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18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

20 In re GILEAD SCIENCES SECURITIES )  
21 LITIGATION )

Master File No. C-03-4999-SI

) CLASS ACTION

22 \_\_\_\_\_ )  
23 This Document Relates To: )

24 ALL ACTIONS. )  
25 \_\_\_\_\_ )

NOTICE OF UNOPPOSED MOTION AND  
UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF

26 DATE: July 7, 2010

27 TIME: 10:00 a.m.

COURTROOM: 10, 19<sup>th</sup> Floor

The Honorable Susan Illston

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1 TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD

2 PLEASE TAKE NOTICE that on July 7, 2010, at 10:00 a.m., or as soon thereafter as the  
3 matter may be heard in the Courtroom of the Honorable Susan Illston, United States District Judge,  
4 at the United States District Court for the Northern District of California, 450 Golden Gate Avenue,  
5 San Francisco, CA 94102, plaintiffs Trent St. Clare and Terry Johnson (collectively, “Lead  
6 Plaintiffs”) will respectfully move, pursuant to Fed. R. Civ. P. 23(e), for entry of the [Proposed]  
7 Order Preliminarily Approving Settlement and Providing for Notice (“Notice Order”), submitted  
8 herewith, which (i) grants preliminary approval of the proposed class action settlement on the terms  
9 set forth in the Stipulation of Settlement dated as of June 28, 2010 (“Stipulation” or “Settlement”),  
10 submitted herewith;<sup>1</sup> (ii) certifies the Class for settlement purposes; (iii) approves the form and  
11 manner of giving notice of the proposed Settlement to the Class; and (iv) sets a date for final  
12 approval of the Settlement.

13 Lead Plaintiffs’ unopposed motion is based on the Stipulation; the following Memorandum  
14 in support thereof; all of the prior pleadings and papers in this Action; and such additional evidence  
15 or argument as may be required by the Court.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. PRELIMINARY STATEMENT**

18 Lead Plaintiffs Trent St. Clare and Terry Johnson submit this Memorandum in support of  
19 their unopposed motion for an order granting preliminary approval of the proposed Settlement of this  
20 securities class action for \$8,250,000 in cash (“Settlement Amount”) on behalf of the Class,<sup>2</sup> so that  
21 notice may be given to Members of the Class.

22 \_\_\_\_\_

23 <sup>1</sup> All capitalized terms not defined herein shall have the same meanings set forth in the  
24 Stipulation.

25 <sup>2</sup> “Class” means for purposes of the Settlement, all Persons who purchased Gilead Publicly  
26 Traded Securities during the period from and including July 14, 2003 through and including October  
27 28, 2003. Excluded from the Class are the Defendants, the officers and directors of Gilead during  
28 the Class Period, members of their immediate families and their legal representatives, heirs,  
successors or assigns and any entity in which any such excluded Person has or had a controlling  
interest. Also excluded from the Class are those Persons who timely and validly request exclusion  
from the Class.

1 This Settlement, reached more than six years after the filing of this case fully resolves the  
2 Class's claims against Defendants Gilead Sciences, Inc. ("Gilead"), John C. Martin, John F.  
3 Milligan, Mark L. Perry, Norbert W. Bischofberger, Anthony Carraciolo, and William A. Lee  
4 (collectively, "Defendants"). The terms of the Settlement are set forth in the Stipulation. The  
5 Settlement is the result of Lead Plaintiffs and their counsel's litigation efforts and extensive arm's-  
6 length negotiations among the parties, with the substantial assistance of the Honorable Layn R.  
7 Phillips, a highly respected retired United States District Judge with significant experience in the  
8 mediation of complex class actions.

9 In determining whether preliminary approval is warranted, the issue before the Court is  
10 whether the Settlement is within the range of what might be found fair, reasonable, and adequate, so  
11 that notice of the Settlement should be given to Class Members, and a hearing scheduled to consider  
12 final settlement approval. "Where the proposed settlement appears to be the product of serious,  
13 informed, non-collusive negotiations . . . and falls within the range of possible approval, preliminary  
14 approval should be granted." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, No. 1023, 1997 U.S. Dist.  
15 LEXIS 20835, at \*22 (S.D.N.Y. Dec. 31, 1997).<sup>3</sup> The Court is not required at this point to make a  
16 final determination regarding the reasonableness of the Settlement, and no Class Members'  
17 substantive rights will be prejudiced by preliminary approval.

