

1 Benjamin Heikali (SBN 307466)
2 **FARUQI & FARUQI, LLP**
3 10866 Wilshire Boulevard, Suite 1470
4 Los Angeles, CA 90024
5 Telephone: (424) 256-2884
6 Facsimile: (424) 256-2885
7 E-mail: bheikali@faruqilaw.com

8 [Additional Captions on Signature Page]

9 *Attorney for Plaintiff William Davis*

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 WILLIAM DAVIS, Individually and on
13 Behalf of All Others Similarly Situated,

14 Plaintiff,

15 v.

16 FINISAR CORPORATION, ROBERT N.
17 STEPHENS, THOMAS E. PARDUN,
18 MICHAEL C. CHILD, ROGER C.
19 FERGUSON, JERRY S. RAWLS,
20 HELENE SIMONET, MICHAEL L.
21 DREYER, and MICHAEL E. HURLSTON,

22 Defendants.

Case No. 3:19-cv-00271

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF SECTIONS 14(a) AND
20(a) OF THE SECURITIES
EXCHANGE ACT OF 1934**

JURY TRIAL DEMANDED

1 Plaintiff William Davis (“Plaintiff”), by his undersigned attorneys, alleges upon personal
2 knowledge with respect to himself, and upon information and belief based upon, *inter alia*, the
3 investigation of counsel as to all other allegations herein, as follows:

4 **NATURE OF THE ACTION**

5 1. This action is brought as a class action by Plaintiff on behalf of himself and the
6 other public holders of the common stock of Finisar Corporation (“Finisar” or the “Company”)
7 against the Company and the members of the Company’s board of directors (collectively, the
8 “Board” or “Individual Defendants,” and, together with Finisar, the “Defendants”) for their
9 violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange
10 Act”), 15 U.S.C. §§ 78n(a), 78t(a), SEC Rule 14a-9, 17 C.F.R. 240.14a-9, and Regulation G, 17
11 C.F.R. § 244.100, in connection with the proposed acquisition (the “Proposed Transaction”) of
12 Finisar by II-VI Incorporated (“II-VI”).

13 2. On November 8, 2018, the Board caused the Company to enter into an agreement
14 and plan of merger (“Merger Agreement”), pursuant to which Finisar shareholders will receive for
15 each share of common stock, at the shareholder’s election and subject to proration, either: (i)
16 \$26.00 in cash; (ii) 0.5546 of a share of II-VI common stock; or (iii) a combination of (A) 0.2218
17 of a share of II-VI common stock and (B) \$15.60 in cash, without interest (collectively, the
18 “Merger Consideration”).

19 3. On December 28, 2018, in order to convince Finisar shareholders to vote in favor
20 of the Proposed Transaction, the Board authorized the filing of a materially incomplete and
21 misleading Proxy Statement on Schedule 14A (the “Proxy”) with the Securities and Exchange
22 Commission (“SEC”), in violation of Sections 14(a) and 20(a) of the Exchange Act.

23 4. While Defendants are touting the fairness of the Merger Consideration to the
24 Company’s shareholders in the Proxy, they have failed to disclose certain material information
25 that is necessary for shareholders to properly assess the fairness of the Proposed Transaction,
26 thereby rendering certain statements in the Proxy false and/or misleading.

PARTIES

11. Plaintiff is, and at all relevant times has been, a Finisar shareholder.

12. Defendant Finisar is a Delaware corporation and maintains its principal executive offices at 1389 Moffett Park Drive, Sunnyvale, California 94089. Finisar’s common stock is traded on the NASDAQ GS under the ticker symbol “FNSR.”

13. Individual Defendant Robert N. Stephens has been a director of the Company since 2005 and as Chairman of the Board since January 2018.

14. Individual Defendant Thomas E. Pardun has been a director of the Company since 2009.

15. Individual Defendant Michael C. Child has been a director of the Company since 2010.

16. Individual Defendant Roger C. Ferguson has been a director of the Company since 1999.

17. Individual Defendant Jerry S. Rawls has been a director of the Company since 1989.

18. Individual Defendant Helene Simonet has been a director of the Company since 2017.

19. Individual Defendant Michael L. Dreyer has been a director of the Company since 2015.

20. Individual Defendant Michael E. Hurlston has been a director of the Company and its Chief Executive Officer since January 2018.

21. The Individual Defendants and Finisar may collectively be referred to as “Defendants.” Each of the Individual Defendants herein is sued individually as well as in his or her capacity as an officer and/or trustee of the Company, and the liability of each arises from the fact that he or she has engaged in all or part of the unlawful acts, plans, schemes, or transactions complained of herein.

CLASS ACTION ALLEGATIONS

22. Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23 on behalf of himself and the other public shareholders of Finisar (the “Class”). Excluded from the Class are Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any Defendant.

