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8

9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

11 IN RE: SANDISK LLC SECURITIES
12 LITIGATION

Case No. 3:15-cv-01455-VC

Hon. Vince Chhabria

13 **CLASS REPRESENTATIVES’**
 14 **UNOPPOSED NOTICE OF MOTION**
 15 **AND MOTION FOR PRELIMINARY**
 16 **APPROVAL OF CLASS ACTION**
 17 **SETTLEMENT, APPROVAL OF**
 18 **FORM AND MANNER OF NOTICE,**
 19 **AND TO SET DATE FOR HEARING**
 20 **ON FINAL APPROVAL OF**
 21 **SETTLEMENT; MEMORANDUM OF**
 22 **POINTS AND AUTHORITIES IN**
 23 **SUPPORT THEREOF**

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1 **NOTICE OF MOTION AND MOTION**

2 TO: ALL PARTIES AND COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on May 16, 2019 at 10:00 a.m., or at such other time as
4 may be set, in Courtroom 4 of the United States District Court for the Northern District of
5 California, located at 450 Golden Gate Avenue, San Francisco, California 94102, the Class
6 Representatives,¹ on behalf of the certified Class, will and hereby do move for an order granting
7 preliminary approval of the proposed Settlement of this class action, including the proposed Plan
8 of Allocation, directing Class Notice, scheduling the events that will lead up to a Final Settlement
9 Hearing, and for such other relief as the Court may grant.

10 **STATEMENT OF ISSUES TO BE DECIDED**

11 1. Whether the proposed \$50 million cash Settlement of this Action should be
12 preliminarily approved under Rule 23(e) of the Federal Rules of Civil Procedure (“FRCP”) and
13 *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1035-37 (N.D. Cal. 2016)?

14 2. Whether the proposed form of Settlement Notice and notice plan, including the
15 methods of disseminating and responding thereto, are the best practicable under FRCP
16 23(c)(2)(B) and (e)(1)?

17 3. Whether the Court should accept and set the proposed schedule of events leading
18 up to a Final Settlement Hearing on the proposed Settlement?

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. PRELIMINARY STATEMENT**

21 After three years of hard-fought litigation, Class Representatives have agreed, subject to
22 the Court’s approval, to settle all claims asserted in this Action in exchange for a cash payment
23 of \$50,000,000. The Settlement is embodied in the Stipulation. As explained more fully herein,
24 Class Representatives and Class Counsel respectfully submit that the Settlement is an excellent
25 recovery for the Class and warrants preliminary approval.

26
27
28 ¹ Unless otherwise defined herein, all capitalized terms have the same meaning as given to them in the Stipulation and Agreement of Settlement (the “Stipulation”), dated May 6, 2019 and filed herewith as Ex. 1 to the Declaration of Max R. Schwartz (“Schwartz Decl.”).

1 The proposed Settlement represents a significant recovery given the Class’ maximum
2 recoverable damages and risks of continued litigation, as well as compared to other recent
3 securities class action settlements. It was achieved through arm’s-length negotiations with the
4 assistance of an experienced mediator at a stage in the proceedings – during summary judgment
5 briefing and weeks before trial – when Class Representatives and Class Counsel were well-
6 informed regarding the merits of and defenses to the claims.

7 Class Representatives also propose direct notice to the Class in the manner customarily
8 utilized in securities class action cases – direct mailing and publication – and that Epiq Class
9 Action & Claims Solutions, Inc. (“Epiq”), a well-qualified Claims Administrator, be appointed
10 to administer the Settlement. Finally, Class Representatives request that the Court set a date for
11 a hearing on Final approval of the Settlement and related matters that will allow for the prompt
12 conclusion of this Action and distribution of Settlement proceeds, while providing sufficient time
13 for Class Members to receive Notice and present any objection or request exclusion.

14 **II. BACKGROUND**

15 **A. The Class’ Claims Against Defendants**

16 The Class has argued and alleged that during the Class Period (October 16, 2014, through
17 and including April 15, 2015), Defendants misled investors concerning the breadth and quality of
18 SanDisk’s enterprise products and its success in integrating its most recent enterprise acquisition,
19 Fusion-io. Specifically, the Class has argued and alleged that by the start of the Class Period,
20 contrary to Defendants’ positive statements, SanDisk’s enterprise business, including Fusion-io,
21 was beset with performance issues. Although Defendants had touted SanDisk’s acquisition of
22 Fusion-io as the reason the Company would achieve \$1 billion in enterprise revenue in 2015, a
23 year ahead of schedule, the Class has argued and alleged that Fusion-io had badly missed the
24 Company’s internal sales forecasts in 4Q2014 and performed even worse in 1Q2015. Fusion-io’s
25 misses stemmed from a number of issues, including, as argued and alleged, the high cost of its
26 products, especially compared to cheaper alternatives, and an ineffective sales organization.
27 Beyond Fusion-io, the Class has argued and alleged that SanDisk’s “legacy” enterprise business
28

1 (consisting of prior enterprise acquisitions Pliant and SMART Storage) was also performing
2 poorly, due to badly designed and outdated products and qualification delays that were adversely
3 impacting its enterprise products across the board and negatively impacting sales, even as
4 Defendants told the market that SanDisk had an industry-leading enterprise portfolio that was
5 experiencing strong demand signals. The Class has argued and alleged that Defendants were
6 aware of the foregoing issues through their participation in regularly scheduled meetings of the
7 enterprise business unit and of SanDisk's senior executive team and that, in touting SanDisk's
8 enterprise business, without disclosing the significant problems described above, Defendants
9 made false and misleading statements that damaged SanDisk investors during the Class Period.

10 **B. Procedural History**

11 The proposed Settlement comes after three years of hard-fought litigation, with the Parties
12 preparing for a rapidly approaching trial. This Action was first filed on March 20, 2015, and the
13 Court appointed the Lead Plaintiffs on February 22, 2016. ECF Nos. 1, 119.² Lead Plaintiffs
14 filed two complaints, and engaged in several rounds of briefing related to Defendants' motions to
15 dismiss, and by order dated June 22, 2017, the Court sustained the SAC. *E.g.*, ECF No. 184.

16 Fact discovery began on August 14, 2017, and, including responses to contention
17 interrogatories and certain other matters, concluded approximately 13 months later on September
18 12, 2018. ECF Nos. 194, 240. Lead Plaintiffs produced over 200 documents, and Defendants
19 deposed each of the five Lead Plaintiffs between January 1, 2018, and January 16, 2018. In turn,
20 Defendants produced 161,725 documents (nearly 920,390 pages). Plaintiffs' Counsel deposed
21 11 former SanDisk employees. In addition, Lead Plaintiffs moved for Class Certification on
22 January 19, 2018, and the briefing on that motion ran through early April 2018. *E.g.*, ECF No.
23 209.