18 Lead Plaintiffs and their counsel believe that the Settlement easily meets the criteria for  
19 preliminary approval and is well within the range of what might be approved as fair, reasonable, and  
20 adequate. Indeed, Plaintiffs' Co-Lead Counsel, who are well-respected and experienced in  
21 prosecuting securities class actions, have concluded that the Settlement is a very good resolution of  
22 this complex action and is in the best interest of the Class. This conclusion is based on all the  
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24 <sup>3</sup> As stated in the *Manual for Complex Litigation* §13.14, at 173 (4th ed. 2004):

25 First, the judge reviews the proposal preliminarily to determine whether it is  
26 sufficient to warrant public notice and a hearing. If so, the final decision on approval  
27 is made after the hearing.  
28

1 circumstances present here, including the substantial risk, expense, and uncertainty in continuing  
2 litigation through summary judgment, trial, and probable appeal, the relative strengths and  
3 weaknesses of the claims and defenses asserted, the amount of time that has passed since the  
4 complained of events occurred, past experience in litigating similar complex actions, and the serious  
5 disputes between the parties concerning the merits and damages. As a result, Lead Plaintiffs ask this  
6 Court to enter the Notice Order that: (1) grants preliminary approval of the Settlement; (2) certifies  
7 the Class for settlement purposes; (3) approves the parties' proposed form and method of giving  
8 notice of the Settlement to the Class; (4) directs that the notice be given to Class Members as  
9 approved by the Court; and (5) sets the date for the hearing at which the Court considers (i) the  
10 parties' request for final approval of the Settlement and entry of the [Proposed] Final Judgment and  
11 Order of Dismissal with Prejudice; (ii) the Plan of Allocation of Settlement proceeds; and (iii)  
12 Plaintiffs' Co-Lead Counsel's request for an award of attorneys' fees and expenses.

13 **II. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY**  
14 **APPROVED**

15 As a matter of public policy, settlement is a strongly favored method for resolving disputes.  
16 *See Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). This is  
17 especially true in complex class actions. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d  
18 615, 625 (9th Cir. 1982).

19 Rule 23(e) of the Federal Rules of Civil Procedure provides that before a class action may be  
20 dismissed or compromised, notice must be given in the manner directed by the court, and judicial  
21 approval must be obtained. Fed. R. Civ. P. 23(e). At the final approval hearing, the Court will have  
22 before it more extensive papers submitted in support of the proposed Settlement and will be asked to  
23 make a final determination as to whether the Settlement is fair, reasonable, and adequate. At this  
24 time, Lead Plaintiffs request only that the Court grant preliminary approval of the Settlement in  
25 order to notify Class Members of the terms of the Settlement, their opportunity to be heard, and their  
26 options with respect to the Settlement. The test for granting preliminary approval is whether the  
27 proposed settlement is "at least sufficiently fair, reasonable and adequate to justify notice to those  
28 affected and an opportunity to be heard." *NASDAQ*, 1997 U.S. Dist. LEXIS 20835, at \*24

1 (citations omitted). *See Manual for Complex Litigation, supra*, §21.632, at 320-21.<sup>4</sup> Lead Plaintiffs  
2 are now requesting the Court to take the first step in the process and grant preliminary approval of  
3 the Settlement. The Settlement, which was extensively negotiated between the parties with the  
4 substantial assistance of Judge Phillips (Ret.), provides a cash benefit to the Class in the amount of  
5 \$8.25 million, for distribution to eligible Class Members after payment of settlement administration  
6 costs, Court-approved attorneys’ fees and expenses, and taxes. Here, the Settlement enjoys a  
7 presumption of fairness because it is the product of extensive arm’s-length negotiations conducted  
8 by experienced and capable counsel with a firm understanding of the strengths and weaknesses of  
9 their respective client’s positions.<sup>5</sup>