23. This action is properly maintainable as a class action because:

a. The Class is so numerous that joinder of all members is impracticable. According to the Proxy, as of December 19, 2018, there were approximately 117,733,459 shares of Finisar common stock outstanding, held by hundreds to thousands of individuals and entities throughout the country. The actual number of public shareholders of Finisar will be ascertained through discovery;

b. There are questions of law and fact that are common to the Class that predominate over any questions affecting only individual members, including the following:

- i) whether Defendants disclosed material information that includes non-GAAP financial measures without a presentation and reconciliation of those measures to their most directly comparable GAAP equivalent in violation of Section 14(a) of the Exchange Act;
- ii) whether the omission of the GAAP financial measures violates Section 14(a) of the Exchange Act;
- iii) whether the Individual Defendants have violated Section 20(a) of the Exchange Act; and
- iv) whether Plaintiff and other members of the Class will suffer irreparable harm if compelled to vote their shares regarding the Proposed Transaction based on the materially incomplete and misleading statements in the Proxy.

1 c. Plaintiff is an adequate representative of the Class, has retained competent
2 counsel experienced in litigation of this nature, and will fairly and adequately protect the
3 interests of the Class;

4 d. Plaintiff's claims are typical of the claims of the other members of the Class
5 and Plaintiff does not have any interests adverse to the Class;

6 e. The prosecution of separate actions by individual members of the Class
7 would create a risk of inconsistent or varying adjudications with respect to individual
8 members of the Class, which would establish incompatible standards of conduct for the
9 party opposing the Class;

10 f. Defendants have acted on grounds generally applicable to the Class with
11 respect to the matters complained of herein, thereby making appropriate the relief sought
12 herein with respect to the Class as a whole; and

13 g. A class action is superior to other available methods for fairly and
14 efficiently adjudicating the controversy.

15 **SUBSTANTIVE ALLEGATIONS**

16 24. Finisar is a provider of fiber optic subsystems and network performance test
17 systems that provides its customers with high-speed data communications over local area networks
18 and storage area networks in a variety of applications.

19 25. On November 9, 2018, Finisar and II-VI announced the Proposed Transaction in a
20 press release which states, in pertinent part:

21 PITTSBURGH & SUNNYVALE, Calif., November 9, 2018 (GLOBE
22 NEWSWIRE) — II-VI Incorporated (NASDAQ:IIVI), a global leader in
23 engineered materials and optoelectronic components, and Finisar Corporation
24 (NASDAQ: FNSR), a global technology leader in optical communications, today
25 announced that they have entered into a definitive merger agreement under which
26 II-VI will acquire Finisar in a cash and stock transaction with an equity value of
27 approximately \$3.2 billion.

1 Under the terms of the merger agreement, which has been unanimously approved
2 by the Boards of Directors of both companies, Finisar’s stockholders will receive,
3 on a pro-rated basis, \$15.60 per share in cash and 0.2218x shares of II-VI common
4 stock, valued at \$10.40 per share based on the closing price of II-VI’s common
5 stock of \$46.88 on November 8, 2018. The transaction values Finisar at \$26.00 per
6 share, or approximately \$3.2 billion in equity value and represents a premium of
7 37.7% to Finisar’s closing price on November 8, 2018. Finisar shareholders would
8 own approximately 31% of the combined company.

9 The combination of II-VI and Finisar would unite two innovative, industry leaders
10 with complementary capabilities and cultures to form a formidable industry leading
11 photonics and compound semiconductor company capable of serving the broad set
12 of fast growing markets of communications, consumer electronics, military,
13 industrial processing lasers, automotive semiconductor equipment and life
14 sciences. Together, II-VI and Finisar will employ over 24,000 associates in 70
15 locations worldwide upon closing of the transaction.

16 “Disruptive megatrends driven by innovative uses of lasers and other engineered
17 materials present huge growth opportunities for both of our companies,” said Dr.
18 Vincent D. Mattera, Jr., President and CEO, II-VI Incorporated. “In
19 communications, materials processing, consumer electronics and automotive, we
20 expect that the combination with Finisar will allow us to leverage our combined
21 technology and intellectual property in InP, GaAs, SiC, GaN, SiP and diamond to
22 achieve faster time to market, cost and scale. Together, we believe that we will be
23 better strategically positioned to play a strong leadership role in the emerging
24 markets of 5G, 3D sensing, cloud computing, electric and autonomous vehicles,
25 and advanced microelectronics manufacturing.”

26 Dr. Mattera continued, “We have long admired Finisar and have a great deal of
27 regard for its founders and its talented global team. Our companies both have a long
28 history of focusing on innovation, breakthrough solutions and competitive follow-
through by manufacturing high quality products for our customers, and we look
forward to welcoming Finisar to the II-VI family and further strengthening our
competitive position in the industry.”

“The combination of our state-of-the-art technology platforms, deep customer
relationships, great assets and amazing talent will enhance our ability to hit market
windows that won’t stay open for long,” said Michael Hurlston, Finisar’s CEO.
“This combination will accelerate our collective growth and will take advantage of
the technology, products and manufacturing expertise that Finisar has uniquely
developed over the course of its 30 year history.”

Mr. Hurlston added, “We are extremely excited to combine Finisar with II-VI and
together create a leader in photonics and compound semiconductors across all of
the markets we serve. We are confident that the growth potential for the combined

1 company is substantial, and we believe that our respective shareholders will be able
2 to enjoy significant potential for value creation when the transaction is completed.”

