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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION	Case No. M-02-1486-PJH MDL No. 1486
This Document Relates to: ALL INDIRECT PURCHASER ACTIONS and *State of California et al. v. Infineon Technologies AG, et al.* and *State of New York v. Micron Technology Inc., et al.*	Case No. C 06-4333 PJH Case No. C 06-6436 PJH **INDIRECT-PURCHASER PLAINTIFFS' AND ATTORNEYS GENERAL'S JOINT NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF JOINT SETTLEMENTS AND TO ADOPT SPECIAL MASTER'S REPORT AND RECOMMENDATIONS, PARTS I & II; MEMORANDUM OF POINTS AND AUTHORITIES** Hearing Date: January 15, 2014 Time: 9:00 a.m. Courtroom: 3, 3rd Floor Judge: Hon. Phyllis J. Hamilton Special Master: Hon. Charles B. Renfrew (ret.)

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 15, 2013, at 9:00 a.m. or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Phyllis J. Hamilton, United States District Judge for the Northern District of California, located at 1301 Clay Street, Oakland, CA 94612, the Indirect Purchaser Plaintiffs and Attorneys General[1] will and hereby do move, under Rules 23 and 53 of the Federal Rules of Civil Procedure, for entry of an Order including the following provisions.

1. Pursuant to Rule 53(f)(2) of the Federal Rules of Civil Procedure, conditionally adopting the findings of fact, conclusions of law and recommendations contained in: (1) the "Report and Recommendation of Special Master, Part I: Settlement Class Certifications And Plans Of Allocation And Distribution Of The Settlement Proceeds To The Settlement Classes," ("Report, Part I"), filed January 8, 2013 (Dkt. No. 2132); and (2) the findings and conclusions relating to claims procedures and processing contained in the "Report and Recommendation of Special Master, Part II: Notice Programs, Claims Procedures, and Processing," ("Report, Part II"), filed June 24, 2013 (Dkt. No. 2147) (cited as "Report, Part II, at ____") pending notice and an opportunity for absent class members to object.
2. Adopting the findings of fact, conclusions of law, and recommendations as to the forms of notice and notice programs contained in the Report, Part II, and ordering the dissemination of Notice in accordance with the Special Master's recommendations and the schedule contained in the proposed order.
3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, conditionally certifying the

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[1] The Defendants do not oppose this motion or its requested relief, and therefore, it is unopposed by any party.

indirect purchaser and government purchaser settlement classes recommended by the Special Master:

> The Indirect Purchaser Settlement Class: All natural persons and non-governmental entities, who, at any time during the period from January 1, 1998 through December 31, 2002, purchased dynamic random access memory ("DRAM") devices and components, including all products containing DRAM, anywhere in the United States indirectly from the defendants, their parents, subsidiaries and affiliates. Excluded from this definition are defendants and their parents, subsidiaries and affiliates, legal representatives, successors, assigns or co-conspirators; all governmental entities; any judicial officer presiding over the settled litigation and the members of his/her immediate family and judicial staff.
>
> The Samsung/Winbond Government Purchaser Settlement Class: All state government entities, all political subdivisions and all public colleges and universities in Class States Alaska, Delaware, Ohio and Pennsylvania, all political subdivisions in New Mexico and all political subdivisions, the University of California and the State Bar of California in Class State California who purchased DRAM or DRAM-containing products directly or indirectly from Samsung and Winbond between January 1, 1998 and December 31, 2002;
>
> The Multi-Defendant Government Purchaser Settlement Class: All political subdivisions in Class State New Mexico and all political subdivisions, the University of California and the State Bar of California in Class State California who purchased DRAM or DRAM-containing products directly or indirectly from Infineon, Elpida, NEC, Mosel, Micron, Hynix, Nanya, Mitsubishi, Toshiba and Hitachi between January 1, 1998 and December 31, 2002.

4. Appointing the representatives and counsel for these classes recommended by the Special Master;

5. Granting preliminary approval to the proposed global settlement of these actions and the plans of allocation and distribution to the settlement classes recommended by the Special Master;[2] and

6. Approving the proposed notice plan and forms of notice to inform class members and

[2] The parties are not moving for an award of a specific amount of attorneys' fees or cost reimbursement at this time, but merely requesting a form of notice that informs class members that Indirect Purchaser Plaintiffs Counsel and the Attorneys General are jointly requesting an aggregate fee of 25% of the Settlement Fund.

persons being represented through the *parens patriae* claims of the Attorneys General of: (i) the conditional certification of the settlement classes, and the opportunity to be excluded; (ii) the Proposed Settlements, and the opportunity to object; and (iii) the pendency of the settlement of *parens patriae* claims and the opportunity to be excluded, all as recommended by the Special Master.

The proposed settlements of these actions total $310,720,000 and include all of the Defendants who were originally sued in the cases brought by the Settling Plaintiffs[3]–Samsung, Winbond, Infineon, Elpida, NEC, Micron, Mosel, Hynix, Nanya–and three additional entities with which the plaintiffs entered into tolling agreements, Toshiba, Hitachi, and Mitsubishi[4] (collectively, "the Settling Defendants"). These payments, after deduction of court-approved attorneys' fees and other expenses, will be distributed for the benefit of a nationwide class of indirect purchaser resellers and end-users that also includes natural persons (and in a few cases, businesses) being represented *parens patriae* by the Attorneys General, and for the benefit of state and local government purchasers represented both directly and in a class capacity by the Attorneys General. There is no right of reversion of undistributed funds back to Settling Defendants. The settlements also provide comprehensive injunctive relief, which includes antitrust compliance training and other measures designed to enhance future adherence to the antitrust laws. Even excluding the value of this non-monetary relief, these proposed settlements constitute one of the largest nationwide indirect purchaser settlement achieved to date.

Upon finality of the settlements, the Settling Defendants will receive a global release of all

[3] As used herein, the term Settling Plaintiffs refers to the named plaintiffs in each of the actions listed in Exhibit 4 to the Appendix to the Report, Part I, the Indirect Purchaser Settlement Class and the Attorneys General, who have filed actions on behalf of governmental entities in their respective states, and for most of their States, asserted claims *parens patriae* on behalf of their natural persons and, in a few cases, businesses.

[4] Settling Defendants Toshiba Corporation, Toshiba America Electronic Components, Inc. (together, "Toshiba"), Hitachi Ltd. and Mitsubishi Electric Corporation and Mitsubishi Electric and Electronics USA, Inc.(together, "Mitsubishi") were named in separately filed actions which have been ordered "related" to these actions (*see* Dkts. 2123, 2124).

claims arising out of the factual nexus underlying the claims brought in the litigation. Given the antitrust standing and litigation class certification issues percolating in indirect purchaser lawsuits, these settlements are a remarkable achievement that provides significant value to indirect purchaser natural persons, businesses, and state and local governments. Counsel for the Indirect Purchaser Plaintiffs and the Attorneys General, who are very experienced antitrust practitioners, negotiated the proposed settlements over a five year period following extensive discovery in this case. Thus, there is nothing in the facts or case law that rebuts the presumption, especially applicable in complex class actions, that settlements like these should be presumed to be fair and reasonable, and well within the range for which preliminary approval is appropriate.

This joint motion for adoption and for preliminary approval is based upon this Notice; the Memorandum of Points and Authorities; the findings of fact and conclusions of law in the Report and Recommendations of the Special Master; the accompanying declarations of Josef D. Cooper and Emilio E. Varanini, and all records on file in this matter.