10 Reference to factors considered by courts in granting final approval of class action  
11 settlements lend support to the proposition that the Settlement is well within the range of possible  
12 approval. First, as discussed above, the terms of the proposed Settlement are the product of  
13 extensive arm’s-length negotiations between the parties. The negotiations were at all times hard-  
14 fought and at arm’s length. During these negotiations, Plaintiffs’ Co-Lead Counsel zealously  
15 advanced Lead Plaintiffs’ positions and were fully prepared to continue to litigate rather than accept  
16 a settlement that was not in the best interest of the Class. Lead Plaintiffs through their counsel,  
17 having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence  
18 adduced to date to support the claims asserted, the likelihood of prevailing on these claims, the risk,  
19 expense, and duration of continued litigation, and the likely appeals and subsequent proceedings  
20 necessary if Lead Plaintiffs did prevail against Defendants at trial, have concluded that the

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22 <sup>4</sup> Preliminary approval does not require the court to make a final determination that the  
23 settlement is fair, reasonable, and adequate. Rather, that decision is made only at the final approval  
24 stage, after notice of the settlement has been given to the class members and they have had an  
25 opportunity to voice their views of the settlement or to exclude themselves from the settlement. *See*

26 <sup>5</sup> *Linney v. Cellular Alaska P’ship*, No. C-96-3008 DLJ, 1997 WL 450064, at \*5 (N.D. Cal.  
27 July 18, 1997), *aff’d*, 151 F.3d 1234 (9th Cir. 1998) (“the fact that the settlement agreement was  
28 reached in arm’s length negotiations, after relevant discovery [has] taken place create[s] a  
presumption that the agreement is fair”); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D.  
Cal. 1980), *aff’d*, 661 F.2d 939 (9th Cir. 1981).

1 Settlement is clearly fair, reasonable, and adequate and in the best interest of the Class. Plaintiffs’  
2 Co-Lead Counsel have significant experience in securities and other complex class action litigation  
3 and have negotiated numerous other class action settlements throughout the country. It is well  
4 established that significant weight should be attributed to the belief of experienced counsel that  
5 settlement is in the best interest of the class. *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,  
6 221 F.R.D. 523, 528 (C.D. Cal. 2004) (“Great weight is accorded to the recommendation of  
7 counsel, who are most closely acquainted with the facts of the underlying litigation.”) (citation  
8 omitted).<sup>6</sup>

9         Although Lead Plaintiffs and their counsel believe that the Class’s claims have substantial  
10 merit, they recognize the significant risk and expense necessary to prosecute Lead Plaintiffs’ claims  
11 against Defendants through summary judgment, trial, and subsequent appeals, as well as the inherent  
12 difficulties and delays complex litigation like this entails. Assuming Lead Plaintiffs survived  
13 Defendants’ summary judgment motions, there was a real risk that a jury would not understand the  
14 complex factual and legal issues in this Action. For example, to prove Lead Plaintiffs’ claims, they  
15 would have to prove, among other things, that Defendants were responsible for material  
16 misstatements or omissions of fact, that Defendants acted with the requisite scienter, that  
17 Defendants’ fraud caused the losses claimed by the Class, and that the Class suffered actual damages  
18 as a result of Defendants’ conduct. Many of the issues related to liability would have been the  
19 subject of expert testimony. There is no telling how the jury would react to the competing  
20 testimony.

21         Even if Lead Plaintiffs were able to establish liability, the determination of damages, like the  
22 determination of liability, is a complicated and uncertain process, involving conflicting expert  
23 testimony. The reaction of a jury to such complex and contradictory expert testimony is highly  
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25 <sup>6</sup>         *See also In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, No. 901, 1992 U.S. Dist.  
26 LEXIS 14337, at \*12 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed  
27 settlement represented the most beneficial result for the class a compelling factor in approving  
28 settlement); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz.  
1989), *aff’d sub nom. Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992).

1 unpredictable, and in such a battle, Plaintiffs’ Co-Lead Counsel recognize the possibility that a jury  
2 could be swayed by convincing experts for the Defendants, and find there were no damages or only a  
3 fraction of the amount of damages contended. The difficulty of proving loss causation was recently  
4 highlighted in *In re Apollo Group, Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2008 U.S. Dist.  
5 LEXIS 61995 (D. Ariz. Aug. 4, 2008). In *Apollo*, the court on a motion for judgment as a matter of  
6 law, overturned a jury verdict of \$277 million in favor of shareholders based on insufficient evidence  
7 presented at trial to establish loss causation.<sup>7</sup>

