[redacted]

C. The Foreign Representatives Approve the TTLA Notwithstanding their Concerns [redacted]

11. Mr. Sakamoto and his team consistently voiced concerns about the [redacted]s in the TTLA and [redacted] Yet, Mr. Sakamoto chose to execute the TTLA anyway. [redacted]

[redacted]

[redacted]

[redacted] [14] [redacted]

13. Notwithstanding these unresolved concerns relating to the [redacted] the next day Mr. Sakamoto signed the TTLA and

---

[redacted]

[redacted]

III Elpida's Proposed Sale of Patents to Rambus and Grant of a Patent License [redacted] to Micron

14. Shortly after the TTLA and the Micron Sponsorship Agreement were executed, in July 2012, Mr. Sakamoto and his team began negotiations with Rambus with respect to the Rambus PLA. [redacted]

15. [redacted] a

[15] Because the Rambus PLA was a pre-petition agreement, the Foreign Representatives, in their capacities as Elpida's trustees, had the option to cause Elpida to exercise its right under Article 61, Paragraph 1 of the JCRA to terminate the Rambus PLA. (See Rambus Motion ¶ 7.) The Foreign Representatives, in connection with the PPA, have entered into an Amended PLA with Rambus [redacted]

[17] A patent family is a set of patents obtained in various countries to protect a single invention.

[redacted]

16. [redacted]

17. [redacted] This deal was documented in a patent purchase agreement between the Foreign Representatives, on behalf of Elpida, and Rambus. (Patent

Purchase Agreement between Rambus Inc. and Elpida Memory, Inc. (the "PPA").)[18] [redacted]

A. [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

---

[18] Attached as Exhibit A to Notice of Filing of Unredacted Patent Purchase Agreement [Dkt. No. 278].

[redacted]

[redacted]

20. [redacted]

[redacted]

B. [redacted]

[redacted] [redacted]

[redacted]

[redacted] [redacted]

[redacted]

20 "NPE" stands for non-practicing entity, which is a patent owner that acquires patents to enforce such patents through litigation and the negotiation of licenses, rather than utilize the patented invented.

23. [redacted]

24. [redacted] Instead, Elpida kept the offer, and subsequent transaction, a secret.

C. After Learning of a Potential Hynix Bid, the Foreign Representatives Agreed to Terms in the PPA and the Associated Micron PLA that Will Harm Elpida [redacted]

25. As is customary in a patent purchase agreement, the PPA provides Elpida with a license to the patents it is selling to Rambus so that Elpida cannot be sued by Rambus or its successor in interest for its use of the patents it previously owned. (PPA § 4.1.) [redacted]

26. However, knowing that Hynix was contemplating an alternative plan, Mr. Sakamoto agreed to a provision of the PPA that permits Rambus to terminate Elpida's license to the patents in the event Elpida is acquired by Hynix. (<u>See, e.g.</u>, PPA § 4.1) ("Rambus may terminate the rights and licenses granted under this Section 4.1 if and only to the extent Elpida undergoes any Change of Control in which SK Hynix, Inc. or any of its Affiliates acquires Control of Elpida or its Subsidiaries.").

27. [redacted]

[redacted]

[redacted]

[redacted]

28. The likelihood that the Micron deal would close was a materialized component of the negotiations. [redacted]

29. [redacted] At no point has Mr. Sakamoto or his team attempted to justify his assumption regarding deal certainty or why, [redacted], he and his team spent so much effort trying to forestall an alternative plan from taking hold.

D. [redacted]

30. As was the case under the TTLA, Micron also got its own deal protection in connection with the Rambus sale. [redacted]

31. Nonetheless, Mr. Sakamoto, in connection with the PPA, agreed to a patent license agreement with Micron (the "Micron PLA") [redacted] The Micron PLA was executed by Mr. Sakamoto, contemporaneously with the PPA.

32. [redacted]

[redacted]

[redacted]

ARGUMENT

33. Each of the TTLA, the PPA and the Micron PLA either transfer assets or interests in assets of Elpida located within the territorial jurisdiction of the U.S. As such, the law in the case is settled: the Foreign Representatives cannot transfer any U.S. assets outside the ordinary course of business without first demonstrating under sections 363(b) and 1520(a) of the Bankruptcy Code that the proposed transfer is a sound exercise of the trustee's business judgment. In re Elpida Memory, Inc., Case No. 12-10947 (CSS) (Nov. 16, 2012) [Dkt. No. 293] (the "Opinion"). Indeed, as this Court found, "[t]he Foreign Representatives must present evidence . . . that Elpida's entry into the transactions subject to the Rambus Motion and Micron Motion *as it pertains to assets located in the territorial jurisdiction of the United States* was a sound exercise of the [Foreign Representatives'] business judgment." Id. (emphasis in original).[24]

[24] The Foreign Representatives make a passing claim that the PPA, the TTLA and the Micron PLA are ordinary course transactions. That is clearly not the case. Courts have generally interpreted "ordinary course of business" in section 363(b) to "embrace the reasonable expectations of interested parties of the nature of transactions that the debtor would likely enter in the course of its normal, daily business." In re Lavigne, 114 F.3d 379, 384 (2d. Cir. 1997) (quoting In re Watford, 159 B.R. 597, 599 (M.D. Ga. 1993), aff'd without opinion, 61 F.3d 30 (11th Cir. 1995)). To that end, in determining whether a transaction is "ordinary," courts have applied two tests, both of which must be satisfied. In re Roth Am., Inc., 975 F.2d 949, 953 (3d Cir. 1992); In re Nellson Nutraceutical, Inc., 369 B.R. 787, 797 (Bankr. D. Del. 2007). The horizontal test asks whether the transaction is of the sort commonly undertaken by companies in that industry. Roth Am., Inc., 975 F.2d at 953 (citation omitted). The vertical test, on the other hand, examines the reasonable expectations of interested parties as to the particular debtor in possession, id., and the court must consider the size, nature and type of business, and the size and nature of the transactions in question. United States ex rel Harrison v. Estate of Deutscher (In re H&S Trans., Inc.), 115 B.R. 592, 598 (M.D. Tenn. 1990) (citing In re Johns-Manville Corp., 60 B.R. 612, 617 (Bankr. S.D.N.Y. 1986)). Here, the sales proposed in the 363 Motions do not satisfy either test and, thus, cannot be deemed ordinary course transactions. As described above, [redacted] s described in detail herein, each of the proposed transactions contain provisions that have a material and harmful impact on Elpida's reorganization value and restructuring alternatives. As such, these transactions

34. A bankruptcy court may only approve a sale outside the ordinary course of business after considering "all salient factors pertaining to the proceeding" and "find[ing] from the evidence presented" that a sufficient business justification exists to sell the assets. Comm. of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983). As this Court has explained,

> The sale of assets which is not in the debtor's ordinary course of business requires proof that: (1) there is a sound business purpose for the sale; (2) the proposed sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the buyer has acted in good faith.

In re Exaeris, Inc., 380 B.R. 741, 744 (Bankr. D. Del. 2008) (citing In re Del. & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991)).

35. As a guide to bankruptcy courts, the Lionel court set forth a non-exhaustive list of factors that might be relevant in determining whether a "sound business justification" exists. 722 F.2d at 1071; see also In re Del. & Hudson Ry. Co., 124 B.R. at 176 (citing Lionel and listing factors to consider). These factors include:

- the proportionate value of the asset to the estate as a whole;
- the amount of elapsed time since the filing;
- the likelihood that a plan of reorganization will be proposed and confirmed in the near future;
- the effect of the proposed disposition on future plans of reorganization;
- the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions; and

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cannot possibly be considered ordinary course under either the vertical or horizontal tests. Notably, the Foreign Representatives do not point to any authority finding any similar transaction to be ordinary course.

- perhaps most importantly, whether the asset is increasing or decreasing in value.

Lionel, 722 at 1071; In re Montgomery Ward Holding Corp., 242 B.R. 147, 155 (D. Del. 1999). Indeed, any exercise of business judgment must be consistent with the trustee's obligation to maximize value for the estate and creditors. See Myers v. Martin (In re Martin), 91 F.3d 389, 394 (3d Cir. 1996) ("[I]t is the trustee's duty to both the debtor and the creditor to realize from the estate all that is possible for distribution among the creditors."); In re Integrated Res., Inc., 135 B.R. 746, 750 (Bankr. S.D.N.Y.1992) ("When a debtor desires to sell an asset, its main responsibility, and the primary concern of the bankruptcy court, is the maximization of the value of the asset sold.").

36. As Trustees in Elpida's Japanese Proceeding, the Foreign Representatives are the only parties authorized under Japanese law to operate Elpida's business and execute non-ordinary course transactions on behalf of Elpida. Indeed, under section 1520(a)(3) of the Bankruptcy Code, the Foreign Representatives are the *only* parties expressly authorized to operate Elpida's business and to seek to transfer Elpida's U.S. assets outside of the ordinary course.[25] Moreover, this Court further ordered that the Foreign Representatives "are entrusted with the administration or realization of all or part of the Debtor's assets located within the territorial jurisdiction of the United States. . . " under section 1521(a)(5) of the Bankruptcy Code.[26] Accordingly, it was the Foreign Representatives, who made the decision to enter into

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[25] That section provides that, "[u]pon recognition of a foreign proceeding that is a foreign main proceeding . . . unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552. . . ." 11 U.S.C. § 1520(a)(3).

[26] Order Recognizing Foreign Representatives and Foreign Main Proceeding, dated April 24, 2012 [Dkt. No.65].

these non-ordinary course transactions with Rambus and Micron[27] and it was the Foreign Representatives who actually executed each of the agreements memorializing those transfers of Elpida's U.S. assets. (See PPA at 16[redacted] Yet, when the Bondholders requested a deposition of Mr. Sakamoto and his production of documents and communications with Rambus and Micron during negotiations of the agreements at issue, he refused to make himself available for deposition or produce any of the requested documents. As such, the only communications and documents concerning the transactions that have been produced are those of Mr. Nakashima, whom the Foreign Representatives also made available as their Rule 30(b)(6) witness. Mr. Nakashima, however, lacks the personal knowledge needed to testify to, or provide evidence of, a sound business purpose for the agreements[redacted] Thus, in the absence of direct testimony from Mr. Sakamoto, the Foreign Representatives cannot satisfy his burden of providing actual evidence demonstrating a sound business judgment for entering into the PPA, the Micron PLA, or the TTLA.

[redacted]

IV The Court Should Not Approve the PPA and the Micron PLA Because the Foreign Representatives Did Not Exercise Sound Business Judgment

37. As the Foreign Representatives have stated, the PPA and the Micron PLA are two halves of an integrated transaction consisting of the sale of patents to Rambus and license of such patents to Micron. (See Micron Motion ¶ 6.) Therefore, the PPA and the Micron PLA must be analyzed together and not in isolation when determining the purchase price for those transactions and their net effect on Elpida's restructuring. The Foreign Representatives, however, have not demonstrated that these related agreements are the product of a sound business judgment because, among other reasons, (1) the value received from Rambus and Micron was not sufficient to justify the transfers of U.S. assets to be made by Elpida, (2) entry into these agreements improperly restricted and dictated Elpida's possible restructuring options, and (3) such transactions were private sales executed without creditor protections.

A. The Value Received by Elpida from Rambus and Micron did not Justify Entry into These Transactions

38. The transfer of U.S. assets under the Rambus PPA and Micron PLA should be denied first because there is no business justification for the price received by Elpida in exchange for those transfers. In determining whether the value received through a non-ordinary course transaction is fair and reasonable, bankruptcy courts normally require the debtor to show that the assets were adequately marketed. See, e.g., In re Del. & Hudson Ry. Co., 124 B.R. at 179 (noting that evidence supporting a fair and reasonable purchase price include the extensive solicitation of bids, negotiations with several perspective purchasers, and that the chosen offer was the best offer for the assets); cf. In re The SCO Grp., Inc., No. 07-11337 (KG), 2009 WL 2425755, at *4 (Bankr. D. Del. Aug. 5, 2009) (finding a purchase price to be "highly suspect"

when the sale was clearly a "rushed, last ditch effort to avoid [c]onversion"). Such marketing generally takes the form of a court-supervised public auction. See, e.g., In re Abbotts Dairies of Penn., Inc., 788 F.2d 143, 149 (3d Cir. 1986) ("Generally speaking, an auction may be sufficient to establish that one has paid 'value' for the assets of a bankrupt."); In re Smurfit-Stone Container Corp., No. 09-10235 (BLS), 2010 WL 2403793, at *10 n.6 (Bankr. D. Del. June 11, 2010) (noting that a "market test, consisting of a court-approved solicitation and auction process, represents the format utilized in the overwhelming majority of asset sales").

39. Public auctions are certainly preferred.[28] See Del. Bankr. L.R. 6004-1(b)(iv)(D) (requiring that a motion seeking approval of an asset sale must disclose and justify why the sale will be conducted privately). However, a court may still approve a "private" sale provided that the movant can produce compelling evidence to demonstrate that the price is fair and that no public auction of the assets is practical under the circumstances.

40. Courts in the Third Circuit consider a number of factors when assessing a private section 363(b) sale, including, among others, (i) evidence of need for a sale on a short timeframe, see, e.g., In re Hoop Holdings, LLC, No. 08-10544 (BLS) (Bankr. D. Del. Apr. 23, 2008) [Dkt. No. 319] (finding that "time is of the essence," as an attempt to conduct an auction would result in a "significant burn of cash"); In re Bldg. Materials Holding Corp., No. 09-12074 (KJC) (Bankr. D. Del. Dec. 30, 2009) [Dkt. No. 1237] (considering the fact that a willing purchaser was motivated to close the deal quickly at a high value to take advantage of tax benefits only

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[28] See In re Blue Coal Corp., 168 B.R. 553, 564 (Bankr. M.D. Pa. 1994) ("[The Court] must [not] treat the approval of a private offer in the very same manner that [it] would consider the confirmation of a public sale . . . . [T]he court [is cautioned] to treat the results of a public sale with some deference . . . [while] retain[ing] a greater degree of flexibility in reviewing a privately negotiated sale . . . "); see also, In re Dura Auto. Sys., Inc., No. 06-11202 (KJC), 2007 WL 7728109, at *93 (Bankr. D. Del. Aug. 15, 2007) ("[A]n open and fair auction process [is] the best means for establishing whether a fair and reasonable price is being paid[.]")

available through the end of the year), (ii) evidence that an auction process would not result in a higher price, (iii) whether a prolonged auction process would unnecessarily diminish the value of the estate, and (iv) the relative importance of the asset to the estate, see, e.g., Sheehan v. Dobin, No. 10-5054 (FLW), 2011 WL 1627051, at *3 (D.N.J. Apr. 28, 2011) (approving private sale where trustee retained professional to market the debtor's assets and no evidence suggested that holding a public auction price would have resulted in a better price).

41. In this case, the facts simply do not justify Mr. Sakamoto's attempt to transfer certain of Elpida's U.S. assets to Rambus and Micron via a private sale on an expedited basis and [redacted] As an initial matter, the Foreign Representatives have provided no reasonable explanation as to why Elpida needed to sell these patents now in a private sale [redacted] Nor is there evidence that Elpida lacked the necessary funds to make those royalty payments or that Rambus was a sole-source buyer of the patents. To the contrary, discovery conducted to date indicates that the sale price obtained by Elpida for the patent transfers, licenses, and [redacted] to Rambus and Micron under the PPA and Micron PLA was grossly insufficient.

42. First, [redacted]

[redacted]

43. [redacted]

44. Third, the final purchase price of $15 million appears to have little or no correlation with the actual value of the patents; but rather, was results-driven. [redacted]

[redacted]

45. Fourth, the stated $15 million purchase price under the PPA must be viewed in conjunction with, and thus be reduced by, the value of the property interests that Elpida is transferring to Micron under the Micron PLA. In re GSC, Inc., 453 B.R. 132, 155 (Bankr. S.D.N.Y. 2011) ("[P]roper analysis of fair value of estate assets" in determining whether proposed sale of assets should be approved, "is the value of the sale in its entirety rather than the value of any individual component of that sale."). [redacted]

46. The Foreign Representatives have attempted to justify their failure to seek and obtain value from Micron by arguing that, pursuant to the Micron Sponsorship Agreement,

[29] See *Infra*, at n.18.

Micron had the right to demand, and indeed did demand, that Elpida grant Micron an immediate license to the patents and release it from all past infringement claims prior to Micron approving Elpida's sale of the patents to Rambus.[30] However, the Micron Sponsorship Agreement provides that Micron shall not "unreasonably" withhold its consent to Elpida's request to sell any of its material patents. (Micron Sponsorship Agreement, Art. 12.3.)[31] If entry into the PPA was a sound exercise of business judgment and in the best interest of Elpida, then it would have been unreasonable, and against its own interests as Elpida's potential owner, for Micron to withhold its consent for such a transaction.

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[30] (See Micron Motion ¶ 7 ("Micron agreed to provide its consent to the Rambus Patent Sale subject to Elpida's agreement to license the Rambus Patents to Micron. The Rambus Patent Sale was therefore conditioned upon the existence of a license to the Rambus Patents in Micron's favor.").)