3 **Compelling Strategic Rationale**

4 As a combined company, II-VI and Finisar will continue to leverage their leading-
5 edge innovation and commercialization of complex technologies to maximize value
6 through vertical integration and manufacturing scale. The core competencies of the
7 two companies in innovation and manufacturing will complement each other at all
8 levels of the value chain, including in the following strategic areas:

- 9 • **A Stronger Position in Optical Communications:** The combined
10 company will provide a full line and scalable supply of high
11 performance Datacom transceivers, products based on coherent
12 transmission technology and ROADM solutions based on more than 30
13 years of industry leadership. It will market products into next-generation
14 undersea, long-haul and metro networks, hyperscale datacenters and in
15 5G optical infrastructure.
- 16 • **Compelling Platform for 3D Sensing & LiDAR:** The combined
17 optoelectronics technology leadership based on GaAs and InP
18 compound semiconductor laser design platforms, together with one of
19 the world’s largest 6-inch vertically integrated epitaxial growth and
20 device fabrication manufacturing platforms, will enable faster time to
21 market for a greater number of opportunities in 3D sensing and LiDAR.
- 22 • **Combined Capabilities Unlock Access to Larger Markets:** The
23 broad portfolio of differentiated engineered materials, including GaAs,
24 InP, SiC, GaN and diamond together with a critical mass of
25 optoelectronic, optical and integrated circuit device design expertise and
26 related intellectual property, will unlock access to larger markets in RF
27 devices for next-generation wireless and military applications, as well
28 as power electronics for electric cars and green energy.
- **Maximizing Value Creation through Vertical Integration:** Deep
vertical integration of core technologies ranging from engineered
materials to high value-add solutions, enabled by differentiated
components, will provide the combined company with a strong
foundation to capitalize on a broad range of emerging opportunities
while making the overall markets even more competitive.

24 **Driving Enhanced Financial Performance**

25 In addition to the compelling strategic benefits, the combination of II-VI and Finisar
26 will:

- 1 • **Accelerate Revenue Growth:** On a pro forma basis, the combined
2 company had approximately \$2.5 billion of annual revenue. The
3 combined broad base of talent, technology and manufacturing is
4 expected to enhance the ability to better address near-to medium-term
5 opportunities and accelerate revenue growth.
- 6 • **Provide Significant Synergy Potential:** The combined company
7 expects to realize \$150 million of run-rate cost synergies within 36
8 months of closing. Synergies are expected to be achieved from
9 procurement savings, internal supply of materials and components,
10 efficient research and development, consolidation of overlapping costs
11 and sales and marketing efficiencies.
- 12 • **Strengthen Earnings Accretion:** The transaction is expected to drive
13 accretion in Non-GAAP earnings per share for the first full year post
14 close of approximately 10% and more than double that thereafter.

15 **Transaction Details**

16 II-VI intends to fund the cash consideration with a combination of cash on hand
17 from the combined companies' balance sheets and \$2 billion in funded debt
18 financing. The transaction is expected to close in the middle of calendar year 2019,
19 subject to approval by each company's shareholders, antitrust regulatory approvals
20 and other customary closing conditions.

21 **Management and Board of Directors**

22 Upon closing of the transaction, Dr. Mattera will continue to serve as President and
23 CEO of the combined company.

24 In addition, in connection with the closing of the transaction, three Finisar board
25 members will be appointed to the II-VI Board, which will be expanded to 11
26 directors.

27 **The Materially Incomplete and Misleading Proxy**

28 26. On December 28, 2018, Defendants caused the Proxy to be filed with the SEC in
connection with the Proposed Transaction. The Proxy solicits the Company's shareholders to vote
in favor of the Proposed Transaction. Defendants were obligated to carefully review the Proxy
before it was filed with the SEC and disseminated to the Company's shareholders to ensure that it
did not contain any material misrepresentations or omissions. However, the Proxy misrepresents
and/or omits both required and material information that is necessary for the Company's

1 shareholders to make an informed decision concerning whether to vote in favor of the Proposed
2 Transaction, in violation of Sections 14(a) and 20(a) of the Exchange Act.

3 ***The Materiality of Financial Projections***

4 27. A company's financial forecasts are material to a board of directors in determining
5 whether to approve a merger transaction and recommend that shareholders vote to approve the
6 transaction. Here, the financial forecasts were relied on to approve the Merger Agreement and
7 recommend the Proposed Transaction to shareholders, as the Proxy discloses that the financial
8 forecasts were "prepared by, and are the responsibility of, Finisar management . . . and were
9 approved by the Finisar Board[.]" Proxy 119.

10 28. When soliciting proxies from shareholders, a company must furnish the
11 information found in Schedule 14A (codified as 17 C.F.R. § 240.14a-101). Item 14 of Schedule
12 14A sets forth the information a company must disclose when soliciting proxies regarding mergers
13 and acquisitions. In regard to financial information, companies are required to disclose "financial
14 information required by Article 11 of Regulation S-X[.]" which includes Item 10 of Regulation S-
15 K. *See* Item 14(7)(b)(11) of 17 C.F.R. § 240.14a-101.