24 Lead Plaintiffs served their opening expert report on August 30, 2018, and expert
25 discovery ran through November 15, 2018. ECF Nos. 237, 250. Lead Plaintiffs' loss causation
26 and damages expert, Chad Coffman ("Coffman"), submitted an opening expert report, as well as
27

28 ² Another group of plaintiffs had initially been appointed lead, but withdrew following the Court's guidance.
See ECF No. 104.

1 a rebuttal report, and was deposed by Defendants (bringing the total number of depositions
2 Plaintiffs' Counsel defended to seven, as Defendants also deposed Coffman in connection with
3 class certification). Similarly, Defendants' loss causation and damages expert, Daniel R. Fischel
4 ("Fischel"), submitted a report and was deposed by Plaintiffs' Counsel (bringing the total number
5 of depositions Plaintiffs' Counsel took to 12). While expert discovery was ongoing, on September
6 4, 2018, the Court issued an order certifying the Class. ECF No. 242. It then issued another
7 order, on December 13, 2018, approving notice of the certification to Class Members ("Class
8 Notice"). ECF No. 242. The Class Notice was disseminated consistent with the approved notice
9 plan, beginning on January 9, 2019, and the response of the Class was overwhelmingly positive
10 – only six individuals requested exclusion.³ ECF No. 269.

11 Defendants moved for Summary Judgment and to exclude Lead Plaintiffs' expert on
12 January 17, 2019. ECF No. 258. Lead Plaintiffs responded to those motions and moved to
13 exclude Defendants' expert on February 28, 2019. ECF No. 264.

14 Shortly after Lead Plaintiffs' filings, on March 8, 2019, the Parties reached a
15 Memorandum of Understanding ("MOU") to settle this Action (as described immediately below).
16 At the time, trial was scheduled to begin in less than three months on May 28, 2019. ECF No.
17 237; *see* ECF No. 252.

18 C. The Settlement

19 1. The Settlement Occurred After Two Mediations and Additional 20 Assistance from a Well-Respected Mediator

21 The Parties retained a former federal judge, the Honorable Layn Phillips (Ret.) ("Judge
22 Phillips"), as their mediator. Judge Phillips has substantial experience mediating securities cases,
23 among others, and led the arm's-length negotiations here.

24 The mediation process unfolded over four-and-a-half months, as the initial attempts to
25 resolve the case were unsuccessful. After fact discovery had concluded, the Parties had served
26 their expert reports, the Class had been certified, and the Parties prepared mediation briefs and

27
28 ³ Five requests for exclusion were received prior to March 2018 by Epiq, which disseminated the Class Notice. ECF No. 269. A sixth exclusion request was postmarked in February 2019, but not received until April 2019. The Parties do not object to the sixth request for exclusion from the Class.

1 attended a full-day mediation with Judge Phillips on October 29, 2018. With the Parties unable
2 to reach a resolution, litigation continued, the expert depositions occurred, the Class Notice was
3 disseminated, and Defendants moved for summary judgment and to exclude Lead Plaintiffs’
4 expert. During that time, Judge Phillips facilitated additional negotiations between the Parties,
5 but they also did not yield a resolution. After Lead Plaintiffs filed their brief opposing summary
6 judgment and the exclusion of their expert, as well as seeking exclusion of Defendants’ expert,
7 the Parties held another full-day mediation on March 8, 2019. At the conclusion of that session,
8 the Parties entered into a MOU to resolve the case, as set forth in the proposed Settlement.

9 2. The Material Settlement Consideration

10 The material consideration Defendants are providing to resolve the Action is a \$50
11 million, non-recourse, cash payment to the Class certified by the Court. Stipulation ¶¶1(hh), 5,
12 25. That is a substantial recovery in its own right, relative to similar cases, and is fair, reasonable,
13 and adequate under the factors that the Ninth Circuit and Federal Rules of Civil Procedure use to
14 evaluate class action settlements. *Infra* at §III.A.

15 In exchange for that payment, the Class is providing Defendants with a release, pursuant
16 to the Court’s rules (“Released Claims”). Specifically, the Released Claims only encompass those
17 that *both*:

18 (a) arise out of, are based on, or relate in any way to any of the allegations, acts,
19 transactions, facts, events, matters, occurrences, representations, or omissions
20 involved that are set forth, alleged, or referred to in the Action, or which could
21 have been alleged in the Action; and

22 (b) arise out of, are based on, or relate to the purchase or acquisition of any
23 SanDisk common stock.

24 Stipulation ¶¶1(bb), 3. The language quoted immediately above ensures that Class Members are
25 only releasing claims that are based on the identical factual predicate as the securities fraud claims
26 at issue here. *See* Standing Order for Civil Cases at 11.

27 Additional elements of the proposed Settlement, in particular the Plan of Allocation and
28 Settlement Notice, are discussed below (*infra* at 19, 22-25).

1 **III. ARGUMENT**

2 **A. The Settlement Merits Preliminary Approval**

3 **1. Governing Standard**

4 “[T]here is a strong judicial policy that favors settlements, particularly where complex
5 class action litigation is concerned.” *E.g., In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th
6 Cir. 2008).⁴ In implementing that policy, courts should assess whether a proposed settlement is
7 “fair, reasonable, and adequate” and should permit notice when that standard is “likely” to be
8 satisfied. FRCP 23(e)(1)-(2). Although that assessment is made over two phases, preliminary
9 and final approval, this Court “review[s] class action settlements just as carefully at the initial
10 stage” as it does “at the final stage.” *Cotter*, 193 F. Supp. 3d at 1035-37.

11 Thus, at preliminary approval, this Court assesses the “settlement taken as a whole” under
12 the factors set forth in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), and the
13 related factors under Rule 23(e)(2). *Cotter*, 193 F. Supp. 3d at 1035. Each of those factors is set
14 forth and discussed in detail below.

15 Additionally, while “settlement approval that takes place prior to formal class certification
16 requires a higher standard of fairness[,]” due to the “dangers of collusion,” that higher standard
17 does not apply here because the Class has already been certified. *Hanlon*, 150 F.3d at 1026.

18 **2. The Settlement Is the Result of Arm’s-Length Negotiations Assisted
19 by an Experienced Mediator**

20 When a proposed settlement is the “product of arms-length negotiations[,]” a presumption
21 that it is fair and reasonable attaches to it, particularly where it occurs after meaningful discovery.
22 *In re Portal Software, Inc. Sec. Litig.*, No.C-03-5138 VRW, 2007 WL 1991529, at *6 (N.D. Cal.
23 June 30, 2007); *see also In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at
24 *9 (C.D. Cal. June 10, 2005). Further, settlements reached with “[t]he assistance of an
25 experienced mediator” are generally deemed fair and non-collusive. *Satchell v. Fed. Express*
26 *Corp.*, No. C03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *Chun-Hoon v.*
27 *McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010).

28 ⁴ Unless otherwise noted, all emphasis is added and internal quotations and citations are omitted.

