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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE ILLUMINA, INC. SECURITIES LIGITATION	Master File No. 3:16-cv-03044-L-MSB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION OF PLAINTIFFS FOR AN ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND DIRECTING DISSEMINATION OF NOTICE TO THE CLASS**

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I. INTRODUCTION

Anton Agoshkov, individually and as the putative assignee of the claims of Lead Plaintiff Natissisa Enterprises Ltd., and Plaintiffs Braden Van Der Wall and Steven Romanoff (collectively, "Plaintiffs") respectfully submit this memorandum in support of their unopposed motion for an order preliminarily approving the proposed settlement ("Settlement") of this action embodied in the Stipulation.[1] The proposed Settlement was reached after the parties engaged in hard-fought litigation and arm's length settlement negotiations. Based on a thorough understanding of the facts and the law, the parties agreed to the proposed Settlement which consists of a payment of $13,850,000 in cash. If approved, it will fully resolve this action filed in December 2016 on behalf of a class of people who purchased or otherwise acquired common stock of Illumina, Inc. ("Illumina" or the "Company") during the period between July 26, 2016, and October 10, 2016, inclusive ("Settlement Class").

In determining whether preliminary approval is warranted, the sole issue before the Court is whether the proposed Settlement is within the range of what might be found to be fair, reasonable and adequate so that notice of the proposed Settlement can be given to members of the Settlement Class and a hearing can be scheduled to consider final settlement approval. The Settlement clearly meets these criteria. As discussed below, while Plaintiffs believe their claims are meritorious, significant issues exist with respect to liability and damages, and therefore the $13,850,000 cash fund that will be created under the parties' agreement represents a beneficial resolution of the Litigation and the Settlement is in the best interests of the Settlement Class.

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[1] Unless otherwise stated, capitalized terms have the same meaning as in the Stipulation.

Because all the requirements for settlement approval are met, the Court should certify the Settlement Class for settlement purposes only. Also, because the Plan of Allocation is fair, reasonable and adequate, it should be preliminarily approved. Finally, the Court should schedule a final approval hearing to determine whether the proposed Settlement, the Plan of Allocation, and Lead Counsel's request for attorneys' fees and reimbursement of expenses should be finally approved as fair, reasonable and adequate.

II. SUMMARY OF LITIGATION AND SETTLEMENT NEGOTIATIONS

A. Plaintiffs' Claims and Allegations

Plaintiffs bring this action on behalf of all persons who purchased or otherwise acquired Illumina common stock during the period between July 26, 2016, and October 10, 2016, inclusive (the "Class Period"). Plaintiffs' Amended Complaint for Violation of Federal Securities Laws (the "Amended Complaint")[2] alleges that Defendants made false and/or materially misleading statements about Illumina's ability to accurately and truthfully disclose that demand for its "HiSeq" sequencing instrument was decreasing, that Ilumina's disclosures relating the resulting earning projections were otherwise misleading, and that control person liability had attached. Specifically, the Amended Complaint alleges that, during the Class Period, Defendants made false and/or misleading statements and/or failed to disclose that: (1) the Company lacked adequate internal controls over financial reporting; and (2) as a result of the foregoing, the Company's financial statement were materially false and misleading at all relevant times.

The Amended Complaint further alleges that the truth emerged on October

[2] Plaintiffs filed the Amended Complaint on May 30, 2017. ECF 28.

10, 2016, when Illumina issued a press release announcing that third quarter revenue amounted to approximately $607 million, significantly lower than Defendants' previous forecast of $625 million to $630 million. According to the Amended Complaint, Defendants revealed that the revenue shortfall was attributable to "a larger than anticipated year-over-year decline in high throughput sequencing instruments," which included the HiSeq instrument. The Amended Complaint alleges that the release of this news caused Illumina's stock price to decline. From a closing market price of $184.85 per share on October 10, 2016, Illumina's stock price fell to $138.99 per share on October 11, 2016, a decline of nearly 25%.

Defendants have denied and continue to deny all wrongdoing and maintain that their conduct was at all times proper and in compliance with applicable provisions of law. Defendants have denied and continue to deny all of the claims and contentions alleged by the Plaintiffs in this Litigation and deny that they have committed any of the wrongful acts or violations of law that are alleged in the Litigation, including that they made any material misrepresentations or omissions. Defendants expressly have denied and continue to vigorously deny all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Litigation.