8 While Lead Plaintiffs believe that they would present sufficient evidence to establish the  
9 Class’s claims, Lead Plaintiffs and their counsel are aware that Defendants would present counter  
10 evidence and other substantial obstacles to obtaining a favorable judgment after trial. The proposed  
11 Settlement provides a very good recovery for the Class while eliminating the risk, expense, delay,  
12 and uncertainty of continued litigation.<sup>8</sup> Even if Lead Plaintiffs were successful at trial, there is no  
13 guarantee that the judgment would ultimately be sustained on appeal or by the trial court. An  
14 evaluation of the benefits of settlement must also be tempered by a recognition that any compromise  
15 involves concessions on the part of all of the settling parties. Indeed, “the very essence of a  
16 settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers*  
17 *for Justice*, 688 F.2d at 624 (citation omitted). As the Fifth Circuit noted in *Cotton v. Hinton*, 559  
18 F.2d 1326 (5th Cir. 1977):

19 The trial court should not make a proponent of a proposed settlement “justify each  
20 term of settlement against a hypothetical or speculative measure of what concessions  
21 might have been gained . . . .”

22 <sup>7</sup> The Ninth Circuit Court of Appeals recently reversed the trial court’s decision. *In re Apollo*  
23 *Group, Inc. Sec. Litig.*, No. 08-16971, slip op. (9th Cir. June 23, 2010).

24 <sup>8</sup> Even if Lead Plaintiffs prevailed through summary judgment, risks to the Class remain.  
25 Even a meritorious case can be lost at trial. See *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-  
26 1486 CW, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial, jury returned a verdict  
27 against plaintiffs and the action was dismissed). Further, a successful jury verdict does not eliminate  
28 the risk to the class. See *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist.  
LEXIS 15608 (N.D. Cal. Sept. 6, 1991) (court entered judgment notwithstanding the verdict for the  
individual defendants and ordered a new trial with respect to the corporation); *Robbins v. Koger*  
*Props.*, 116 F.3d 1441 (11th Cir. 1997) (reversing \$81 million jury verdict for securities fraud).

1 *Id.* at 1330 (citation omitted).

2 In short, while Lead Plaintiffs and their counsel believe that the claims asserted have  
3 substantial merit, if the Action continued, Lead Plaintiffs and the Class would bear the risks of  
4 establishing liability and damages that would have been vigorously challenged by Defendants.  
5 Absent settlement, this contest would have ultimately developed into a battle of competing facts and  
6 inferences, competing experts, and a credibility toss-up to be decided by the jury. By contrast, the  
7 \$8.25 million settlement is immediately realizable by the Class and eliminates all of the risk, delay,  
8 and expense of continued litigation.

9 While Lead Plaintiffs believe that the Settlement merits final approval, the Court need not  
10 make that determination at this time. The Court is being asked to permit notice of the terms of the  
11 Settlement to be sent to the Class and schedule a hearing, pursuant to Federal Rule of Civil  
12 Procedure 23(e), to consider any expressed views by Class Members of the fairness of the  
13 Settlement, the Plan of Allocation, and Plaintiffs' Co-Lead Counsel's request for an award of fees  
14 and expenses. *Moore, supra*, §23.165[3], at 23-587 to 23-588.

15 **III. THE PROPOSED NOTICE PROGRAM IS ADEQUATE AND**  
16 **CONSTITUTES DUE AND SUFFICIENT NOTICE UNDER RULE 23,**  
**DUE PROCESS, AND THE PSLRA**

17 Rule 23(e) governs notice requirements for settlements or “compromises” in class actions.  
18 The Rule provides that a class action shall not be dismissed or compromised without the approval of  
19 the court, and notice of the proposed dismissal or compromise shall be given to all members of the  
20 class in such manner as the court directs. Fed. R. Civ. P. 23(e). In addition, the Rule provides,  
21 “[t]he court must direct notice in a reasonable manner to all class members who would be bound by  
22 the proposal.” Fed. R. Civ. P. 23(e)(1).

23 Here, the parties have negotiated the Notice of Proposed Settlement of Class Action (the  
24 “Notice”) to be disseminated to all persons who fall within the definition of the Class and whose  
25 names and addresses can be identified from Gilead's transfer records. In addition, the Claims  
26 Administrator sends out letters to entities which commonly hold securities in “street name” as  
27 nominees for the benefit of their customers who are the beneficial purchasers of the common stock.  
28 The parties further propose to supplement the mailed Notice with a summary notice (the “Summary

1 Notice”), to be published in *Investor’s Business Daily*. The Notice and Summary Notice are  
2 attached to the Stipulation as Exhibits A-1 and A-3.