MEMORANDUM OF POINTS & AUTHORITIES

I. THE PROPOSED SETTLEMENTS

The salient terms of the proposed settlements[5] are summarized below. The Report and Recommendations, Part I, contains detailed descriptions of each of the individual agreements. Report, Part I at ¶¶ 57-60 and Exhibit 7 (Samsung); *id.* at ¶¶ 61-64 and Exhibit 9 (Winbond); *id.* at ¶¶ 65-74 and Exhibit 10 (Multi-Defendant); *id.* at ¶¶ 75-80 and Exhibit 13 (Nanya); *id.* at ¶¶ 81-86 and Exhibit 14 (Mitsubishi); *id.* at ¶¶ 87-92 and Exhibit 15 (Toshiba); *id.* at ¶¶ 93-98 and Exhibit 16 (Hitachi). The negotiation and drafting of these nationwide settlements, resulting in more than $310 million in cash and other benefits to a proposed nationwide class of reseller and end-user indirect purchasers as well as the natural persons, government entities, and in a few cases

[5] The proposed settlements are attached as Exhibits 7 through 16 to the "Appendix to Report and Recommendations of Special Master," filed January 8, 2013 (Dkt. Nos. 2135-2137). The settlements with Infineon, Elpida, NEC, Micron, Mosel and Hynix are documented in a single "Multi-Defendant Settlement Agreement."

businesses, represented by the Attorneys General, required considerable time on the part of all Counsel.

A. Benefits for the Settling Plaintiffs and Proposed Settlement Classes

1. Monetary

The Settling Defendants have paid for the benefit of the named plaintiffs, members of the proposed Settlement Classes, and persons and other government entities represented by the Attorneys General, a total of $310,720,000.[6] Pursuant to the terms of the Proposed Settlements, 8/9^{ths} of the monetary consideration paid by the Settling Defendants will be used for the benefit of the proposed Indirect Purchaser Settlement Class, consisting of all natural persons and non-governmental entities on whose behalf have been asserted *parens patriae* and/or class action claims. The remaining 1/9th of the monetary consideration will be used for the benefit of those governmental entities with individual or class claims that were asserted on their behalf by the Attorneys General.[7] *See* Report, Part I, at ¶¶ 58, 69, 76, 83, 89, 95.

2. Antitrust Injunction and Compliance

All Settling Defendants have agreed for a period of up to three years, not to engage in price fixing, market allocation and bid rigging with respect to the manufacture and sale of DRAM for delivery in the United States, which constitutes horizontal conduct that is a *per se* violation of Section 1 of the Sherman Act.[8] Additionally, each Settling Defendant that continues to manufacture and market DRAM has agreed to maintain (or if applicable, establish) and certify that it has an antitrust compliance program. Those defendants who have ceased manufacturing DRAM

[6] This figure includes funds available to pay the classes' notice and claims processing costs and attorneys' fees and expenses, as well as a small amount of funds received or to be received as consideration for a delay in payment by certain defendants. The payment of attorneys' fees and costs is addressed in the Report and Recommendation of Special Master, Part III: Attorneys' Fees, Expenses and Incentive Awards to Plaintiffs."

[7] The Winbond Settlement Agreement does not contain this allocation, but all parties agreed and the Special Master concurred that it would be fair and reasonable to apply it to the Winbond settlement proceeds. *See* Report, Part I, at ¶62, n. 43, and ¶68.

[8] Report, Part I, Appendix, Ex. 7 (Samsung Agreement) at ¶13; Ex. 9 (Winbond Agreement) at ¶III.A.; Report Appendix, Ex. 10 (Multi-defendant Agreement) at ¶14; Ex.13 (Nanya Agreement) at ¶14; Ex. 14 (Mitsubishi Agreement) at ¶14; Ex. 15 (Toshiba Agreement) at ¶14; Ex. 16 (Hitachi Agreement) at ¶14.

have agreed that in the event they begin again to manufacture and sell DRAM, they will comply with the education provisions of the respective agreements.[9]

3. Cooperation

The Settlement Agreements contain cooperation provisions. For example, if the Settling Plaintiffs go to trial against one or more of the Settling Defendants due to the Court's rejection of a Settlement, then those Settling Defendants for whom the Court has approved a Settlement are obligated to provide full, continuing and complete cooperation, including authentication of documents, producing witnesses, and providing other assistance.[10]

B. Release of Claims against the Settling Defendants

Upon finality of the approval process, the Indirect Purchaser Plaintiffs and Attorneys General will effectuate a global nationwide release of the Settling Defendants from all claims for monetary or injunctive relief by any indirect purchaser, be they a reseller, end-user, natural person or business, arising out of or relating in any way to any act or omission of the Settling Defendants concerning the pricing, production, development, or sale of DRAM products (chips or modules) or DRAM-containing products (computers, printers and other devices) from January 1, 1998 through December 31, 2002, based on the conduct alleged and causes of action asserted or that could have been asserted in the complaints filed in this litigation. Additionally, the Attorneys General will release the claims of individual Government Purchaser Plaintiffs who directly or indirectly purchased DRAM or DRAM-containing products (in two-thirds of the Plaintiffs states); and indirect purchasers within the Government Purchaser Settlement Classes of certain state government entities and political subdivisions in Alaska, California, Delaware, New Mexico, Ohio and Pennsylvania (the "Class States"). The releases in the proposed settlements do not affect contract, warranty, or product-defect claims arising in the ordinary course of business.[11]

[9] Report, Part I, Appendix, Ex. 7 at ¶ 13; Ex. 9 at ¶ III.B.; Ex. 10 at ¶ 14; Ex. 13 at ¶14; Ex. 14 at ¶ 14; Ex. 15 at ¶14; Ex. 16 at ¶ 14.

[10] Report, Part I, Appendix, Ex. 7 at ¶19; Ex. 9 at ¶ III.C; Ex. 10 at ¶20; Ex. 13 at ¶20; Ex. 14 at ¶ 20; Ex. 15 at ¶20; Ex. 16 at ¶20.

[11] Report, Part I, Appendix, Ex. 7 at ¶16; Ex. 9 at ¶ V.C; Ex. 10 at ¶19; Ex. 13 at ¶19; Ex. 14 at ¶19; Ex. 15 at ¶19; Ex.

II. SUMMARY OF REFERENCE ORDERS AND THE SPECIAL MASTER'S REPORTS AND RECOMMENDATIONS

This Court recognized early on that certain settlement issues must be comprehensively addressed in order for there to be a sufficient basis to assess the fairness, reasonableness and adequacy of the proposed settlements. Such issues include the following: (1) whether indirect purchaser classes can be appropriately certified here for purposes of settlement, with or without subclasses; (2) whether any potential conflicts exist that need to be addressed in either the certification or allocation and distribution process; (3) whether allocation and distribution plans can be devised that treat groups with different characteristics in a fair and equitable manner; and (4) what kind of notice and claims procedures must be devised to ensure that the settlement proceeds be distributed in a fair and equitable manner. Accordingly, this Court appointed the Hon. Charles B. Renfrew, a retired district court judge and experienced antitrust practitioner, to serve as a Special Master to review the evidence and case law on these issues and make findings and recommendations.[12]

As discussed in the Report and Recommendations, those referral orders, taken together, required the Special Master to issue a Report and Recommendations on the subjects of the certification of classes or subclasses (if any); the development of a plan of allocation for each class or subclass; the development and dissemination of a proposed form of notice; the appropriate amount of fees and reimbursement of expenses to be awarded to Settling Plaintiffs; and the appropriate amount of incentive awards to be awarded to the class representatives. Before addressing these issues and issuing his reports and recommendations, the Special Master conducted lengthy proceedings that included the submission of argument and evidence, including expert reports, by counsel for the Indirect Purchaser Plaintiffs, the Attorneys General, the Settling

16 at ¶19.