B. Procedural History and Settlement Negotiations

On December 16, 2016, plaintiff Yi Fan Chen and Frontline Global Trading Pte. Ltd. filed a class action complaint in the United States District Court for the Southern District of California against Defendants. The complaint alleged violations of the Securities Exchange Act of 1934. The complaint was styled *Chen v. Illumina Inc., et al.*, No. 3:16-cv-3044. ECF. No. 1.

On January 10, 2017, plaintiff James McLeod filed a second class action complaint in the United States District Court for the Southern District of California against Defendants. The complaint was substantially similar to the complaint filed by Yi Fan Chen and Frontline Global Trading Pte. Ltd. and included the same allegations of violations under the Securities Exchange Act of 1934 as the *Chen* complaint. The complaint was styled *McLeod v. Illumina Inc., et al.*, No. 3:17-cv-00053.

On March 30, 2017, the District Court consolidated the *Chen* and *McLeod* actions and appointed Natissisa Enterprises Ltd. as Lead Plaintiff and Levi & Korsinsky, LLP, as Lead Counsel pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4. ECF No. 19.

On May 30, 2017, Lead Plaintiff filed the Amended Complaint asserting securities fraud claims against Defendants based, inter alia, on allegations that Illumina failed to accurately and truthfully disclose that demand for its "HiSeq" sequencing instrument was decreasing, that Ilumina's disclosures relating the resulting earning projections were otherwise misleading, and that control person liability had attached. Lead Plaintiff alleged that Defendants had committed fraud under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 by, in pertinent part, falsely representing that Illumina was expecting to earn revenue of between $625 million and $630 million in the third quarter of 2016. Lead Plaintiff asserted these allegations on behalf of itself and a class of shareholders of Illumina who purchased shares between July 26, 2016 and October 10, 2016. ECF No. 28.

On July 31, 2017, the Defendants moved to dismiss the Amended Complaint. ECF No. 32. Lead Plaintiff filed its opposition to the motion to

dismiss on September 29, 2017. ECF No. 34. Defendants filed a brief in reply and further support of the motion to dismiss on November 13, 2017. ECF No. 35.

The District Court denied in part and granted in part the motion to dismiss as to certain allegations on January 22, 2018. ECF No. 39.

On March 7, 2018, Defendants filed their answer. ECF No. 49.

The parties began discovery promptly after completing the meeting requirements under Rule 26(f). On May 4, 2018, the parties exchanged initial disclosures pursuant to Rule 26(a). On May 25, 2018, Lead Plaintiff served initial requests for production of documents and interrogatories on Defendants. On June 5, 2018, Defendants served initial requests for production of documents on Lead Plaintiff. Additional requests for production of documents were served by the parties over the course of the following months.

Lead Plaintiff focused its discovery efforts on, among other things, Defendants' processes for forecasting revenue, various factors that caused estimates to vary from actual results, measures implemented by Defendants to improve forecasting processes, specific orders during the relevant period that failed to materialize into sales, the effect of Defendants' public statements on the market for Illumina's securities, and the damages caused by Defendants' alleged fraud. Meanwhile, Defendants focused their discovery efforts on Lead Plaintiff's typicality and adequacy for purposes of class certification under Rule 23, including assignments of claims by and between Lead Plaintiff and its owners and/or managers.

On September 12, 2018, Lead Plaintiff moved to amend the Amended Complaint in order to include Anton Agoshkov as an additional named plaintiff. Anton Agoshkov had been supervising the litigation on behalf of Lead Plaintiff and, given that Lead Plaintiff had decided to voluntarily unwind its operations,

Lead Plaintiff sought to include Anton Agoshkov as a named plaintiff in the case for the purpose of seeking his certification as a class representative. ECF No. 62.

On September 14, 2018, Lead Plaintiff and Anton Agoshkov moved for class certification pursuant to Rule 23. In support of the motion, Lead Plaintiff submitted a declaration from Anton Agoshkov attesting to his ability to serve as class representative as well as an expert declaration from Michael Hartzmark, Ph.D., analyzing the efficiency of the market for Illumina's securities. ECF No. 63. Defendants opposed the motion, but the Court had not rendered a decision on the motion prior to the date of this Stipulation.

On October 4, 2018, Plaintiffs Braden Van Der Wall and Steven Romanoff filed an additional action in the United States District Court for the Southern District of California against Defendants with the assistance of Lead Counsel. The complaint was substantially similar to Lead Plaintiff's Amended Complaint. The complaint was styled *Van Der Wall et ano. v. Illumina Inc., et al.*, No. 3:2018-cv-02307.