3 As required by Federal Rule of Civil Procedure 23(c)(2) and the Private Securities Litigation  
4 Reform Act of 1995 (15 U.S.C. §78u-4(a)(7)), the Notice describes the nature of the Action; sets  
5 forth the definition of the Class; states the Class’s claims; and discloses the right of Class Members  
6 to exclude themselves from the Class, as well as the deadline and procedure for doing so and warns  
7 of the binding effect of the settlement approval proceedings on Class Members who do not exclude  
8 themselves. In addition, the Notice describes the Settlement; the Settlement Amount, both in the  
9 aggregate and on an average per-share basis; explains the proposed Plan of Allocation; states the  
10 parties’ disagreement over damages and other issues; sets out the amount of attorneys’ fees and  
11 expenses that counsel for Lead Plaintiffs intend to seek in connection with final settlement approval,  
12 including the amount of the requested fees and expenses determined on an average per-share basis;  
13 provides contact information for Plaintiffs’ Co-Lead Counsel, including a toll-free telephone  
14 number; and summarizes the reasons the parties are proposing the Settlement. The Notice also  
15 discloses the date, time, and place of the formal fairness hearing, and the procedures for objecting to  
16 the Settlement, the Plan of Allocation, or counsel’s request for attorneys’ fees and expenses and  
17 appearing at the hearing. The contents of the Notice therefore satisfy all applicable requirements.

18 Lastly, as part of the preliminary approval of the Settlement, Lead Plaintiffs also respectfully  
19 request the appointment of A.B. Data, Ltd. (“A.B. Data”) as Claims Administrator. As Claims  
20 Administrator, A.B. Data will be responsible for, among other things, mailing the Notices to the  
21 Class, publishing the Summary Notice, reviewing claims from Class Members, and compiling a  
22 distribution schedule to Class Members. A.B. Data has extensive experience in settlement  
23 administration and will adequately fulfill its duties in this case. *See* [www.abdata.com](http://www.abdata.com).

24 **IV. PROPOSED SCHEDULE OF EVENTS**

25 In connection with the preliminary approval of the Settlement, the Court must set a final  
26 approval hearing date, dates for mailing the Notice and publication of the Summary Notice,  
27 deadlines for objecting to the Settlement, opting out of the Class, and filing papers in support of the  
28 Settlement. Lead Plaintiffs propose the following schedule:

1	Notice and Proof of Claim mailed to Class Members (Notice Order, ¶5(a))	14 days after entry of the Notice Order (“Notice Date”)
2		
3	Summary Notice published (Notice Order, ¶5(c))	Within 10 days after the Notice Date
4		
5	Deadline for filing papers in support of the Settlement, Plan of Allocation, and request for an award of attorneys’ fees and expenses (Notice Order, ¶15)	14 days before deadline for submitting exclusion requests and filing objections
6		
7	Deadline for requesting exclusion from the Class (Notice Order, ¶11) and deadline for filing objections to the Settlement, Plan of Allocation, or request for attorneys’ fees and expenses (Notice Order, ¶13)	60 days after the Notice Date
8		
9		
10	Deadline for filing reply papers in support of the Settlement, Plan of Allocation, and request for an award of attorneys’ fees and expenses (Notice Order, ¶15)	7 days prior to final approval hearing
11		
12	Final approval hearing (Notice Order, ¶4)	At the Court’s convenience, on or after 90 days after the mailing of the Notice
13		
14	Deadline for submitting Proof of Claim forms (Notice Order, ¶9)	30 days after final approval hearing

15           This schedule is similar to those used and approved by numerous courts in class action  
16 settlements and provides due process to Class Members with respect to their rights concerning the  
17 proposed Settlement. *See Torrasi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993).

18 **V. CONCLUSION**

19           For the reasons set forth above, Lead Plaintiffs respectfully request that the Court  
20 preliminarily approve the proposed Settlement and enter the Notice Order.

21 DATED: June 29, 2010

Respectfully submitted,  
ROBBINS GELLER RUDMAN  
& DOWD LLP  
JEFFREY D. LIGHT

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s/Jeffrey D. Light  
JEFFREY D. LIGHT

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