[12] A description of the various orders of reference, their timing and content appears in the Report, Part I at ¶¶ 4-8.

Defendants, specially-appointed counsel for resellers and private counsel for Celestica, a large reseller and putative class member.[13]

Due to the breadth of the referral and the volume of evidence, data and legal authority under consideration, the Special Master issued his highly detailed Report and Recommendations in three parts. Part I, which itself is 200 pages with thousands of pages of appendices, covered the terms of the proposed settlements, history of the proceedings and issues relating to certification of settlement classes and the formulation of plans of allocation and distribution of the settlement proceeds. Part II, which is 30 pages with approximately 300 pages of appendices, covered the issues of notice and claims procedures. A third part, the "Report and Recommendation of Special Master, Part III: Attorneys' Fees, Expenses and Incentive Awards to Plaintiffs," ("Report, Part III"), filed November 5, 2013 (Dkt. No.2155), which is another 67 pages not counting appendices, covered the legal and factual issues underlying the award of common fund attorneys' fees, expense reimbursements, and incentive awards. [14]

A. The Proposed Settlement Classes and the Processes/Findings Regarding Any Conflicts

The Special Master recommended the certification of the following indirect purchaser and government purchaser settlement classes:

> **The Indirect Purchaser Settlement Class**: All natural persons and non-governmental entities, who, at any time during the period from January 1, 1998 through December 31, 2002, purchased dynamic random access memory ("DRAM") devices and components, including all products containing DRAM, anywhere in the United States indirectly from the defendants, their parents, subsidiaries and affiliates. Excluded from this definition are defendants and their parents, subsidiaries and affiliates, legal representatives, successors, assigns or co-conspirators; all governmental entities; any judicial officer presiding over the settled litigation and the members of his/her immediate family and judicial staff.

[13] A description of the appointment of Resellers' Allocation Counsel and the work done by private reseller's counsel appears in the Report, Part I at ¶¶ 207-211.

[14] As discussed, *infra*, the Indirect Purchaser Plaintiffs and the Attorneys General are not requesting this court to adopt, even conditionally, the findings in Part III at this time.

> **The Samsung/Winbond Government Purchaser Settlement Class**: All state government entities, all political subdivisions and all public colleges and universities in Class States Alaska, Delaware, Ohio and Pennsylvania, all political subdivisions in New Mexico and all political subdivisions, the University of California and the State Bar of California in Class State California who purchased DRAM or DRAM-containing products directly or indirectly from Samsung and Winbond between January 1, 1998 and December 31, 2002;
>
> **The Multi-Defendant Government Purchaser Settlement Class**: All political subdivisions in Class State New Mexico and all political subdivisions, the University of California and the State Bar of California in Class State California who purchased DRAM or DRAM-containing products directly or indirectly from Infineon, Elpida, NEC, Mosel, Micron, Hynix, Nanya, Mitsubishi, Toshiba and Hitachi between January 1, 1998 and December 31, 2002.[15]

Before recommending the certification of these settlement classes, the Special Master gave great consideration to the question of the certification of the Indirect Purchaser Settlement Class, and found that the requirements of Rule 23 for certification of this class have been satisfied. *See* Report, Part I at ¶¶14-23, 30-37, 115-164. The Special Master paid particular attention to the distinction between certifying classes for purposes of settlement, *i.e.*, in order to facilitate the payment of voluntary class-wide consideration and effectuate a global release, and certifying classes for purposes of trial, i.e., to adjudicate multiple damage claims against a defendant with common evidence within the confines of a manageable trial. *See* Report, Part I at ¶¶14-23, 30-37, 115-164 & *id* at p. 207 (citing and discussing *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 297–98, 301–04, n.27 (3rd Cir. 2011) (*en banc*) ("*Sullivan*"), *cert. denied sub nom. Murray v. Sullivan*, 132 S. Ct. 1876 (2012); *id.* at 335 (Scirica, J., concurring). In particular, the Special Master considered the issue of whether common issues justify a nationwide damages or restitution class and found that such a class could be certified on three separate grounds so as to effectuate a global release in exchange for substantial benefits: (1) a nationwide class could be certified under the

[15] The reason why the Special Master recommended the certification of two government purchaser classes for purposes of settlement is that the Samsung and Winbond settlements preceded certain rulings from this Court that reduced the number of Attorneys General in this case to the present 33 Attorneys General, thereby reducing the number of Class States involved in this case. The Special Master addressed whether this Court's rulings should preclude the proposed certification of the larger Government Purchaser Class as to the Samsung and Winbond settlements given that these rulings were post-settlement and the Class States' appellate rights still had some value in any event. *See* Report, Part I, at ¶¶161-164 and ¶¶255-261.

Cartwright Act—given that the evidence submitted by Settling Plaintiffs demonstrated a substantial nexus between the facts of this particular case and California, (Report, Part I, at ¶¶ 147, 149) and given that, subsequent to the submission of the Report, Part I, the United States Court of Appeals for the Ninth Circuit held that out-of-state purchasers may recover under the Cartwright Act where such a nexus exists, *AT&T Mobility et al. v. AU Optronics et al.*, 707 F.3d 1106, 1113 (9th Cir. 2013); (2) a nationwide class could be certified under the laws of the different States given that there is a common factual nucleus involved in the claims of the different States, citing, among other decisions, the Third Circuit's findings in an analogous case, *see, e.g., Sullivan*, 667 F.3d at 297-98, 301-02, 303-04 & n.27 and 335 (Scirica, J., concurring) (Report, Part I, at ¶¶ 144, 150-57); and (3) a nationwide injunctive class could be certified in which disgorgement and restitution would be available as ancillary relief that this Court could order under its inherent equitable powers, (Report, Part I, at ¶¶ 132-135, 137, 148-49), a view endorsed in several recent opinions of various district courts, *see, e.g.*, *Oregon v. AU Optronics*, No. No. 3:07-md-01827-SI, 2011 U.S. Dist. LEXIS 76562 (N.D. Cal. July 11, 2011); *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, 568 (S.D.N.Y. 2012); and *United States v. Keyspan*, 763 F. Supp. 2d 633, 639-40 (S.D.N.Y. 2011).

The Special Master further observed that rulings of this Court adverse to Settling Plaintiffs in a litigation context did not prevent certification of the proposed settlement classes. *See, e.g.*, Report, Part I, at ¶158 & n.118 (discussing case law bearing on the effect of this Court's ruling on standing on the certification of settlement classes). The Special Master was also careful to note that his recommendation of the certification of a settlement class in this case arose from a compromise in which states with *Illinois Brick* repealer laws that allowed only their Attorneys General to represent class members in indirect purchaser antitrust actions ("AG-only States") consented to the proposed Indirect Purchaser Settlement Class and their *parens patriae* representation of class members to proceed concurrently without the need to determine which were representing the claims of these members. As part of this negotiated compromise, the parties agreed that the AG-only States' agreement was based on the particular facts of this case, and that the recommended certification of a settlement class that included their citizens would have no precedential value in

any other case. Report, Part I, at ¶¶ 112-114. Pursuant to this compromise, and with the recommendation of the Special Master subject to this Court's approval, the parties agreed that language reflecting the compromise would be inserted into the preliminary and final approval orders. *Id.* at ¶¶ 113-114.

