig.*, No. 07-CV-0118-BTM (JMA), 2009 U.S. Dist. LEXIS 31650, at **9-
 8 10 (S.D. Cal. Apr. 13, 2009) (citing *Armstrong*); see also *Manual for Complex Litigation (Fourth)* §
 9 13.14 (“First, the judge reviews the proposal preliminarily to determine whether it is sufficient to
 10 warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.”).

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

18 Accordingly, Plaintiffs seek an order: (i) granting preliminary approval of the Settlement; (ii)
 19 provisionally certifying the Settlement Class; and (iii) deferring publication of notice to class
 20 members regarding the Settlement and final approval proceedings until resolution of the case or such
 21 other time as counsel may request and the Court approves.

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

23 1. Whether the Settlement is sufficiently within the range of possible approval to justify
 24 future publication of the Settlement to class members and future scheduling of final approval
 25 proceedings.

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

27
 28 ⁴ As discussed below, Plaintiffs seek to defer publication and mailing of notice to avoid, if possible,
 incurring those costs again at final resolution of the case.

1 **III. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Allegations**

3 This action alleges that Defendants conspired to fix the price of SRAM. Plaintiffs are
4 individuals and entities that indirectly purchased SRAM during the period November 1, 1996
5 through December 31, 2006 (the “Class Period”). Defendants are domestic and foreign entities that
6 manufactured, sold or distributed SRAM in the United States during the Class Period. *See* Fifth
7 Consolidated Amended Class Action Complaint (“Compl.”) ¶¶ 110-128 (Dkt. No. 1067). Plaintiffs
8 allege injuries incurred as a result of Defendants’ conduct and seek: (i) injunctive relief pursuant to
9 Section 16 of the Clayton Act, 15 U.S.C. § 16, for Defendants’ violations of Section 1 of the
10 Sherman Act, 15 U.S.C. § 1; and (ii) damages or restitution under relevant state antitrust, consumer
11 protection and unjust enrichment laws.

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

18 **B. Discovery and Class Certification**

19 In Spring 2007, actions initially commenced throughout the nation were transferred and
20 centralized before the District Court. *See* Dkt. Nos. 1, 5, 34. Following the U.S Department of
21 Justice’s (“DOJ”) 2007 motion to intervene and to stay discovery, the District Court entered an order
22 staying all deposition and interrogatory discovery until June 1, 2008. Dkt. No. 208. During this
23 time, Plaintiffs served limited document discovery on Defendants, much of which Defendants
24 objected to, necessitating motions to compel before the Court-appointed Special Master.⁵ Plaintiffs,
25 however, were allowed access to the millions of pages of documents that Defendants had produced

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

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

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

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

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

28

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

13 Plaintiffs' counsel has worked extensively with consultants and experts in preparation for
14 trial and future motions. In particular, Plaintiffs' counsel spent considerable time working with
15 expert antitrust economists Michael J. Harris, Ph.D. and Mark Dwyer, Ph.D., especially in
16 connection with the class certification and summary judgment proceedings. *See* Scarpulla Decl.
17 ¶ 10.

18 On November 25, 2009, over Defendants' opposition, the Court certified the Litigation
19 Classes. Class certification was by no means guaranteed, and Plaintiffs were successful in
20 overcoming Defendants' petition to the Ninth Circuit, pursuant to Fed. R. Civ. P. 23(f), to review the
21 Court's class certification order. *See* Scarpulla Decl. ¶ 11. Since then, the parties completed merits
22 discovery and engaged in and completed expert discovery—including the exchange of several expert
23 merits reports regarding, *inter alia*, liability and damages as well as depositions of their respective
24 experts. *See id.* In July 2010, Samsung and Cypress filed several motions relating to summary
25 judgment on Plaintiffs' claims, the FTAIA, and decertification, to which Plaintiffs filed oppositions
26 in August and September 2010. The FTAIA motion is still pending before the Court.