On December 14, 2018, the parties submitted a joint request to the Court to extend various case management deadlines, including the deadline to complete fact discovery, in order to provide the parties more time to complete document discovery and depositions as well as participate in a private mediation. ECF No. 83. The Court granted the parties' joint request. ECF No. 84.

On January 8, 2019, the Court denied Lead Plaintiff's motion to amend without prejudice. ECF No. 85.

On or around January 30, 2019, the parties scheduled a mediation with David Geronemus, Esq., at JAMS, for April 18, 2019.

The parties continued discovery until the mediation on April 18, 2019. In total, the parties exchanged over 200,000 pages of party and non-party document

discovery and conducted depositions of Lead Plaintiff, Lead Plaintiff's expert, and Illumina. The parties had also scheduled depositions for at least two additional witnesses on behalf of Defendants. Lead Plaintiff had also served a number of non-party subpoenas and had filed a motion to compel against one of the entities in federal court.

The parties submitted extensive briefing to the mediator before the mediation, including opening briefs and reply briefs. The parties also prepared presentations for a joint session at the opening of the mediation. After a full day of negotiation, the parties tentatively agreed to a settlement.

III. THE PROPOSED TERMS OF SETTLEMENT

A. Settlement Class Definition

The Settlement Class includes all persons or entities who purchased or otherwise acquired a legal or beneficial ownership interest in Illumina's common stock between July 26, 2016 through October 10, 2016, inclusive. Excluded from the Settlement Class are (i) any putative Settlement Class Members who exclude themselves by filing a timely and valid request for exclusion in accordance with the requirements set forth in the Notice; (ii) Defendants and their family members; (iii) any entity in which Defendants have or had a controlling interest; (iv) the officers and directors of Illumina during the Class Period; and (iv) the legal representatives, agents, executors, successors, or assigns of any of the foregoing excluded persons or entities, in their capacities as such.

B. Monetary Consideration and Plan of Allocation

Under the terms of the proposed Settlement, the parties have agreed that Defendants will cause their insurers to make a cash payment of thirteen million eight-hundred and fifty thousand dollars ($13,850,000), as set forth in greater detail in ¶¶ 1 – 3 of the Stipulation. The $13,850,00 in cash will be deposited into

the Settlement Fund (as defined in ¶ qq of the Stipulation) within twenty (20) business days after the Court enters an order granting preliminary approval of the Settlement or after the provision of wire transfer and payment information, whichever date is later. *See* Stipulation at ¶ 1. Any interest earned will be for the benefit of the Settlement Class. *See id.* at ¶ 8.

Lead Counsel has considered the issues of liability and damages in determining an appropriate proposed Plan of Allocation. Lead Counsel did not favor or consider the particular trading history of the Plaintiffs or of any other individual member of the Settlement Class in crafting this plan. Lead Counsel consulted with a damages expert experienced in the area of class action securities fraud litigation when developing the proposed Plan of Allocation.

A copy of the Plan of Allocation is set forth in the Notice of Pendency and Proposed Settlement of Class Action. *See* Stipulation at Ex. A-1, pp. 9-12.

C. Release Provisions

As fully set forth in ¶ 6-8 of the Stipulation, upon the Effective Date, as defined in ¶ o of the Stipulation, Plaintiffs and each Settlement Class Member, on behalf of themselves, their successors and assigns, and any other Person claiming by or through them, regardless of whether they ever seek or obtain by any means, including without limitation by submitting a Proof of Claim, any disbursement from the Settlement Fund, shall be deemed to (a) have released, waived, discharged and dismissed each and every of the Released Claims against the Released Parties; (b) forever be enjoined from commencing, instituting or prosecuting any or all of the Released Claims against any of the Released Parties; and (c) forever be enjoined from instituting, continuing, maintaining or asserting, either directly or indirectly, whether in the United States or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause

of action, claim, or demand against any person or entity who may claim any form of contribution or indemnity from any of the Defendant Released Parties in respect of any Released Claim. Nothing contained herein shall, however, bar the Releasing Parties from bringing any action or claim to enforce the terms of this Stipulation or the Final Judgment.

As fully set forth in ¶ kk of the Stipulation, Released Claims shall mean any and all claims (including Unknown Claims as defined in ¶ aaa of the Stipulation), that (1) that have been or could have been asserted in any of the Complaints filed in this action, or (2) that, directly or indirectly, arise out of or are related to (i) any of the factual allegations in the Complaints, (ii) any misrepresentation or omission or alleged misrepresentation or omission by any Released Party before or during the Class Period related to or in connection with Illumina, or any of its subsidiaries, or the purchase or sale of Illumina Common Stock or (iii) any loss sustained or allegedly sustained as a result of the purchase, sale, or holding Illumina Common Stock during the Class Period.