Finally, the Special Master considered carefully the issue of the need for subclasses and thoroughly analyzed the various constituencies within the settlement classes. Because the negotiated plans of distribution treated each of these constituencies equally, and each of these constituencies had separate representation in negotiating the terms of the distribution and allocation process, the Special Master concluded that no subclasses were necessary. Report, Part I at ¶¶161-164 and ¶¶255-261 (subclasses for the Indirect Purchaser Settlement Class).

Similarly, the Special Master found that the requirements for certification of the two Government Purchaser Settlement Classes were also satisfied on very similar grounds to those applied to the Indirect Purchaser Plaintiffs. *See, e.g.*, Report, Part I at ¶¶30-37; 165-200; *id.* at p. 207. The Special Master carefully explained why this Court's denial of the certification of a government purchaser class for litigation purposes, subject to the caveat that this Court would entertain the certification of subclasses, did not bar the certification of government purchaser classes for settlement purposes based both on the case law and on additional evidence submitted by the Attorneys General. *See, e.g.*, Report, Part I, at ¶¶ 181-83(citing and quoting, e.g., *Sullivan*, 667 F.3d at 306). The Special Master also carefully considered the need for government purchaser subclasses and determined that they were not necessary. The Special Master found the inclusion of the class members' direct purchaser claims along with their indirect purchaser claims did not create a conflict requiring subclasses, based on directly applicable authority from the United States Court of Appeals for the Third Circuit. *See* Report, Part I at ¶¶191-200 (subclasses for the Government Purchaser Settlement Classes) (citing and discussing *In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009)).[16]

[16] The Attorneys General are representing most of their Government Purchaser Plaintiffs in a non-class capacity. The settlement of those claims, however, does not require court approval.

B. Plans of Allocation and Distribution to Indirect Purchaser Plaintiff Class Members and Members of the Government Purchaser Classes

Prior to determining whether subclasses were needed for the Indirect Purchaser Settlement Class, the Special Master conducted the proceedings relating to the allocation and distribution issues. In doing so, the Special Master, Counsel for the Indirect Purchaser Settlement Class and the Attorneys General recognized the need for independent representation of the resellers and end-users who are both present in the proposed Settlement Class, and actively solicited the participation of counsel for indirect purchaser resellers. Report, Part I, at ¶207. Ultimately, the Special Master appointed the law firm of Berman DeValerio, as Reseller Allocation Counsel, to represent those putative class members who indirectly purchased DRAM and DRAM-containing products for resale. Report, Part I, at ¶¶208-211. Thus, throughout the Special Master's proceedings, Berman DeValerio and the firm of Susman Godfrey, LLP, counsel for putative reseller class member Celestica, a large electronics manufacturing services company, advanced the interests of resellers, while Plaintiffs' Co-Lead Counsel and the Attorneys General advocated on behalf of the end-users. The Report, Part I, at ¶¶212-259, contains an extensive description of the exchange of data, expert opinion and legal advocacy by Plaintiffs' Co-Lead Counsel, the Attorneys General, Reseller Allocation Counsel and counsel for Celestica that formed the basis for the negotiation of the plan of allocation and distribution for the proposed Indirect Purchaser Settlement Class that was recommended by the Special Master. That description is incorporated by reference and not repeated here in the interest of brevity.

As described in the Report, Part I, with the guidance and feedback of the Special Master, Co-Lead Counsel, the Attorneys General, Reseller Allocation Counsel and counsel for Celestica reached agreement on a plan to allocate the settlements' monetary compensation among members of the Indirect Purchaser Settlement Class. The Special Master recommended this proposed distribution plan as being fair and reasonable, and as treating claimants in a fair and equitable manner based on market facts ascertained both in the course of the litigation and in the proceedings before the Special Master. It treats end-user claims and reseller claims as being equal subject only

to certain special protections for small claims. It provides for *pro rata* cash distribution in accordance with the level of purchases made by the claimant subject to a minimum disbursement of $10 and potentially a *cy pres* distribution of a percentage of settlement funds if small claimants' (those receiving the minimum $10) claims are too few or too many. The Special Master also determined that because of the fair and equitable treatment of all claims, and given the separate representation of the differing levels of indirect purchasers, the creation of subclasses was not required. Report, Part I, at ¶¶ 21-23, 161-164.

The principal terms of the negotiated Indirect Purchaser Plaintiff Plan of Distribution is summarized in the Report, Part I:

> •All claimants will be required to submit claim forms under penalty of perjury, stating the quantity and type of DRAM modules and DRAM-containing products purchased during the settlement class period.
>
> • A *pro rata* recovery amount will be calculated for each claimant on the basis of the amount of DRAM modules and DRAM-containing product purchases each made, according to a formula that weights the DRAM content of the various categories of DRAM-containing products and converts all purchases to a common unit of measure. The "value" of the DRAM in computers and other categories of DRAM-containing products will be determined from available data.[17]
>
> •All small claimants (resellers and end users), defined as those claimants whose *pro rata* recovery amount is less than $10, will have their recovery raised to that amount.
>
> •The total amount of recoveries to small claimants will be capped at $50 million. If the total dollar amount of all small claimant recovery, after each claimant is raised to $10, exceeds $50 million, no distribution of individual checks will be made to this group. Rather, $40 million will be distributed *cy pres* to the benefit of small claimants.[18]
>
> •In the event that the number of small claims received is such that the total small claimants' recovery (after enhancement to the $10 minimum described above) does not exceed $25 million, the difference between the amount being paid directly to small claimants and $25 million will be distributed as follows: (1) first, the amount of the small claimants' checks will be increased *pro rata* above $10, up to a the estimated single damages suffered by each claimant as a result of his/her/its claimed purchases, until the available funds up to such $25 million are exhausted; or (2) if this procedure for increasing small claimants' checks does not exhaust the available funds up to such

[17] The specifics of this formula, along with the estimate of actual damages referred to below are covered in Part II of the Special Master's Report and Recommendations as part of the discussion of the claim form and claims processing procedures. *See* Report, Part II, at 63-65. These specifics are described in more detail *infra* in this motion.

[18] Any *cy pres* distribution that may be required as a result of the claims experience would occur only upon the entry of a separate order of this Court, after a public hearing and pursuant to a noticed motion.

> $25 million, any remainder will be distributed *cy pres*.
>
> • In the event that the *pro rata* distribution share of any claimant whose *pro rata* share would be greater than $10 would exceed the estimated single damages suffered by him/her/it as a result of their claimed purchases, their recoveries will be limited to their estimated single damages. Any excess would be distributed *cy pres*.
>
> • Estimated actual single damages for DRAM and DRAM-containing products will be calculated as a percentage overcharge based on data developed during the litigation.
>
> •No specific *cy pres* distribution plan(s) will be submitted until events dictate that a *cy pres* distribution is necessary. Similarly, a decision as to the ultimate disposition, (e.g., *cy pres* or additional distribution) of the residue of uncashed checks will not be made until the size of any residual amount is quantified.

Report, Part I, at ¶¶ 262.