1 **C. Settlement Negotiations**

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

7 Only after the close of discovery and multiple rounds of summary judgment and related
8 briefing, including as described above, and only after thorough consideration of applicable law, did
9 Plaintiffs' counsel reach settlement with Samsung. *See* Scarpulla Decl. ¶ 13. Negotiations with
10 Samsung were protracted and difficult, much like the negotiations with the other Settling
11 Defendants. *Id.* The settlement discussions occurred through the latter half of 2010, including a
12 mediation session with Samsung and Cypress before the Court-appointed mediator, the Hon. Daniel
13 Weinstein, on September 27, 2010. *Id.* ¶ 14. Negotiations continued until the Samsung Settlement
14 was concluded and entered on October 4, 2010. *Id.* The negotiations were vigorous and non-
15 collusive, and included considerable meetings, exchanges of information as well as presentations by
16 the parties about their views of the case. *Id.*

17 Despite the Settlement, Samsung maintains that it has meritorious defenses to Plaintiffs'
18 claims.

19 **IV. NOTICE TO CLASS**

20 While Plaintiffs seek preliminary approval at this time, Plaintiffs also seek to defer giving
21 notice of the settlement to the Class until resolution of the case or until such other time as Plaintiffs
22 may request, taking into consideration the best interest of the Class. A court may postpone giving
23 notice if there exists a reason for delay and such delay would not prejudice absent class members.
24 *Cf. Fischer v. Kletz*, 41 F.R.D. 377, 386 (S.D.N.Y. 1966) (notice of class certification would be
25 "premature" where there was "no evidence that a delay would presently harm any of the security
26 holders" and absent class members "already received substantially the notice called for by Rule
27 23(c)(2). . . calling attention to, inter alia, the existence of these very suits."). Here, Plaintiffs'
28 contemplated published and mailed notice plan will cost in excess of \$1 million. In order to avoid

1 incurring those costs twice—once now and then again when the case is finally resolved and a plan of
2 distribution is prepared and presented to the Court for approval—at this time, Plaintiffs seek to defer
3 publication of notice and scheduling a final approval hearing. Plaintiffs seek preliminary approval
4 now, however, because they are preparing to proceed to trial against the remaining defendant,
5 Cypress. As such, Plaintiffs (and Samsung) would like to obtain preliminary approval of the
6 Settlement prior to the commencement of trial in order to at least provisionally confirm that the
7 Settlement is within the range of possible approval, contains no obvious deficiencies, and that IP
8 Plaintiffs need not proceed to trial against Samsung. As the case progresses, circumstances may
9 arise such that it may be in the Class’s best interests for Plaintiffs to seek final approval of the
10 Settlement before final resolution of the case.

11 **V. THE TERMS OF THE SETTLEMENT**

12 Samsung has agreed to pay \$14,900,000 to the Class in exchange for a dismissal with
13 prejudice and a release of all claims asserted in the Complaint. Samsung made the Settlement
14 payment to an interest-bearing escrow account on October 14, 2010. *See* Scarpulla Decl. Ex. A
15 (Samsung Settlement) ¶¶ 16-17. For the Settlement, the Class is defined as follows:

16 All persons and entities residing in the United States who, from November 1,
17 1996 through December 31, 2006 (the “Class Period”), purchased SRAM (as
18 defined in paragraph 2) in the United States indirectly from the Defendants. The
19 class excludes the following persons and entities: the Defendants; the officers,
20 directors or employees of any Defendant; any entity in which any of the
21 Defendants has a controlling interest; any affiliate, legal representative, heir or
22 assign of any Defendant; any federal, state or local governmental entities; and any
23 judicial officer presiding over the Action and the members of her immediate
24 family and judicial staff.

25 *Id.* ¶ 1. Paragraph 2 of the Settlement defines “SRAM” as “all types of static random access
26 memory (including pseudo static random access memory known as “PSRAM”), whether or not
27 packaged, and any parts and modules thereof.” *Id.* ¶ 2.

28 When the Settlement becomes final, Plaintiffs and the Class members will release any claims
that they may have against the Samsung Defendants based, in whole or in part, on the matters
alleged or that might have been alleged relating to the manufacture, sale, pricing, etc. of SRAM up
through the last date of the Class Period. *See* Scarpulla Decl. Ex. A ¶ 13. The release does not

1 include claims for product liability, breach of contract, direct purchaser claims, or indirect purchaser
2 claims for SRAM purchased outside the United States. *See id.* ¶¶ 15, 30. The Settlement becomes
3 final upon: (i) the Court entering a final order of approval of the Settlement under Federal Rule of
4 Civil Procedure 23(e) and a final judgment dismissing the case with prejudice as to Samsung; and
5 (ii) expiration of the time to appeal the Court’s final approval and judgment, or, if an appeal is taken,
6 affirmance of the Court’s final approval and judgment with no possibility of further review. *See id.*
7 ¶ 11.