1 The proposed Settlement is the product of extensive arm’s-length negotiations between
2 highly experienced and capable counsel, pursuant to a formal mediation process overseen by a
3 well-respected mediator with expertise in securities class actions. *Supra* at §II.C.1. With fact
4 discovery complete, and the experts’ reports served prior to the first full-day mediation session,
5 and summary judgment largely briefed prior to the second full-day mediation session, the Parties
6 were well informed about the strengths and weaknesses of the claims. The negotiations were
7 hard-fought and focused on such complex and highly disputed issues, such as Defendants’
8 scienter, the Parties’ damages reports, and the difficulties in proving and defending the case at
9 trial. These circumstances therefore confirm that the Settlement is non-collusive and create a
10 presumption that it is fair and reasonable.

11 **3. The *Hanlon* Factors Support Approval**

12 The *Hanlon* factors used to evaluate settlements are non-exclusive and need not all be
13 shown. *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 n.7 (9th Cir. 2004). “The
14 relative degree of importance to be attached to any particular factor will depend upon and be
15 dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts
16 and circumstances presented by each individual case.” *Officers for Justice v. Civ. Serv. Comm’n*
17 *of City & Cty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982); *see Torrasi v Tucson Elec. Power Co.*,
18 8 F.3d 1370, 1376 (9th Cir. 1993). These factors strongly support approval of the proposed
19 Settlement.⁵

20 **a. The Amount Offered in Settlement Is Substantial**

21 A settlement agreement “normally embodies a compromise; in exchange for the saving of
22 cost and elimination of risk, the parties each give up something they might have won had they
23 proceeded with litigation.” *Officers for Justice*, 688 F. 2d at 624. Thus, in evaluating the amount
24 offered in settlement, courts consider how that amount compares to the amount the class could

25 _____
26 ⁵ This analysis does not include two of the *Hanlon* factors that are not relevant factors for or against the
27 Settlement under the present circumstances. It does not include a discussion of the “presence of a governmental
28 participant” because there was no such participant. *See Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS,
2011 WL 1230826, at *10 (N.D. Cal. Apr. 1, 2011) (that factor was inapplicable to the *Hanlon* analysis where no
government entity was involved in the case). Similarly, it does not include a discussion of the reaction of the Class
because that factor is applicable at final approval after dissemination of the settlement notice, which has not yet
occurred here.

1 potentially recover at trial, taking into account the risks, delay, and expense of doing so. *See id.*;
2 *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331(CM)(MHD), 2014 WL 1224666, at *11
3 (S.D.N.Y. Mar. 24, 2014) (amount of settlement is evaluated “not in comparison with the possible
4 recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of
5 plaintiffs’ case”).

6 After three years of hard-fought litigation, Class Representatives and Class Counsel have
7 succeeded in obtaining a substantial recovery for the Class of \$50,000,000 in cash. No portion
8 of the Settlement Amount will revert to Defendants.

9 Class Representatives and Class Counsel respectfully submit that this is an outstanding
10 result, in both percentage and absolute terms, particularly when compared to other securities fraud
11 class action settlements. Based on the analysis of Class Representatives’ loss causation and
12 damages expert, Coffman, the maximum potential damages for the Class after disaggregation and
13 netting were approximately \$361 million.⁶ Schwartz Decl., Ex. 2 ¶28 (Declaration of Chad
14 Coffman Regarding Plaintiffs’ Calculation of Damages (“Coffman Decl.”)). If accepted, specific
15 criticisms of Coffman’s methodology proffered by Defendants’ expert, Fischel, would have
16 reduced the amount of Class-wide damages to \$85 million or less. *Id.* ¶33. Based on these figures,
17 the \$50 million Settlement represents a recovery of approximately 14%-58% of the Class’
18 maximum recoverable damages. That is a considerably larger recovery as a percentage of
19 damages than in most securities class action cases. Cornerstone Research estimates that from
20 2009-2018, the median percentage of “simplified tiered damages” that all securities class actions
21 recovered was a far lower percentage than the recovery here, namely about 5%. Schwartz Decl.,
22 Ex. 5 at 6 (Laarni T. Bulan, et al., *Securities Class Action Settlements – 2018 Review and Analysis*,
23 CORNERSTONE RES. (2018) (the “2018 Cornerstone Report”)).⁷

24 _____
25 ⁶ The term “disaggregation,” as used here, means disaggregating the portion of a stock price movement in
26 response to information that was allegedly wrongfully withheld from the portion of that movement, which responded
to other information. Additionally, the term “netting,” as used here, means netting any investor gains due to artificial
inflation against any of the investor’s losses due to artificial inflation.

27 ⁷ According to the 2018 Cornerstone Report, the methodology used to calculate “simplified tiered damages”
might overstate damages relative to case-specific analyses because of a number of simplifying assumptions applied.
28 *Id.* For example, among other things, the simplified tiered damages approach “does not examine the mix of
information associated with the specific dates listed in the plan of allocation, but simply applies the stock price

1 Highlighting that point, courts regularly approve securities class action settlements with
2 substantially lower percentage recoveries than the proposed Settlement provides here. *See, e.g.*
3 *In re Biolase, Inc. Sec. Litig.*, No. SAC 13-1300-JLS (FFMx), 2015 WL 12720318, at *4 (C.D.
4 Cal. Oct. 13, 2015) (settlement at “8% of the maximum recoverable damages . . . equals or
5 surpasses the recovery in many other securities class actions”); *McPhail v. First Command Fin.*
6 *Planning, Inc.*, No. 05cv179-IEG-JMA, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009)
7 (settlement at “7% of the estimated damages . . . weigh[s] in favor of final approval”); *Int’l Bhd.*
8 *of Elec. Workers Local 697 Pension Fund. v. Int’l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-
9 WGC, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (settlement at approximately “3.5% of
10 the maximum damages . . . is within the median recovery in securities class actions settled in the
11 last few years”).

12 Further, in absolute terms, the proposed Settlement’s \$50 million recovery is more than
13 four times larger than the median securities fraud class action settlement in 2018, which was \$11.3
14 million. 2018 Cornerstone Report at 1. Significantly, this impressive result was obtained
15 notwithstanding the absence of factors associated with larger settlements in securities class action
16 cases, such as accounting violations or a corresponding SEC or criminal action. *Id.* at 9, 12, 15.
17 The Settlement also compares favorably to settlements of securities class action cases resolved at
18 a similar stage of litigation. For securities class actions in which class certification was granted
19 and a motion for summary judgment was filed, but not decided, in the five-year period from 2014
20 to 2018, the median recovery was \$36.5 million, or 4.4% of “simplified tiered damages,” notably
21 lower than here. *Id.* at 13.

22 Class Representatives and Class Counsel obtained this impressive amount offered in
23 settlement by doing the hard work necessary to prepare this case for trial. By the time the
24 Settlement was reached, merits and expert discovery were complete, summary judgment and
25 *Daubert* briefing was ongoing, and Class Representatives had retained, and were working with,
26 jury and trial consultants in preparation for the scheduled May 28, 2019, trial date. As described

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movements on those dates to an estimate of the ‘true value’ of the stock during the alleged class period (or ‘value
line’).” *Id.* at 17.