D. Attorneys' Fees and Reimbursement of Expenses

Lead Counsel will apply to the Court for an award of attorneys' fees in an amount not to exceed twenty-five percent (25%) of the total Settlement Fund (or approximately $3,462,500). Lead Counsel will also apply to the Court for a reimbursement of its reasonable expenses incurred through the Litigation (not to exceed $180,000).

E. The Court's Continuing Jurisdiction

If the Court grants final approval of the proposed Settlement, the parties will request that the Court enter a final judgment of dismissal. The Court will retain jurisdiction with respect to the implementation and enforcement of the terms of the Settlement, and all parties agree to submit to the jurisdiction of the

Magistrate Judge for purposes of implementing and enforcing the Settlement. *See* Stipulation at ¶ 62.

IV. PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT IS APPROPRIATE

A. The Settlement Approval Process

Rule 23(e) requires that before a class action is dismissed or compromised, notice of the proposed dismissal or compromise must be given in the manner directed by the Court and judicial approval must be obtained. To that end, the Court must find that the proposed settlement is "fundamentally fair, adequate, and reasonable. *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1040 (N.D. Cal. 2008) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citations omitted)). A settlement agreement is presumptively fair if it "was reached in arm's length negotiations, after relevant discovery had taken place." *Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. Jul. 18, 1997). Here, the settlement was reached following a detailed investigation by Plaintiffs' counsel, extensive litigation in the District Court, extensive discovery, and arms' length negotiations between counsel experienced in securities class action litigation. The settlement is thus entitled to a presumption of fairness.

Moreover, the Ninth Circuit has a policy favoring settlement, "particularly in class action suits." *Omnivision*, 559 F. Supp. 2d at 1041; *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (stating that "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . . ."). The court's inquiry into the settlement agreement is ultimately limited to the extent necessary to make a judgment that the agreement

is not "the product of fraud or overreaching by, or collusion between, the negotiating parties." *Omnivision*, 559 F.Supp. 2d at 1041(internal citations omitted). Thus, the court "need not reach the merits of the case or form conclusions about the underlying questions of law or fact" in determining the fairness, reasonableness and adequacy of a settlement agreement. *Id.*

B. The Proposed Settlement Meets the Requirements for Preliminary Approval

At the preliminary approval stage, the Court must conduct a "prima facie review of the relief and notice" provided by the settlement agreement before the Court orders notice to be sent. *Browing v. Yahoo! Inc.*, No., C04-01463 HRL, 2006 WL 3826714, at *7 (N.D. Cal. Dec. 27, 2006). The court must find the release to be "fair and reasonable" and the notice to be "adequate." *Id.* at *7-8. Ultimately, in making a final determination of whether the proposed Settlement is fair, adequate, and reasonable, the Court will balance some or all of the following factors:

> [T]he strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the state of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Consideration of these factors shows that the proposed Settlement now before the Court falls squarely within the range of reasonableness warranting notice of the proposed Settlement to members of the Settlement Class and scheduling a final approval hearing.

1. The risk, expense, complexity, and likely duration of further litigation

Plaintiffs believe that the case has merit and that they will be able to establish Defendants' liability at trial. Nevertheless, Plaintiffs recognize that, were they to continue prosecution of this action, they would face substantial risks. Litigation of the claims alleged in this case raised a number of complex questions that required substantial efforts by Plaintiffs. One critical risk faced by Plaintiffs was that the alleged misrepresentation in this matter was "forward-looking" and therefore subject to protection under the safe harbor provision of the Exchange Act. While Plaintiffs defeated Defendants' argument on this point at the motion to dismiss stage, the evidentiary record at that point was limited and Defendants were likely to introduce additional examples of "cautionary language" that could have been dispositive at summary judgment.

Plaintiffs also faced a significant risk with respect to proving damages at trial. While the decline in Illumina's stock price at the end of the Class Period was approximately $45 per share, Defendants would likely have introduced evidence at trial showing that only a small portion of the decline was attributable to the alleged fraud (thus leaving the majority of Plaintiffs' damages not recoverable). A jury could have accepted Defendants' arguments on this point, especially considering the fact that Illumina's stock price only increased by approximately $10 per share at the beginning of the Class Period when the alleged misrepresentation was initially made.