8 The Settlement also requires the Samsung Defendants to provide cooperation that Plaintiffs
9 believe will assist in prosecuting this action against Cypress. The cooperation that Samsung is
10 required to provide includes producing sales and pricing documents and meeting and conferring on
11 making employees available for deposition and trial, including to testify about the authenticity and
12 admissibility of documents. *See id.* ¶ 23. Additionally, the Settlement authorizes the use of
13 \$1,600,000 of the Settlement Payment for notice and administrative purposes, and the use of
14 \$4,600,000 of the Settlement Payment for expenses incurred in prosecuting the case against Cypress.
15 *See id.* ¶ 19(a), (c).

16 Subject to the approval and direction of the Court, the Settlement Payment, plus accrued
17 interest, will be: (i) distributed in accordance with a plan to be submitted to and approved by the
18 Court at the appropriate time; (ii) used to pay Class Counsel’s attorneys’ fees, costs and expenses as
19 they may be awarded by the Court; and (iii) used to pay costs and expenses incurred in the
20 prosecution of the action, as well as the administration and distribution of the Settlement Payment.
21 *See id.* ¶¶ 21, 22, 24.

22 **VI. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

23 Through this motion, Plaintiffs seek preliminary approval of the Settlement. The approval of
24 class action settlements required by Federal Rule of Civil Procedure 23(e) is a two-step process. The
25 first step, preliminary approval, requires only that the terms of the proposed settlement fall within
26 the “range of possible approval.” *See Armstrong v. Bd. of School Dirs.*, 616 F.2d 305, 314 (7th Cir.
27 1980) (overruled on different grounds in *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998));
28 *accord In re M.L. Stern Overtime Litig.*, 2009 U.S. Dist. LEXIS 31650, at *940 (S.D. Cal. Apr. 13,

1 2009) (citing *Armstrong*); see also *Manual* § 13.14 (“First, the judge reviews the proposal
2 preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the
3 final decision on approval is made after the hearing.”). Granting preliminary approval amounts to a
4 determination that the terms of the proposed settlement warrant consideration by members of the
5 class and a full examination at a final approval hearing. *Manual* § 13.14. It is at the second step,
6 final approval (which takes place after preliminary approval and after notice to the class of the
7 settlement has been provided), that there is a full review by the Court as to the fairness of the
8 settlement. It is at final approval that, if appropriate, the Court makes a finding that a settlement is
9 “fair, reasonable and adequate.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

10 Because preliminary approval is provisional, courts grant preliminary approval where the
11 proposed settlement lacks “obvious deficiencies” that raise doubts about the fairness of the
12 settlement. See *In re Vitamins Antitrust Litig.*, 1999 U.S. Dist. LEXIS 21963, at *29-30 (D.D.C.
13 Nov. 23, 1999) (quoting *Manual* § 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* § 11.25 (3d ed. 1992)). In ruling on a motion for preliminary
17 approval, many courts have:

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

26 *Moore’s Federal Practice – Civil* § 23.165[2].

27 Further, it is well recognized that there is strong public policy in favor of settlement of
28 complex class action disputes, and that rulings on such settlement are committed to the sound
discretion of the Court. “Voluntary out of court settlement of disputes is ‘highly favored in the law’
and approval of class action settlements will be generally left to the sound discretion of the trial

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

10 When applying the above cited standards and considerations, it is clear that the Samsung
11 Settlement of \$14,900,000, like the previously approved Settlements with the other Settling
12 Defendants totaling \$25,422,000, warrants preliminary approval.

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

27 Second, in addition to these payments, the Settlement provides that Cypress, the sole
28 remaining defendant in the indirect-purchaser case, remains jointly and severally liable for damages

1 caused by the alleged conspiracy, including those from sales by the Settling Defendants. *See*
2 Scarpulla Decl. Ex. A ¶¶ 29. The Settlement, therefore, provides a significant and certain recovery
3 for Plaintiffs before trial, but does not reduce the total amount of damages that may be recovered in
4 the case. *See In re Corrugated Container Antitrust Litig.*, MDL No. 310, 1981 U.S. Dist. LEXIS
5 9687, at *51 (S.D. Tex. June 4, 1981).