1 immediately below, the substantial risks that the Class faced from continued litigation further
2 demonstrate that the proposed Settlement provides an excellent recovery.

3 **b. The Strength of Class Representatives' Case Balanced Against**
4 **the Substantial Risks of Continued Litigation**

5 Courts “must balance the risks of continued litigation, including the strengths and
6 weaknesses of plaintiff’s case, against the benefits afforded to class members, including the
7 immediacy and certainty of a recovery.” *Knapp v Art.com, Inc.*, 283 F. Supp. 3d 823, 831 (N.D.
8 Cal. 2017). Based on the evidence and expert reports reviewed in connection with summary
9 judgment and preparing for trial, Class Representatives and Class Counsel believe in the merits
10 of this Action. But they also recognize the substantial risks of continued litigation, with
11 Defendants vigorously disputing all elements of the Class’ claims. The most prominent risks to
12 the Class securing a jury verdict and surviving appeals therefrom are set forth below.

13 The Risk of Establishing Material Misstatements and Omissions

14 As noted in the Court’s opinion granting in part and denying in part Defendants’ motion
15 to dismiss the SAC (the “MTD Order”), the alleged false and misleading statements and
16 omissions detailed in the SAC generally fell into two categories: (i) “a series of qualitative
17 pronouncements about the strength of SanDisk’s enterprise SSD portfolio”; and (ii) “a series of
18 quantitative statements” that addressed the future prospects of the enterprise business, particularly
19 Fusion-io. ECF No. 184 at 1.

20 Throughout the litigation, including in their motion for summary judgment, Defendants
21 argued that the “qualitative” statements alleged to be false in the SAC (*e.g.*, that SanDisk had the
22 “broadest” or “most comprehensive” enterprise SSD product line and its enterprise business had
23 a “market leadership position,” “momentum,” “strong demand signals” from customers “in all
24 key product categories,” and was “firing on all cylinders”) were general, optimistic statements
25 (*i.e.*, puffery) and opinions that were not actionable as a matter of law. *See* ECF No. 258 at 10-
26 12. While the Court had ruled that certain of the “qualitative” statements were not puffery, when
27 considered “in context” (ECF No. 184 at 2), the MTD Order specifically addressed only a few of
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1 the 47 statements alleged to be materially false and misleading and none that were made prior to
2 January 21, 2015.

3 As a result, there was *some* risk that the Court might grant summary judgment with respect
4 to qualitative statements notwithstanding its MTD Order. Indeed, Defendants argued that
5 summary judgment should be granted with respect to all such statements *before* January 21, 2015.
6 That was because, prior to that date, the “relevant context” that the Court found “could reasonably
7 have led investors to rely on [the] accuracy and completeness” of Defendants’ qualitative
8 statements touting enterprise – the loss a major customer (in a different part of SanDisk’s
9 business) – had not yet been discussed publicly. *See* ECF No. 258 at 21-22. Class Representatives
10 believed that the “context” of the pre-January 21, 2015, qualitative statements touting enterprise
11 – Defendants need to convince investors that they were successfully re-orienting SanDisk from
12 older products that were experiencing slow growth to new, purportedly high-margin enterprise
13 products – also “could reasonably have led investors to rely on [the] accuracy and completeness”
14 of those statements. ECF No. 184 at 2. But this argument was untested and there was no
15 assurance it would be successful.

16 As for Defendants “quantitative” statements, the Court had previously ruled that these
17 statements, including that Fusion-io would earn \$1 billion in 2015, were forward-looking
18 statements protected by the PSLRA’s “safe harbor.” *See* ECF No. 104 at 1, 4-6; ECF No. 184 at
19 1. Although Class Representatives believed that an intervening Ninth Circuit decision – *In re*
20 *Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130 (9th Cir. 2017) – demonstrated that all of the
21 statements previously dismissed by this Court as forward-looking were, in fact, actionable
22 “mixed” statements – *i.e.*, forward-looking statements accompanied by non-forward-looking
23 statements not subject to the safe harbor – there was no assurance that the Court would revisit its
24 earlier ruling or, if it did, rule in Class Representatives’ favor with respect to this issue.

25 Defendants also argued that even if the alleged misstatements and omissions were not
26 immaterial as a matter of law, they were not rendered false and misleading by Defendants’ failure
27 to disclose the allegedly concealed facts concerning the issues in SanDisk’s enterprise business.

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1 See ECF No. 258 at 14. While Class Representatives argued that this position was inconsistent
2 with well-settled law that once Defendants chose to tout positive information to the market, they
3 could not mislead investors by withholding negative information cutting the other way, *see*
4 *Schueneman v. Arena Pharms., Inc.*, 840 F.3d 698, 706 (9th Cir. 2016), as explained below (*infra*
5 at 13-15). A decision by the Court at the summary judgment stage that some or all of the
6 statements alleged to be false and misleading were not actionable as a matter of law could have
7 had implications with respect to the length of the Class Period, loss causation, and damages.

8 The Risk of Establishing Scienter

9 As Defendants' motion for summary judgment made plain, Defendants viewed the
10 absence of any apparent personal financial motive on the part of the Individual Defendants (for
11 example, significant insider selling) as an important factor weighing in their favor. ECF No. 258
12 at 22-23. In addition, the Individual Defendants adamantly asserted that they believed their
13 statements were truthful when made. *See* ECF Nos. 259-60. In this regard, Defendants noted,
14 among other things, that their scripted remarks during earnings conference calls were reviewed
15 and revised by the Company's investor relations personnel and other members of SanDisk's
16 senior management, including John Scaramuzzo, general manager of the enterprise business. *See*
17 ECF No. 259 ¶14. Defendants also argued that Class Representatives' claim that Defendants
18 intentionally or knowingly misled investors was implausible given that their optimistic
19 statements, with respect to the financial prospects of the enterprise business unit, "would be put
20 to the test in a matter of weeks" and risked destroying their credibility with the market. *See* ECF
21 No. 258 at 23. Moreover, Defendants argued that there was no evidence of deliberate recklessness
22 either since the financial projections they provided were supported by forecasts agreed to by the
23 Company's senior management team. *Id.* at 24-25.

24 While Class Representatives were confident that Defendants' claims of "no motive"
25 would not carry the day on summary judgment, Class Counsel knew from experience that this
26 fact did have the potential to sway a jury. In addition, while Class Representatives believed that
27 the record evidence demonstrated that Defendants (as well as SanDisk's senior management,
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1 including John Scaramuzzo) possessed substantial information contradicting Defendants’
2 positive statements concerning enterprise and its financial prospects (ECF No. 264 at 31-35), their
3 arguments, in this regard, depended on voluminous, technical evidence that a jury could have
4 found difficult to follow. In short, Class Representatives and Class Counsel recognized that
5 persuading a jury as to Defendants’ scienter would be challenging.