As with the proposed plan of distribution for the Indirect Purchaser Settlement Class, the plans of allocation and distribution for the Government Purchaser Settlement Classes were the product of agreement between the relevant counsel, in this instance, the Attorneys General of Class and Non-Class States, and based on the use of a survey, expert analysis and prior precedent. Report, Part I, at ¶ 293. Pursuant to this process, the Attorneys General submitted to the Special Master a plan for allocation of the proceeds between the States. Attorneys General for the Class States also submitted intrastate distribution plans for allocation of the proceeds within each of those Class States. No party to the proceedings before the Special Master objected to the allocation plan or the intrastate distribution plans. *Id.* The Attorneys General proposed, and the Special Master agreed, that the proceeds for government entities be divided among the Class and Non-Class states, and within several of the Class States, based on the results of a survey that estimated the percentage of DRAM purchases between various classes of government entities and then calculated each State's share of the distribution based on the FTEs (or in the case of colleges and universities, enrollment) in each State's represented categories of government entities. FTEs are an acceptable proxy for procurement by government entities that were approved for use in allocation plans in a prior antitrust settlement. Once the settlement proceeds were so allocated, the plan called for a further division of the proceeds among individual entities. The Attorneys General that have entities who are part of the Settlement Classes, proposed either a *pro rata* cash distribution, a

combined *pro rata* cash and *cy pres* distribution, or a *cy pres* distribution, depending on the feasibility of making a cash distribution.[19] Report, Part I, at ¶¶ 306-363.

The Special Master found that the proposed plans of allocation and distribution for the Indirect Purchaser Settlement Class and the Government Purchaser Settlement Classes were the product of arm's length negotiations in which the interests of all class members were fairly and adequately represented. Report, Part I, at ¶¶25-26, 38. They treat all claimants fairly and equitably given the factual circumstances of this litigation and implement *pro rata* cash distribution when feasible in accordance with applicable precedent. Report, Part I, at ¶¶270-278 and 293-305. To the extent that plans contain provisions for a *cy pres* distribution, it is to be used only when a direct cash distribution would not be fair or feasible. In the plan for the Indirect Purchaser Settlement Class, *cy pres* is used solely as a contingency to provide benefit to small claimants if either too many or too few claims are submitted by this group and cash distribution would be either unfair (too few claimants) or infeasible (too many claimants). Report, Part I. at ¶¶279-292. Because the Government Purchaser Settlement Classes have far less money to distribute when allocated among each State, *cy pres* is a part of the proposed distribution plans for most of the individual Class States, which the Special Master properly found to be appropriate under state and federal law. Report, Part I, at ¶41.

Ultimately, the Special Master found these plans of allocation and distribution to be fair and reasonable and well within the wide scope of discretion afforded to settling parties in crafting such plans. *See* Report, Part I, at ¶¶ 263-363. Even in the more demanding context of final approval, many courts have observed that "a Plan of Allocation need not be, and cannot be, perfect." *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 272 (D.N.J. 2000), *aff'd*, 264 F.3d 201 (3d Cir.), *cert. denied*, 535 U.S. 929 (2002). Keeping this point in mind, the Special Master followed the

[19] The Special Master approved these plans, noting specifically that the Attorneys General should have wide discretion in their plans of allocation to the government entities that they represent, *see, e.g.*, Report, Part I, at ¶ 315, and that said plans comply with both state and federal requirements, *see id* at ¶¶ 306-363.

admonition that "[a] district court's 'principal obligation' in approving a plan of allocation 'is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.' *Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir. 1983)." *Sullivan*, 667 F.3d at 312.

C. Notice Plans and Forms and Claims Processes and Forms

The Settling Plaintiffs proposed a notice plan for the proposed Indirect Purchaser Settlement Class that was designed by Kinsella Media, LLC, a recognized expert in the field, that has developed and directed notice efforts in some of the largest and most complex antitrust and securities cases in the country. To reach the target demographic of adults 25 years and older, this firm recommended the following: (1) paid media advertising in consumer magazines and newspapers, network and cable television, and online media and (2) the distribution of press releases through a variety of different mediums, including press releases by the Attorneys General. Report, Part II, at ¶¶ 9-18. This notice plan is estimated to reach an approximately 84.2% of adults 25 years and older an average of 3.5 times (*see id.* at ¶ 17). The Special Master found the plan comported with Rule 23 and due process requirements in providing the best notice practicable under the circumstances. Report, Part II, at ¶¶ 48-62 (reviewing submissions and evidence of Settling Plaintiffs as well as case law). The Special Master also reviewed the proposed short form and long form notices and found that they clearly and adequately explained the rights of class members. *Id*. at ¶ 58-62 (reviewing case law and evidentiary submissions).

Additionally, the Attorneys General for several States proposed a notice plan for the proposed settlement classes of Government Purchaser Plaintiffs based on the prior experience of the Attorneys General in notifying their state and local government entities about class settlements. This plan was reviewed and approved by Kinsella Media. Report, Part II, at ¶¶ 39-45. The proposed notice plan provides that Government Purchaser Plaintiffs class members would be notified by a combination of methods, including e-mailing or mailing notice directly or, if direct notification is not possible, through in-state associations of government entities, providing posts

and links on Attorney General web sites and a dedicated web site, and providing a phone number for these Plaintiffs to call. *Id*. at ¶ 41. The Attorneys Generals' estimate that the proposed notice would reach nearly 100% of the proposed class members (*id*. at ¶ 69), an estimate the Special Master found to be credible, *ibid.*, the Special Master concluded that this notice plan provided the best notice practicable under the circumstances per the requirements of Rule 23 and the Due Process Clause. Report, Part II, at ¶¶ 67-72.[20] The Special Master also reviewed the notice forms for the Government Purchaser Plaintiff Classes and found that these forms adequately explained the rights of class members. *Id*. at ¶ 71-73.[21]

Finally, the Special Master concluded in accordance with the reference orders that the claims process for members of the proposed Indirect Purchaser Settlement Class, which weights DRAM containing products according to a standard estimate of their DRAM content in "Computer Equivalent Units," is fair and reasonable, that the proposed Claims Forms in both online and paper formats, are clearly written in plain English and should be easy for claimants to read and understand, and that the Claims Processing Instructions clearly and adequately communicate to potential claimants that they will receive their appropriate *pro rata* share based on the number and type of DRAM-containing products they purchased during the Class Period. Report, Part II, at ¶¶ 63-65.

D. Attorneys' Fees and Incentive Awards to Plaintiffs

Co-Lead Counsel for the Indirect Purchaser Plaintiffs and the Attorneys General filed with the Special Master a joint application requesting an aggregate award of attorneys' fees in the amount of 25% of the monetary value of the settlements. Additionally, the Indirect Purchaser Plaintiffs and the Attorneys General submitted separate applications for the reimbursement of their

[20] Pursuant to the requirements of Oregon law, the Special Master also addressed whether the proposed notice plan of the Oregon Attorney General for notifying its state and local government entities, which closely tracked the notice plan proposed by the Class States, complied with due process requirements, Report, Part II, at ¶¶ 67-72 & n. 84. The Special Master found that it did. *Id.*

[21] The Special Master also conducted the same review, resulting in the same recommendation, as to the proposed notice form for Oregon.

costs, and Indirect Purchaser Plaintiffs requested incentive awards for the *Petro* class representatives and the plaintiffs in the other settled actions. The total amount requested for cost reimbursements and incentive awards is less than 5% of the total settlement fund. These applications were submitted to the Special Master pursuant to this Court's orders of reference. *See* Report, Part III at ¶¶3-26. The Special Master examined the relevant authorities governing attorneys' fees, expense reimbursement and incentive awards in this Circuit, applied them to the facts and circumstances of this case, and concluded that the aggregate attorneys' fees requested, the expenses submitted for reimbursement and the incentive awards requested fall within the range of fair and reasonable under the law of this Circuit. *See, e.g., id.*

In conjunction with preliminary approval, however, plaintiffs are proposing that putative settlement class members be informed that the plaintiffs will request attorneys' fees in the amount of 25% of the settlement fund, plus expenses and incentive awards, and that the Settling Plaintiffs will file a motion for fees and costs before the fairness hearing. Accordingly, it is not necessary for the Court to determine whether to adopt the findings and conclusions set out in the Special Master's Report, Part III, until it has before it plaintiffs' formal motion for fees, expenses and incentive awards. However, there are certain findings made in the Report, Part III, that support points made herein as to why these proposed Settlements are fair and reasonable and therefore warrant preliminary approval. Those findings are referenced as appropriate herein.