6 Third, the Settlement requires Samsung to provide cooperation that Plaintiffs believe will
7 assist in the prosecution of this case against Cypress. This is a valuable benefit to class members
8 because it will save time, reduce costs, and provide access to information and documents to which
9 they might not otherwise have access. *See In re Initial Public Offering (IPO) Sec. Litig.*, 226 F.R.D.
10 186, 198 (S.D.N.Y. 2005); *In re Mid Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D.
11 Md. 1983) (cooperation is an appropriate factor for a court to consider in approving a settlement).

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

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

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

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

4 Moreover, experienced plaintiffs' counsel's judgment that settlements are fair and reasonable
5 is entitled to great weight. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528
6 (C.D. Cal. 2004) ("Great weight' is accorded to the recommendation of counsel, who are most
7 closely acquainted with the facts of the underlying litigation."); *accord Bellows v. NCO Fin. Sys.*,
8 No. 3:07-cv-01413-W-AJB, 2008 U.S. Dist. LEXIS 103525, at *22 (S.D. Cal. Dec. 2, 2008); *Ellis v.*
9 *Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (court accorded "considerable weight"
10 to settlement being reached after hard-fought negotiations by experienced counsel); *Rutter &*
11 *Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *Wilkerson v. Martin Marietta*
12 *Corp.*, 171 F.R.D. 273, 288 89 (D. Colo. 1997). In fact, "the trial judge, absent fraud, collusion, or
13 the like, should be hesitant to substitute its own judgment for that of counsel." *Nat'l Rural*
14 *Telecomm.*, 221 F.R.D. at 528 (*quoting Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). In
15 other words, there is generally "an initial presumption of fairness when a proposed class settlement,
16 which was negotiated at arms' length by counsel for the class, is presented for court approval." 2
17 *Newberg on Class Actions* § 11.41 (3d ed. 1992).

18 In light of the above, it is plain that the \$14,900,000 in cash payments guaranteed by the
19 Settlement presented here is worthy of preliminary approval. It provides substantial and certain
20 benefits and avoids – at least with regard to the Samsung Defendants – the risks, delay and expense
21 of further litigation. And while Plaintiffs believe their case is strong, Samsung has not conceded
22 liability and would vigorously defend itself at trial.

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

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

1 requirements of Rule 23(b). *See* Fed. R. Civ. P. 23; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019
2 (9th Cir. 1998). Certification of a class action for damages requires a showing that “questions of law
3 and fact common to the members of the class predominate over any questions affecting only
4 individual members, and that a class action is superior to other available methods for the fair and
5 efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). In certifying a settlement class,
6 the Court is not required to determine whether the action, if tried, would present intractable
7 management problems, “for the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620. As
8 Judge Posner has explained, manageability concerns that might preclude certification of a litigated
9 class may be disregarded with a settlement class “because the settlement might eliminate all the
10 thorny issues that the court would have to resolve if the parties fought out the case.” *Carnegie v.*
11 *Household Int’l., Inc.*, 376 F.3d 656, 660 (7th Cir. 2004) (*citing Amchem*, 521 U.S. at 620); *see also*
12 *In re IPO Sec. Litig.*, 226 F.R.D. at 190, 195 (settlement class may be broader than litigated class
13 because settlement resolves manageability and predominance concerns).

14 This Court previously determined that the exact same class proposed herein warranted, for
15 settlement purposes, certification pursuant to Fed. R. Civ. P. 23(a) and (b)(3). *See* Order Granting
16 Final Approval of Settlements (Micron, Hynix, Renesas-Hitachi-Mitsubishi, Etron, Toshiba, NEC)
17 at ¶ 3 (Dkt. No. 1141). For the reasons described below, certification of the instant Settlement Class
18 is similarly warranted.