6 The Risk of Establishing Loss Causation and Damages

7 Risks to establishing loss causation and damages were detailed in Defendants’ motion
8 seeking to exclude the opinion of Class Representatives’ expert, Coffman, under *Daubert v.*
9 *Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993), and in the rebuttal report of their expert, Fischel.
10 *See* ECF No. 258 at 26-30; ECF No. 263-9.

11 To establish loss causation, Class Representatives would have to prove “a causal
12 connection between the material misrepresentation and the loss[.]” *Dura Pharms., Inc. v. Broudo*,
13 544 U.S. 336, 342 (2005). Defendants argued that Coffman’s methodology improperly
14 “assumed” this causal connection because it assumed that Class Representatives would establish
15 Defendants’ liability for *all* of the alleged misstatements and omissions, including, in particular,
16 the “quantitative” statements that the Court had previously concluded were protected by the
17 PSLRA safe harbor for forward-looking statements. *See* ECF No. 258 at 27. In turn, Defendants
18 argued that Coffman was required to, but did not, disaggregate the market impact of these
19 protected statements from the impact of actionable statements.

20 Additionally, Defendants criticized Coffman’s use of the “constant dollar” methodology
21 to measure artificial inflation (under that methodology, the dollar amount of artificial inflation
22 that dissipates with a corrective disclosure is the same as the dollar amount of artificial inflation
23 caused by the corresponding misstatement). They argued that certain of the issues and financial
24 results that led enterprise to suffer losses did not occur until later in the Class Period, and that
25 Defendants, therefore, could not have known of or disclosed those issues at the start of the Class
26 Period, purportedly rendering it inappropriate to assign the same value to the artificial inflation
27 of certain information at the start of the Class Period and the time of its disclosure. *Id.* at 28-30.

1 While Class Representatives believed these criticisms were unfounded, and that Coffman
2 had applied widely accepted methodologies in securities class action cases, if Defendants
3 succeeded in excluding his opinions, Class Representatives' ability to prove loss causation and
4 damages would have been substantially impaired, if not extinguished. Indeed, Defendants
5 insisted that, based on the foregoing arguments, Coffman's opinions were not reliable and should
6 be excluded by the Court under *Daubert. Id.*

7 Also, though not a basis of their motion for summary judgment, Defendants, through
8 Fischel's rebuttal report, advanced several other arguments for limiting damages at trial. First,
9 Fischel attacked Coffman's decision to use revenue attributable to the enterprise business as a
10 metric to disaggregate fraud-related declines in SanDisk's stock price on corrective disclosure
11 dates. Fischel argued that Coffman should have used enterprise profits, instead of revenue, as a
12 disaggregation metric, and concluded that use of this alternate metric would have reduced
13 Coffman's maximum artificial inflation per share by 26%. *See* ECF No. 263-9 ¶¶34-38. Second,
14 Fischel attacked Coffman for identifying only two corrective disclosures, where Fischel found a
15 third purported corrective disclosure on July 22, 2015, a date three months after the end of the
16 Class Period. *Id.* ¶¶39-45. On this date, SanDisk announced better than expected results for its
17 enterprise business in 2Q2015 and its stock price rose nearly 18% after controlling for market and
18 industry factors. *Id.* ¶¶41-42. Finally, as noted, Defendants argued that the Class Period should
19 begin no earlier than January 21, 2015, effectively reducing it by half, because the alleged
20 misstatements and omissions prior to that date were inactionable as a matter of law, which would
21 have substantially reduced the amount of damages as well. ECF No. 258 at 21-22.

22 While Class Representatives believed that Defendants' arguments with respect to loss
23 causation and damages lacked merit, the risk that the Court might shorten the Class Period and/or
24 that the jury would credit Fischel's positions on disaggregation and corrective disclosures over
25 Coffman's had considerable consequences in terms of the amount of the Class' potential recovery.
26 *See, e.g., City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL
27 1883494, at *9 (S.D.N.Y. May 9, 2014) ("Undoubtedly, the Parties' competing expert testimony
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1 on damages would inevitably reduce the trial of these issues to a risky battle of the experts and
2 the jury's verdict with respect to damages would depend on its reaction to the complex testimony
3 of experts, a reaction that is inherently uncertain and unpredictable.”). Each of the arguments, if
4 accepted by the jury, would individually reduce the potential recoverable Class-wide damages by
5 approximately \$100 million to \$170 million and would collectively reduce damages by almost
6 \$300 million – that is from a maximum amount of \$361.5 million to as little as \$85.6 million.
7 Coffman Decl. ¶33. Compared to the possibility of a recovery at those substantially lower levels,
8 which would likely be further reduced by the post-trial claims process, the value the proposed
9 Settlement increases even further.

10 * * *

11 As set forth in Class Representatives' opposition to Defendants' motion for summary
12 judgment, Class Representatives believe that they adduced substantial evidence to support their
13 claims and were prepared to proceed to trial. *See* ECF No. 264 at 4-35. They also understood,
14 however, that success was not guaranteed. In particular, the outcome of a jury trial, especially in
15 a case involving complex facts and claims, such as this one, can never be predicted with certainty.
16 Moreover, as noted, this Action did not have many of the hallmarks of a successful securities
17 fraud action – there was no restatement of financial results, SEC investigation, or criminal
18 indictment. Simply put, for the reasons discussed above, there is no assurance that the Class
19 would have recovered an amount equal to, let alone greater than, the proposed Settlement
20 Amount.

21 **c. The Complexity, Expense, and Likely Duration of Continued**
22 **Litigation**

23 Given the “notorious complexity” of securities class actions, in particular, settlement is
24 often proper, as it “circumvents the difficulty and uncertainty inherent in long, costly trials.” *In*
25 *re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, No. MDL 1500, 2006 WL 903236, at *8,
26 (S.D.N.Y. Apr. 6, 2006); *see Torrissi*, 8 F.3d at 1375-76 (finding settlement fair due to “the cost,
27 complexity and time of fully litigating the case”); *In re LinkedIn User Privacy Litig.*, 309 F.R.D.
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1 573, 587 (N.D. Cal. 2015) (“Generally, unless the settlement is clearly inadequate, its acceptance
2 and approval are preferable to lengthy and expensive litigation with uncertain results.”).