Whatever the outcome on these issues, an appeal likely would have been taken. All of the foregoing would have posed considerable expense to the parties, and would have delayed any financial recovery for several years, assuming that Plaintiffs ultimately succeeded on their claims. For their part, Defendants have

denied the material allegations of the Complaint and have vigorously asserted that Illumina shareholders have not sustained any damages as a result of the alleged misconduct.

In view of the complexity, expense, and likely duration of the litigation, without a settlement, this is a realistic possibility that Plaintiffs and the Settlement Class members would ultimately receive nothing. In all events, protracted and highly complex further litigation without a reasonably predictable outcome would ensue if this case were not resolved at this time.

2. Amount Offered in Settlement

As discussed above, a Settlement Fund of $13,850,000 in cash will be created under the terms of the proposed Settlement. Plaintiffs estimated damages of approximately $300 million. While this represents a 4.6% recovery, even a "small recovery may be fair, reasonable, and adequate." *Gudimetla v. Ambow Educ. Holding*, 2014 U.S. Dist. LEXIS 195147, *18 (C.D. Cal. December 2, 2014) (preliminarily approving a settlement of for alleged violations of Rule 10b-5 and 20(a) of the Exchange Act as well as Section 11 of the Securities Act where recovery would be only be approximately $0.06 per share on shares originally purchased for $10.00); *see In re Prudential Sec., Inc. L.P. Litig.*, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6% and 5% of claimed damages); *In re Cendant Corp. Litig.*, 264 F.3d 201, 240 (3d. Cir. 2001) (typical recoveries in securities class actions range from 1.6% to 14% of total losses).

According to a 2018 report by Cornerstone Research (a leading economic consulting firm that tracks class action securities fraud litigation), the median settlement in Rule 10b-5 cases as a percentage of overall damages in cases with

approximately $300 million in damages was 3.9%.[3] Meanwhile, the same report published by NERA Economic Consulting (another leading economic consulting firm that tracks class action securities fraud litigation) concluded that the median settlement as a percentage of overall damages in cases of this size was 2.6%.[4] These percentages provide assurance that the settlement before the Court is reasonable under the circumstances given the size of the case.

3. The Stage of the Proceedings

The parties reached the proposed Settlement after substantial discussions and during discovery and briefing on Plaintiffs' class certification motion. With the benefit of extensive discovery, Plaintiffs were able to properly gauge the likelihood of succeeding on the merits and evaluate the appropriateness of the Settlement. Thus, Lead Counsel conducted a thorough examination regarding the impact of Defendants' alleged conduct on the Settlement Class members and the alleged damages, and were able to act intelligently in negotiating the proposed Settlement.

4. The Proposed Settlement Resulted from Arm's Length Negotiations and Did Not Involve Any Collusion

The parties reached the proposed Settlement after substantial discussions, including formal mediation before David Geronemus, Esq., at JAMS. The parties submitted extensive briefing to the mediator before the mediation, including

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[3] Cornerstone Research, *Securities Class Action Settlements, 2018 Review and Analysis* at 6 Fig. 5, *available at*: https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2018-Review-and-Analysis.

[4] NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* at 35 Fig. 27, *available at*: https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf.

opening briefs and reply briefs. The parties also prepared presentations for a joint session at the opening of the mediation. After a full day of negotiation, the parties tentatively agreed to a settlement. There should be no question that the proposal was negotiated at arm's length.

Moreover, counsel for each party is experienced and thoroughly familiar with the factual and legal issues. Courts recognize that the opinion of experienced and informed counsel supporting a settlement is entitled to considerable weight. *See Bellows v. NCO Financial Sys., Inc.*, No. 3:07-CV-01413-W-AJB, 2008 WL 5458986, at *8 (S.D. Cal. Dec. 10, 2008) (finding that "it is the considered judgment of experienced counsel that this settlement is a fair, reasonable, and adequate settlement of the litigation, which should be given great weight"); *see also Alberto v. GMRI*, No. Civ. 07-1895 WBS DAD, 2008 WL 4891201, at *10 (E.D. Cal. Nov. 12, 2008) (stating that "when approving class action settlements, the court must give considerable weight to class counsel's opinions due to counsel's familiarity with the litigation and its previous experience with class action lawsuits").

For the reasons summarized above, Lead Counsel believes, based on their experience, knowledge of the strengths and weaknesses of the case, and all other factors considered in evaluating proposed class action settlements, that the proposed Settlement is fair, reasonable, and adequate and in the best interests of the members of the Settlement Class.