[31] Article 12.3 of the Micron Sponsorship Agreement provides in pertinent part:

> [T]he Trustees shall cause Both Reorganization Companies, and to cause Both Reorganization Companies to cause their Related Parties, not to, without the prior written consent of the Sponsor **(such consent not to be unreasonably withheld or delayed)**:
>
> > (1) engage in any transaction that has, or is reasonably likely to have a material impact on the business of Both Reorganization Companies and their Related Companies;
> >
> > (2) engage in any transaction that has, or is reasonably likely to have a material impact on the assets, liabilities or results of operations of Both Reorganization Companies and their Related Companies;
> >
> > (3) engage in any transaction that requires court approval under Article 7 of the decision of commencement of reorganization proceedings as of 23 March 2012 against Both Reorganization Companies; or
> >
> > (4) enter into any material license or sale of patents or other intellectual property.

(See Micron Technology, Inc., Current Report (Form 8-K/A) (Amendment No. 2), Ex. 2.1 (Oct. 31, 2012)) (emphasis added).

B. [redacted] ***Provisions in the PPA and Micron PLA have the Effect of Curtailing Significantly Elpida's Restructuring Options***

47. The Court should also deny approval of the PPA and Micron PLA because there is no business justification for including provisions in those agreements that would cause significant damage to Elpida [redacted] As recognized by the Lionel decision, the Court should consider "the effect of the proposed disposition" on the debtor's reorganization efforts when determining whether there is a sound business justification for the proposed transaction. 722 F.2d at 1071; see also In re Montgomery Ward Holding Corp., 242 B.R. at 155.

48. [redacted]

[redacted] A decision to entrench Micron's interests at the expense of Elpida and making it non-economic for Elpida to pursue any other reorganization strategy simply cannot be an exercise of sound business judgment.

C. [redacted]

51. Section 363(b) of the Bankruptcy Code requires that creditors receive notice and an opportunity to be heard before a non-ordinary course transaction may be approved. See 11 U.S.C. § 363(b)(1); see also Fed. R. Bankr. P. 2002(a)(2). The purpose of this requirement is simple: to ensure that transfers maximize value and provide other parties with an opportunity to submit a higher bid is the proposed price is inadequate. See Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Indus. Corp.), 132 B.R. 504, 509 (D. Me. 1991) ("The purpose of notice to creditors and other parties-in-interest when bankruptcy assets are to be sold . . . is to insure that the sales price is fair and that the funds flowing into the bankrupt estate for distribution among creditors or for other purposes are the most that could be realized from the assets sold."); Cedar Island Builders, Inc. v. S. County Sand & Gravel, Inc., 151 B.R. 298, 303 (D.R.I. 1993) ("A lack of proper notice [as mandated by Bankruptcy Rule 2002 and corresponding local rules] corrupts the judicial sale process at its very roots. Without notice, the number of bidders at a judicial sale is limited and the goal of obtaining the optimum sale price for the debtor's assets is frustrated.").

52. Here, the Foreign Representatives seek retroactive approval of transactions that were negotiated and agreed to in near secrecy. Only as a result of the Bondholders' objection to unseal the terms of the PPA did the purchase price of the PPA and the identification numbers of the patents being sold thereunder become publicly available. However, the Foreign Representatives have not invited potential bidders to review and bid on the assets and potential bidders have been kept in the dark about the value of the patents being sold. [redacted]

[redacted] Accordingly, due to the Foreign Representatives' lack of notice and continued insistence on secrecy, potential bidders still do not have access to the most basic information necessary to make an informed bid for the U.S. patents.

V **Entry into the TTLA is not an Exercise of Sound Business Judgment**

53. Similar to the Rambus Deal, the Foreign Representatives have also not presented evidence that Elpida's entry into the TTLA was a sound exercise of the Trustees' business judgment. [redacted] As with the Micron PLA discussed above, these provisions have the effect of entrenching Micron as the only viable reorganization sponsor before any plan has been voted on by creditors and with no apparent benefit to Elpida or its creditors. [redacted]

A. The TTLA Improperly Entrenches Micron as Elpida's Sponsor

54. [redacted]

[redacted]

[redacted] In this highly-competitive DRAM market, such a provision will quickly chill any potential alternative sponsors for Elpida.

55. [redacted]

56. The business justification for including such provisions is as hard for the Bondholders to understand now as it was for Elpida's employees when they were reviewing the terms of the TTLA. [redacted]

[redacted]

B. The Purported Business Reason for the TTLA Does Not Justify its Execution and Any Benefits Are Outweighed by the Harm Imposed on Elpida

57. [redacted]

[redacted] [redacted]

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33 [redacted]

[redacted]

59. [redacted]

60. The cost-benefit analysis of the TTLA is not even close. Yet, the Foreign Representatives provide absolutely no explanation of how or why they decided to accept these Micron-centric provisions wholesale. Accordingly, without any evidence of a business justification, the Foreign Representatives' request for approval of the TTLA, as it relates to the transfer of Elpida's U.S. assets, should be denied.

RESERVATION OF RIGHTS

As of the date of this Objection, the Bondholders have not yet had the opportunity to depose the witness that the Foreign Representatives plan on calling at the hearing. Accordingly, the Bondholders expressly reserve all of their rights and remedies with respect to the 363 Motions, including the right supplement this Objection based on further discovery related to the 363 Motions.

CONCLUSION

For the foregoing reasons, the Bondholders respectfully request that the Court deny approval of the 363 Motions and grant such other and further relief as the Court deems proper.

Dated: November 29, 2012

FOX ROTHSCHILD LLP

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Counsel to the Steering Committee of the Ad Hoc Group of Elpida Bondholders

Exhibit A

Filed Under Seal

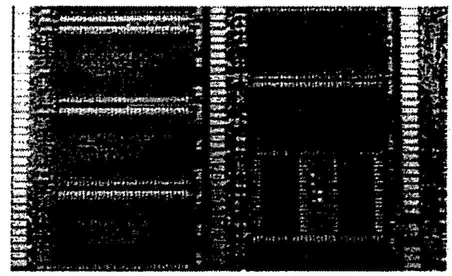
Exhibit B

» Print

Micron wins exclusive right to bid for Elpida: source

Mon, May 7 2012

By Maki Shiraki



TOKYO (Reuters) - Micron Technology won the right to negotiate exclusively to buy Elpida Memory Inc after offering more than 200 billion yen ($2.5 billion) for the failed Japanese chipmaker, according to a source with direct knowledge of the deal that would more than double the U.S. company's global market share.

By acquiring Elpida, Micron would boost its market share to 25 percent, surpassing South Korea's SK Hynix and becoming the second-biggest maker of DRAM memory chips used in personal computers, according to U.S. technology research firm IHS iSuppli. Samsung Electronics is the largest.

Elpida, which also makes chips used in smartphones and tablets, has been searching for an investor to sponsor its restructuring after filing for bankruptcy protection in February with 448 billion yen in liabilities.

Part of the 200 billion yen would be used to repay Elpida's debts and part of it will be invested in the chipmaker's operations, the source said, declining to be identified because the negotiations are confidential.

With investors concerned about how much Micron might pay, its shares have fallen about 20 percent since late March when it was first identified as a bidder for Elpida.

Waddell & Reed analyst Brad Warden said Micron's offer was half a billion dollars more than he had expected but that the potential tie-up would improve the memory industry. Waddell & Reed owns $155 million worth of Micron's stock.

"The most important thing is, after this deal you end up with three major players in DRAM, which makes it a more rational market, with more rational capital decision-making and probably more stability from a pricing standpoint," Warden said.

Micron held $2.1 billion of cash and short-term investments, while long-term debt totaled $2.2 billion, according to the company's earnings statement for the quarter ended March 1. It issued an additional $870 million of convertible senior notes in April.

In the final round of bidding that closed last Friday, Micron also offered to keep open Elpida's two main factories in Japan and guarantee jobs for the company's current employees for the time being, the source said.

Those promises helped it to outmaneuver SK Hynix, which dropped out of the race last week. U.S. private equity firm TPG Capital LP and China's Hony Capital had placed a joint bid in the final round, the source said.

Orbis Investment Management, Micron's third largest shareholder, said it was too early to judge a potential deal, which could involve substantial investments by the Boise, Idaho company to upgrade Elpida's factories in Japan.

Adam Karr, head of Orbis' U.S. research team, said Micron's management has a track record of not overpaying for assets in the cut-throat memory chip business.

"They have a lot of scars, and they've been through a lot in this industry, so we'd be confident they'd handle this in a prudent way," Karr said.

The auction was overseen by Elpida Chief Executive Yukio Sakamoto and lawyer Nobuaki Kobayashi, the court-appointed trustees.

A Micron spokesman and the office of Elpida's trustees declined to comment.

Shares of Micron fell 1.5 percent to $6.45 late Monday afternoon.

POTENTIAL RIVAL BID

A final restructuring plan for Elpida will require the approval of a local court and the company's creditors, not all of them may be happy with the acquisition deal.

Last week, a group of Elpida debt holders said they may submit a rival reorganization plan if trustees agreed to a low-ball bid, referring to a previous media report that put Micron's first-round offer at 150 billion yen.

The 200 billion yen offer is better than the previously reported price, a source close to the group of Elpida debt holders told Reuters on Monday.

"But you cannot tell from the latest reports if what Micron is offering is acceptable or not. The latest numbers could seriously undervalue Elpida," the source said, declining to be identified because he is not allowed to speak to the media.

The bondholders have told Elpida's trustees to share information with key creditors before finalizing any deal with Micron, the source said. They also want to know how much of the money to be injected into Elpida would be used to repay creditors, according to the source.

Elpida previously said it may submit its restructuring plans to a local court by August 21.

A growing preference for tablets has dampened demand for memory chips used in PCs, and growing costs to implement new technology has added to pressure faced by dynamic random-access memory (DRAM) makers.

If Micron buys Elpida, it may convert production lines now making DRAM to produce more profitable chips widely used in smartphones and tablets, many analysts believe.

Elpida's failure was the largest ever by a Japanese manufacturer and an embarrassment for the government, which had propped up Elpida with public funds to save what was billed as the country's last hope for the DRAM chip market.

Elpida was formed in 1999 through a merger of the DRAM units of Hitachi Ltd and NEC Corp under a government initiative to promote the country's DRAM business. In 2003, Mitsubishi Electric sold its DRAM division to Elpida.

Elpida reported losses for five straight quarters, hit by sliding prices of DRAM chips and a strong yen.

Analysts say they are positive about the outlook for chips used in mobile devices, which contributed 50 percent of Elpida's revenue in the latest fiscal year to March while only accounting for 15 percent of the memory capacity it produced.

($1 = 79.8800 Japanese yen)

(Additional reporting by Junko Fujita and Emi Emoto, and Noel Randewich in San Francisco; Editing by Ryan Woo and Phil Berlowitz)

Exhibit C

» Print

SK hynix, GlobalFoundries in talks with Elpida bondholders -source

Mon, May 21 2012

TOKYO, May 21 (Reuters) - A group of Elpida Memory bondholders opposes Micron Technology's offer to buy the bankrupt Japanese chipmaker as too low and has begun talks with South Korea's SK hynix and U.S.-based GlobalFoundries on an alternative plan, a source with direct knowledge of the matter said.

SK hynix, which had dropped out during the second and final round of bidding for Elpida, is interested in buying the memory chipmaker's Taipei operations, while GlobalFoundries is interested in its Hiroshima operations, said the source, who asked not to be identified because the discussions are not public.

Although the talks are still very preliminary, if SK hynix and GlobalFoundries agree to pay a price that satisfies bondholders, the group may file a rival restructuring plan for Elpida to the Tokyo district court in hopes of starting a new round of bidding, the person said.

The submission of an alternative plan, which is highly unusual in bankruptcy cases in Japan, would require the approval of the court before it could be put to a vote of Elpida's debt holders, including its banks.

U.S.-based Micron won the right to negotiate exclusively to buy Elpida, Japan's sole maker of dynamic random-access memory (DRAM) chips, with a bid that a source with direct knowledge of the deal said was worth 200 billion yen ($2.5 billion).

Elpida, which is trying to stay in business after failing in February with 448 billion yen in liabilities, Japan's biggest bankruptcy ever by a manufacturer, chose Micron as its preferred investor early this month.

TPG Capital LP and China's Hony Capital also presented a joint bid in the final round of bidding.

The group of bondholders had said a Micron proposal reported in Japanese media before the final round of bidding worth 150 billion yen was too low. The bondholders did not identify themselves in a filing to a U.S. court.

EXHIBIT 6

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 15
Elpida Memory, Inc.,	)	Case No. 12-10947 (CSS)
Debtor in a Foreign Proceeding.	)	**Re: Docket Nos. 163-166**

MEMORANDUM OF FOREIGN REPRESENTATIVES REGARDING CHAPTER 15 AND BANKRUPTCY CODE SECTIONS 363 AND 107

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITIES

Mr. Yukio Sakamoto and Mr. Nobuaki Kobayashi, as foreign representatives (the "Foreign Representatives") of Elpida Memory, Inc. ("Elpida"), a Japanese company that is the subject of reorganization proceedings under Japanese law ("Japan Proceeding") currently pending before the Tokyo District Court, Eighth Civil Division ("Tokyo Court"), submit this memorandum regarding the application of Sections 363 and 107 of the Bankruptcy Code in the context of this case.

Background

A. Elpida's Japanese Case, Recognition, and the Instant Motions

Elpida is a Japanese corporation that has commenced reorganization proceedings under the Japan Corporate Reorganization Act (*Kaisha Kosei Ho*) ("JCRA") in the Tokyo Court. This Court has recognized Elpida's Japan proceeding as a foreign main proceeding, and its Trustees as foreign representatives, under 11 U.S.C. § 1517.

After the commencement of Elpida's case, its Trustees determined that Elpida needed a sponsor in order to have a viable plan. To select the sponsor, the Trustees engaged in a rigorous auction process in Japan. See Status Report filed November 7, 2012 ("Status Report"), Ex. 4 (Order of Tokyo Court rejecting proposed Bondholder Plan ("Bondholder Plan Order")) ¶ 5(2); Ex. 2 (Report of Examiner ("Examiner Opinion") recommending Trustees' reorganization plan ("Trustee Plan")), at 4.

Micron Technology, Inc. ("Micron") was the winning bidder, and on July 2, 2012, the Tokyo Court approved the execution of a sponsor agreement between Elpida and Micron. In contemplation of the ultimate implementation of the sponsor agreement, the Trustees also sought authority for certain technology transfer agreements ("Micron Agreements"). On July 2, 2012, the Tokyo Court approved the Micron Agreements (the "Micron Order"), and sealed the application for authority to execute the Micron

Agreements, including its exhibits ("Micron Sealing Order"). See Debtor's Exhibits ("Debtor's Exs.") 3 and 4. On October 31, 2012, the Tokyo Court approved the Trustee Plan for creditor vote. See Status Report, Ex. 3 (Order of Tokyo Court referring Trustee Plan for creditor vote).

The Trustees also entered into agreements with Rambus Inc. ("Rambus") to sell certain Elpida patents, some registered in the United States, and to continue to cross-license certain patents ("Rambus Agreements," and with the Micron Agreements, the "Agreements"). On August 10, the Tokyo Court approved the Rambus Agreements ("Rambus Order") and ordered the application for approval and its exhibits sealed as well (the "Rambus Sealing Order," and with the Micron Sealing Order, the "Sealing Orders"). See Debtor's Exs. 1 and 2.

Elpida's Foreign Representatives then filed applications in this Court for approval under 11 U.S.C. §§ 1520 and 363 of asset transfers within the territorial United States.

B. Elpida's Prepetition Yen-Denominated Bonds

Pre-petition, Elpida had issued several series of yen-denominated, unsecured bonds in Japan ("Japanese Bonds"). Its Bondholders have asserted claims in the Japan proceeding, have met with the Examiner and the Court, and have proposed a competing Bondholder Plan. On October 29, 2012, certain Bondholders asked the Tokyo Court to vacate its Sealing Orders, and to defer to the ruling of this Court before approving any plan for a vote. See Status Report, Ex. 1 ("Bondholder Motion") ¶ 5.

> "The [Bondholders] believe that there is an extremely high probability that U.S. Federal Bankruptcy Court will not approve the [Agreements]. In that case, this may have a significant impact on the ability to implement the [Bondholder Plan]. Furthermore, the [Bondholders] believe that the commencement of disclosure and the examination of witnesses in U.S. Federal Bankruptcy Court may reveal that the [Agreements] unjustly transfer value held by the reorganizing

> company to Micron, and the impact this has on the ability to implement the [Bondholder plan.]. For the reasons above, it is believed that the legality of both the [Trustee Plan] and the [Bondholder Plan] can only be determined after sufficient consideration of the result of the December hearing[.]" Id. ¶ 6.

C. The Tokyo Court's Rejection of the Bondholders' Claims

The Tokyo Court has not ruled upon the Bondholder Motion. However, in its Bondholder Plan Order, the Tokyo Court specifically rejected the Bondholders' claim of insufficient information. "[W]e cannot accept the aforementioned claim of the Bondholders that they were unable to submit a revised version of the Draft Reorganization Plan due to the insufficiency of information from the trustees." See Status Report, Ex 4 ¶ 5(1). In addition, the Tokyo Court concluded that the Bondholder Plan was not, and could not be made, feasible, finding that "it is impossible to continue the business and make repayment to the reorganization creditors, etc. through an independent restructuring as provided in the [Bondholder Plan][.]" Id. The Bondholders' information demands have therefore become moot.