3 If the Class survived summary judgment, the Action would have soon proceeded to trial,
4 which would have been extremely complex and expensive in and of itself, and, even if successful,
5 would have likely extended the length of the litigation by years due to the post-trial appeals and
6 claims process. The complexity and expense of the trial would result from numerous factors,
7 including that: the Class would have to present its highly-technical case-in-chief entirely through
8 hostile witnesses; loss causation and damages would turn into a “battle of the experts” between
9 Coffman and Fischel; and the use of jury consultants to maximize the Class’ presentation of all
10 of these issues. “A trial of a complex, fact-intensive case like this could have taken weeks, and
11 the likely appeals of rulings on summary judgment and at trial could have added years to
12 litigation.” *In re Amgen, Inc. Sec. Litig.*, No. CV 7-2536 PSG (PLAx), 2016 WL 10571773, at
13 *3 (C.D. Cal. Oct. 25, 2016). Indeed, in other securities fraud class actions that have gone to trial,
14 it has taken as long as seven years to proceed from verdict to final judgment, which would
15 enormously magnify the Class’ expenses. *See Jaffe Pension Plan v. Household Int’l., Inc.*, No.
16 1:02-cv-05893, Verdict Form (N.D. Ill. May 7, 2009) (ECF No. 1611) and Final Judgment and
17 Order of Dismissal with Prejudice (N.D. Ill. Nov. 10, 2016) (ECF No. 2267); *In re Vivendi*
18 *Universal, S.A. Sec. Litig.*, No. 1:02-cv-05571, Verdict Form (S.D.N.Y. Feb. 10, 2010) (ECF No.
19 998) and Final Judgment Approving Class Action Settlement of All Remaining Claims (S.D.N.Y.
20 May 9, 2017) (ECF No. 1317). Moreover, assuming the Class won at trial and that verdict was
21 affirmed on appeal, Class Members would have likely faced a complex, lengthy, and contested
22 claims administration process to recover their individual awards.

23 But for the proposed Settlement, resolution of this Action would unquestionably entail
24 considerable time and expense, making the present value of a certain and substantial recovery far
25 preferable to the mere chance of a greater recovery in the distant future and the real possibility of
26 a smaller one.

1 **d. Fact and Expert Discovery Are Complete and the Action Is at**
2 **an Advanced Stage**

3 “A settlement following sufficient discovery and genuine arms-length negotiation is
4 presumed fair” because, in those circumstances, the parties and their counsel had sufficient
5 information to make an informed decision about the merits of the case. *Nat’l Rural Telecomms.*
6 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). Discovery here is more than just
7 sufficient, as both fact and expert discovery are, in fact, complete. Moreover, Class
8 Representatives and Class Counsel had a deep understanding of the evidence because they had
9 prepared extensive responses to Defendants’ contention interrogatories, opposed Defendants’
10 motion for summary judgment, and were in the midst of preparing evidence for trial. In short, a
11 careful and complete evaluation of the evidence led to the conclusion that entering into the
12 proposed Settlement would produce an excellent recovery for the Class. *See Todd v. STAAR*
13 *Surgical Co.*, No. CV 14-5263 MMF (GJSx), 2017 WL 4877417, at *4 (C.D. Cal. Oct. 24, 2017)
14 (“the parties had ample information with which to make informed settlement decisions” after,
15 among other things, having “engaged in substantial discovery”).

16 **e. The View of Experienced Counsel**

17 Courts consider and place “weight” on the views of experienced counsel because parties
18 represented by such counsel are positioned to “produce a settlement that fairly reflects each
19 party’s expected outcome in the litigation.” *See DIRECTV*, 221 F.R.D. at 528. As detailed above,
20 through extensive discovery, litigation, and mediation, Class Counsel has a comprehensive
21 understanding of the merits and risks of the claims and of the proposed Settlement. Given Class
22 Counsel’s extensive experience with securities cases and class actions, its assessment that the
23 proposed Settlement is a very favorable outcome for Class Members merits substantial weight.

24 **f. The Risk of Maintaining Class Action Status Through Trial**

25 Following the class certification order, Defendants have raised no new issues or
26 subsequent arguments with regard to the maintenance of class certification that the Court did not
27 already address therein. This factor does not favor or disfavor approval. Nor does it affect the
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1 overall evaluation of the proposed Settlement, as all of the other factors overwhelmingly favor
2 approval. *General Electric*, 361 F.3d at 576 n.7.

3 * * *

4 To summarize, the *Hanlon* factors strongly support approving the proposed Settlement
5 because: the amount offered is substantial; continued litigation would pose significant risks of
6 non-recovery or lesser recovery, while imposing considerable delays and expense on the Class;
7 and having completed fact and expert discovery, the Parties and their experienced counsel were
8 well informed about the strengths and weaknesses of the Action.

9 **4. The Rule 23(e)(2) Factors Support Approval**

10 The Rule 23(e)(2) factors largely overlap with the *Hanlon* factors and also strongly favor
11 approving the proposed Settlement.

12 **a. Class Representatives and Class Counsel Have Adequately**
13 **Represented the Class**

14 Class Representatives and Class Counsel respectfully submit that they have adequately
15 represented the Class, including with respect to the proposed Settlement. Within the Ninth
16 Circuit, the adequacy inquiry is governed by two questions: “(1) whether the named plaintiffs and
17 their counsel have any conflicts of interest with other class members, and (2) whether the named
18 plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class.” *Brown*
19 *v. China Integrated Energy Inc.*, No. CV 11-02559 BRO (PLAx), 2015 WL 12720322, at *15
20 (C.D. Cal. Feb. 17, 2015) (quoting *Hanlon*, 150 F.3d at 1020).

21 Class Representatives’ interests are directly aligned with those of absent Class Members
22 because they all have an interest in obtaining the largest possible recovery from Defendants. Class
23 Representatives, along with all eligible Class Members, will share *pro rata* in the Class’ recovery
24 pursuant to the Plan of Allocation. Moreover, Class Representatives have actively supervised the
25 litigation and retained experienced counsel who have vigorously prosecuted the Action on behalf
26 of the Class to within months of trial.
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1 **b. The Settlement Was Negotiated at Arm’s-Length**

2 Not only is the Settlement a product of arm’s-length negotiations, as required, but it also
3 resulted from a lengthy mediation process overseen by Judge Phillips, a retired federal judge and
4 experienced mediator. *Supra* at §III.A.2.

5 **c. The Relief Provided Is Adequate, Taking into Account the**
6 **Costs, Risks, and Delay of Trial and Appeal, as Well as Other**
7 **Factors**

7 The primary element of this factor – whether the relief, in this instance the amount offered,
8 is adequate taking into account the costs, risks, and delay of trial and appeal – overlaps with
9 several of the *Hanlon* factors. As discussed, the \$50 million payment to the Class is a substantial
10 recovery, particularly when weighed against the potential negative consequences of ongoing
11 litigation, and unquestionably adequate relief. *Supra* at 7-17.