16 29. Under Item 10 of Regulation S-K, companies are encouraged to disclose
17 "management's projections of future economic performance that have a reasonable basis and are
18 presented in an appropriate format." 17 C.F.R. § 229.10(b). Although the SEC recognizes the
19 usefulness of disclosing projected financial metrics, the SEC cautions companies to "take care to
20 assure that the choice of items projected is not susceptible of misleading inferences through
21 selective projection of only favorable items." *Id.*

22 30. In order to facilitate investor understanding of the Company's financial projections,
23 the SEC provides companies with certain factors "to be considered in formulating and disclosing
24 such projections[.]" including:

25 (i) When management chooses to include its projections in a Commission filing,
26 *the disclosures accompanying the projections should facilitate investor*
understanding of the basis for and limitations of projections. In this regard investors

1 should be cautioned against attributing undue certainty to management's
2 assessment, and the Commission believes that investors would be aided by a
3 statement indicating management's intention regarding the furnishing of updated
4 projections. *The Commission also believes that investor understanding would be*
5 *enhanced by disclosure of the assumptions which in management's opinion are*
most significant to the projections or are the key factors upon which the financial
results of the enterprise depend and encourages disclosure of assumptions in a
manner that will provide a framework for analysis of the projection.

6 (ii) Management also should consider whether disclosure of the accuracy or
7 inaccuracy of previous projections would provide investors with important insights
8 into the limitations of projections. In this regard, *consideration should be given to*
9 *presenting the projections in a format that will facilitate subsequent analysis of the*
10 *reasons for differences between actual and forecast results.* An important benefit
may arise from the systematic analysis of variances between projected and actual
results on a continuing basis, since such disclosure may highlight for investors the
most significant risk and profit-sensitive areas in a business operation.

11 17 C.F.R. § 229.10(b)(3) (emphasis added).

12 31. Here, Finisar's shareholders would clearly find complete and non-misleading
13 financial projections material in deciding how to vote, considering that in making its
14 recommendation that shareholders vote in favor of the Proposed Transaction, the Board considered
15 "the prospects and likelihood of realizing superior benefits through remaining an independent
16 company, risks associated with remaining an independent company, and possible alternative
17 business strategies[.]" Proxy 94.

18 32. As discussed further below, the non-GAAP financial projections here do not
19 provide Finisar's shareholders with a materially complete understanding of the assumptions and
20 key factors considered in developing the Forecasts, which assumptions, factors and other inputs
21 the Board reviewed.

22 ***The Financial Projections are Materially Incomplete***

23 33. As mentioned above, the Proxy discloses that "[i]n connection with Finisar's
24 evaluation of strategic alternatives and a possible business combination transaction involving
25 Finisar, in August 2018, Finisar prepared certain unaudited projections and estimates of future
26

1 financial and operating performance with respect to Finisar’s fiscal years ending in 2019, 2020
2 and 2021.” *Id.* at 119. The Proxy discloses summaries of the aforementioned financial projections.

3 34. The first summary discloses several non-GAAP financial measures, including
4 Gross Margin, Gross Profit, Total Operating Expenses, Operating Income, Operating Margin,
5 EBITDAS, Pre-Tax Income, Net Income, and Fully Diluted EPS. *Id.* at 119.

6 35. In a footnote, the Proxy further discloses that “Finisar has historically calculated
7 financial information on a non-GAAP basis” due to the exclusion of, *inter alia*:

8 (i) amortization of acquired technology (non-cash charges related to technology
9 obtained in acquisitions); (ii) stock-based compensation expense (non-cash
10 charges); (iii) impairment of long-lived/intangible assets (non-cash charges); (iv)
11 reduction in force costs and other restructuring charges (non-core cash charges);
12 (v) acquisition related retention payments (non-core cash charges); (vi) inventory
13 write-offs related to discontinued products (non-cash charges); (vii) discontinued
14 product services fees (non-core cash charges); (viii) duplicate facility costs during
15 facility move (non-core cash charges); (ix) acquisition related costs (non-core cash
16 charges); (x) litigation settlements and resolutions and related costs (non-core cash
17 charges); (xi) amortization of purchased intangibles (non-core, non-cash charges);
18 (xii) start-up cash costs related to Finisar’s Sherman VCSEL fab until Finisar
19 begins commercial production; (xiii) imputed interest expenses on convertible debt
(non-cash charges); (xiv) imputed interest related to restructuring (non-cash
charges); (xv) other interest income (non-core benefits); (xvi) gains and losses on
sales of assets and other miscellaneous (non-cash losses and cash gains related to
the periodic disposal of assets no longer required for current activities); (xvii) loss
(gain) related to minority investments (non-core charges or benefits); (xviii) dollar
denominated foreign exchange transaction losses (gains) (non-cash charges or
benefits); and (xix) amortization of debt issuance costs (non-cash charges).

20 *Id.* at 119-20. The footnote further discloses that the financial projections “have adjusted non-
21 GAAP income and non-GAAP income per share for the difference between GAAP income taxes
22 and non-GAAP income taxes.” *Id.*

23 36. The second summary discloses additional non-GAAP financial projections,
24 including Non-GAAP EBIT, NOPAT, and Unlevered Free Cash Flow (“UFCF”). *Id.* at 120.

25 37. The Proxy further discloses that UFCF was “derived from the Finisar management
26 projections” and “calculated by starting with net operating profit after tax, or NOPAT, and adding

1 back depreciation and then subtracting change in net working capital and capital expenditures.”