III. THE SPECIAL MASTER'S FINDINGS AND CONCLUSIONS AS TO THE CERTIFICATION OF THE SETTLEMENT CLASSES AND THE PROPOSED DISTRIBUTION PLANS SHOULD BE CONDITIONALLY ADOPTED BY THIS COURT PENDING OBJECTIONS FROM THIRD PARTIES

This Court can adopt the Reports and Recommendations of the Special Master, without the need for de novo review as to the facts and the law, if there are no objections from the settling parties. Fed. R. Civ. P. 53(f)(3); *see Lacks Industries, Inc. v. McKechnie Vehicle Components USA, Inc.*, 322 F.3d 1335, 1341 (Fed. Cir. 2003) (district court adopted the findings of the Special Master in their entirety and the appellate court reviewed those findings for clear error as if they were the

findings of the district court). Moreover, the procedural issues addressed by the Special Master as part of his Reports and Recommendations are reviewable only for abuse of discretion. Fed. R. Civ. P. 53(f)(5). As set out above, the Reports and Recommendations as to Parts I and II set out a process that was thorough, involved the submission of extensive evidence, and resulted in a detailed analysis of the legal issues. This Court may thus adopt these Reports and Recommendations as to the issues set forth in the referral orders, e.g., the certification of the proposed settlement classes, the need for subclasses, the reasonableness of the proposed allocation and distribution plans pursuant to Rule 53(f) subject to being revisited during the final approval process after absent class members have an opportunity to object.

At final approval, this Court may decide in reviewing third party objections that it needs to engage in *de novo* review as to factual or legal determinations made by the Special Master in these reports and recommendations though any challenges to the process set up by the Special Master would be reviewable only for an abuse of discretion. *See Sullivan v. DB Investments*, Civ. No. 04-289 (SRC), 2008 WL 8747721, *7 (D.N.J. May 22, 2008) (court can review findings of Special Master de novo if objections involve those findings). How those objections work as to the Reports and Recommendations, though, differ for the portion of the Report, Part II that concerns the forms and dissemination of class notice.

The Report, Part I involves issues pertinent to the process by which the Court grants preliminary and final approval in its fiduciary capacity under Federal Rule of Civil Procedure 23(e) so that the settlement in question may bind absent class members/individuals covered by the Attorneys General acting in their *parens patriae* capacity. *See, e.g., Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (2nd Cir. 2010). Thus, adoption of the findings and conclusions in the Report, Part I, is conditional subject to being revisited in the final approval process. The same procedures apply to the portion of the Report, Part II dealing with the claims processing protocols.

However, the Report, Part II also contains findings and recommendations relevant to the process by which the Court, in its fiduciary capacity, approves the form(s) and dissemination of notice as being the best notice practicable under the circumstances *before* proceeding to final

approval. *See, e.g.,* Fed. R. Civ. P. 23(c)(2)(b); *Dusenbery v. United States*, 534 U.S. 161, 167-68, 170-71 (2002); *see also, e.g., Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56-57 (1st Cir. 2004) ("After ... appropriate notice is given, if the absent class members fail to opt out of the class action, such members will be bound by the court's actions, including settlement and judgment, even though those individuals never actually received notice."). Although this Court can revisit what otherwise would be a final determination as to the adequacy of notice in the course of considering final approval of these settlements, this is done only if proper objections to the dissemination method(s) or form of notice are received— i.e., those objections are not based on the notion that the Settling Plaintiffs should have "tried harder" or come up with a proposed means of notice that on 20-20 hindsight might arguably have been better, *see Dusenbery*, 534 U.S. at 172-73, or on the notion that the Settling Plaintiffs should have exhausted every conceivable method for notifying individual class members, *see, e.g.,* 4 Conte, Newberg on Class Actions, § 11.53 (4th ed. 2002). Thus, the moving parties are requesting that this Court disseminate the forms of notice attached to the proposed order submitted concurrently herewith, which are in the form recommended by the Special Master, according to the procedures submitted by Kinsella Media and approved by the Special Master.

Consequently, the Settling Plaintiffs respectfully request that this Court adopt the Special Master's Report, Part I as to all matters therein and Part II as to the claims protocols subject to the final approval process, and to unconditionally adopt the findings and conclusions in the Report, Part II, as to notice, and to order the dissemination of notice pursuant thereto.

IV. THE SETTLEMENTS SHOULD BE GIVEN PRELIMINARY APPROVAL

A. The Standards for Granting Preliminary Approval of Combined Class-*Parens* Settlements

Rule 23(e) of the Federal Rules of Civil Procedure provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." The same requirement concerning the need for court approval also applies to a

number of the *parens patriae* claims of the Attorneys General. *See, e.g.*, Cal. Bus. & Prof. Code §16750(b), (c).[22] Consistent with this requirement, courts generally apply a two-step approach to the class action settlement approval process, which also applies in combined class action and *parens patriae* proceedings. *See, e.g., In re Crocs Securities Litig.*, No. 07-cv-03251-PAB KLM, 2013 WL 4547404, *3 (D. Col. Aug., 28, 2013); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078 1079-80 (N.D. Cal. 2007); *In re Mid-Atlantic Toyota Antitrust Litig*., 564 F. Supp. 1379, 1383 (D. Md. 1983).

First, the court reviews the proposed settlement for obvious deficiencies, and makes "a preliminary determination of whether to give notice of the proposed settlement to members of the class and whether to schedule a hearing at which to receive evidence in support of and in opposition to the proposed settlement." *In re Mid-Atlantic Toyota*, 564 F. Supp. at 1384 (citing *Manual for Complex Litigation* § 1.46 at 62, 64-65 (5th ed. 1982)); *see In re Crocs Securities Litig.*, 2013 WL 4547404 at * 3; *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079-80. Second following preliminary approval and publication of class and *parens* notices, the court conducts an inquiry into the fairness of the proposed settlement, hears from putative settlement class members, and rules on any objections to any aspect of the settlement. If none is persuasive and the settlement falls within the range that qualifies as fair and reasonable under the guidance of applicable precedent, the court grants final approval. *See In re Crocs Securities Litig.*, 2013 WL 4547404 at * 3; Fed. R. Civ. P. 23(e)(2); 4 Conte, Newberg on Class Actions, § 11.22 *et seq*. (4th ed. 2002) ("*Newberg*"). As explained below, the proposed settlements satisfy fully the standard for preliminary approval.