5. Any agreement required to be identified under Rule 23(e)(3)

Aside from the Stipulation, the parties have entered into the Supplemental Agreement. The Supplemental Agreement, as described in the Stipulation, provides Illumina with the right to terminate the Settlement if a certain number of

Class Members exceeds a threshold. *See* Stipulation at ¶¶ ee. The Supplemental Agreement is "confidential" as is customarily the case. See *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 150292, at *23 (N.D. Cal. Sep. 4, 2018) (allowing confidential filing of supplemental agreement in order to "'avoid the risk that one or more shareholders might use this knowledge to insist on a higher payout for themselves by threatening to break up the Settlement.'"); *Thomas v. MagnaChip Semiconductor Corp.*, No. 14-CV-01160, 2017 U.S. Dist. LEXIS 174353, 2017 WL 4750628, at *5 (N.D. Cal. Oct. 20, 2017) (same).

C. The Settlement Treats Class Members Equitably

The Settlement treats Class Members equitably. This is because the proposed Plan of Allocation treats all claimants uniformly. "[A]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 332 (N.D. Cal. 2018) (citation omitted); *see Vinh Nguyen v. Radient Pharm. Corp.*, No. SACV 11-00406 DOC, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014). Further, courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members equitably." *Rodriguez v. W. Publ'g Corp*., No. CV-05-3222 R(MCx), 2007 U.S. Dist. LEXIS 74849, at *76 (C.D. Cal. Aug. 10, 2007) (citing *Hammon v Barry,* 752 F. Supp. 1087, 1095 (D. D.C. 1990) (internal quotations and citations omitted)).

As described in the Notice (Stipulation, Exhibit A-1), the Plan of Allocation has a rational basis and was formulated by Class Counsel ensuring its fairness and reliability. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165, 2007 WL 4115809, at *13 (S.D.N.Y. Nov. 7, 2007). Under the proposed Plan of

Allocation, each Authorized Claimant will receive their pro rata share of their Recognized Loss depending upon the number of Illumina shares purchased during the Class Period and held at the close of trading on October 10, 2016. The Plan of Allocation is based upon the premise that Class Members sustained damages by purchasing Illumina's common stock at artificially inflated prices. Accordingly, the proposed Plan of Allocation seeks to compensate Class Members in accordance with the devaluation that Illumina common stock experienced when corrective disclosures entered into the public sphere. The Plan of Allocation relies on the corrective disclosures listed in the Amended Complaint along with other disclosures that are legally and factually relevant according to Class Counsel's consultation with experts, which is common in securities class actions. *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525, 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007); *see also In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) (deeming plan of allocation where "claimants are to be reimbursed on a *pro rata* basis for their recognized losses based largely on when they bought and sold their shares of [company] stock" as "even handed").

The Plan of Allocation is substantially similar to other plans of allocation that have been approved and successfully implemented in other securities class action settlements, including within this Circuit. *See Veeco*, 2007 WL 4115809, at *14 ("Each valid claim will then be calculated so that each authorized claimant will receive, on a proportionate basis, the share of the net settlement fund that the claimant's recognized loss bears to the total recognized loss of all authorized claimants."); *Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach."). In assessing a proposed plan of allocation, the Court may give great weight to the opinion of informed counsel. *See, e.g.*, *Chavarria v. N.Y. Airport Serv., LLC*, 875

F. Supp. 2d 164, 175 (E.D.N.Y. 2012) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. That is, 'as a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.'"). Accordingly, given Class Counsel's opinion concerning the Plan of Allocation, this factor weighs in favor of granting preliminary approval.

V. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS UNDER RULE 23 IS APPROPRIATE

For the sole purpose of implementing the proposed Settlement, Plaintiffs seek and Defendants agree to the certification of a Settlement Class defined as all persons or entities, including, without limitation, their beneficiaries, that purchased or otherwise acquired purchased or otherwise acquired Illumina's common stock between July 26, 2016, and October 10, 2016 (inclusive), with the exclusions noted above in the Settlement Class Definition. Before a class may be certified, the following requirements of Rule 23(a) must be satisfied: (a) the class is so numerous that joinder of all class members is impracticable; (b) there are questions of law or fact common to the class; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) the representative parties will fairly and adequately protect the interests of the class. *See Hanlon,* 150 F.3d at 1019.

As discussed below, certification of a settlement class is appropriate here.