2 *Id.* at 120.

3 38. Despite disclosing that the Company makes at least nineteen (19) adjustments to its
4 financial projections, if not more, the Proxy fails to disclose how any of the measures were
5 calculated (other than UFCF), nor does the Proxy disclose the values of the line item adjustments
6 disclosed, rendering the Proxy materially false and/or misleading.

7 39. Thus, the Proxy’s disclosure of these non-GAAP financial projections provides an
8 incomplete and materially misleading understanding of the Company’s future financial prospects
9 and the inputs and assumptions for which those prospects are based upon. It is clear that those line
10 items were in fact forecasted and utilized in calculating the non-GAAP measures disclosed and
11 relied on by the Board to recommend the Proposed Transaction, in violation of Section 14(a) of
12 the Exchange Act.

13 40. The financial projections disclosed on pages 119-20 of the Proxy violate Section
14 14(a) of the Exchange Act because: (1) the use of such forecasted non-GAAP financial measures
15 alone violates SEC Regulation G as Defendants failed to reconcile those non-GAAP measures to
16 their closest GAAP equivalents or otherwise disclose the specific financial assumptions and inputs
17 used to calculate the non-GAAP measures; and (2) they violate SEC Regulation 14a-9 because
18 they are materially misleading as shareholders are unable to discern the veracity of the financial
19 projections. As such, this information must be disclosed in order to cure the materially misleading
20 disclosures regarding both the financial projections developed by the Company as well as the
21 projections relied upon by the Company’s financial advisors.

1 ***The Financial Projections Violate Regulation G***

2 41. The SEC has acknowledged that potential “misleading inferences” are exacerbated
3 when the disclosed information contains non-GAAP financial measures¹ and adopted Regulation
4 G² “to ensure that investors and others are not misled by the use of non-GAAP financial
5 measures.”³

6 42. Defendants must comply with Regulation G. More specifically, the company must
7 disclose the most directly comparable GAAP financial measure and a reconciliation (by schedule
8 or other clearly understandable method) of the differences between the non-GAAP financial
9 measure disclosed or released with the most comparable financial measure or measures calculated
10 and presented in accordance with GAAP. 17 C.F.R. § 244.100. This is because the SEC believes
11 “this reconciliation will help investors . . . to better evaluate the non-GAAP financial measures . .
12 . . [and] more accurately evaluate companies’ securities and, in turn, result in a more accurate
13 pricing of securities.”⁴

14 43. Moreover, the SEC has publicly stated that the use of non-GAAP financial
15 measures can be misleading.⁵ Former SEC Chairwoman Mary Jo White has stated that the frequent
16

17 ¹ Non-GAAP financial measures are numerical measures of future financial performance
18 that exclude amounts or are adjusted to effectively exclude amounts that are included in the most
19 directly comparable GAAP measure. 17 C.F.R. § 244.101(a)(1).

20 ² Item 10 of Regulations S-K and S-B were amended to reflect the requirements of
21 Regulation G.

22 ³ United States Securities and Exchange Commission, *Final Rule: Conditions for Use of*
23 *Non-GAAP Financial Measures* (2002), available at <https://www.sec.gov/rules/final/33-8176.htm>
24 (last visited Jan. 16, 2019) (“SEC, *Final Rule*”).

25 ⁴ SEC, *Final Rule*.

26 ⁵ See, e.g., Nicolas Grabar and Sandra Flow, *Non-GAAP Financial Measures: The SEC’s*
27 *Evolving Views*, Harvard Law School Forum on Corporate Governance and Financial Regulation
28 (June 24, 2016), available at [https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-](https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/)
[measures-the-secs-evolving-views/](https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/) (last visited Jan. 16, 2019); Gretchen Morgenson, *Fantasy*
Math Is Helping Companies Spin Losses Into Profits, N.Y. Times, Apr. 22, 2016, available at
[http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0)
[into-profits.html?_r=0](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0) (last visited Jan. 16, 2019).

1 use by publicly traded companies of unique, company-specific non-GAAP financial measures
2 implicates the centerpiece of the SEC's disclosures regime:

3 In too many cases, the non-GAAP information, which is meant to supplement the
4 GAAP information, has become the key message to investors, crowding out and
5 effectively supplanting the GAAP presentation. Jim Schnurr, our Chief Accountant,
6 Mark Kronforst, our Chief Accountant in the Division of Corporation Finance and
7 I, along with other members of the staff, have spoken out frequently about our
8 concerns to raise the awareness of boards, management and investors. And last
9 month, the staff issued guidance addressing a number of troublesome practices
10 *which can make non-GAAP disclosures misleading*: the lack of equal or greater
11 prominence for GAAP measures; exclusion of normal, recurring cash operating
12 expenses; individually tailored non-GAAP revenues; lack of consistency; cherry-
13 picking; and the use of cash per share data. I strongly urge companies to carefully
14 consider this guidance and revisit their approach to non-GAAP disclosures. I also
15 urge again, as I did last December, that appropriate controls be considered and that
16 audit committees carefully oversee their company's use of non-GAAP measures
17 and disclosures.⁶