Unless this Court is satisfied that the proposed settlement is demonstrably not within the range of possible approval, so that there is no point in proceeding with notice and a final hearing, preliminary approval should be granted. *In re Mid-Atlantic Toyota*, 564 F. Supp. at 1384 (citing

[22] Though there are States in this litigation that do not require court approval as a precursor to settling their *parens* claims, this Court need not make a determination as to which States require court approval to settle those claims as its approval of the Settlements, using the same standards applicable to the settlement of the Rule 23 claims, would cover all of those States that do require such court approval. *See* Report, Part II, at ¶ 9.

Manual for Complex Litigation § 1046 at 62, 64¬65 (5th ed. l982)); *see, e.g., Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (preliminary approval requires a court simply to find that the proposed settlement fits "within the range of possible approval" and should be given further consideration); *see also Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1988). Preliminary approval "is simply a determination that there is, in effect, 'probable cause' to submit the proposal to members of the class and to hold a full-scale hearing on its fairness." *In re Mid-Atlantic Toyota*, 564 F. Supp. at 1384 (citing *Manual for Complex Litigation* § 1.46 at 62, 64-65 (5th ed. 1982)); *see In re Crocs Securities Litig.*, 2013 WL 4547404 at *3 (same). This same standard applies to this Court's review of the settlement of the Attorneys General's *parens patriae* claims. *See In re Compact Disc Minimum Advertised Price Litigation*, 216 F.R.D. 197, 204, 206 (D. Me. 2003) (approving settlements of state and federal *parens patriae* antitrust claims brought by 43 States).

The class action and *parens patriae* settlement approval process puts the court in the role of a fiduciary to the absent class members, not as a party to the settlement contract who can second-guess its terms. *See, e.g., Ehrheart*, 609 F.3d at 593. This has important implications for how courts go about determining whether settlements should receive approval: as the Ninth Circuit has observed, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027 (quotation marks omitted). In this vein, the district court in *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079, held that "[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing * * *.") (internal citations and quotation marks omitted). As explained below, applying the appropriate presumption of

reasonableness to these Proposed Settlements, results in no indicia of fraud, collusion, or overreaching, and militates that preliminary approval should be granted.

Indeed, any thought that there could have been fraud, overreaching, or collusion in the negotiation of the proposed settlements becomes even more remote considering that the settlements were viewed favorably by a Special Master with substantial experience as both a jurist and practitioner, and negotiated and achieved jointly by private counsel and 33 Attorneys General. This public-private partnership is evidence not only that collusion and overreaching are absent, but that the settlements taken as a whole fit within the range of possible approval. *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) (quoting *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000)) ("participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected")); *see also, e.g., In re Uponor, Inc., F1807 Plumbing Fittings Products Liability Litigation*, 716 F.3d 1057, 1064 (8th Cir. 2013) (Congress enacted provisions of Class Action Fairness Act requiring that Attorneys General be notified of class action settlements in order to prevent inequitable settlements).

Moreover, the other factors relevant to determining whether the Proposed Settlements fall within the bounds of reasonableness also support granting preliminary approval. These include the following: (1) an evaluation of the benefits of the proposed settlements in relation to the nature and strength of the claims being released; and (2) whether sufficient discovery has been conducted to appropriately evaluate the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (discussing the factors that district courts must consider as part of final approval). *See also, In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1383-1384 ; *see also In re Crocs Securities Litig.*, 2013 WL 4547404 at * 10-11 (analyzing these additional factors in granting preliminary approval); and *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080 (same).

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B. These Proposed Settlements Can Be Presumed to Be Reasonable Especially Where the Underlying Case Is Complex

When determining whether to grant preliminary approval, it is important to begin the analysis with the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). And it is beyond question that international antitrust price-fixing indirect purchaser cases are complex. *Cf., e.g., Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), *aff'd on other grounds*, 525 U.S. 299 (1999) ("Complex antitrust cases . . . invariably involve complicated questions of causation and damages."). Ultimately, Indirect Purchaser Plaintiffs' Co-Lead Counsel and the Attorneys General –who are very experienced in complex antitrust and consumer class actions– have determined that the Proposed Settlements are in the best interests of the members of the proposed Indirect Purchaser and Government Purchaser Settlement Classes. *See* Cooper Decl. ¶ 12; Varanini Decl. ¶¶ 12, 15. "'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004). And, as noted above, the participation in the proposed settlements by such a substantial number of State Attorneys General reinforces the presumption of reasonableness. *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. at 380; *In re Music Compact Disc Minimum Advertised Price Litigation*, 216 F.R.D. at 206.

C. A Review of the Facts Confirms the Proposed Settlements Are Within the Range of Reasonableness and Should Be Given Preliminary Approval

The presumption of reasonableness that applies to these Proposed Settlements is fully supported by an analysis of the facts and the applicable case law on when settlements fall within the ballpark of reasonableness and so should be given preliminary approval.

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1. These Proposed Settlements Are Within the Range of Reasonableness Given the Substantial Monetary and Non-Monetary Consideration and the Continued Risks of Litigation

The substantial consideration received, both monetary and non-monetary, as well as an analysis of the continued risks of litigation, demonstrate that these Proposed Settlements fall well within the range of reasonableness. First, the monetary consideration of over $310 million, ranks as one of the largest antitrust settlements involving indirect purchasers where litigation class certification had not been granted. Cooper Decl. at ¶ 12; Varanini Decl. at ¶ 15. Further, the monetary consideration, as a percentage of total estimated single damages, is approximately 12 percent,[23] which compares quite favorably with other settlements, many for classes who had not seen the majority of their claims dismissed. *See, e.g., Sullivan*, 667 F.3d at 324 (settlement that is 10.93% of potential recovery is reasonable); *In re Mego Financial Corp.*, 213 F.3d at 459 (settlement that is one-sixth of potential recovery is reasonable); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1324 & n.17 (2d Cir. 1990) (settlement that is 11.4% of potential recovery is reasonable). Furthermore, these proposed settlements are "all-cash," and do not involve the return of any undistributed monies back to Defendants; therefore these proposed settlements lack the problems associated with proposed coupon or reversionary settlements. *See, e.g., In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1175-79 & n.4 (9th Cir. 2013) (coupon settlements subject to special scrutiny under Class Action Fairness Act); *In re Baby Foods Antitrust Litig.*, 708 F.3d 163, 172 (3rd Cir. 2013) (*cy pres* distribution of residual funds is preferable to reversion of residual funds to defendants because reversion "risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement.").

Additionally, the non-monetary relief obtained can also be considered in determining the total value of these proposed settlements. *See In re HP Inkjet Printer Litig.*, 716 F.3d at 1176 n.3; *Staton v. Boeing*, 327 F.3d 938, 962-63 (9th Cir. 2003). Here, the non-monetary injunctive relief

[23] Although the Settling Defendants deny that any alleged conspiracy resulted in artificially raised prices, Direct Purchaser Plaintiffs' expert, Dr. Paul C. Liu, estimated that the total overcharges due to the Settling Defendants' conspiracy was at least $2.6 billion. Rebuttal Expert Report of Paul C. Liu, Nov. 22, 2006, at 3 (Dkt. No. 1182). Thus, the $310 million recovery represents approximately 12% of single damages alleged by the Direct Purchaser Plaintiffs.

of the settlements is valuable, and neither moot nor superfluous, as the Special Master explains in his Report, Part I, at ¶¶ 70, 138 -139 (discussing compliance training); ¶140 (discussing cooperation); *see also* Report, Part III, at ¶ 61. For example, even though Settling Plaintiffs have settled with all possible defendants in this case, the provisions regarding cooperation with earlier Settling Defendants not only induced later Settling Defendants to settle but also provided a valuable benefit in the event that one or more Settling Defendants terminates the proposed settlements. *See In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1386 (a defendant's agreement to cooperate with plaintiffs "is an appropriate factor for a court to consider in approving a settlement").