12 This factor also analyzes the adequacy of the relief relative to several other considerations,
13 including the “effectiveness of any proposed method of distributing relief to the class, including
14 the method of processing class-member claims[.]” FRCP 23(e)(2)(C)(ii). The proposed Plan of
15 Allocation was developed by the Class’ damages expert, Coffman. It is based on the
16 methodologies and calculations that he has submitted to date in this Action and would have
17 presented at trial. Coffman Decl. ¶34. Thus, it provides for a claims process that distributes the
18 Net Settlement Fund *pro rata* based on the approximate individual losses of eligible Class
19 Members. Schwartz Decl., Ex. 1-A-1 at 17-25 (Settlement Notice). Courts regularly approve
20 similar allocation plans in securities class actions. *See In re Oracle Sec. Litig.*, No. C-90-0931-
21 VRW, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) (“A plan of allocation that reimburses
22 class members based on the extent of their injuries is generally reasonable.”); *see Heritage Bond*,
23 2005 WL 1594403, at *11 (allocation formula need only have a reasonable basis).⁸

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26 ⁸ If, after the first distribution, a sufficient amount of money remains unclaimed from the Net Settlement
27 Fund, Epiq will make a second distribution, should it be economically efficient to do so. After the distribution
28 process is complete, Epiq will distribute any remainder in the Net Settlement Fund in equal amounts to the Consumer
Federation of America and the Council of Institutional Investors (or such other non-profit organizations approved by
the Court) – organizations that promote interests similar to the securities laws and with which Class Counsel has no
relationships.

1 In addition, this factor takes into account “the terms of any proposed award of attorney’s
2 fees[.]” FRCP 23(e)(2)(C)(iii). As the Settlement Notice explains, Class Counsel plan to seek
3 an award of attorneys’ fees not to exceed 28% of the Settlement Fund. A 28% fee award, if
4 requested, would be slightly greater the Ninth Circuit’s 25% benchmark and within the “usual
5 range.” *Destefano v. Zynga, Inc.*, No. 12-cv-04007-JSC, 2016 WL 537946, at *16 (N.D. Cal.
6 Feb. 11, 2016). It would also result in a negative multiplier of approximately 0.9 – that is it would
7 be less than Class Counsel’s collective lodestar to date of over \$15 million Schwartz Decl. ¶6.
8 Given the substantial amount of effort necessary to bring the Action to summary judgment and
9 within three months of trial, and to achieve the excellent recovery described herein, Class Counsel
10 respectfully submit that an award of up to 28% would be appropriate, and courts have granted
11 such awards in similar circumstances. *See, e.g., Heritage Bon.*, 2005 WL 1594403, at *11 (factors
12 that support an award above the benchmark include “the hours devoted to the case” and awarding
13 33.3% fee of \$27.8 million settlement); *In re CV Therapeutics, Inc., Sec. Litig.*, No. C 03-3709
14 SI, 2007 WL 1033478, at *1 (N.D. Cal. Apr. 4, 2007) (awarding 30% fee of \$13.5 million
15 settlement). Class Counsel will also seek reimbursement of reasonable litigation expenses,
16 including reimbursement of Class Representatives’ costs and wages for work expended on the
17 Action, not to exceed \$1 million. Here too, in light of the substantial amount of expert and factual
18 development necessary to bring the Action to this stage and prepare for trial, Class Counsel
19 respectfully submits that such reimbursement is appropriate, and courts have granted such awards
20 in similar circumstances.

21 Finally, this factor takes into account “any agreement made in connection with the
22 propos[ed]” settlement. FRCP 23(e)(2)(C)(iv) and (e)(3). The only such agreement here,
23 assuming it falls within that rule, is the Parties’ confidential Supplemental Agreement Regarding
24 Requests for Exclusion (“Supplemental Agreement”). It would permit Defendants to terminate
25 the Settlement if the number of Class Members who request exclusion in connection with the
26 Settlement reaches a certain threshold. That is the entire substance of the Supplemental
27 Agreement. Such agreements are standard provisions in securities class actions and ensure that
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1 Defendants are receiving finality, without affecting Class Members' rights under, or altering the
2 substance or fairness of, the Settlement. Should the Court wish to review the Supplemental
3 Agreement, the Parties are prepared to present it, and would respectfully request that they be
4 permitted to do so under seal, as litigants and courts typically treat such agreements as
5 confidential.

6 **d. The Settlement Treats Class Members Equitably Relative to**
7 **Each Other**

8 The proposed Plan of Allocation treats all Class members equitably relative to each other.
9 As discussed above (*supra* at 19-20), the proposed claims process will result in each Class
10 Member, who submits an eligible claim, receiving a Recognized Claim amount, expressed in
11 dollars, that approximates its losses based on the alleged artificial inflation in SanDisk common
12 stock at the time it acquired and/or disposed of that stock. Settlement proceeds will then be
13 distributed *pro rata* among those Class Members, according to the relative size of their
14 Recognized Claims. This process treats Class Members equally by using the same objective
15 criteria to determine their Recognized Claims and distributing Settlement proceeds in direct and
16 consistent proportion to the amount of the Recognized Claims. Class Representatives' claims
17 will be handled in the same manner.⁹

18 * * *

19 Like the *Hanlon* factors, the Rule 23(e)(2) factors strongly support preliminary approval
20 because the Settlement will provide a substantial recovery as a result of extensive litigation and
21 arm's-length negotiation, avoid the potential negative outcomes of additional litigation, and
22 disseminate the Settlement proceeds in an efficient and equitable manner.

23 **B. The Class Has Been Certified and the Settlement Specifically Applies to that**
24 **Class**

25 The Class definition that the Court certified, and that the Settlement adopts, is the same.
26 Specifically, in both instances, the Class covers: "all persons and entities who purchased or
27 otherwise acquired SanDisk's publicly traded common stock during the period from October 16,

28 ⁹ As noted, Class Representatives will also seek reimbursement of their reasonable costs, including lost wages, for work they performed in the Action.

1 2014 through April 15, 2015 (inclusive), and were damaged thereby.” ECF Nos. 209 at 9, 242 at
 2 4; Stipulation ¶1(e).¹⁰ In turn, as discussed herein (*supra* at §II.C.2.), the Class Members’
 3 Released Claims under the Settlement are limited to claims with the same factual predicate as the
 4 claims at issue in the Action and already certified. Thus, the certified Class perfectly overlaps
 5 with the Settlement and enables the Class-wide resolution of the Action through the Settlement.