ARGUMENT

A CHAPTER 15 COURT MUST DEFER TO THE COURT PRESIDING OVER THE MAIN FOREIGN PROCEEDING

1. Chapter 15 Mandates Comity After Recognition

The purpose of Chapter 15 is to "incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501. Its objectives include cooperation between courts of the United States and courts of foreign countries involved in cross-border insolvency cases, and the "fair and *efficient* administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor." 11 U.S.C. § 1501(a)(3) (emphasis added). After a foreign insolvency case is recognized as a foreign main proceeding, and its trustees as foreign representatives, "a court in the United States *shall* grant comity or cooperation to the foreign representative," 11 U.S.C. § 1509(b)(3) (emphasis added), and must "cooperate to the maximum extent possible with a foreign court or a foreign representative," 11 U.S.C. § 1525(a).

Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). The Supreme Court has recognized that the United States "cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972). "[A]s Judge Cardozo so lucidly observed: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'" RSM Richter Inc. v. Aguilar (In re Ephedra Prods. Liability Litig.), 349 B.R. 333, 336 (S.D.N.Y. 2006) (quoting Loucks v. Standard Oil Co., 224 N.Y. 99, 110-11 (1918) (Cardozo, J.)).

For that reason, U.S. courts have long afforded comity to foreign judicial proceedings involving commercial disputes where such proceedings abide by fundamental standards of procedural fairness and do not violate the laws or public policy of the United States. Argo Fund Ltd. v. Bd. of Directors of Telecom Argentina, S.A. (In re Bd. of Directors of Telecom Argentina, S.A.), 528 F.3d 162, 171-72 (2d Cir. 2008). And the need to grant comity to foreign insolvency proceedings has long been recognized as particularly acute.

> "Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries." Canada S. Ry v. Gebhard, 109 U.S. 527, 539 (1883).

Accord Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-14 (2d Cir. 1987) ("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings" since "[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding"); Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999) (courts have "repeatedly noted the importance of extending comity to foreign bankruptcy proceedings."); Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 458 (2d Cir. 1985) ("The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.").

Consequently, for over a century courts have rejected unfairness claims by bondholders of foreign debtors seeking to escape the jurisdiction of foreign courts. The Supreme Court has held that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes," and that any creditor "may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations." Gebhard, 109 U.S. at 539; accord In re Telecom Argentina, 528 F.3d at 175 ("[F]oreign courts have an interest in conducting insolvency proceedings concerning their own domestic business entities, and . . . 'creditors of an insolvent foreign corporation may be required to assert their claims against a foreign bankrupt before a duly convened bankruptcy tribunal[.]'"(quoting Salen Reefer Servs., 773 F.2d at 458-59)).

Congress explicitly recognized the importance of international comity in cross-border insolvencies when it enacted section 304 in 1978. See Maxwell Comm'cn Corp. plc v. Societe Generale, 93 F. 3d 1036, 1048 (2d Cir. 1996) (discussing legislative history). The principle was given even greater primacy in Chapter 15, in which comity was declared "the central concept to be addressed." See H.R. Rep. No. 109-31, pt. 1, at 109 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 172. Consequently, while a grant of comity under section 304 was a matter of discretion, under Chapter 15 it became mandatory, in part because Chapter 15 is now the only portal through which comity may be sought for protection of a foreign insolvency proceeding. 11 U.S.C. § 1509.

The sole limitation to the comity mandate is found in section 1506:

> "Nothing in this chapter [15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

"Manifestly contrary" is not defined in Chapter 15, but courts have uniformly interpreted the provision very narrowly. See, e.g., In re Ephedra, 349 B.R. at 336 ("'[t]he word "manifestly" in international usage restricts the public policy exception to the most fundamental policies of the United States.' H.R. Rep. No. 109-31(I) (2005), at 109, as reprinted in 2005 U.S.C.C.A.N. 88, 172.") (alteration in original). In particular, section 1506 does not authorize scrutiny of every decision of the foreign court, a process that would be inconsistent with the goals of Chapter 15, but only asks whether the foreign proceeding is fair. See SNP Boat Servs. S.A. v. Hotel Le St. James, No. 11-cv-62671-

KMM, 2012 U.S. Dist. LEXIS 54615, at *26-27 (S.D. Fla. Apr. 18, 2012) ("To inquire into a specific foreign proceeding is not only inefficient and a waste of judicial resources, but more importantly, necessarily undermines the equitable and orderly distribution of a debtor's property by transforming a domestic court into a foreign appellate court where creditors are always afforded the proverbial 'second bite at the apple.'"); In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (court "is not required to make an independent determination about the propriety of individual acts of a foreign court"); cf. Victrix, 825 F.2d at 714-15 (court looked to whether the "foreign laws" at issue comported with due process and not whether the specific individual proceeding afforded due process); Salen Reefer Servs., 773 F.2d at 459-60 (analyzing Swedish bankruptcy law to determine whether the foreign bankruptcy proceeding should be accorded comity).

2. The Applications Under Sections 1520 and 363 Must Be Granted

Here, the Tokyo Court has been recognized as the court with the right to control and supervise Elpida's insolvency proceeding, see 11 U.S.C. § 1502(3), and there is no dispute that the Tokyo Court has plenary and primary jurisdiction over Elpida's insolvency case and its creditors, and *in rem* jurisdiction over Elpida's assets.

However, Elpida's assets within the territorial jurisdiction of the United States are also within the *in rem* jurisdiction of this Court. Because only one court can exercise *in rem* jurisdiction over a particular asset, a protocol must exist for determining which court's orders will govern. Here, Chapter 15 dictates that protocol. A filing under Chapter 15 commences an *ancillary* case, see 11 U.S.C. § 1504, and a Chapter 15 court is directed to grant comity to foreign representatives who seek recognition of the orders of the foreign court. 11 U.S.C. § 1509(b)(3).

Pursuant to section 1520, a recognized foreign representative is authorized to use the debtor's U.S. assets in the ordinary course, and to transfer such assets on an extraordinary basis "after notice and a hearing." Thus, section 1520 provides in relevant part:

> "(a) *Upon recognition* of a foreign proceeding that is a foreign main proceeding—
>
> (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
>
> (2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
>
> (3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552[.]" (Emphasis added.)
>
> Section 363 provides, in relevant part:
>
> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ;
>
> * * *
>
> (c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing."

As section 363 applies automatically but only *after recognition* (i.e., *after* the comity obligation has been triggered), it is necessarily a mechanism by which to extend comity to transfers of U.S. assets. "Subsection (a)(2), by its reference to sections 363 and 552 adds to the powers of a foreign representative of a foreign main proceeding an automatic right to operate the debtor's business and exercise the power of a trustee under section 363 and 542, unless the court orders otherwise." H.R. Rep. No. 109-31, pt. 1, at 115, reprinted in 2005 U.S.C.C.A.N. at 177 (emphasis added). The Tokyo Court has authorized Elpida's Trustees to execute the Agreements. See Debtor's Exs. 1 and 3. Because the Foreign Representatives have asked for approval, under section 363, of the use or transfer of Elpida's U.S. assets pursuant to the Micron Order and the Rambus Order, this Court in the exercise of its ancillary jurisdiction, and consistent with the stated goals of section 1501(a), is obliged to do so.[1]

The Bondholders' opposition is based upon a misreading of section 1520. They claim that it restricts, rather than expands, the rights of foreign representatives, and argue that the Model Law upon which Chapter 15 is based requires adherence to local law when using local assets.[2] They contend that this Court should grant *no* comity to the orders of the Tokyo Court, but should instead give those orders a *de novo* review under U.S. law, promising a "showdown" which will pit this Court against the Tokyo Court.

---

[1] Where, in addition to the mere recognition and implementation of a foreign court order, the Chapter 15 court is requested to make additional findings, e.g., a finding of the purchaser's good faith, the court may require any additional evidence for purposes of making those findings only. For example, Rambus has specifically required a finding of good faith under section 363(m) of the Bankruptcy Code, and the Foreign Representatives have filed the *Declaration of Seiji Nakashima* in support of such finding.

[2] The Bondholders referred this Court to Article 20(1)(c) of the Model Law, which provides that "[u]pon recognition . . . [t]he right to transfer, encumber or otherwise dispose of any asset of the debtor is suspended." However, Article 20(1)(c) is addressed to legal systems that do not contain a concept of reorganization or debtor in possession. The UNCITRAL Working Group specifically introduced exceptions to accommodate systems such as in the United States. See UNCITRAL, Report of the Working Group on Insolvency Law on the Work of its Twenty-First Session, U.N. Doc. A/CN.9/435 ¶ 35, available at http://www.uncitral.org/uncitral/en/commission/sessions/30th.html ("[T]he Working Group had agreed [in response to "the concern that an unqualified suspension of transfers of assets might paralyze all transactions of the debtor in the enacting State"] . . . that the matter should be left to be treated as an exception or limitation that might be made to the scope of the suspension under paragraph (2) (A/CN.9/433, para. 125."). The final draft of the Model Law provided for the enacting state's ability to introduce such exceptions. See Model Law, Article 20(2). The inclusion of section 363 within section 1520 is one of those exceptions.

See Hr'g Tr. 33:1-2, Nov. 8, 2012.[3] But their argument ignores the fact that the automatic importation of section 363 is a uniquely American addition, and, as this Court has noted, it is not the Model Law that governs this case, it is Chapter 15, with its specific U.S. character.

Thus, where the Tokyo Court has already issued orders authorizing the transfer of assets over which it has jurisdiction, section 363 must operate within Chapter 15 to facilitate cooperation and comity, enabling this Court to recognize that the Tokyo Court's orders are sufficient evidence for its application. And indeed, courts in this District have taken exactly that approach. See, e.g., In re Spansion Inc., No. 09-10690 (KJC), Order Approving Settlement ¶¶ D, 11, 13 (Jan. 29, 2010) (attached hereto as Exhibit A) (authorizing transfer of assets under Section 363 by Japanese foreign representative based upon the anticipated issuance of an order of the Japanese home court authorizing such transfer, without applying the U.S. standard which governed transfers by related Chapter 11 debtors).

3. The Japan Proceeding Is Not Manifestly Contrary to Any Fundamental U.S. Policy

Finally, there can be no argument that granting comity by recognizing that the Tokyo Court's Micron and Rambus Orders as the basis for section 363 relief can fall afoul of section 1506. Chapter 15 expressly grants section 363 rights after recognition, so the issuance of a section 363 order is consistent with, not "manifestly contrary" to, the

[3] The Bondholders can cite no case in support of any such "showdown." In re Grand Prix Associates Inc., No. 09-16545 (DHS), 2009 Bankr. LEXIS 1779 (Bankr. D.N.J. June 26, 2009), is inapposite. There, no foreign court had previously issued any order, the foreign representatives made no comity request, and the parties were settling a U.S. lawsuit pursuant to which various transfers of U.S. assets were consensually, pursuant to the settlement, required to be effected free and clear and with findings of fairness, reasonableness and good faith.

policy of Chapter 15. The Bondholders hold no property interest in any of Elpida's assets.[4] Nor do they claim that the Japanese process is generally unfair as a matter of law.

No court has refused to grant recognition to the administrative order of a foreign court dealing with the debtor or its assets on the grounds that the foreign procedure was different from U.S. procedure. In particular, under Chapter 15 and old section 304, Japanese bankruptcy proceedings have consistently been found entitled to comity. See, e.g., Katsumi Iida v. Junichi Kitahara (In re Katsumi Iida), 377 B.R. 243 (B.A.P. 9th Cir. 2007) (finding no fundamental U.S. policy offended by recognizing Japanese bankruptcy proceeding); In re Hideki Kojima, 177 B.R. 696, 701 (Bankr. D. Colo. 1995) ("Implicit and explicit in the Bankruptcy Law of Japan is fair and equal treatment for foreign parties in a Japanese case . . . . Clearly, the Japanese bankruptcy law is neither contradictory nor 'repugnant' to the American laws and policies").

Indeed, section 1506 has been used, very rarely, only to deny either recognition generally, or where a creditor property right is implicated. The recent Vitro case is instructive. See Vitro S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro S.A.B. de C.V.), 473 B.R. 117, 130-31 (Bankr. N.D. Tex. 2012). There, creditors asked the Chapter 15 court to deny recognition to a plan approved in a Mexican court based upon two sets of objections – first, to the fairness of the process generally, and to its legality under

[4] If the U.S. assets had been collateral for the bonds, this Court might well have the ability under Section 363(e) to provide adequate protection for the transfers authorized under Section 363 in order to protect a Constitutionally protected property interest. Cf. In re Treco, 240 F.3d 148 (2d Cir. 2001) (under Section 304, refusing to turn over U.S. assets on the basis of comity prior to adjudication of the alleged secured status of the objecting creditor as regards the property at issue.) But no such issue is presented in this case.

Mexican law, and second, to a plan provision that effectively deprived them of a property right – their indemnification rights against non-debtor third parties.

The "unfairness" objections were similar to those raised by the Bondholders. The objectors complained that there were *ex parte* contacts between the debtor and the Mexican judges, that the judges did not consider their objections, and that the proceedings violated Mexican law. The Vitro court refused to deny recognition based on this basis, finding that these procedural complaints did not affect the fundamental fairness of the process and were matters of Mexican law to be addressed by Mexican courts. 473 B.R. 130-31; accord Armada (Singapore) PTE LTD. v. Chetan Shah (In re Ashapura Minechem LTD), No. 11-1468 (JMP), 2012 U.S. Dist. LEXIS 90230, at *32 (S.D.N.Y. June 28, 2012) ("Nothing in the case law suggests that if the proceeding is collective in nature its recognition can be deemed to be against public policy—nor do the facts warrant such a finding.").

The Vitro court declined to recognize Vitro's Mexican plan for an entirely different reason—that the plan, by discharging guarantees of non-debtor parties, deprived creditors of their rights against those non-debtors. The Vitro court concluded that this was a violation of a fundamental U.S. policy, in the context of that case. See 473 B.R. at 131-32; cf. In re Metcalfe, 421 B.R. 685 (finding that release of non-debtor third parties did *not* violate fundamental U.S. policy.) No such issue is presented here. No case supports the Bondholders' demand that this Court completely ignore the comity mandate of Chapter 15.

4. The Section 107 Applications Must Be Granted

The same analysis applies to the applications under section 107 of the Bankruptcy Code, which is made applicable in a Chapter 15 case by section 103, to file certain documents under seal based upon the Sealing Orders.

Section 107(b) requires protection of confidential commercial information[.]" Bankruptcy Rule 9018 permits the grant of such protection on an *ex parte* basis. The Tokyo Court's Sealing Orders are entirely consistent with both. See Status Report, Ex. 4 ¶ 5(1) (confirming need for confidentiality). Yet once again, the Bondholders ask this Court to collaterally attack the Sealing Orders, and to extend *no* comity to the *in rem* administrative orders of the Tokyo Court.

But the Bondholders cannot credibly claim any violation of U.S. policy. Bankruptcy Rule 9018 provides specifically for *ex parte* applications and orders. Further, while U.S. policy favors openness in the courtroom, the policy is plainly not absolute, since section 107 itself provides for sealing, and therefore there is no fundamental U.S. policy precluding the Sealing Orders. And indeed courts have rejected the idea that the policy is of such fundamental importance that it should preclude recognition of a Chapter 15 petition, holding that although public policy strongly favors public access to court records and proceedings, "'the right is not absolute. . . . In limited circumstances, courts must deny access to judicial documents—generally where open inspection may be used as vehicle for improper purposes.'" In re Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 95 (S.D.N.Y. 2012) (omission in original) (quoting In re Orion Pictures Corp., 21 F.3d 24, 26-27 (2d Cir. 1994)).

Conclusion

This Court is required to grant comity to Elpida's Foreign Representatives, and to the orders of the Tokyo Court, and on that basis to grant the applications of the Foreign representatives under sections 1520, 363 and 107 of the Bankruptcy Code.

Dated: November 13, 2012
Wilmington, Delaware

RICHARDS, LAYTON & FINGER, P.A.

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
SPANSION INC., *et al.*,[1]	)	Case No.: 09-10690 (KJC)
	)	Jointly Administered
Debtors.	)	
	)	**Related Docket Nos.: 1213, 1657, 1698, 2132, 2141, 2142, 2152, 2163, 2171, 2340**

In re:	)	Chapter 15
SPANSION JAPAN LIMITED,	)	Case No.: 09-11480 (KJC)
	)	Jointly Administered
Debtor in a Foreign Proceeding.	)	
	)	**Related Docket No.: 98**

ORDER PURSUANT TO 11 U.S.C. § 105, 363, 1501 AND 1521 AND FED. R. BANKR. P. 6004 AND 9019 APPROVING SETTLEMENT BETWEEN SPANSION LLC AND SPANSION JAPAN

On January 15, 2010, the above-captioned debtors and debtors-in-possession in chapter 11 cases jointly administered under Case No. 09-10690 (KJC) (the "Debtors") and Spansion Japan Limited ("Spansion Japan"), debtor in foreign proceeding under Case No. 09-11480 (KJC) (the "Chapter 15 Proceeding") filed a motion (the "Motion") for entry of an order, under sections 105, 363, 1501 and 1521 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 6004 and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing Debtor Spansion LLC and chapter 15 debtor Spansion Japan to (I) enter into a settlement (the "Settlement"), reflected in the Term Sheet attached hereto as

[1] The Debtors in these cases are Spansion Inc., Spansion Technology LLC, Spansion LLC, Cerium Laboratories LLC, and Spansion International, Inc.