18 44. The SEC has required compliance with Regulation G, including the reconciliation
19 requirement in other merger transactions. *Compare Youku Tudou Inc., et al.*, Correspondence 5
20 (Jan. 11, 2016) (Issuer arguing that Rule 100(d) of Regulation G does not apply to non-GAAP
21 financials relating to a business combination),⁷ with *Youku Tudou Inc., et al.*, SEC Staff Comment
22 Letter 1 (Jan. 20, 2016) (“[The SEC] note[s] that your disclosure of projected financial information
23 is not in response to the requirements of, or pursuant to, Item 1015 of Regulation M-A and is thus
24 not excepted from Rule 100 of Regulation G.”);⁸ *see Harbin Electric, Inc.*, Correspondence 29
25 (Aug. 12, 2011) (“Pursuant to the requirements of Regulation G, we have added a reconciliation
26

27 ⁶ Mary Jo White, *Keynote Address, International Corporate Governance Network Annual
28 Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-
GAAP, and Sustainability* (June 27, 2016), available at <https://www.sec.gov/news/speech/chair-white-icgn-speech.html> (emphasis added) (footnotes omitted) (last visited Jan. 16, 2019).

⁷ Available at <https://www.sec.gov/Archives/edgar/data/1442596/000110465916089133/filename1.htm> (last visited Jan. 16, 2019)

⁸ Available at <https://www.sec.gov/Archives/edgar/data/1442596/000000000016062042/filename1.pdf> (last visited Jan. 16, 2019)

1 of actual and projected EBIT to GAAP net income . . .”).⁹

2 45. Compliance with Regulation G is mandatory under Section 14(a), and non-
3 compliance constitutes a violation of Section 14(a). Thus, in order to bring the Proxy into
4 compliance with Regulation G, Defendants must provide a reconciliation of the non-GAAP
5 financial measures to their respective most comparable GAAP financial measures.

6 ***The Financial Projections are Materially Misleading and Violate SEC Rule 14a-9***

7 46. In addition to the Proxy’s violation of Regulation G, the lack of reconciliation or,
8 at the very least, the line items utilized in calculating the non-GAAP measures renders the financial
9 forecasts disclosed materially misleading as shareholders are unable to understand the differences
10 between the non-GAAP measures and their respective most comparable GAAP financial
11 measures. Such projections are necessary to make the non-GAAP projections included in the
12 Proxy not misleading for the reasons discussed above.

13 47. Moreover, the Forecasts are clearly material since the Board considered the
14 Company’s “prospects and likelihood of realizing superior benefits through remaining an

15 ⁹ Available at [https://www.sec.gov/Archives/edgar/data/1266719/000114420411046281/](https://www.sec.gov/Archives/edgar/data/1266719/000114420411046281/filename1.htm)
16 [filename1.htm](https://www.sec.gov/Archives/edgar/data/1266719/000114420411046281/filename1.htm) (last visited Jan. 16, 2019). See also *Actel Corporation*, SEC Staff Comment Letter
17 2 (Oct. 13, 2010) (“Opinion of Actel’s Financial Advisor, page 24 . . . This section includes non-
18 GAAP financial measures. Please revise to provide the disclosure required by Rule 100 of
19 Regulation G.”). Available at [https://www.sec.gov/Archives/edgar/data/907687/00000000001](https://www.sec.gov/Archives/edgar/data/907687/000000000010060087/filename1.pdf)
20 [0060087/filename1.pdf](https://www.sec.gov/Archives/edgar/data/907687/000000000010060087/filename1.pdf) (last visited Jan. 16, 2019). See also *The Spectranetics Corporation*, SEC
21 Staff Comment Letter 1 (July 18, 2017) (“Item 4. The Solicitation or Recommendation Certain
22 Spectranetics Forecasts, page 39 . . . [P]rovide the reconciliation required under Rule 100(a) of
23 Regulation G”). Available at [https://www.sec.gov/Archives/edgar/data/789132/0000000000](https://www.sec.gov/Archives/edgar/data/789132/000000000017025180/filename1.pdf)
24 [17025180/filename1.pdf](https://www.sec.gov/Archives/edgar/data/789132/000000000017025180/filename1.pdf) (last visited Jan. 16, 2019). The SEC Office of Mergers and Acquisitions
25 applied Regulation G in these transactions, which reflect the SEC’s official position. Any claim
26 that the SEC has officially sanctioned the use of non-GAAP financial forecasts for business
27 combinations when the Board itself created and relied on such non-GAAP forecasts to recommend
28 a transaction such as the Proposed Transaction, is incorrect. The SEC’s website provides certain
unofficial guidance for certain matters, called Compliance and Disclosure Interpretations
 (“C&DI”), which through the use of Q&As reflect the views of particular SEC staff and on which
 certain issuers have in the past claimed an exemption from Regulation G. The SEC itself expressly
 disclaims C&DIs as they are not regulations that have been reviewed by the SEC, and the SEC
 expressly states that they are not binding and should not be relied on. See
 www.sec.gov/divisions/corpfin/cfguidance.shtml (last visited Jan. 16, 2019).

1 independent company” in recommending shareholders vote in favor of the Proposed Transaction,
2 Proxy 94. As such, shareholders would clearly want a complete and non-misleading understanding
3 of those Forecasts.