A. The Settlement Class Members Are So Numerous that Joinder Is Impracticable

While the precise number of members of the Settlement Class is unknown, the number certainly exceeds any number considered practical for joinder. As of the end of the Class Period, the Company had over 90 million shares of common stock outstanding. Indeed, courts routinely hold that Rule 23(a)'s numerosity requirement is satisfied under similar facts. *See In re Applied Micro Circuits Corp. Sec. Litig.*, No. 01-cv-0649 (KAJB), 2003 WL 25419526, at *8 (S.D. Cal. July 15, 2003) (finding numerosity where the company issued millions of shares and the class is presumed to have thousands of members). From this information, one may conclude that there are likely thousands of members in the Settlement Class. The threshold for a presumption of impracticability is thus easily met. *See Hanlon*, 150 F.3d at 1019.

B. Common Questions of Law or Fact Exist

In order to maintain a class action, there must be "questions of law *or* fact common to the class . . . ." Fed. R. Civ. P. 23(a)(2) (emphasis added). Construed liberally like the other Rule 23 requirements, commonality does not "require all questions of law and fact to be common." *In re Heritage Bond Litig.*, No. MDL 02-ML-1475 DT, 2004 WL 1638201, at *14 (C.D. Cal. July 12, 2004) (finding that "it is not necessary that every issue of law or fact be identical"); *see also Rodriguez v. Carlson*, 166 F.R.D. 465, 472 (E.D. Wash. 1996).

This case presents numerous common questions of both law *and* fact. Here, questions of law and fact common to all members of the Settlement Class include:

(a) Whether the federal securities laws were violated by Defendants' acts as alleged in the Amended Complaint;

(b) Whether the misstatements and omissions alleged herein were made

with scienter;

(c) Whether the statements made by Defendants to the investing public during the Class Period misrepresented material facts about Illumina's ability to correctly forecast declining instrument sales;

(d) Whether Defendants acted knowingly or recklessly in issuing false and misleading financial statements;

(e) Whether the prices of Illumina common stock during the Class Period were artificially inflated because of Defendants' conduct complained of herein; and

(f) To what extent the Settlement Class members have sustained damages, and the proper measure of damages.

Accordingly, Rule 23(a)(2) is met.

C. Plaintiffs' Claims Are Typical of Those of the Settlement Class

A plaintiff's claims will be deemed typical if "they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *see also Schaefer v. Overland Express Family of Funds*, 169 F.R.D. 124, 128-29 (S.D. Cal. 1996) (finding that typicality was met even though defendant claimed that the vast majority of shares were purchased by institutional investors rather than small investors and that plaintiff relied on oral representations of his broker). The heart of the inquiry is whether the representative's claims and the class claims are interrelated so that class treatment is economical. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

Here, Plaintiffs' claims are similar to the claims of the other Settlement Class members. Defendants' alleged course of conduct described in the Amended Complaint uniformly affected all Settlement Class members, as they each

allegedly suffered economic injury from the decline in market value following the corrective disclosures. Plaintiffs' claims are typical of the other Settlement Class members because, like all other Settlement Class members, they allegedly were injured when the truth about Illumina's inability to forecast declining sales of instruments was revealed. Thus, the typicality requirement of Rule 23(a)(3) is met.

D. Plaintiffs Are Adequate Representatives of the Settlement Class

The purpose of the adequacy requirement is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 594 (1997). The factors relevant to a determination of adequacy are: (1) the absence of potential conflicts between the named plaintiff and his counsel with other class members; and (2) that counsel chosen by the representative party is qualified, experienced and able with the named plaintiff to vigorously conduct the litigation. *See Hanlon,* 150 F.3d at 1020.

There are no apparent conflicts of interest between Plaintiffs and the absent Settlement Class members. Plaintiffs have been committed to the vigorous prosecution of this action from the outset and have reached a resolution that they believe is in the best interests of the Settlement Class. Plaintiffs have been engaged during the settlement negotiation process and support this motion and the Settlement it requests. Moreover, the Court previously determined that Lead Counsel, Levi & Korsinsky is qualified to represent the Settlement Class.

E. The Requirements Of Rule 23(b)(3) Are Also Satisfied

Rule 23(b)(3) authorizes class certification where, in addition to the requirements of Rule 23(a), common questions of law *or* fact predominate over any individual questions and a class action is superior to other available means of

adjudication. *See Amchem,* 521 U.S. at 607. This case easily meets Rule 23(b)(3)'s requirements.

1. Common Legal and Factual Questions Predominate

"Predominance is a test readily met in certain cases alleging . . . securities fraud . . . ." *Amchem,* 521 U.S. at 625. In this securities fraud case, Defendants' alleged liability arises from their conduct with respect to Illumina's ability to forecast a decline in instrument sales. Whether Defendants' publicly disseminated releases and statements during the Class Period omitted and/or misrepresented material facts is the central issue in this case and predominates over any individual issue that theoretically might arise. *See Hanlon*, 150 F.3d at 1022 (stating that Rule 23(b)(3) is satisfied where "[a] common nucleus of facts and potential legal remedies dominates [the] litigation"). Thus, the predominance requirement is satisfied here.