Exhibit A (the "Term Sheet") comprised of a series of agreements (the "Definitive Agreements") with Spansion Japan, including, but not limited to, (a) a Foundry Agreement (the "Foundry Agreement"), substantially in the form attached hereto as Exhibit B; (b) a License Agreement (the "License Agreement"), substantially in the form attached hereto as Exhibit C; (c) a Transition Services Agreement (the "Transition Services Agreement"), substantially in the form attached hereto as Exhibit D; (d) a Bailment Agreement (the "Bailment Agreement"), substantially in the form attached hereto as Exhibit E, and (e) the Term Sheet; and (II) fund and cause Spansion LLC's new Japanese subsidiary, Spansion Nihon Limited ("Spansion Nihon"), to purchase Spansion Japan's Kawasaki distribution and research and development business (the "Kawasaki Business"). It appearing that the relief requested by the Motion is in the best interests of the Debtors and Spansion Japan, their estates, their creditors, and other parties in interest; and after due deliberation thereon and sufficient cause appearing therefor, it is hereby

FOUND AND DETERMINED THAT:

A. The Court has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334;

B. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and venue in this district is proper under 28 U.S.C. §§ 1408, 1409 and 1410;

C. Proper and adequate notice of the Motion, the Definitive Agreements and the hearing thereon has been given, and no other or further notice is necessary;

D. Spansion Japan has sought to obtain authorization from the Tokyo District Court in Spansion Japan's corporate reorganization proceeding in Japan (the "Japanese Proceeding") to enter into and consummate the Settlement, and anticipates that the Tokyo District Court (the "Tokyo Court") will grant Spansion Japan authorization to enter into the

Settlement, execute the Definitive Documents and consummate the transactions contemplated thereby;

E. GE Financial Services Corporation ("GE"), for itself and as agent for a syndicate of secured lenders (the "SJL Secured Lenders") in the Japanese Proceeding, has consented to the Settlement consistent with the Term Sheet, conditioned upon (a) this Court's approval of the Settlement and (b) approval of its own term sheet with Spansion Japan, attached hereto as Exhibit F, as same may be modified by agreement of Spansion Japan and the SJL Lenders (the "GE Term Sheet"), by the Tokyo Court in the Japanese Proceeding;

F. Resolution of the disputes of the parties, including the resolution of Spansion Japan's asserted administrative expense under section 503(b) of the Bankruptcy Code in excess of $415,000,000 (the "Administrative Expense") on the terms set forth in the Definitive Agreements is a reasonable exercise of the Debtors' sound business judgment and is in the best interests of the Debtors, their estates, their creditors, and all parties in interest; and

G. Approval of the Settlement will permit Spansion Japan to reorganize its business in the Japanese Proceeding and is therefore consistent with the stated goals of section 1501(a) of the Bankruptcy Code by: (i) fostering the fair and efficient administration of the Japanese Proceeding by protecting the interests of all creditors and other interested parties, including Spansion Japan, (ii) protecting and maximizing the value of Spansion Japan's assets and (iii) facilitating the rescue of Spansion Japan's business, thereby protecting investment and employment; and it is therefore

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED in all respects and the Settlement is APPROVED.

2. The Debtors are authorized to take all actions necessary to implement the relief granted in this Order and the Settlement. In addition, the Debtors are directed, upon the occurrence of the effective date of the Second Amended Plan of Reorganization, as it may be amended, (the "Plan"), to fund the purchase of and cause Spansion Nihon to take all actions necessary to consummate the acquisition of the Kawasaki Business consistent with the Term Sheet and the Definitive Agreements.

3. The Debtors are authorized to execute, deliver and perform under any documents necessary or desirable to consummate the Definitive Agreements and to take such other action that is consistent with the Motion, the Term Sheet and the Definitive Agreements. If the Debtors fail to enter into the Definitive Agreements or cause Spansion Nihon to consummate the purchase of the Kawasaki Business consistent with the terms in the Term Sheet, then there shall be no settlement of Spansion Japan's Administrative Expense.

4. Subject to confirmation of a plan of reorganization by the Debtors, the Debtors shall pay to Spansion Japan the sum of $45,000,000 (the "Settlement Payment"), payable as follows: $10,000,000 on March 31, 2010, $12,500,000 on June 30, 2010, $12,500,000 on September 30, 2010, and $10,000,000 on December 31, 2010. The Settlement Payment shall be in consideration of, among other things, the settlement of Spansion Japan's Administrative Expense including as set forth in Spansion Japan's Motion for Entry of an Order Allowing Certain Claims as an Administrative Expense and Directing Payment of Same (Docket No. 1698). In addition, the Debtors are hereby authorized and directed to pay any other amounts due or required to be paid to Spansion Japan under, and in accordance with the terms of, the Definitive Agreements. Except as otherwise provided herein, subject to the receipt of the Settlement Payment, all accounts payable and accounts receivable between Spansion Japan and

Spansion LLC for any and all activities, including, but not limited to, foundry, distribution, and research and development, before October 27, 2009 shall be considered settled as of October 27, 2009. If the Settlement Payment is not paid for any reason, including the failure to confirm a plan of reorganization that directs such payment to be made on terms consistent with the Settlement, then there shall be no settlement of Spansion Japan's Administrative Expense.

5. Spansion LLC, subject to confirmation of a plan of reorganization by the Debtors, shall pay the sum of $5 million to Spansion Japan as consideration for the provision of certain technical information to the Debtors as provided in the Term Sheet. No such technical information shall be provided to the Debtors unless and until the $5 million is paid.

6. Notwithstanding anything herein to the contrary and for the avoidance of doubt, any amounts due between Spansion Japan and Spansion LLC for the period of October 27, 2009 through and including January 29, 2010 (the "Post-October 27, 2009 Amounts"), are not resolved pursuant to this Order and shall be resolved and netted in accordance with the various agreements between the parties and any net amount paid by the applicable party in accordance with the terms of the purchase orders governing such period. In the event that there are any Post-October 27, 2009 Amounts due and owing to Spansion Japan, such amounts are hereby allowed as an administrative expense under section 503(b) of the Bankruptcy Code in the Debtors' chapter 11 cases and shall be paid to Spansion Japan on or before the effective date of the Debtors' plan of reorganization.

7. With regard to the claims of Spansion LLC against Spansion Japan arising prior to February 9, 2009 (the "Spansion LLC Prepetition Claims"), Spansion LLC is hereby authorized and directed to vote such claims in favor of Spansion Japan's plan of reorganization consistent with the terms herein; provided, however, that Spansion LLC shall not be entitled to

receive any distribution on account of such claims. Except as set forth and subject to the satisfaction of the conditions set forth herein, all claims of Spansion Japan and Spansion LLC against each other shall be expunged, released and satisfied.

8. Notwithstanding anything herein to the contrary, (a) Spansion Japan shall retain its rejection damage claims against Spansion LLC in respect of the rejection of the Second Amended Foundry Agreement or the rejection of any other executory contract or agreement between Spansion LLC and Spansion Japan (collectively, the "Rejection Damage Claims"); (b) Spansion LLC (on behalf of itself and its bankruptcy estate) shall retain all of its rights and defenses against the Rejection Damage Claims, including, but not limited to, (x) any liability that Spansion Japan may have to Spansion LLC under chapter 5 of the Bankruptcy Code and (y) its right to argue that it is entitled to reduce the Rejection Damages Claims by up to $85 million on account of the Spansion LLC Prepetition Claims; and (c) Spansion Japan shall retain all of its rights and defenses to oppose any claim or defense to the Rejection Damage Claims, including, but not limited to, under chapter 5 of the Bankruptcy Code or Spansion LLC's alleged right to reduce the Rejection Damage Claims by up to $85 million on account of the Spansion LLC Prepetition Claims by Spansion LLC or any other party in interest in Spansion LLC's bankruptcy case.

9. Spansion LLC shall support Spansion Japan's reorganization plan in the Japanese Proceeding provided it is consistent in all respects with this Order, and Spansion LLC shall not file any pleading, motion or request for relief in the Japanese Proceeding with respect to Spansion Japan's plan of reorganization without the prior written consent of Spansion Japan. With regards to Spansion LLC's plan of reorganization, Spansion Japan shall be entitled to take any action or file any motion, pleading or response to the plan, including, without

limitation, to address the plan's current classification and treatment of Spansion Japan's Rejection Damage Claims against Spansion LLC, as well as the alleged failure of such plan to establish a reserve for Spansion Japan's Rejection Damage Claims, and the Debtors and any party in interest in the Debtors' cases shall be entitled to respond thereto.

10. In the event that Spansion LLC modifies its plan (a) to include the relevant provisions approved herein and (b) to treat all of Spansion Japan's Rejection Damage Claims as Class 5 general unsecured claims under the plan and provides Spansion Japan a reserve for the full amount of all such Rejection Damage Claims (as agreed by Spansion Japan), and in the event that Spansion LLC circulates to Spansion Japan an approved disclosure statement with respect to its plan that is consistent with all respects with the foregoing, Spansion Japan shall support confirmation of Spansion LLC's plan of reorganization and Spansion Japan will not file any pleading, motion or request for relief with respect to the Debtors' plan of reorganization without the prior written consent of Spansion LLC.

11. As of the first date that both (a) the Tokyo Court shall have approved the GE Term Sheet and (b) either (i) the order confirming the Debtors' Plan becomes a Final Order (as defined in the Plan) or (ii) the Effective Date of the Plan (as defined therein) shall have occurred, GE shall withdraw all claims and pending pleadings or papers in the Debtors' chapter 11 cases; provided, however, that (x) such withdrawal does not affect, waive, or release any of GE's rights under the GE Term Sheet, including its rights to cooperate in Spansion Japan's prosecution of its Rejection Damage Claims, including without limitation the classification and treatment of such Rejection Damage Claims under the Plan, and (y) such withdrawal shall be without prejudice if any situation arises where Spansion Japan's Administrative Expense is not settled, and (z) nothing in the Settlement, the Definitive Agreements, the GE Term Sheet, or this

Order shall affect, modify or release any claims of any of GE's affiliated entities against the Debtors or Spansion Japan unrelated to the Settlement.

12. The Court shall retain exclusive jurisdiction to resolve any dispute arising from or relating to this Order. With regard to the Definitive Agreements, this Court and the Tokyo District Court shall each retain jurisdiction to resolve any dispute arising from or relating to the Definitive Agreements.

13. A copy of the order or writing entered by the Tokyo District Court authorizing Spansion Japan to enter into the Settlement and the Definitive Agreements shall be filed in Spansion Japan's chapter 15 case for the purposes of recognition in accordance with chapter 15 of the Bankruptcy Code.

14. Notwithstanding any Bankruptcy Rules to the contrary, this Order shall take effect immediately upon entry.

Dated: Wilmington, Delaware
January 29, 2010

Honorable Kevin J. Carey
Chief United States Bankruptcy Judge

EXHIBIT 7

United States Bankruptcy Court,
E.D. Virginia,
Alexandria Division.
In re QIMONDA AG, Debtor.

No. 09–14766–SSM.
Oct. 28, 2011.

Background: Following entry of order granting foreign representative's petition for recognition of pending German insolvency proceeding of manufacturer of memory chips for computers, foreign representative moved for determination as to inapplicability to foreign debtor of provision of the Code that prevented debtors from unilaterally terminating the rights of licensees of their intellectual property by rejecting licensing agreements, so as to allow foreign representative to reject licenses for debtor's United States patents and to compel licensees to negotiate new licensing agreements at more favorable rates. Semiconductor manufacturers with which foreign debtor had executed various joint venture and patent cross-licensing agreements objected. The Bankruptcy Court, Robert G. Mayer, J., 2009 WL 4060083, granted the foreign representative's motion, and objectors appealed. The District Court, T.S. Ellis, III, J., 433 B.R. 547, affirmed in part and remanded in part.

Holdings: On remand, the Bankruptcy Court, Stephen S. Mitchell, J., held that:
(1) on the whole, hardship to foreign debtor of depriving it of opportunity to negotiate new licensing agreements at higher rates was outweighed by substantial detriment to licensees, such that foreign representative was not entitled to relief requested on balancing grounds, and
(2) granting relief requested would be "manifestly contrary to the public policy of the United States," as severely impinging an important statutory protection accorded licensees of United States patents and thereby undermining a fundamental United States public policy of promoting technological innovation.

Motion denied.

West Headnotes

[1] Bankruptcy 51 2341

51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases

Bankruptcy statute which barred court, in case ancillary to foreign proceeding, from granting any relief, without first ensuring that interests of creditors and other interested parties, including foreign debtor, were sufficiently protected, prevented foreign representative of manufacturer of semiconductor memory devices, that held both United States and non-United-States patents to various types of memory technology, and that was the subject of insolvency proceedings pending in Germany, from obtaining relief, in form of determination as to inapplicability to foreign debtor of provision of the Bankruptcy Code that prevented debtors from unilaterally terminating the rights of licensees of their intellectual property by rejecting licensing agreements, so as to allow foreign representative to reject licenses for debtor's United States patents and to compel licensees to negotiate new licensing agreements at more favorable rates; on the whole, hardship to foreign debtor of depriving it of opportunity to negotiate new licensing agreements at higher rates was outweighed by substantial detriment to licensees, which had made very substantial investments in research and manufacturing facilities in United States in reliance on design freedom provided by their cross-license agreements with foreign debtor. 11 U.S.C.A. §§ 365(n), 1522(a).

[2] Bankruptcy 51 2341

51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases

Mere fact that application of foreign law will lead to different result than application of United States law, without more, is insufficient to allow court, in case ancillary to foreign insolvency proceeding, to refuse to take action governed by Chapter 15 of the Code, upon ground that this "would be manifestly contrary to public policy of the United States." 11 U.S.C.A. § 1506.

[3] Bankruptcy 51 2341

51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases

To determine whether "public policy" exception to Chapter 15 permits it to refuse to take action in case ancillary to foreign insolvency proceeding, bankruptcy court properly focuses on two factors: (1) whether foreign proceeding is procedurally unfair, and (2) whether application of foreign law, or recognition of foreign main proceeding under Chapter 15, would severely impinge value and import of a United States statutory or constitutional right, such that granting comity would severely hinder United States bankruptcy courts' abilities to carry out the most fundamental policies and purposes of such rights. 11 U.S.C.A. § 1506.

[4] Bankruptcy 51 2341

51 Bankruptcy
51III The Case
51III(H) Cases Ancillary to Foreign Proceedings
51k2341 k. In general. Most Cited Cases

In case ancillary to foreign proceeding brought by foreign representative of bankrupt German manufacturer of semiconductor memory devices, granting foreign representative's request for relief in nature of determination as to inapplicability to foreign debtor of provision of the Bankruptcy Code that prevented debtors from unilaterally terminating the rights of licensees of their intellectual property by rejecting licensing agreements, so as to allow foreign representative to reject licenses for debtor's United States patents and to compel licensees to negotiate new licensing agreements at more favorable rates, would be "manifestly contrary to the public policy of the United States," as severely impinging an important statutory protection accorded licensees of United States patents and thereby undermining a fundamental United States public policy of promoting technological innovation; deferring to German law, to extent it allowed cancellation of debtor's United States patent licenses, would add increased measure of uncertainty to semiconductor industry, which, while it obviously would not bring technological innovation to grinding halt, could nonetheless slow its pace, to detriment of the United States economy. 11 U.S.C.A. §§ 365(n), 1506(a).

***167** G. David Dean, Esquire, Cole, Schotz, Meisel, Forman & Leonard, P.A., Baltimore, MD, Conflicts counsel for Dr. Michael Jaffé as insolvency administrator for Qimonda AG.

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Guy S. Neal, Esquire, Sidley Austin LLP, Counsel, Washington, DC, Marc Palay, Esquire, Sidley Austin LLP, Co-counsel, for Nanya Technology Corporation.

M. Jarrad Wright, Esquire, Weil, Gotshal & Manges, LLP, Counsel, Washington, DC, Jared Bobrow, Esquire, Weil, Gotshal & Manges, LLP, Co-counsel, Redwood Shores, CA, for Micron Technology, Inc.

MEMORANDUM OPINION

STEPHEN S. MITCHELL, Bankruptcy Judge.