4 48. In order to cure the materially misleading nature of the projections under SEC Rule
5 14a-9 as a result of the omitted information on pages 119-20, Defendants must provide a
6 reconciliation table of the non-GAAP financial measures to the most comparable GAAP measures.

7 49. In sum, the Proxy independently violates: (i) Regulation G, which requires a
8 presentation and reconciliation of any non-GAAP financial measure to its most directly
9 comparable GAAP equivalent; and (ii) Rule 14a-9, since the material omitted information renders
10 certain statements, discussed above, materially incomplete and misleading. As the Proxy
11 independently contravenes the SEC rules and regulations, Defendants violated Section 14(a) and
12 Section 20(a) of the Exchange Act by filing the Proxy to garner votes in support of the Proposed
13 Transaction.

14 50. Absent disclosure of the foregoing material information prior to the special
15 shareholder meeting, Plaintiff and the other members of the Class will be unable to make a fully-
16 informed decision regarding whether to vote in favor of the Proposed Transaction, and are thus
17 threatened with irreparable harm, warranting the injunctive relief sought herein.

18 COUNT I

19 **(Against All Defendants for Violations of Section 14(a) of the Exchange Act** 20 **and 17 C.F.R. § 244.100 Promulgated Thereunder)**

21 51. Plaintiff incorporates each and every allegation set forth above as if fully set forth
22 herein.

23 52. Section 14(a)(1) of the Exchange Act makes it “unlawful for any person, by the use
24 of the mails or by any means or instrumentality of interstate commerce or of any facility of a
25 national securities exchange or otherwise, in contravention of such rules and regulations as the
26 Commission may prescribe as necessary or appropriate in the public interest or for the protection

1 of investors, to solicit or to permit the use of his name to solicit any proxy or consent or
2 authorization in respect of any security (other than an exempted security) registered pursuant to
3 section 78l of this title.” 15 U.S.C. § 78n(a)(1).

4 53. As set forth above, the Proxy omits material information required by SEC
5 Regulation G, 17 C.F.R. § 244.100, which therefore constitutes an independent violation of Section
6 14(a). SEC Regulation G, among other things, requires an issuer that chooses to disclose a non-
7 GAAP measure to provide a presentation of the “most directly comparable” GAAP measure, and
8 a reconciliation “by schedule or other clearly understandable method” of the non-GAAP measure
9 to the “most directly comparable” GAAP measure. 17 C.F.R. § 244.100(a).

10 54. The failure to reconcile the numerous material non-GAAP financial measures
11 included in the Proxy is a violation of Regulation G and constitutes a violation of Section 14(a).

12 55. The misrepresentations and omissions in the Proxy are material to Plaintiff and the
13 Class, who will be deprived of their right to cast an informed vote if such misrepresentations and
14 omissions are not corrected prior to the vote on the Proposed Transaction.

15 56. Plaintiff and the Class have no adequate remedy at law. Only through the exercise
16 of this Court’s equitable powers can Plaintiff and the Class be fully protected from the immediate
17 and irreparable injury that Defendants’ actions threaten to inflict.

18 **COUNT II**

19 **(Against All Defendants for Violations of Section 14(a) of the Exchange Act**
20 **and Rule 14a-9 Promulgated Thereunder)**

21 57. Plaintiff incorporates each and every allegation set forth above as if fully set forth
22 herein.

23 58. SEC Rule 14a-9 prohibits the solicitation of shareholder votes in Proxy
24 communications that contain “any statement which, at the time and in the light of the circumstances
25 under which it is made, is false or misleading with respect to any material fact, or which omits to
26 state any material fact necessary in order to make the statements therein not false or misleading[.]”

1 17 C.F.R. § 240.14a-9.

2 59. Regulation G similarly prohibits the solicitation of shareholder votes by “mak[ing]
3 public a non-GAAP financial measure that, taken together with the information accompanying that
4 measure . . . contains an untrue statement of a material fact or *omits to state a material fact*
5 *necessary in order to make the presentation of the non-GAAP financial measure . . . not*
6 *misleading.*” 17 C.F.R. § 244.100(b) (emphasis added). The SEC’s official public position is to
7 enforce Regulation G in merger transactions by compelling target companies to amend solicitation
8 material, including proxies, to comply with Regulation G.

9 60. Defendants have issued the Proxy with the intention of soliciting shareholder
10 support for the Proposed Transaction. Each of the Defendants reviewed and authorized the
11 dissemination of the Proxy, which fails to provide critical information regarding, amongst other
12 things, the financial projections for the Company.

13 61. In so doing, Defendants made untrue statements of fact and/or omitted material
14 facts necessary to make the statements made not misleading. Each of the Individual Defendants,
15 by virtue of their roles as directors, were aware of the omitted information but failed to disclose
16 such information, in violation of Section 14(a). The Individual Defendants were therefore
17 negligent, as they had reasonable grounds to believe material facts existed that were misstated or
18 omitted from the Proxy, but nonetheless failed to obtain and disclose such information to
19 shareholders although they could have done so without extraordinary effort.

20 62. The Individual Defendants knew or were negligent in not knowing that the Proxy
21 is materially misleading and omits material facts that are necessary to render it not misleading.
22 The Individual Defendants undoubtedly reviewed and relied upon the omitted information
23 identified above in connection with their decision to approve and recommend the Proposed
24 Transaction.