6 **C. The Court Previously Approved the Notice Plan for Class Certification and**
 7 **Should Approve the Similar Plan for Disseminating the Settlement Notice and**
 8 **the Form of Notice**

8 The Federal Rules of Civil Procedure require the Court to direct the “best notice that is
 9 practicable under the circumstances, including individual notice to all [class] members who can
 10 be identified through reasonable effort” and “who would be bound by the propos[ed]” settlement.
 11 FRCP 23(c)(2)(B) and (e)(1)(B) (notice must be given “in a reasonable manner”). The Court
 12 previously approved the Class Notice, informing Class Members of class certification, under this
 13 standard. The Settlement Notice program builds on information already gained from the
 14 dissemination of the Class Notice and follows a similar dissemination plan. Class Representatives
 15 propose to provide notice of the Settlement: (i) by first-class mailing (and email if provided) of
 16 the long-form Settlement Notice, addressed to all Class Members, who can reasonably be
 17 identified and located, including by using the mailing information gathered from the mailing of
 18 the Class Notice; and (ii) by publication of the Summary Settlement Notice in *Investor’s Business*
 19 *Daily* and its transmission on the internet over *PR Newswire*. The Settlement Notice will also be
 20 posted on the case website and Class Counsel’s website.¹¹ Courts regularly find that similar plans
 21

22 ¹⁰ The same is true for the exclusions from the Class. The definition of the certified Class has the following
 23 exclusions: “[e]xcluded from the Class are Defendants and their immediate family members; the officers and
 24 directors of the Company during the Class Period and their immediate family members; any entity in which
 25 Defendants have or had a controlling interest; and the legal representatives, heirs, successors, assigns, or affiliates of
 26 any excluded person” (ECF No. 209 at 9) and “those who purchased or otherwise acquired SanDisk’s publicly traded
 common stock during the class period but who sold their stock prior to the first corrective disclosure on March 26,
 2015” (ECF No. 242 at 4). The Class defined in the Stipulation for the proposed Settlement has the exact same
 exclusions. Stipulation ¶1(e) (also noting that any person or entity that properly seeks exclusion from the Class will
 be excluded).

27 ¹¹ Because of the availability of name and address data for Class Members from third-party banks, brokers,
 and nominees, and Epiq’s ability to reach potential Class Members through individual mailed notice, Class Counsel
 28 and Epiq (which has its own department that specializes in media notice via multi-channel advertising) have
 conferred and determined that using social media or hiring an outside marketing specialist would not be appropriate
 here.

1 providing “notice by mail and publication [are] the best notice practicable under the
2 circumstances, as mandated by FRCP 23(c)(2)(B).” *Portal Software*, 2007 WL 1991529, at *7;
3 *see also* ECF No. 255. Just as it approved the Class Notice dissemination plan, the Court should
4 approve the similar Settlement Notice dissemination plan.

5 Relatedly, the Court appointed Epiq to disseminate the Class Notice (ECF No. 255 at 4),
6 and for the same reasons, as well as for efficiency concerns, should permit Epiq to disseminate
7 the Settlement Notices and serve as the claims administrator. In selecting Epiq, on November 9,
8 2018, Class Counsel requested bids from five highly qualified claims administration firms for two
9 separate projects: (1) notice of pendency; and (2) settlement administration. Class Counsel
10 selected Epiq because its estimates were the most competitive of the five submissions and
11 commensurate with the costs of other comparable administrations that Class Counsel has
12 overseen. *See* Schwartz Decl., Ex. 3 (Declaration of Alexander Villanova of Epiq in Support of
13 Settlement Notice Plan (“Villanova Decl.”)). With respect to Notice and Administration
14 Expenses, Epiq estimates that its fees and expenses in connection with the Settlement notices and
15 claims process may be in the range of \$430,000 to \$480,000, which includes Epiq’s fees and
16 expenses to date in connection with disseminating the Class Notice. *Id.* ¶19.¹² This estimate
17 assumes, among other things, that approximately 140,000 notice packets of roughly 20 pages will
18 be mailed and that 35,000 claim forms will be received. *Id.* In the event that actual experience
19 differs from these assumptions, the administrative fees and expenses may differ. *Id.* Within the
20 past two years, Class Counsel, serving as Lead Counsel, has engaged Epiq on three matters to
21 administer claims. Schwartz Decl. ¶4 (providing further information regarding engagements with
22 Epiq). Both Epiq and Class Counsel have effectively disseminated notice programs in similar
23 cases and expect a similar experience here. *See* Villanova Decl. ¶17; Schwartz Decl. ¶5.

24 In terms of its form, notice is satisfactory if it generally describes the terms of the
25 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come
26 forward and be heard. Several rules, statutes, and guidelines place additional requirements on the
27

28 ¹² Epiq’s fees and expenses in connection with the Class Notice, to date, total \$87,150.33, and Epiq anticipates
incurring approximately \$10,000 more to complete this stage. *Id.* at 5 n.2.

1 form of notice. The proposed Settlement Notice here (Schwartz Decl., Ex. 1-A-1) meets all of
 2 these requirements. It is written in plain language and clearly sets forth all relevant information
 3 along with answers to commonly asked questions:

- 4 • As required by Rules 23(c)(2)(B) and (e)(1), the Settlement Notice objectively and
 5 neutrally apprises Class Members of the Action's nature, claims, and issues, Class
 6 definition, procedures and deadlines for any Class Members who so wish to exclude
 themselves from the Settlement or object, and binding effect of the judgment on
 Class Members;
- 7 • As required by the PSLRA, 15 U.S.C. §78u-4(a)(7), the Settlement Notice provides
 8 the amount of the Settlement on an absolute and per-share basis, a discussion of the
 9 issues on which the Parties disagree, the amount of attorneys' fees and litigation
 10 costs that Class Counsel will seek, the names and contact information of Class
 11 Counsel available to answer Class Members' questions, and a discussion of why the
 12 Parties are proposing the Settlement;
- 13 • As required by ¶3 of the Court's Procedural Guidance for Class Action Settlements
 14 ("N.D. Cal. Guide"), the Settlement Notice provides the web address for the case
 15 website and instructions on how to access the case docket; and
- 16 • The Settlement Notice informs Class Members of the date, time, and location of the
 17 Final Settlement Hearing, procedures and deadlines for submitting Claim Forms or
 18 objections, and Plan of Allocation, among other things.¹³

19 The Summary Settlement Notice (Schwartz Decl., Ex. 1-A-3) provides similar abbreviated
 20 information. Accordingly, the Court should approve the form of Settlement Notice.

21 Class Members who wish to receive a recovery must respond by filing a Proof of Claim
 22 (Schwartz Decl., Ex. 1-A-2), which is appropriate because their potential damages and recovery
 23 under the Plan of Allocation are dependent on their transactions in SanDisk common stock, and
 24 neither Defendants nor Class Representatives possess that data.

25 **D. The Proposed Schedule of Events**

26 The Parties respectfully propose that the Court should enter the schedule of events leading
 27 up to the Final Settlement Hearing (*see* Schwartz Decl., Ex. 4), which complies with *In re*
 28 *Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010) (requiring that fee motion be
 made available to the class before the deadline for objecting to the fee), and the N.D. Cal. Guide.

¹³ In addition to the Settlement Notice discussed above, Defendants will serve the notice required by the Class
 Action Fairness Act, 28 U.S.C. §1715, *et seq.*, no later than 10 days after the filing of the Stipulation with the Court.
 Stipulation ¶52; N.D. Cal. Guide ¶10.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should grant the Motion in full, preliminarily approve
3 the Settlement, approve the Settlement Notice and notice plan, and enter the schedule set forth
4 herein.

5 Dated: May 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

Executed on May 6, 2019, at New York, New York.

/s/ Max R. Schwartz
MAX R. SCHWARTZ (*pro hac vice*)