Before the court—on remand from the United States District Court—is the motion of Dr. Michael Jaffé, the foreign representative in this cross-border insolvency case, to modify the Supplemental Order to eliminate or restrict the applicability of § 365 of the

Bankruptcy Code. The foreign debtor, Qimonda AG ("Qimonda"), is a German manufacturer of semiconductor memory devices, and the motion is opposed by seven licensees of the debtor's U.S. patents: Samsung Electronics Co., Ltd. ("Samsung"), Infineon Technologies AG ("Infineon"), Micron Technology, Inc. ("Micron"), Nanya Technology Corporation ("Nanya"), International Business Machines Corp. ("IBM"), Hynix Semiconductor, Inc. ("Hynix"), and Intel Corporation ("Intel"). The issues to be resolved are (a) whether the failure of German insolvency law to afford patent licensees the protections they would enjoy under § 365(n) of the Bankruptcy Code is "manifestly contrary" to the public policy of the United States; and (b) whether the licensees of the debtor's United States patents are "sufficiently protected" if they are not accorded those protections. An evidentiary hearing was held on March 1, 2, 3, and 4, 2011, and was continued to March 30, 2011 for final argument after the parties had submitted extensive proposed findings of fact and conclusions of law. For the reasons stated, the court concludes that public policy, as well as the economic harm that would otherwise result to the licensees, ***168** requires that the protections of § 365(n) apply to Qimonda's U.S. patents.

Background and Findings of Fact[FN1]

FN1. Because portions of the testimony and some of the exhibits related to information that had been designated "Highly Confidential—Attorneys' Eyes Only" under a protective order that was entered following the remand, the court proceedings were closed whenever such matters were being presented. To avoid the necessity of a secret annex to this opinion, the findings related to such matters are presented only in the aggregate without identifying specific parties by name or the details of specific transactions.

A.

Qimonda, which had its headquarters in Munich, Germany, was a manufacturer of semiconductor memory devices. It was formed in 2006 as a spin-off of the memory products division of another German company, Infineon, itself a 1999 spin-off of the semiconductor division of still a third German company, Siemens AG ("Siemens"). Qimonda filed an application in the Amtsgericht München—Insolvenzgericht ("Munich Insolvency Court") in Munich, Germany, on January 23, 2009, and Dr. Jaffé was appointed as the Insolvency Administrator on April 1, 2009. On June 15, 2009, Dr. Jaffé filed a petition in this court for recognition of the Qimonda proceedings under Chapter 15 of the Bankruptcy Code. [FN2] On July 22, 2009, Judge Mayer of this court entered an order (Doc. # 56) recognizing the German insolvency proceedings as the foreign main proceeding and a Supplemental Order (Doc. # 57), which, among other provisions, made § 365 of the Bankruptcy Code "applicable in this proceeding."

FN2. Two U.S. subsidiaries of Qimonda had filed voluntary chapter 11 cases several months earlier in the District of Delaware. *In re Qimonda Richmond, LLC,* Case No. 09–10589 (Bankr.D. Del., filed Feb. 20, 2009); *In re Qimonda North American Corp.*, Case No. 09–10590 (Bankr.D. Del., filed Feb. 20, 2009);

Qimonda's assets include approximately 10,000 patents, of which approximately 4,000 are U.S. patents. After receiving communications from two licensees of the patents—Samsung and Elpida Memory, Inc. ("Elpida")—asserting rights under § 365(n) of the Bankruptcy Code, Dr. Jaffé filed a motion to modify the Supplemental Order to remove the reference to § 365 altogether or to qualify it by inserting a proviso that § 365 would apply "only if the Foreign Representative rejects an executory contract pursuant to Section 365 (rather than simply exercising the rights granted to the Foreign Representative pursuant to the German Insolvency Code)." The motion was opposed by Samsung, Elpida, Infineon, Micron, and Nanya. By memorandum opinion and order of November 19, 2009, Judge Mayer determined that deference to German law was appropriate. *In re Qimonda AG,* 2009 WL 4060083 (Bankr.E.D.Va.2009). An Amended Supplemental Order (Doc. # 180) was entered that same day that, while maintaining the general applicability of § 365, inserted, in a somewhat modified form,[FN3] the proviso requested by the Foreign Representative.

FN3. Specifically, the Amended Supplemental Order stated that the application of § 365 "shall not in any way limit or restrict (i) the right of the Administrator to elect performance or nonperformance of agreements

> under § 103 German Insolvency Code or such other applicable rule of law in the Foreign Proceeding, or (ii) the legal consequences of such election; provided, however, if upon a motion by the Administrator under Section 365 of the Bankruptcy Code, the court enters an Order providing for the assumption or rejection of an executory contract, then Section 365 shall apply without limitation solely with respect to the contracts subject to such motion."

An appeal was taken by Samsung, Infineon, Micron, Nanya, and Elpida to the United States District Court, which on July 2, 2010, affirmed in part but remanded***169** to determine whether restricting the applicability of § 365(n) was "manifestly contrary to the public policy of the United States" and whether the licensees would be "sufficiently protected" if § 365(n) did not apply. *In re Qimonda AG Bankruptcy Litigation,* 433 B.R. 547 (E.D.Va.2010). Following the remand, three additional licensees—IBM, Hynix, and Intel—were allowed to intervene.[FN4]

> FN4. Judge Mayer recused himself following the remand because of a conflict involving one of the intervening licensees. After the evidentiary hearing was held, Elpida settled with the foreign representative and withdrew its opposition to the motion.

B.

The evidence at the remand hearing established that Qimonda's most valuable remaining assets are its patents, most of which are related to Dynamic Random Access Memory ("DRAM") technology, but some of which is related to flash memory and to semiconductor process technology. According to the testimony, most of Qimonda's patents are new or have a long remaining life (8 to 9 years on the average). Claims in the amount of approximately € 4 billion—about one-fourth of them by U.S. creditors, including Qimonda's U.S. subsidiaries—have been filed in the German proceedings. Dr. Jaffé, the insolvency administrator, is a German attorney specializing in insolvency law. Over the past 15 years, he has been appointed as insolvency administrator in more than 500 cases and preliminary insolvency administrator in many more. As insolvency administrator, Dr. Jaffé serves as a fiduciary for the creditors and has responsibilities similar to that of a trustee under the U.S. Bankruptcy Code.

C.

As noted, Infineon is a German corporation that was spun out from Siemens in 1999. It was and remains Qimonda's majority shareholder. Infineon designs, manufactures, and markets semiconductors for use in automotive, industrial, and security industries. By its own account, it is either number one or two in the world in providing semiconductor chips to the automotive industry, first in providing power semiconductors, and first in producing chips for security cards and passports. Its security chips are used in U.S. passports and its power chips in such iconic U.S. products as the iPhone and iPad. At the time Qimonda was spun off, Infineon and Qimonda entered into a Carve–Out and Contribution Agreement, under which Infineon transferred to Qimonda all the assets of its memory products division, including 20,000 patents (of which 10,000 were U.S. patents), many of which were subject to existing licenses in favor of Intel, IBM, Hynix, and Texas Instruments. As part of the agreement, Qimonda was granted a license to those intellectual property rights remaining with Infineon and to future patents, while Infineon received a license to the transferred patents as well as future patents. Approximately $1 billion of its € 4.5 billion in annual revenues is derived from sales and operations in the United States, where it has 650 employees located at research and manufacturing facilities located in California and Detroit. Its vice president for intellectual property, Joseph Villella, Jr., testified that without the benefit of its license to Qimonda's U.S. patents, the vast majority of which originally belonged to Infineon, Infineon would be placed in the position of "innovating into law suits and injunctions" and would likely end up having "to pay a lot of money" for the right to continue using patents that it had developed. Additionally, he testified that Infineon could face significant indemnity claims from its own licensees of those ***170** patents if Dr. Jaffé were to carry through on his threat (communicated at a meeting in September 2009) to bring exclusion actions against Infineon's customers before the United States International Trade Commission ("ITC").

D.

Samsung, which is based in Korea, is a global manufacturer of consumer electronic goods, including flat screen televisions and mobile telephones. It also manufactures semiconductor chips both for its own use and for sale to other manufacturers. It has been the top producer of commodity DRAM products in the world for many years and now produces approximately 35% of the world's commodity DRAM products. It is also the top-ranked producer of a type of non-volatile memory referred to as “NAND flash” memory and is a major supplier to many U.S. companies, including such major technology firms as Apple and Hewlett Packard, with total sales in the United States in 2010 of $40 billion. Approximately 4,500 of its 150,000 employees work in the United States. It has a fabrication facility in Austin, Texas, as well as sales offices in New Jersey and California. Last year, it announced plans to invest approximately $3.4 billion to expand the capacity of its Austin fabrication and semiconductor research facility, bringing its total investment in Austin to approximately $9 billion.

Samsung owns approximately 90,000 patents worldwide, of which approximately 20,000 are U.S. patents. It entered into a patent cross-license agreement with Siemens in 1995 for a perpetual and irrevocable license to Siemens's patents. In 2006, Qimonda expressly undertook to be bound by the license agreement that Samsung had with Siemens and Infineon and to continue granting licenses to Samsung in return for a reciprocal obligation from Samsung. Its vice-president and director of licensing, Jae Shim, testified that Samsung's licenses to Qimonda's U.S. patents are critical to its semiconductor operations and that Samsung had invested billions of dollars in reliance on the belief that it had achieved freedom of action with respect to the licensed patents.

E.

Nanya, which is based in Taiwan, is a manufacturer of DRAM products. It has sales offices in the United States, Europe, Japan, and China. It does not manufacture in the United States but does operate (though subsidiaries) a sales organization in California and design facilities in Texas and Vermont. Between 20% and 40% of its annual DRAM sales are made directly to customers in the United States. Nanya shares 50% of the total wafer output from Inotera Memories, Inc. (“Inotera”), also a Taiwanese company. Inotera, which operates two fabrication facilities, was formed in 2003 as a joint venture between Nanya and Infineon. Under the technical cooperation agreement that was entered into as part of the joint venture, Nanya was granted a fully paid-up, world-wide license to Infineon's 110 nm technology,[FN5] with the two working together to jointly develop 90nm and 70nm DRAM processes that would allow a larger number of memory cells to reside on a single chip. As part of the joint development project, both Nanya and Infineon contributed engineering personnel as well as their existing proprietary technologies, with the technical cooperation teams working primarily at two Infineon facilities in Germany. In 2005, ***171** Nanya entered into a second technical cooperation agreement with Infineon, this one for the development of 60 nm DRAM. The development work was mostly carried out in Germany, and, as with the earlier agreement, Nanya was granted a fully paid-up license for any patents resulting from the joint development efforts, as well as for any existing patents. Qimonda succeeded to Infineon's interest at the time of the spin-off in 2006, and in 2007 entered into a technical information exchange agreement with Nanya. In 2008, Micron bought Qimonda's shares in Inotera. In connection with that purchase, the existing joint venture between Nanya and Qimonda was formally terminated. The termination agreement, which is governed by New York law, provided that the license rights under the earlier technical cooperation agreements remained in full force and effect. Additionally, a patent ownership and license agreement was subsequently entered into by Nanya and Qimonda in late 2008 (but apparently never fully carried out) to allocate between them the jointly-owned patents. In late July 2009, Nanya received a letter from Dr. Jaffé declaring “non-performance” of the joint venture termination agreement and terminating Nanya's license rights.

FN5. A nanometer (abbreviated nm) is one-billionth of a meter, or approximately .000000039 inch.

F.

Hynix—formerly known as Hyundai Electronics Industries Co., Ltd.—is a Korean manufacturer of semiconductor products, principally DRAM memory and NAND flash memory chips, but also CMOS image sensors. It currently ranks second in market share for DRAM products and fourth for NAND flash memory. Its research and development costs are substantial, averaging just over 9% of revenues in the last three years. During that same period, its capital expenditure on new fabrication facilities and upgrading existing facilities has averaged approximately $2 billion per year. Hynix's fabrication facilities are located in Korea and China, and it has research and development centers in Korea and (though a subsidiary) the United States. Approximately 20% to 25% of its annual semiconductor sales are made to customers located in the United States. Hynix itself owns approximately 46,000 patents world-wide, of which more than 6,500 consist of U.S. patents.

To obtain "patent freedom" and thereby avoid possible disruptions to its operations, and also to protect its customers from claims of infringement from others, Hynix has negotiated and entered into portfolio cross-licenses with many of its competitors and other major semiconductor manufacturers, including Infineon. The Infineon cross-license agreement—which requires no royalties—was entered into in late 2000 in order to settle litigation that had been brought by Siemens (before the Infineon spin-off) against another company that Hynix later acquired. The agreement currently extends to December 2011, at which time it would be extended for another two years unless one of the parties gives timely notice of non-renewal. Hynix has no agreement directly with Qimonda. Hynix first learned of Qimonda's insolvency proceedings in January 2010 when it receive notice of a motion filed in this court by Dr. Jaffé to establish procedures for the sale of the U.S. patents.[FN6] It subsequently received***172** a letter from Dr. Jaffé stating that he elected non-performance of the Hynix–Infineon cross-license "to the extent applicable between [Qimonda] and Hynix" and that he terminated the agreement "to the extent it concerns [Qimonda]." In reliance on the cross-license, Hynix has not studied the scope or validity of any Qimonda patents, and no Qimonda patents have yet been asserted against Hynix, its products, or its customers.

FN6. The motion—which was opposed by Hynix, Nanya, IBM, Elpida, Infineon, Samsung and ProMOS Technolgies, Inc. ("ProMOS") to the extent it sought to sell the patents "free and clear" of licensee interests—resulted in an order (Doc. # 254) entered on March 11, 2010, and amended on June 18, 2010 (Doc. # 265) allowing Dr. Jaffé to sell the debtor's U.S. patents but preserving any rights of the objectors with respect to their licenses pending the result of the present litigation and requiring that any agreement for sale of the patents contain a notice to that effect.

G.

Micron is a U.S. manufacturer of semiconductor devices, primarily DRAM and flash memory, but also CMOS image sensors. It has manufacturing facilities not only in the United States, but also in China, Italy, Japan, Puerto Rico, and Singapore. It is the largest manufacturer of DRAM in the United States, and approximately 50% of its DRAM and flash memory chips are manufactured in the United States. It has approximately 25,900 employees world wide, of which approximately 10,000 work in the United States. In October 2008, Micron purchased for $400 million Qimonda's approximately 36% share interest in Inotera Memories, Inc., a DRAM manufacturing joint venture between Qimonda and Nanya that included a fabrication facility in Taiwan.[FN7] As part of the purchase, Qimonda and Micron entered into a world-wide, royalty-free cross-license agreement. Among other things, it recited that a "significant goal" of the agreement was to provide each of the parties "with worldwide freedom to make, use, import, offer to sell, sell, lease, license and/or otherwise transfer" products "without concern for suits claiming infringement of the Patents ... licensed hereunder." In reliance on the cross-license, Micron, when planning the transition of the Inotera facility from manufacturing Qimonda's chips to its own chips, did not implement a "clean room," "fire wall" or similar protocol to protect against adoption of technology being used at the plant that fell within the scope of Qimonda's patents. And because of the cross license, Micron has never performed an analysis of whether in fact it practices any of the Qimonda patents.

FN7. Dr. Jaffé has brought an action against Micron in the German courts to set aside the share purchase as a fraudulent transfer.

H.

IBM is a world-wide technology firm based in the United States. It manufactures semiconductor chips both for its clients and for its own advanced technology needs. Somewhat over 10% of its revenues are derived from its microelectronics division, which has approximately 6,000 U.S. employees, and sales in the United States accounted for a little over one-third of its total worldwide revenues. Its semiconductor products are critical components of complex mainframe computers that are used in banking, and its chips are also used in large networking devices built by other major manufacturers. All of IBM's semiconductor manufacturing is done in the United States. It has research and development centers in New York and fabrication facilities in New York and Vermont, the latter being a so-called “trusted foundry” that manufactures highly secret products for the U.S. Government related to national security. IBM owns approximately 50,000 active patents world-wide, over 30,000 of which are U.S. patents. In 2003, IBM entered into a cross-licensing agreement with Infineon and its subsidiaries under which it was granted an irrevocable, fully-paid up license to Infineon patents***173** and patent applications for the life of the patents. IBM has long been active in semiconductor joint development initiatives. In the 1990s, IBM, in conjunction with Siemens, developed a semiconductor manufacturing technology known as “trench” technology. That technology, which was passed down from Siemens to Qimonda and was used by Qimonda prior to the insolvency proceedings, is still used by IBM in many of its most important processors and semiconductor products. Qimonda's patent portfolio includes patents that cover “trench” technology. In 2006, IBM entered into a joint development agreement with Infineon and its subsidiaries to develop a type of DRAM technology referred to as “trench DRAM.” As part of that agreement, IBM obtained a cross-license to patents covering the jointly-developed “trench” technology.

I.

Intel is a U.S. manufacturer of semiconductor chips for industries such as computing and communications. It is the world's largest semiconductor chip maker based on revenue. It does not manufacture DRAM chips but does sell NAND memory chips manufactured by IM Flash Technologies, LLC, a company formed by Intel and Micron. Approximately one-fifth of its revenues are generated from the Americas. As of 2009, more than half of its wafer fabrication took place in the United States, with the remaining fabrication taking place in Israel and Ireland. Intel routinely obtains licenses to patent portfolios of third parties in the semiconductor industry to eliminate the risk that the third party could enjoin Intel from making or selling semiconductor products or impose significant costs on Intel by threatening or initiating patent litigation. Its director of licensing, Dana Hayter, testified that Intel relies on these cross licenses (which number more than a hundred and embrace approximately 800,000 patents) in making the enormous expenditures required each year for research and development and investment in manufacturing facilities in order to remain competitive. Intel does not have a cross-license agreement with Qimonda. It does, however, have a cross-license agreement with Infineon that was entered into in late 2005 before the Qimonda spin-off, as well as an earlier cross-license agreement with Siemens that was entered into before the Infineon spin-off. The Intel–Infineon agreement expressly provides that any patents subsequently transferred to a subsidiary, as well as any patents subsequently issued to a subsidiary, would be subject to the license. It also contains a choice of law provision that Delaware law would govern. In July 2010, Dr. Jaffé wrote a letter to Intel stating that he was terminating both the Intel–Siemens and Intel–Infineon cross licenses.