1 63. The Individual Defendants knew or were negligent in not knowing that the material
2 information identified above has been omitted from the Proxy, rendering the sections of the Proxy
3 identified above to be materially incomplete and misleading.

4 64. The Individual Defendants were, at the very least, negligent in preparing and
5 reviewing the Proxy. The preparation of a Proxy statement by corporate insiders containing
6 materially false or misleading statements or omitting a material fact constitutes negligence. The
7 Individual Defendants were negligent in choosing to omit material information from the Proxy or
8 failing to notice the material omissions in the Proxy upon reviewing it, which they were required
9 to do carefully as the Company's directors. Indeed, the Individual Defendants were intricately
10 involved in the process leading up to the signing of the Merger Agreement and the preparation of
11 the Company's financial projections.

12 65. Finisar is also deemed negligent as a result of the Individual Defendants'
13 negligence in preparing and reviewing the Proxy.

14 66. The misrepresentations and omissions in the Proxy are material to Plaintiff and the
15 Class, who will be deprived of their right to cast an informed vote if such misrepresentations and
16 omissions are not corrected prior to the vote on the Proposed Transaction.

17 67. Plaintiff and the Class have no adequate remedy at law. Only through the exercise
18 of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate
19 and irreparable injury that Defendants' actions threaten to inflict.

20 **COUNT III**

21 **(Against the Individual Defendants for Violations**
22 **of Section 20(a) of the Exchange Act)**

23 68. Plaintiff incorporates each and every allegation set forth above as if fully set forth
24 herein.

25 69. The Individual Defendants acted as controlling persons of Finisar within the
26 meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as

1 officers and/or directors of Finisar, and participation in and/or awareness of the Company's
2 operations and/or intimate knowledge of the incomplete and misleading statements contained in
3 the Proxy filed with the SEC, they had the power to influence and control and did influence and
4 control, directly or indirectly, the decision making of the Company, including the content and
5 dissemination of the various statements that Plaintiff contends are materially incomplete and
6 misleading.

7 70. Each of the Individual Defendants was provided with or had unlimited access to
8 copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or
9 shortly after these statements were issued and had the ability to prevent the issuance of the
10 statements or cause the statements to be corrected.

11 71. In particular, each of the Individual Defendants had direct and supervisory
12 involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had
13 the power to control or influence the particular transactions giving rise to the Exchange Act
14 violations alleged herein and exercised the same. The Proxy at issue contains the unanimous
15 recommendation of each of the Individual Defendants to approve the Proposed Transaction. They
16 were thus directly involved in preparing the Proxy.

17 72. In addition, as described herein and set forth at length in the Proxy, the Individual
18 Defendants were involved in negotiating, reviewing, and approving the Merger Agreement. The
19 Proxy purports to describe the various issues and information that the Individual Defendants
20 reviewed and considered. The Individual Defendants participated in drafting and/or gave their
21 input on the content of those descriptions.

22 73. By virtue of the foregoing, the Individual Defendants have violated Section 20(a)
23 of the Exchange Act.

24 74. As set forth above, the Individual Defendants had the ability to exercise control
25 over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9 by
26 their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these

1 Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate
2 result of Individual Defendants' conduct, Plaintiff and the Class will be irreparably harmed.

3 75. Plaintiff and the Class have no adequate remedy at law. Only through the exercise
4 of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate
5 and irreparable injury that Defendants' actions threaten to inflict.

6 **PRAYER FOR RELIEF**

7 **WHEREFORE**, Plaintiff prays for judgment and relief as follows:

8 A. Declaring that this action is properly maintainable as a Class Action and certifying
9 Plaintiff as Class Representative and his counsel as Class Counsel;

10 B. Enjoining Defendants and all persons acting in concert with them from proceeding
11 with the shareholder vote on the Proposed Transaction or consummating the Proposed Transaction,
12 unless and until the Company discloses the material information discussed above which has been
13 omitted from the Proxy;

14 C. Directing Defendants to account to Plaintiff and the Class for all damages sustained
15 as a result of their wrongdoing;

16 D. Awarding Plaintiff the costs and disbursements of this action, including reasonable
17 attorneys' and expert fees and expenses; and

18 E. Granting such other and further relief as this Court may deem just and proper.

19 **JURY DEMAND**

20 Plaintiff demands a trial by jury on all issues so triable.

21 Dated: January 16, 2019

22 Respectfully submitted,

23 **FARUQI & FARUQI, LLP**

24 **OF COUNSEL:**

By: /s/ Benjamin Heikali
Benjamin Heikali, Bar No. 307466
10866 Wilshire Blvd., Suite 1470
Los Angeles, CA 90024

25 **FARUQI & FARUQI, LLP**

1 Nadeem Faruqi
2 James M. Wilson, Jr.
3 685 Third Ave., 26th Fl.
4 New York, NY 10017
5 Telephone: (212) 983-9330
6 Email: nfaruqi@faruqilaw.com
7 Email: jwilson@faruqilaw.com

Tel.: (424) 256-2884
Fax: 424.256.2885
Email: bheikali@faruqilaw.com

Counsel for Plaintiff

Counsel for Plaintiff