While substantial under any circumstances, the benefits of the $310 million in cash as well as the non-monetary consideration increases when the substantial risks involved in continuing litigation are considered. First, there is a split among district courts as to whether, and under what circumstances, indirect purchasers in component price-fixing cases may have standing to sue, a split that includes a ruling from this Court highly damaging, if not "devastating," to the value of the plaintiffs' claims. *Compare, e.g.*, Dkt. Nos. 1555 and 1809; "the AGC Orders" *with, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109 (N.D. Cal. 2008). Nothing could be more self-evident than that the loss of claims during the litigation has a great bearing on the adequacy of a settlement. *See In re Crocs Securities Litig.*, 2013 WL 4547404 at * 10-11; *cf. In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080 (court's grant of summary judgment against plaintiffs prior to settlement relevant in assessing adequacy of the settlement's consideration).

Second, there is a split of authority among federal appellate courts as to the impact of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) on the ability to certify a litigation class. *Compare, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 12-7085, MDL No. 1869, 2013 WL 4038561 (D.C. Cir. August 9, 2013) *with, e.g., Butler v. Sears Roebuck & Co.*, Nos. 11-8029, 12-8030, 2013 WL 44782000 (7th Cir. Aug, 22, 2013) (Posner, J.). This means that even if the Ninth Circuit were to rule in favor of plaintiffs on standing, DRAM-containing device purchasers might still have faced considerable obstacles to obtaining litigation class certification.

See In re Crocs Securities Litig., 2013 WL 4547404 at * 11 (likelihood of certifying a litigation class has to be factored into value of pre-certification settlement). Indeed, one obstacle that factored into the settlement value of this litigation was this Court's ruling denying the certification of a litigation class of government purchasers.[24]

Whenever private (or state entity) damage litigation occurs within the context of a federal criminal investigation, there is inevitably the suggestion that pleas taken in the criminal proceedings solve all problems and virtually guarantee a substantial damage recovery. This litigation, however, offers a good example of how false that assumption is. While a number of the Settling Defendants, though not all, had plead guilty to criminal charges for price-fixing in this Court, *see, e.g.*, Plea Agreement, *United States v. Samsung Electronics Co., Ltd., et al.*, No. CR05-0643 PJH (N.D. Cal. Nov. 30, 2005), those plea agreements were limited to prices of DRAM sold *only* to certain Original Equipment Manufacturers at certain limited times during the alleged conspiracy period, *see, e.g., id.* at ¶ 4(c), (d). This decreased the value of the guilty pleas to indirect purchasers for their most vital issues – proof of actual injury and measure of damages. Further, during the time the settlements were being negotiated, this Court ruled that the guilty pleas of a specific Defendant had only limited evidentiary value against other Defendants. *See* Transcript of Hearing at 113-117, *Sun Microsystems v. Hynix Semiconductor, Inc. et al.*, C 06-1665 PJH (N.D. Cal. May 7, 2009). Accordingly, the precarious litigation posture of the settled claims thus fully supports a finding that the settlement is sufficiently within the range of fairness and adequacy that notice of it should be sent to putative class members.[25]

Indeed, in the context of evaluating a fair and reasonable fee for plaintiffs' counsel, the Special Master found that the $310 million consideration in the Proposed Settlements was an excellent result after an extensive review of the history and proceedings of this case. Applying his

[24] *State of California et al. v. Infineon Technologies et al.*, No. 06-4333 PJH, 2008 WL 4155665 (N.D. Cal. Sept. 5, 2008). This is true notwithstanding the fact that this Court had left open the prospect of certifying subclasses.

[25] These issues do not defeat certification of the proposed settlement classes because such certification can be appropriate even when a district court has ruled against plaintiffs on the merits. S*ee,* Report, Part I, at ¶158 & n.118).

expertise and experience, the Special Master reached this conclusion based not only on the Proposed Settlements collectively being one of the largest nationwide indirect price-fixing recoveries, but also on the difficulty and complexity of proving indirect purchaser damages, particularly in light of several significant adverse rulings on threshold issues such as antitrust standing and class certification. *See* Report, Part III, at ¶¶ 7, 19, 86-107.

2. The Arm's-Length Negotiations and Conduct of Extensive Discovery By Experienced and Skillful Counsel Demonstrates That These Proposed Settlements Were Not the Subject of Fraud, Collusion, or Overreaching

Any settlement is also entitled to "an initial presumption of fairness" where, as here, it is the result of arm's-length negotiations among experienced counsel. *Newberg* § 11.41; *Hughes v. Microsoft*, 2001 U.S. Dist. LEXIS 5976 (W.D. Wash. 2001) at *20. This presumption of fairness is reinforced where, as here, the settlements were concluded after the plaintiffs had conducted extensive discovery. In particular, negotiations were contested and conducted in the utmost good faith by experienced private and government antitrust practitioners who were well informed about the evidence and precedent available to address the factual and legal issues in the litigation, as well as mindful of their fiduciary obligations to represent fully and faithfully the interests of all entities within the definition of the class, or *parens patriae*, claims they had alleged. Cooper Decl. ¶¶ 9-12; Varanini Decl. ¶¶ 10-14.

In fact, the Special Master found that Indirect Purchaser Plaintiffs and Attorneys General engaged in extensive pre-filing investigation and full litigation discovery as described in the Report, Part I, at ¶¶42-43, 49-50 and 52 and in the Report, Part III, at ¶¶ 74-84. The Special Master also found counsel for the Indirect Purchaser Plaintiffs and the Attorneys General to be very experienced, reputable, and skillful, a finding that was based in part on his personal observations of their experience and skill in the proceedings before him. Report, Part III, at ¶ 109.

It therefore follows that the Indirect Purchaser Plaintiffs and Attorneys General, represented by experienced and capable counsel, were able to negotiate the Proposed Settlements at arms'-length with detailed knowledge of the factual and legal issues underlying the claims and defenses in

the actions, as well as the strengths and weaknesses of their cases. Cooper Decl., at ¶¶ 5-7; Varanini Decl., at ¶¶ 10-14. And that fact supports not just the presumption that these Proposed Settlements were fair but indeed the conclusion that these Settlements represent a very good result for the Plaintiffs and members of the proposed settlements classes in lieu of their being the result of fraud, collusion, or overreaching.

V. CONCLUSION

For the foregoing reasons, the Indirect Purchaser Plaintiffs and the Attorneys General respectfully request that the Court grant preliminary approval to these Proposed Settlements, conditionally certify the above-described Settlement Classes, and conditionally adopt the Report and Recommendations of the Special Master, Parts I and II, as to all findings and recommendations except those going to the forms of and plans for the dissemination of notice. The Indirect Purchaser Plaintiffs and the Attorneys General further respectfully request that the Court adopt the Special Master's findings and recommendations on the forms of and plans for the dissemination of notice, order that notice be given in the forms attached to the Proposed Order filed herewith and in the manner and according to the schedule set forth in the Proposed Order. Finally, the Indirect Purchaser Plaintiffs and the Attorneys General respectfully request the Court set a date for the final approval hearing as provided in the Proposed Order.

Dated: December 11, 2013

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ATTESTATION

Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that I have obtained concurrence in the service and filing of this document with electronic signatures from all counsel of the parties listed above.

Dated: December 11, 2013

/s/ Josef D. Cooper
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