J.

Upon being appointed as Insolvency Administrator, Dr. Jaffé assessed Qimonda's cash position and determined that the company had a monthly burn rate of € 120 million but only € 40 million in cash reserves. As a result, he immediately cut costs in an effort to prevent the immediate collapse of Qimonda and its subsidiaries, both in Germany and abroad. After consulting with the creditors, he ultimately decided that the company should be liquidated. As part of his analysis, he identified contracts to which Qimonda was a party that fell within § 103 of the German Insolvency Code. Section 103 governs mutual contracts with respect to which the obligations of the debtor and the counter-party have not been completely performed. Under German insolvency law, such contracts are automatically unenforceable unless the insolvency administrator elects to perform the contracts. In practice, to ***174** avoid any implied election of performance, an insolvency administrator will usually send a letter of non-performance to the counter-party. In Dr. Jaffé's view, Qimonda's patent cross-licenses with the objecting parties fell within § 103. According to the testimony, that view prevails generally among German insolvency professionals but remains technically an open question, since it has never been ruled upon by Germany's highest court. Because Qimonda, once it ceased business operations, no longer had a need for the license from the counter-party, Dr. Jaffé determined that there was no consideration to the insolvency estate from Qimonda's continued license of its own patents to the counter-party. He testified that electing non-performance of the license agreements was appropriate, first, because there otherwise would be no compensation to the Qimonda estate for the use of the patents, and, second, because honoring the licenses would violate the principle of equal treatment of creditors. Accordingly, he sent letters of non-performance to all of the objectors except for Micron, with respect to which he was attempting to resolve unrelated issues arising from Micron's purchase of Qimonda's shares in Inotera. As noted, Elpida and Samsung responded by taking the position that they were protected by § 365(n) of the Bankruptcy Code with respect to Qimonda's U.S. patents. Additionally, Samsung initiated an arbitration proceeding in Vienna, Austria, in which it asserted that under German law, the license to Qimonda's patent portfolio was not terminated by the opening of the insolvency proceedings. And Infineon has brought a court action in Germany seeking a declaration that its license to Qimonda's patent portfolio is subsisting and enforceable and that its sublicenses to Hynix, IBM, Intel, Nanya and Samsung are enforceable.

After determining that a going-concern sale of Qimonda could not be achieved, Dr. Jaffé explored ways of monetizing its principal asset, which was its patent portfolio. Initially, he considered a bulk sale of the portfolio, for which the most likely purchaser would be a so-called "non-practicing entity" or "NPE" (sometimes disparagingly referred to as a "patent troll") but ultimately concluded that such a sale would result in the NPEs, not the Qimonda estate, realizing the true value of the patents. He also hired a broker to attempt to sell three small packages of Qimonda's patents, but those efforts were unsuccessful. Accordingly, he decided that licensing the patents would be the best way to realize value from the patent portfolio. As part of this effort, he made offers to many of the objectors—including Infineon, Micron, Samsung, and Hynix—to re-license the patent portfolio. Subsequent to the remand from the District Court, Dr. Jaffé has filed pleadings committing to re-licensing Qimonda's patent portfolio at a reasonable and non-discriminatory ("RAND") royalty to be determined if possible though good faith negotiations, otherwise through arbitration under the auspices of the World Intellectual Property Organization ("WIPO").[FN8] He testified that in the event a new license was not obtained it was "conceivable" that he would sue the former licensee for infringement but suggested that he would "not necessarily" sue customers of infringers, and that any decision would be based on his business judgment after considering the risks to the estate, limited resources, and creditor desire to expedite the proceedings. He did acknowledge,***175** though, that in negotiations with Infineon he had mentioned possible infringement claims against Infineon's customers, although he also professed not to know who those customers were. Mr. Villella, who was present at the negotiation, had a less benign view and testified that he viewed the presentation as threatening.

FN8. The proposed terms for the arbitration were modified following the evidentiary hearing in response to criticism from some of the witnesses, primarily that the time periods for party submissions to the expert were too short. The current form of the proposal is set forth as an attachment to a proposed order filed on March 8, 2011 as Doc. # 597.

K.

The evidence at trial established that the semiconductor industry is characterized by the existence of what the experts have referred to as a "patent thicket," such that any given semiconductor device may incorporate technologies covered by a multitude of patents, many of which are not owned by the manufacturer of the device. Indeed, such is the number of potentially applicable patents that it is not always possible to identify which ones might cover a new product, and in any event it would be all but impossible to design around each and every patented technology used in any new semiconductor product. As a result, manufacturers must, as a practical matter, obtain licenses to many different patents held by many different owners in order to protect against potential infringement claims. Often, such licenses are agreed to as a component of settling actual or threatened infringement suits or in entering into joint development agreements. In both contexts, it is common for each party to license its relevant patents to the other, sometimes with the addition of equalizing payments (either up-front payments or so-called running royalties) to account for differences in the size and breadth of the respective patent portfolios.

Such cross-license agreements are highly beneficial in conferring "design freedom" on the licensees. In the absence of design freedom, manufacturers are subject to what the experts described as a "hold-up premium" if a particular semiconductor is ultimately determined to infringe on someone else's patent. This is because the construction of a fabrication facility ("fab") for semiconductor chips is an enormously expensive undertaking (in the range of two to five billion dollars). Once these expenses (referred to in the testimony as "sunk costs") have been incurred, they cannot be recovered if the design of the chip must be changed to avoid the infringement. The owner of the patent, knowing this, has much more leverage in negotiating a royalty for its use *after* the fact than if a license had been sought *before* the investment had been made. The difference between these hypothetical royalty terms ("ex ante" and "ex post") constitutes the hold-up premium.

In at least one context, however, patent owners may commit themselves in advance to licensing a patent on "ex ante" or so-called "reasonable and non-discriminatory" ("RAND") terms. This is when a particular patent is identified by the owner as necessary to a standard adopted by standard-setting organizations such as JEDEC, which sets standards for the semiconductor industry. The semiconductor industry relies heavily on standards to promote the interoperability of semiconductor products, improve design and production efficiencies, reduce the uncertainty of investments, encourage innovation, and facilitate market entry. Importantly, standardization results in lower prices and improves consumer choice over products such as cell phones, computers, and even automobiles that rely on and incorporate semiconductors. Today, over 95% of DRAM chips are compliant with one or more JEDEC standards. As a result, JEDEC requires that its members, prior to the adoption of a standard, notify JEDEC of any patents it owns that may be "essential" to practice a proposed standard and agree to license those patents on RAND terms. In practice, the determination of a ***176** RAND royalty is more of an aspirational goal than a mathematical methodology, with one witness characterizing RAND as a "flexible" standard and testifying that there was no "consensus in the industry" as to how it should be calculated. Another witness, while conceding that the RAND process required by JEDEC has "worked moderately well in practice," also stated that the attendant negotiations were "extraordinarily difficult."

L.

One of the objectors' experts, Professor Jerry A. Hausman,[FN9] explained that patent cross-licensing, by providing freedom of action (also referred to by various witnesses as "freedom to operate" or "design freedom") and by avoiding the hold-up problem, promotes not only investment and innovation in the semiconductor industry, but also competition and lower prices, to the great benefit of consumers. And joint development agreements ("JDAs"), because they provide opportunities for companies with different areas of expertise to work together, also foster innovation. Patent cross-licenses are a key component of JDAs because they guarantee that each party will have the opportunity to use any technology resulting from the joint development efforts. They also promote the efficient exchange and transfer of technology and innovation, because the parties to the agreement need not worry about being exposed to or using the other's patented technology. Professor Hausman further testified that eliminating the protection § 365(n) provides licensees in the event the licensor goes into bankruptcy would harm innovation by creating uncertainty, which in turn affects investment decisions. As Professor Hausman explained, the decision to make the large investments in research and development and in construction of fabrication facilities required in the semiconductor industry is heavily influenced by the level of uncertainty—the expected reward versus the risk of the investment. The required rate of return for any given investment—the "hurdle rate"—increases dramatically with even small increases in uncertainty. He concluded, therefore, that increased uncertainty regarding the enforceability of patent licenses would necessarily lead to decreased investments, at least at the margin, as well as less spending on research and development, and less innovation. And innovation, he testified, is key to the continued health of the United States economy:

FN9. Professor Hausman testified as an expert for all of the objectors except Micron, which called its own expert, William Bratic, whose testimony focused on the specific impact termination of the cross-licenses would have on Micron rather than on the industry as a whole.

> Well, innovation and technology investment are among the most important features of the U.S. economy. As we have heard, once upon a time Texas Instruments used to produce a lot of [DRAM] in the United States. Now Micron is the only [DRAM] U.S. company that produces [DRAM] in the United States. And most of it's moved offshore. I can explain the economic reasons, if people are in-

terested. But the U.S. has stayed in the forefront of semiconductors because of companies like Intel and IBM. Intel has continued to manufacture semiconductors in the US, but also it's because of the innovation that's gone on in the US. And this investment, although a lot of the manufacturing gets done overseas, the investment and innovation is done in the US. I heard His Honor say, of course, that most of Apple is produced offshore. Which is absolutely correct. But, and I'm going to use public numbers here, so hopefully no one ***177** will get heartburn. But an Apple [iPhone] sells for between 5 and 600 depending much memory it has. The parts for that cost about 180. The assembly cost by Foxcon in China is about $4 and a dime. And so why is an [iPhone] worth all that money. It's not the parts. It's not the assembling in China. It's because of the software. That's all U.S. innovation and technology investment.... So even though the stuff is getting manufactured and assembled overseas, most of the value added is remaining in the US. So for an [iPhone] pretty much 300, 350 out of 500 or 600 stays in the US.... So it's not the manufacturing so much. I think *it's really the innovation and the R & D that drives the modern economy.*
3/3/11 Tr. 260–62 (emphasis added).

By contrast, the insolvency administrator's economic expert, Dr. William O. Kerr, testified that there is no reason to believe that the objectors' research and development would be affected by a decision that § 365(n) does not apply. As he analyzed the situation, the cross-licenses originally represented value streams going in both directions over the life of each agreement, and that having to pay cash for the licenses now only changes the *form* of compensation the objectors will have to provide to Qimonda, not the *value.* In his view, Dr. Jaffé's commitment to re-license the Qimonda patent portfolio to the objectors on RAND terms would simply result in the objectors paying fair value for rights to use the technology embodied in the portfolio. He also noted that a decision applying § 365(n) would only preserve the objectors' rights to the U.S. patents, and that, regardless of this court's decision, new licenses will have to be negotiated for use of Qimonda's non-U.S. patents. By analyzing the terms of a large number of existing licenses to which the objectors are currently parties, and assuming that a RAND royalty would be in the lower portion (but at the mode) of the range that was being charged under existing agreements, Dr. Kerr concluded that payment of such a royalty—which he calculated at no more than 3.6% of the industry's annual research and development spending—would have a minimal effect on innovation. Finally, he calculated that if the objectors did not have to pay for the continued right to use the U.S. patents, the loss of licensing revenues to Qimonda's estate would be approximately $47 million.

M.

The evidence presented at trial shows that “design freedom,” while an important goal of cross-license agreements, is never completely realized and in any event often involves payments of large sums. Put another way, notwithstanding the many cross-license agreements to which the objectors are parties, the industry is nevertheless characterized by frequent patent disputes that are often resolved by payments of large sums, either to other manufacturers or to NPEs. One of the objectors, for example, has paid approximately $3 billion since 2007 to settle various infringement claims. Another has paid nearly $900 million to settle such claims. And at least some of the objectors, although condemning the activities of NPEs have either sold patents to an NPE or have acquired an ownership interest in an NPE. Indeed, an infringement action that one of the objectors paid $85 million to settle involved patents that another of the objectors had sold to an NPE. Finally, while none of the cross-licenses with respect to which Dr. Jaffé has given notice of non-performance provide for running royalties, the objectors are parties to many other licenses that do provide for running royalties.

***178** *Conclusions of Law and Discussion*

I.

Chapter 15—which replaced former § 304 of the Bankruptcy Code—was enacted by Title VIII of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub.L. No. 109–8, 119 Stat. 23 (Apr. 20, 2005). Its stated purpose is “to incorporate the [United Nations Commission on International Trade Law (‘UNCITRAL’)] Model Law on Cross–Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency,” and its objectives are to promote:

(1) cooperation between—

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor's assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

§ 1501(a), Bankruptcy Code. Among other relief, chapter 15 allows the foreign representative [FN10] of an insolvency proceeding in another country involving a debtor with assets in the United States to petition a U.S. bankruptcy court for recognition of the foreign proceeding. § 1504, Bankruptcy Code. Upon recognition of a foreign proceeding, the foreign representative "is entitled to participate as a party in interest in a case regarding the debtor," § 1512, Bankruptcy Code, and "may exercise the rights and powers of a trustee under and to the extent provided by [§§] 363 and 552." § 1520(a)(3), Bankruptcy Code. Additionally, but "subject to any limitations the court may impose consistent with the policy of [chapter 15]," U.S. courts are required to "grant comity or cooperation to the foreign representative." § 1509(b)(3), Bankruptcy Code. Finally, "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors," the U.S. court may grant "any appropriate relief," which may include "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative" and—with the exception of certain avoidance powers—granting "any additional relief that may be available to a trustee." § 1521(a)(5), (7), Bankruptcy Code. Such relief may be granted, however, "only if the interests of the creditors and other interested parties, including the debtor, are sufficiently protected." § 1522(a), Bankruptcy Code. Importantly, nothing in chapter 15 bars the U.S. court "from refusing to take an action governed by [chapter 15] if the action would be manifestly contrary to the public policy of the United States." § 1506, Bankruptcy Code.

FN10. A "foreign representative" is defined as "a person or body ... authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." § 101(24), Bankruptcy Code.

Although the question has not yet been authoritatively decided by Germany's highest court and technically remains open, ***179** this court—as did the District Court [FN11]—will assume that under § 103 of the German Insolvency Code an insolvency administrator, by electing non-performance of a patent license agreement, may terminate a licensee's right to use the debtor's patents. A very different result would obtain under U.S. bankruptcy law. Although a trustee or debtor in possession may reject an executory contract under which the debtor is the licensor of "intellectual property"—which is defined as including United States patents, § 101(35A), Bankruptcy Code—the licensee may elect "to retain its rights (including a right to enforce any exclusivity provision of such contract) under such contract." § 365(n)(1)(B), Bankruptcy Code. The licensee must, of course, make any royalty payments due under the contract. § 365(n)(2)(B), Bankruptcy Code. In addition, the licensee waives any rights of setoff or administrative claim. § 365(n)(2)(C), Bankruptcy Code.

FN11. *Qimonda*, 433 B.R. at 565 n. 28.

The protections afforded patent licensees by § 365(n) have their origins in Congressional reaction to the decision of the United States Court of Appeals for the Fourth Circuit in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir.1985). The debtor in that case, Richmond Metal Finishers, Inc., had granted Lubrizol Enterprises, Inc., a non-exclusive license to use a metal coating process technology the debtor owned. As part of its reorganization plan, the debtor sought to reject the license agreement. The Fourth Circuit affirmed the bankruptcy court's legal determination that the license agreement, even though fully paid-up, was nevertheless executory (based in part on the inclusion of a "most favored licensee" clause under which royalties would be reduced if the debtor licensed the process to anyone else). The Fourth Circuit also affirmed the bankruptcy court's factual finding that rejection represented the exercise of sound business judgment by the debtor because "continued obligation to Lubrizol under the agreement would hinder [the debtor's] capability to sell or license the technology on more advantageous terms to other potential licensees." Importantly, Fourth Circuit rejected the argument that rejection, because it only constitutes a breach of the contract, would not actually deprive Lubrizol of the right to use the licensed technology:

> Under 11 U.S.C. § 365(g), Lubrizol would be entitled to treat rejection as a breach and seek a money damages remedy; however, it could not seek to retain its contract rights in the technology by specific performance even if that remedy would ordinarily be available upon breach of this type of contract. Even though § 365(g) treats rejection as a breach, the legislative history of § 365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party. For the same reason, Lubrizol cannot rely on provisions within its agreement with [the debtor] for continued use of the technology by Lubrizol upon breach by [the debtor]. Here again, the statutory "breach" contemplated by § 365(g) controls, and provides only a money damages remedy for the non-bankrupt party. Allowing specific performance would obviously undercut the core purpose of rejection under § 365(a), and that consequence cannot therefore be read into congressional intent.