2. A Class Action is the Superior Means to Adjudicate Plaintiffs' and Members of the Settlement Class's Claims

The second prong of Rule 23(b)(3) is essentially satisfied by the proposed Settlement itself. As explained in *Amchem*, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial." 521 U.S. at 620 (citing Fed. R. Civ. P. 23(b)(3)(D)). Thus, any manageability problems that may have existed here—and Plaintiffs know of none—are eliminated by the Settlement. In any event, given the alternatives, *e.g.*, unnecessarily burdening the judiciary with numerous actions involving relatively small amounts of damages, which "would prove uneconomic for potential

plaintiffs" where "litigation costs would dwarf potential recovery," resolving this case on a class-wide basis is clearly preferable. *Hanlon*, 150 F.3d at 1023.

VI. THE PROPOSED NATURE AND METHOD OF CLASS NOTICE ARE CONSTITUTIONALLY SOUND AND APPROPRIATE

Preliminary approval of the proposed Settlement permits notice to be given to the Settlement Class members of a hearing on final settlement approval, at which they and the settling parties may be heard with respect to final approval. *See Manual for Complex Litigation*, Third, §23.14 (West ed. 1995). Here, the parties propose that notice be given principally by U.S. mail. *See* Stipulation, Exhibit A at ¶ 12. In addition, the Stipulation provides for publication of a summary notice, which will be published on the claims administrator website and in a national business newswire. *See id*. at ¶ 15.

The proposed form of mailed notice (Exhibit A-1 to the Stipulation), provides the following details of the Stipulation to prospective members of the Settlement Class in a fair, concise and neutral way: (1) the existence of and their rights with respect to the class action, including the requirement for timely opting out of the Settlement Class; and (2) the Settlement with Defendants and their rights with respect to the Settlement. The proposed form of summary notice (Exhibit A-3 to the Stipulation), provides essential information about the Litigation and the Settlement, including an address for potential class members to write in order to obtain the full long form of notice.

The means and forms of notice proposed here constitute valid and sufficient notice to the Settlement Class, the best notice practicable under the circumstances, and comply fully with the requirements of Rule 23 and due process. *See e.g.*, *In re Cement and Concrete Antitrust Litig.*, 817 F.2d 1435, 1440 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 93 (1989) (stating that "notice is satisfactory if

it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard'") (internal citation omitted); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993); *In re Equity Funding Corp. of Am Sec. Litig.*, 603 F.2d 1353, 1361 (9th Cir. 1979) (directing that class notice must "present a fair recital of the subject matter and proposed terms" and provide "an opportunity to be hear to all class members") (internal citation omitted); *see also Manual Third* § 30.41 (approving use of combined class notice and settlement notice where appropriate).

VII. PROPOSED SCHEDULE

Plaintiffs respectfully request the Court schedule the dates required by, and set forth in the [Proposed] Order Granting Preliminary Approval of Settlement and Directing Dissemination of Notice to the Class. Specifically, Plaintiffs request the Court schedule the following dates:

Last day to complete mailing of Notice and Proof of Claim Form and to publish Summary Notice	At least 60 days before deadline for objections
Last day for filing and serving papers in support of final approval of the proposed Settlement, and the applications for Fee and Expense Awards.	At least 42 days prior to Final Approval Hearing
Last day for Settlement Class Members to submit comments in support of or in opposition to the proposed Settlement, and the applications for Fee and Expense Awards.	At least 35 days prior to Final Approval Hearing

Last day for potential Settlement Class Members to request exclusion from the Settlement Class.	At least 35 days prior to Final Approval Hearing
Last day for filing and serving papers in response to objections to the proposed Settlement, and the applications for Fee and Expense Awards.	At least 14 days prior to Final Approval Hearing
Final Approval Hearing	At least 110 days from after entry of Preliminary Approval Order

VIII. CONCLUSION

The proposed Settlement is presumptively fair and presents no obvious deficiencies. Accordingly, the Court should grant preliminary approval of the proposed Settlement and enter an order substantially in the form of the accompanying [Proposed] Order Granting Preliminary Approval of Settlement and Directing Dissemination of Notice to Class.

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Respectfully submitted,

s/ Adam M. Apton

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