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

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

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

27 The Court should find that it may provisionally certify the proposed Settlement Class for
28 settlement purposes under Rule 23(a) and (b) of the Federal Rules of Civil Procedure. It is

1 undisputed that hundreds of thousands of people purchased SRAM products during the class period;
2 therefore, the Class is so numerous that joinder of all Class members in the action is impracticable.
3 See Fed. R. Civ. P. 23(a)(1); see also *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-
4 14 (9th Cir. 1964) (“impracticability does not mean ‘impossibility,’ but only the difficulty or
5 inconvenience of joining all members of the class”). Thus, the proposed Class readily satisfies the
6 numerosity requirements of Rule 23. See *In re Static Random Access Memory (SRAM) Antitrust*
7 *Litig.*, No. 07-CV-1819-CW, 264 F.R.D. 603, 608 (N.D. Cal. 2009). There are questions of law and
8 fact common to the Class that predominate over any individual questions, including whether
9 Defendants conspired to inflate and fix the prices of SRAM; how long Defendants’ conspiracy
10 lasted; whether Defendants’ conduct violated Section 1 of the Sherman Act as well as the state
11 antitrust and unfair competition laws identified in the Complaint; the extent to which Defendants’
12 conduct injured the class members; the appropriate measure of damages; and whether the class
13 members are entitled to injunctive relief. “Antitrust, price fixing conspiracy cases, by their nature,
14 deal with common legal and factual questions about the existence, scope and effect of the alleged
15 conspiracy. Whether defendants participated in the actions alleged is a common question.” *In re*
16 *Linerboard Antitrust Litig.*, 203 F.R.D. 197, 206 (E.D. Pa. 2001) (citation and quotation marks
17 omitted). The issues constitute a common core of questions focusing on the central issue of the
18 existence of the alleged conspiracy and plainly satisfy the commonality requirement of Rule
19 23(a)(2). *Estate of Jim Garrison v. Warner Bros., et al.*, 1996 WL 407849 at *2 (C.D. Cal. 1996)
20 (Plaintiffs’ allegations “which constitute the classic hallmark of antitrust class actions under Rule 23
21 ... are more than sufficient to satisfy the commonality requirements.”).

22 Plaintiffs’ claims are typical of those of the Settlement Class. Like all other Settlement Class
23 members, Plaintiffs each indirectly purchased SRAM products during the relevant time period, and
24 allege that Defendants engaged in an anti-competitive conspiracy. As the Court recognized when it
25 certified the direct and indirect purchaser classes, here “the overarching price fixing scheme is the
26 linchpin of [Plaintiffs’] complaint, ‘regardless of the product purchased, the market involved or the
27 price ultimately paid.’” *SRAM*, 264 F.R.D. 609. This Court also held that Plaintiffs’ claims are
28 typical although they might have used different purchasing procedures, purchased different

1 quantities or a different mix of products, or received different prices than other class members. *Id.*
2 Because the same is true here, the typicality requirement is met. Furthermore, as evidenced by the
3 history of the litigation, Plaintiffs and their counsel have fairly and adequately represented and
4 protected the interests of all Class members. *See* Fed. R. Civ. P. 23(a)(3) and (a)(4).

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

16 Individual issues in this case will not overwhelm the common questions of law or fact,
17 because the central question is whether the Defendants conspired to improperly raise the prices of
18 SRAM products, and, if so, how. *SRAM*, 264 F.R.D. at 611. There is no doubt that Plaintiffs would
19 present common evidence regarding the existence and scope of the alleged conspiracy and illegal
20 activities at any trials of this matter. Similarly, although a wide range of SRAM products are
21 potentially involved, common proof of sales and marketing practices, as well common pricing
22 practices will apply to many claims. Moreover, the fact that individual Class members’ damages
23 may vary due to quantity of purchases or types of SRAM products purchased does not defeat
24 predominance. *See, e.g., In re Master Key Antitrust Litig.*, 528 F.2d 5, 12 n.11 (2d Cir. 1975); *In re*
25 *Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996) (citing cases). Finally,
26 Plaintiffs have presented plausible methodologies that would be used to perform quantitative
27 analysis to demonstrate classwide injury. *SRAM*, 264 F.R.D. at 613-15.

28

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

15 **VIII. CONCLUSION**

16 For the reasons set forth herein, the Court should enter an order: (i) granting preliminary
17 approval of the Samsung Settlement; (ii) provisionally certifying the Settlement Class; and (iii)
18 deferring notice to class members and the scheduling of the final approval hearing until resolution of
19 the case or such other time that Plaintiffs determine, subject to the Court's approval, is appropriate
20 for the giving of notice and establishing the timetable for final approval proceedings.

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1 Dated: December 22, 2010

Respectfully submitted,

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