757 F.2d at 1048 (internal citations omitted). Bills were quickly introduced into both houses of Congress to overturn the result that had been reached in ***Lubrizol*** ***180** and a substitute Senate version was ultimately enacted as the Intellectual Property Licenses in Bankruptcy Act of 1987, Pub.L. No. 100–506, 102 Stat. 2538 (Oct. 18, 1988). The report of the Senate Judiciary Committee that accompanied the Act explained its purpose as follows:

> The purpose of the bill is to amend Section 365 of the Bankruptcy Code to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to Section 365 in the event of the licensor's bankruptcy. Certain recent court decisions interpreting Section 365 *have imposed a burden on American technological development* that was never intended by Congress in enacting Section 365. The adoption of this bill *will immediately remove that burden and its attendant threat to the development of American Technology* and will further clarify that Congress never intended for Section 365 to be so applied.

S.Rep. No. 100–505, 1988 U.S.C.C.A.N. 3200 (emphasis added).

II.

In remanding the Amended Supplemental Order further consideration, the District Court identified two issues to be resolved: first, whether limiting the applicability of § 365(n) "appropriately balanced" the interests of the debtor and the licensees as required by § 1522(a); and second, whether granting comity to German insolvency law would be "manifestly contrary to the public policy of the United States" within the meaning of § 1506. *Qimonda*, 433 B.R. at 558, 571.

A. *Balancing the Interests of the Foreign Debtor and the Licensees*

[1] With respect to the first issue, the District Court held that this court had not adequately articulated its reasons for concluding that application of § 365(n) "would unavoidably 'splinter' or 'shatter' the Qimonda patent portfolio 'into many pieces that can never be reconstructed,' thereby diminishing its value and rendering the ... patent portfolio essentially unsalable." *Qimonda*, 433 B.R. at 558. The District Court also concluded that this court's analysis did not sufficiently take into account "the nature of the U.S. patents licensed to [the objectors], and whether cancellation of licenses for those patents would put at risk [the objectors'] investments in manufacturing or sales facilities in this country for products covered by the U.S. patents," with the appropriate test being that articulated in *In re Tri–Continental Exchange, Ltd.*, 349 B.R. 627 (Bankr.E.D.Cal.2006) (explaining that § 1522 requires the court "to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another."). *Qimonda*, 433 B.R. at 558.

The argument that preserving the objectors' rights to use Qimonda's U.S. patents would "splinter" or "fracture" Qimonda's portfolio has not been pursued by Dr. Jaffé on remand and in any event has no support in the evidence. The licenses in question are non-exclusive, and nothing prevents Dr. Jaffé or any purchaser of the patent portfolio (or portions of it) from licensing the patents to other manufacturers. At the same time, there are very few practicing entities not already licensed, and the universe of potential new licensees is limited. Put most simply, licensing the U.S. patents to manufacturers not already having licenses will likely generate relatively little income for Qimonda's estate, while re-licensing them to the existing licensees, even on RAND terms, would generate***181** significantly more. FN12

FN12. In questioning Dr. Jaffé and his German insolvency law expert, Professor Christopher G. Paulus, the objectors sought to characterize his legal obligation to maximize returns to creditors in a nefarious light But, of course, a trustee in a U.S. bankruptcy case has exactly the same responsibility. Indeed, one of the express objectives of chapter 15 is "maximization of the value of the debtor's assets." § 1501(a)(4), Bankruptcy Code.

A significant complicating factor is that any particular invention may, and commonly is, patented by the inventor in multiple jurisdictions, since patent protection does not have extra-territorial effect. As a result, a licensee, in order to be protected against an infringement suit, must license the applicable patent for each jurisdiction in which the licensee expects to manufacture or sell products that embody the patent. None of the objecting parties limit their manufacturing and sales solely to the United States. Thus, regardless of whether the licensees retain the right to use the U.S. patents, they would still have to make their peace with the insolvency administrator with respect to the foreign patents covering the same technology if they were to continue manufacturing or selling their products outside the United States.

A further complicating factor is that none of the objectors have identified any specific U.S. patent owned by Qimonda the cancellation of which would jeopardize their continued manufacture or sale within the United States of any particular product they produce. The closest to a showing of concrete, rather than hypothetical, risk was made by IBM, since it—like Qimonda, but unlike the other objectors—relies heavily on "trench" technology, which is the subject of a number of Qimonda's patents. As the objectors argue, however, their inability at this time to identify specific Qimonda patents implicated by the products they manufacture and sell is not at all surprising, since the whole point of portfolio cross-licenses is to eliminate the necessity (and in some cases impossibility) of individually analyzing each and every patent that might possibly apply to determine if a new design infringes on it. Yet in terms of the inquiry directed by the District Court—"the nature of the U.S. patents licensed to [the objectors], and whether cancellation of licenses for those patents would put at risk [the objectors'] investments in manufacturing or sales facilities in this country for products covered by the U.S. patents"—the failure to identify specific patents prevents this court from making a finding that cancellation of the objectors' right to use Qimonda's U.S. patents would have a specific dollar impact on them, only that it creates a substantial *risk* of harm. On the other hand, it ill behooves Dr. Jaffé to argue that the objectors have not shown they actually practice any Qimonda patents, when he himself, in negotiations with them, has taken the position that they do and has prepared claim charts outlining what he believes their infringement exposure to be. Put another way, the *threat* of infringement litigation can be as damaging as an actual finding of infringement.

To be sure, the hold-up risk is lessened by Dr. Jaffé's offer to re-license the patents on RAND terms.FN13 Although the revised***182** proposed procedures for the WIPO expert determination if the parties cannot agree may not be optimal, they are not wholly unreasonable either, and while the compressed time schedules for submissions to the expert and the lack of discovery may limit the licensee's ability to present the strongest possible case, the insolvency administrator is equally disadvantaged in presenting his case.FN14 And even though the determination of a RAND royalty may be as much an art as a science, the fact that companies in the industry routinely rely on the ability to obtain a license on RAND terms when they adopt a standard that relies on particular patents as essential to the standard demonstrates that RAND requirements do provide at least some comfort against the hold-up risk that would otherwise exist in an "ex post" licensing negotiation.

FN13. An issue raised by the objectors, but not really resolved by the evidence, was whether any license from Dr. Jaffé would itself be insecure, because Dr. Jaffé could still sell the underlying patents to a purchaser—whether a practicing entity or a "troll"—that might itself file for insolvency under German law or transfer the patent to a special purpose entity for the purpose of having it file for insolvency under German law. Dr. Jaffé testified that any sale by him of the patents would be made subject to any licenses he had granted (and which he would retain). Whether that strategy, which has apparently never been tested, would actually protect the licensees is an open question.

FN14. Indeed, Dr. Jaffé argues that he actually has *less* bargaining leverage than the objectors have in negotiating licensing terms with each other because, as a non-practicing entity, his ability to obtain injunctive relief in connection with a finding of infringement has been severely curtailed, if not eliminated, by the Supreme Court's ruling in *eBay, Inc. v. MercExchange, LLC,* 547 U.S. 388, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). While that may be, the fact remains that in discussions with at least two of the licensees, Dr. Jaffé has made thinly veiled threats to seek exclusion orders from the ITC, and has gone so far as to incorporate Qimonda Licensing LLC in Florida for the stated purpose of establishing the "domestic industry" in the United States required in order to bring ITC exclusion actions. In any event, the precise degree of negotiating leverage Dr. Jaffé would otherwise have is immaterial given the commitment to arbitrate if agreement cannot be reached.

At the same time, even if the WIPO expert determination process were to arrive at the same figure that would have been agreed to in an "ex ante" scenario, the objectors, because of their sunk costs, do not have the option of avoiding royalties altogether by designing around the patent. And Infineon—because it developed at its own cost most of the patents it is now being asked to pay for (and for which it received in exchange only now-worthless stock in the debtor)—would be especially hard-hit, not only in having to pay a second time for its own technology, but in indemnifying parties to which it licensed the patents prior to transferring them to Qimonda as part of the spin-off. [FN15]

FN15. Of course, it could also be argued that Infineon, as a German company, was in a better position than the other objectors to assess the impact of German insolvency law on its license rights in the event Qimonda were to become insolvent and to take such risks into account in negotiating the terms of the spin-off.

Certainly the issue is close. But having carefully considered the evidence and the argument of the parties, the court concludes that the balancing of debtor and creditor interests required by § 1522(a), Bankruptcy Code, weighs in favor of making § 365(n) applicable to Dr. Jaffé's administration of Qimonda's U.S. patents. It is true that application of § 365(n) will result in less value—and for the purpose of the present ruling the court accepts Dr. Kerr's estimate of $47 million—being realized by the Qimonda estate. But Qimonda's patent portfolio will by no means be rendered worthless. The U.S. patents can still be licensed to parties that do not already have a license, and Dr. Jaffé, to the extent permitted by German law, will be able to fully monetize the non-U.S. patents. Application of § 365(n), moreover, imposes no affirmative burden on Dr. Jaffé. By contrast, the risk to the very substantial investment the objectors—particularly IBM, Micron, Intel, and Samsung***183** —have collectively made in research and manufacturing facilities in the United States in reliance on the design freedom provided by the cross-license agreements, though not easily quantifiable, is nevertheless very real. For that reason—and even absent the public policy considerations to be discussed next—the court determines that Dr. Jaffé's right to administer the debtor's U.S. patents should be subject to the constraints imposed by § 365(n).

B. *Whether the Failure of German Insolvency Law to Protect Patent Licensees is "Manifestly Contrary" to U.S. Public Policy*

[2][3] With respect to the public policy issue, the District Court, citing the legislative history of § 365(n) as a reaction to the *Lubrizol* decision, noted that "Congress carefully considered *Lubrizol's* public policy implications, and, by overturning *Lubrizol,* took affirmative steps to protect patents licensees from ... termination of patent licenses in bankruptcy proceedings." *Qimonda,* 433 B.R. at 567. The District Court also explained, however, that Congress's use of

the word "manifestly" in § 1506 "substantially limits" the public policy exception "to the *most fundamental policies* of the United States." *Qimonda,* 433 B.R. at 568 (emphasis added). As the district court noted, only four published decisions had addressed the public policy exception.[FN16] *Id.* at 568. The reported decisions all agreed that "the fact that application of foreign law leads to a different result than application of U.S. law is, without more, insufficient to support § 1506 protection." *Id.* Rather, the analysis properly focuses "on two factors: (i) whether the foreign proceeding was procedurally unfair, and (ii) whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would 'severely impinge the value and import' of a U.S. statutory or constitutional right, such that granting comity would 'severely hinder United States bankruptcy courts' abilities to carry out ... the most fundamental policies and purposes' of these rights." *Id.* at 568–69 (ellipsis in original).

FN16. The decisions discussed by the district court were *In re Metcalfe & Mansfield Alternative Investments,* 421 B.R. 685 (Bankr.S.D.N.Y.2010) (upholding third-party releases approved by Canadian courts as part of foreign debtor's restructuring plan); *In re Ernst & Young, Inc.,* 383 B.R. 773 (Bankr.D.Col.2008) (recognizing Canadian receivership over Canadian company and two former Canadian residents now living in the United States as foreign main proceeding); *In re Ephedra Prods. Liability Litig.,* 349 B.R. 333 (S.D.N.Y.2006) (granting comity to Canadian insolvency court's claims resolution procedure that did not provide for jury trial of personal injury claims); and *In re Gold & Honey,* 410 B.R. 357 (Bankr.E.D.N.Y.2009) (denying recognition of Israeli receivership proceedings that violated automatic stay in case of debtor's American subsidiary).

As the District Court emphasized, the fact that application of foreign law leads to a different result than application of U.S. law is, without more, insufficient to deny comity. There can be little doubt that the whole purpose of chapter 15 would be defeated if local or parochial interests routinely trumped the forum law of the main proceeding. Instead, this court must determine whether the foreign proceeding was "procedurally unfair," and whether the application of foreign law or the recognition of a foreign main proceeding would "severely impinge" a U.S. statutory or Constitutional right in a way that would offend "the most fundamental policies and purposes" of such right.

[4] The objectors do not contend that either German insolvency law or the German insolvency proceedings in this case lack *procedural* fairness. Germany clearly has a mature and well-developed system of ***184** insolvency law with goals congruent to those of U.S. bankruptcy law, including maximizing returns to creditors and treating equally-situated creditors equally.[FN17] Parties aggrieved by actions taken in a German insolvency case have ready access to a functioning and fair court system to challenge them (as indeed Infineon already has). The inquiry, therefore, resolves to whether the application of German law, to the extent it allows the U.S. patent licenses to be cancelled, severely impinges a U.S. statutory or constitutional right such that deferring to German law would defeat "the most fundamental policies and purposes" of such rights.

FN17. To be sure, both U.S. and German insolvency law recognize priorities that, to a greater or lesser extent, detract from the principle of equal treatment. But the mere fact that application of foreign law will result in different creditor priorities than those recognized by U.S. law is hardly a sufficient basis for not according comity to foreign law. At the same time, a licensee, even if technically a creditor, stands on a considerably different footing than, say, a lender, trade creditor, or customer. Even though a non-exclusive patent license conveys no property interest in the patent itself and "is in essence nothing more than a promise by the licensor not to sue the licensee," *Imation Corp. v. Koninklijke Philips Electronics N.V.,* 586 F.3d 980, 987 (Fed.Cir.2009), performance of that promise, unlike a promise to repay a lender or supplier, or to deliver goods or provide services to a customer, requires no affirmative expenditure of funds or transfer of assets, only that the licensor refrain from taking an injurious action.

Here, of course, no Constitutional right is implicated, only a statutory right. That the right of a non-bankrupt licensee to continue using a patent license was deemed by Congress to be of great public *importance* can scarcely be doubted. The legislative history is clear that Congress believed that allowing patent licenses to be terminated in bankruptcy would "impose[ ] a burden on American technological development." Moreover, the alacrity with which Congress acted following the *Lubrizol* decision is ample evidence of the seriousness with which it viewed the "threat to American Technology" raised by the holding of that case. The question before the court, however, is whether the policy that § 365(n) seeks to promote is *fundamental.*

At the outset, it is curious that if Congress believed the protection conferred by § 365(n) to be fundamental, it did not include it among the Bankruptcy Code provisions that apply automatically once an order of recognition is entered in a cross-boarder case,[FN18] but instead made the application of § 365 generally, and § 365(n) in particular, entirely discretionary. *Qimonda,* 433 B.R. at 560–61 ("Congress sensibly left the application of § 365(n) to the discretion of bankruptcy courts, where appropriate."). The court notes, too, that the particular threat to American technology identified in the legislative history differs from the threat articulated by the objectors. The concern voiced in the legislative history was that allowing licenses to be cancelled in bankruptcy would encourage those seeking to use a patent to insist on an assignment rather than a mere license. S. Rep. 100–505 at 3, 1988 U.S.C.C.A.N. at 3202–03. As a result, the financial return to the inventor would likely be less than the return from licensing the patent to multiple parties, thereby causing inventors "to be shortchanged to adjust for a risk which under present law cannot be contractually removed if a license format is selected" and "creat [ing] obvious disincentives***185** to the full development of intellectual property." *Id.*

FN18. The provisions that apply automatically are § 361 (property of the estate), § 362 (the automatic stay), § 363 (use, sale, or lease of property), § 549 (avoidance of unauthorized post-petition transactions), and § 552 (postpetition effect of a security interest). § 1520(a), Bankruptcy Code.

Here, the objectors focus on an entirely different threat, namely the uncertainty that would be created by allowing licenses to be cancelled. They argue that even the threat that a licensee, having already paid once, might have to pay a second time on "hold up" terms in order to continue practicing the licensed patent, would discourage the kind of heavy investment, not only in research and development, but more importantly in construction of manufacturing facilities, that are required in the semiconductor industry. Although Professor Hausman could not identify any specific technology that would not have been pursued against the backdrop of uncertainty if § 365(n) were not to apply, he posited that many innovative products, such as the iPhone, might well have come to market later. By contrast, Dr. Kerr opined essentially that the sky would not fall if § 365(n) were held *not* to apply and the objectors had to pay a RAND royalty to obtain new licenses. The objectors themselves, after all, pay or have paid significant royalties to settle past infringement claims (some of which they have brought against each other) but nevertheless continue to invest large sums in research and development. Because the specific royalty rate estimated by Dr. Kerr was deemed to be "highly confidential," it has not been disclosed to Dr. Jaffé. As a result, there is no evidence in the record as to whether Dr. Jaffé (absent the agreement for arbitration) would actually be willing to license the patents on the terms envisioned by Dr. Kerr. It seems likely, however, that a WIPO expert would go through a process similar to Dr. Kerr's in determining a RAND royalty rate if the parties were unable to agree, and that the royalty range derived by Dr. Kerr from his analysis of existing license agreements is not radically different from the figure that would be arrived at though the WIPO expert determination process.

It is certainly true, as Dr. Jaffé argues, that the mere threat of infringement claims if § 365(n) is not made applicable is nothing new in an industry in which the objectors themselves often bring infringement claims against each other and sometimes even sell portions of their patent portfolios to non-practicing entities. Thus, there will be plenty of patent threats and patent litigation in the industry whether or not § 365(n) applies. But the issue is not whether there is or ever can be complete "patent peace," but whether declining to apply § 365(n) in the context of the semiconductor industry would nevertheless adversely threaten U.S. public policy favoring technological innovation. Although innovation would obviously not come to a grinding halt if licenses to

U.S. patents could be cancelled in a foreign insolvency proceeding, the court is persuaded by Professor Hausman's testimony that the resulting uncertainty would nevertheless slow the *pace* of innovation, to the detriment of the U.S. economy. Thus, the court determines that failure to apply § 365(n) under the circumstances of this case and this industry would "severely impinge" an important statutory protection accorded licensees of U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation. For that reason, the court holds that deferring to German law, to the extent it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy.

III.

A separate order will be entered denying the foreign administrator's motion to amend the Supplemental Order and confirming that § 365(n) applies with respect to Qimonda's U.S. patents. It goes without***186** saying that nothing in the court's ruling affects the foreign administrator's right, to the extent permitted under German insolvency law, to terminate licenses to non-U.S. patents.

Bkrtcy.E.D.Va.,2011.
In re Qimonda AG
462 B.R. 165, 55 Bankr.Ct.Dec. 195, Bankr. L. Rep. P 82,098

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EXHIBIT 8

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UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

In re QAG AG, Debtor in a Foreign Proceeding.	Case No. 09-14766 (RGM) Chapter 15

PRE-TRIAL BRIEF OF THE INSOLVENCY
<u>ADMINISTRATOR DR. MICHAEL JAFFÉ</u>

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Qimonda AG ("QAG") is a German debtor in liquidation in Germany. The primary remaining asset available that can generate recovery for QAG's creditors is a global patent portfolio. The German liquidation has been recognized by this Court as the main proceeding in QAG's worldwide liquidation. The central task under Chapter 15 is to implement that Chapter's goal of achieving a coherent, universalist resolution of the bankruptcy of this German corporation with global operations by extending comity and deference to that foreign main proceeding. The key legal issue here is the determination of the claim that a narrow exception applied in U.S. bankruptcy cases, Section 365(n), represents so profound a U.S. public policy that it overrides the statutory mandate that the main proceeding is the arena for the resolution of the treatment of global contracts and the primacy of creditor equality under German law.

The central issues set forth by Judge Ellis on remand are: (1) whether this Court, which has ancillary jurisdiction, should defer to the German main proceeding, under the principles of comity mandated in Chapter 15, because the application of German law to that proceeding is not manifestly contrary to a fundamental U.S. public policy; and (2) if this Court finds that the application of German law to the patent license agreements at issue is not manifestly contrary to a fundamental U.S. public policy, whether the parties to this proceeding are sufficiently protected under 11 U.S.C. § 1522.

This Court should grant comity to the German main proceeding. The sole exception to granting comity to a foreign main proceeding under Chapter 15 is set forth in 11 U.S.C. § 1506, which provides that a court may refuse to take an action that would be "manifestly contrary" to U.S. public policy. It is well-settled, as Judge Ellis stated in his Memorandum Opinion remanding this matter, that this exception is very narrow, and is restricted to "the most fundamental policies of the United States." Mem. Op. at 30 (internal citations omitted). Section

365(n) is not one of the most fundamental policies of the U.S. First, it is an exception to the general rule allowing debtors to terminate all executory contracts, including those in the context of certain intellectual property licenses. Second, if Section 365(n) were one of the most fundamental U.S. policies, Congress would have mandated its application in Chapter 15, as it did with certain other Code sections such as the automatic stay. Predictably, Judge Ellis already held Section 365 is not automatically applicable in Chapter 15 cases.

The public policy exception is reserved for only those foreign policies that violate the "most basic notions of morality and justice,"[1] that is, those "fundamental principles of law, in particular constitutional guarantees."[2] Any U.S. policy reflected in Section 365(n) does not rise to that level. U.S. Courts have found that "Germany's legal system clearly follows procedures that ensure that litigants will receive treatment that satisfies American notions of due process."[3] In fact, the Objectors[4] expressly admit that there is no question that German proceedings afford litigants procedural fairness.[5] Thus, there are no legitimate concerns in this case that the Objectors would suffer any inequitable treatment in the German courts that would violate "basic notions of morality or justice" or offend constitutional guarantees if this Court grants comity to the foreign main proceeding.

Any decision not to defer to the German proceeding, however, would undermine the foundation of Chapter 15. One of the express purposes of Chapter 15 is to provide effective mechanisms for cooperation with foreign courts and to promote the fair and efficient

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[1] *See, e.g., Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 165 (S.D.N.Y. 1987).
[2] *See* UNCITRAL Guide, ¶ 87.
[3] *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1520 (11th Cir. 1994).
[4] Samsung Electronics Co., Ltd., Elpida Memory, Inc., Infineon Technologies AG, Micron Technology, Inc., Nanya Technology Corporation, International Business Machines Corporation, Hynix Semiconductor, Inc. and Intel Corporation are collectively referred to as the "Objectors."
[5] *See, e.g.*, Docket No. 544, Objectors' Motion to Exclude and Strike Testimony of Prof. Dr. Christoph G. Paulus at 3.

administration of cross-border insolvencies.[6] The Objectors seek to avoid the application of German law by arguing that an exception to the normal treatment of executory contracts found in Section 365, a section of the Bankruptcy Code not automatically applicable in Chapter 15 proceedings, should govern the German corporation's principal assets. Permitting the Objectors to inject U.S. law into the German main proceeding would violate the most fundamental tenet of German insolvency law – the equal treatment of creditors – thereby allowing a narrow exception under U.S. law to trump the foundation of the law of the foreign main proceeding through the use of another exceedingly narrow exception, the public policy exception of Section 1506. The elevation of territorial interests contrary to the law of the foreign main proceeding is the very problem Chapter 15 was designed to avoid. This Court should reject any attempt to interfere with the legitimate application of German law to QAG's insolvency proceedings in Munich.

Chapter 15 expressly recognizes its own international origins, and its fundamental principle of providing a common framework through which to administer cross-border insolvencies effectively and efficiently. It is clear, under both U.S. and international law, that the meaning of the public policy exception to granting comity does not extend to each difference between the law of the U.S. and the law of foreign jurisdictions.[7] Rather, the exception was intended only to provide protection from those instances where foreign law provides inadequate due process protections or where a foreign law is inconsistent with fundamental American policy. That is certainly not the case here, as it is beyond argument that German law and procedure are as equitable and just as U.S. laws. Certainly, U.S. courts would not want courts in Germany to insert German insolvency law into a plenary bankruptcy proceeding pending in the U.S. if a portion of the U.S. debtor's assets were in Germany.

[6] *See, e.g.*, 11 U.S.C. § 1501(a)(3).

[7] Indeed, Judge Ellis found: "the mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception." Mem. Op. at 34-35.

On the second issue before the Court, all of the parties' interests will be sufficiently protected by the German legal system. Any party aggrieved by the operation of the German insolvency code section that renders executory contracts unenforceable (Section 103 InsO) may seek redress from the proper German court. Indeed, two of the Objectors, Samsung and Infineon, have done so. [redacted] Infineon similarly has filed a declaratory judgment action before the District Court in Munich (*Landgericht München*) seeking to retain its licenses to QAG's patent portfolio, as well as the licenses of five of the Objectors and other alleged Infineon sub-licensees, on the ground that those licenses with QAG are not executory.[8] Thus, as certain Objectors themselves have recognized, there is no need for U.S. courts to rule on the application of Section 103 InsO to these proceedings because German law and German courts afford the former licensees of QAG the opportunity to challenge the operation of German law in the forum where the insolvency proceeding is taking place. The Objectors also are expressly permitted to file claims in QAG's German insolvency proceeding regarding the application of Section 103 InsO to their licenses.

Even if the Court found that the ability to address these issues in Germany did not provide sufficient protection for the Objectors, the Insolvency Administrator has offered to enter into good faith negotiations with anyone seeking to obtain a license to the QAG patent portfolio. Furthermore, in the event that the parties could not agree on a reasonable royalty for a license, the Insolvency Adminsitrator has agreed to submit the issue to a neutral third-party arbitrator experienced in these matters, the World Intellectual Property Organization ("WIPO"). That organization can take into account, as appropriate, all of the factors argued by the Objectors in

8 [redacted]

their expert reports. The Insolvency Administrator's binding offer to re-license QAG's patent portfolio eliminates any claim that granting comity will allow the Insolvency Administrator to "hold up" the former licensees or to disrupt their business.

In contrast, a decision not to grant comity in this case would substantially harm the QAG estate. QAG's creditors will be unable to realize the full value of QAG's patent portfolio because of the carving out of the U.S. patents. Because the QAG patent portfolio is a global portfolio, the application of different law to a portion of that portfolio will dramatically affect the ability to enforce the remaining foreign patents, many of which cover the same technology covered by the U.S. patents, creating a void in the coverage of QAG's patent portfolio. Such a decision would also diminish the value of the remaining patents, the licenses to which will be unaffected by this Court's ruling on the applicability of Section 365(n).

This case presents the classic example of the need for a single worldwide resolution of the contract rights and obligations of a corporation with global operations in a bankruptcy proceeding. Every jurisdiction picks winners and losers among parties contracting with a debtor, but the Balkanization of this process is nearly certain to produce great loss of value and to provoke yet more litigation in countries where products are produced and sold. The Model Law on Cross-Border Insolvency and the U.S. version of that law embodied in Chapter 15 represent specific policy responses to the need for that coherence in the global economy.

Nowhere is that need greater than in the determination of global contract rights. Its importance lies in two directions. The first is the large number of global contracts found in the estate of a bankrupt multinational company such as QAG. It is important they be treated according to a consistent set of principles, regardless of the exceptions and variations in bankruptcy provisions outside of the jurisdiction of the main proceeding. Second, as to a given global contract, it is of the highest importance to have similar results in every country to the maximum extent possible. Both economic efficiency and fairness require that result. These sorts of concerns, which are at the center of this case, are the very reason for the action of Congress, and many of the U.S.'s leading trading partners, in adopting the Model Law.

In view of the remedies available to them under German law and the Insolvency Administrator's commitment to re-license at a reasonable royalty, the Objectors' contention that they would suffer harm if the Court deferred to the foreign main proceeding and did not apply Section 365(n) is illusory. The Objectors' true complaint is purely financial – they seek to avoid payment of adequate value for their use of the QAG patent portfolio even though they are no longer providing consideration to the QAG estate under their terminated cross-licenses. The Objectors enter into patent licenses regularly; in fact, they argue that the entire semiconductor industry is premised on the execution of such license agreements. Asking the Objectors to perform acts they admit are integral to operation in the semiconductor industry and in the ordinary course of business should certainly sufficiently protect their interests. The Insolvency Administrator's offer is even more meaningful, and offers greater protection than the Objectors could potentially receive in this case, because he is offering the Objectors a worldwide license, rather than only a license to QAG's U.S. patents, with the royalty determined by a neutral arbitrator, if necessary.

This is an insolvency case. It is not a patent infringement lawsuit, or a medium to provide commentary on the disadvantages of the existence of "patent trolls" in the semiconductor industry. The Insolvency Administrator is not seeking to "hold-up" the semiconductor industry – in fact, he has expressly avoided any such issue by submitting to the

Court his offer to relicense the QAG patents to the Objectors on a worldwide basis.[9] QAG is a German entity involved in insolvency proceedings in Germany, and through his Motion, the Insolvency Administrator is simply seeking to proceed with the liquidation of QAG's assets under German law. That law mandates the equal treatment of creditors, not favoring a subset of those creditors. There is no valid reason to interfere with the main insolvency proceeding, as German law and procedure provide protections and procedures similar to those offered in the U.S. As Justice Cardozo noted: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[10] Thus, the Insolvency Administrator respectfully requests that the Court grant his Motion and amend the Supplemental Order to modify the improvident reference to Section 365 of the Bankruptcy Code.

FACTS

A semiconductor chip is an electronic circuit that that has been manufactured in a small substrate of semiconductor material, such as silicon. These chips are used in many types of consumer electronic goods.

I. SEMICONDUCTOR INDUSTRY

A. History Of Industry Since Entry Of QAG

QAG entered the semiconductor industry in May 2006, when it was spun out of Infineon. *See, e.g.*, QAG Trial Ex. No. 191 ("QAG Ex."), Infineon/Qimonda Carve Out and Contribution Agreement. At the time that QAG was spun out, it was one of the leading semiconductor producers. *See* QAG Ex. 11 at 13, ¶ 37. In the early and mid-2000s, improvements in the semiconductor industry, particularly the size, speed and performance of semiconductor products, led to increased development of consumer electronics such as mobile phones, computers, and

[9] The Insolvency Administrator has also agreed to seek approval under Section 363, of any sales of U.S. patents.
[10] *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918).

other handheld devices. *Id.* at 7-8. The need for storage of information on these devices led to increased demand for smaller, faster memory products such as the types sold by QAG and the Objectors. *Id.* Also in response to that demand, companies that provided the memory chips needed for these products expended billions of dollars in research and development to provide smaller, faster, more powerful memory chips. *Id.* at 8. This increased demand led to a dramatic increase in production capacity by the semiconductor industry from approximately 2003-2007. *Id.* This increased capacity led, in turn, to an oversupply in the semiconductor chip markets and a corresponding steep decline in prices. *Id.* at Exs. 8 and 9. It was this steep decline in prices, and the corresponding drop in profits, in conjunction with the global economic recession, that led to the decline, and eventual insolvency, of QAG.

B. Effect Of Withdrawal Of QAG From Market

QAG declared insolvency in January 2009. After QAG left the market, prices for DRAM products increased due to the reduction in supply brought about by its exit. *See* QAG Ex. 11 at 10, fn. 16. The other companies in the semiconductor industry benefitted from QAG's exit from the market through the decline in supply, the resultant increase in prices, and increasing operating margins in the second and third quarters of 2009. *See* QAG Ex. 11 at Exs. 9 and 10. These benefits accrued to the Objectors, which increased their market shares and sales in 2009 after QAG's exit from the market. *See* QAG Ex. 11 at Exs. 1 and 11. Consequently, the share prices of many of the Objectors also increased after QAG's exit from the market. *See* QAG Ex. 11 at Ex. 20. In fact, the gains in the market value of certain of the Objectors during the week after QAG filed for insolvency alone was over $600 million. *See* QAG Ex. 11 at Ex. 12.

II. QAG BACKGROUND

A. Background Of Spinouts

48041/0001-7399119v2

QAG was a German company headquartered in Munich, Germany. At its height, QAG employed approximately 13,500 people worldwide. QAG was formed as the spin-out of the memory products division of Infineon, which is also a German company, in May 2006. Infineon itself had been created by a spin-out of the semiconductor division of another German company, Siemens AG, in 1999. Each time those divisions were spun-out, their intellectual property was transferred to the spun-out entity.

B. <u>QAG's Global Patent Portfolio</u>

The QAG patent portfolio includes approximately 8-10,000 patents and patent applications registered internationally, representing approximately 4,800 patent families. There are approximately 4,400 U.S. patents and patent applications in that global portfolio. The QAG patent portfolio includes, among others, patents directed to the manufacturing and production of semiconductor products, including DRAM, flash memory, and packaging technology.

QAG filed patents in different jurisdictions in order to obtain protection on a global basis. But technology companies such as QAG do not simply file patents in every country that has a system for the registration of patents. *Id.* Due to the expense of preparing, filing and maintaining patents, companies choose very specifically the jurisdictions in which they file their patents. *Id.* Simply put, if front-end wafer fabrication plants for DRAM were only located in Japan, Taiwan and the U.S., those jurisdictions would be the only jurisdictions in which a company would need to file patents that relate exclusively to front-end wafer fabrication. Furthermore, due to the exclusionary nature of patents, companies may file patents in jurisdictions not because they manufacture or sell there, but to prevent their competitors from doing so. Thus, a company can achieve global patent protection, yet only file its patents in a limited number of countries.

C. <u>Insolvency</u>

Although QAG is a German company, it has creditors from across the world. For example, approximately twenty-eight percent of its creditors based upon claims filed are U.S.-based entities. *See* QAG Ex. 52. Each and every one of the Objectors is also a potential creditor of QAG. *See* QAG Ex. 13 at 16-17. The implications of a decision in this matter will not merely affect a transfer of money from the U.S. to Germany. For example, the Objectors are predominantly foreign entities from Japan, Taiwan, Germany, and Korea, as well as the U.S.

Moreover, the U.S. subsidiaries of QAG, Qimonda North America and Qimonda Richmond, LLC, (collectively, "QUS"), are debtors in U.S insolvency proceedings and will benefit if the Insolvency Administrator is successful in monetizing the QAG patent portfolio.[11] Thus, all of the creditors of those U.S. subsidiaries, including groups of former employees who have appeared in this Court such as the WARN Plaintiffs, will derive a benefit from the monetization of the QAG patent portfolio. Despite the Objectors' attempts to characterize this case as a "U.S. vs. Germany" situation, this is, exactly as recognized by UNCITRAL in passing the Model Law, and the U.S. Congress in passing Chapter 15, a global issue, with the interests of many nations intertwined. The complicated nature of cross-border insolvencies is the very reason that the United Nations, the U.S. and the European Union, among others, universally agreed that care must be taken when addressing local issues, and that territorial concerns should not outweigh the "supra-national" concerns that will inevitably arise in those cases, and will likely arise more often in the future due to the expansion of the global economy.

[11] Specifically, the Insolvency Administrator and QUS are parties to a settlement agreement, approved by the bankruptcy court in Delaware, which allows the QUS entities claims against QAG in the aggregate amount of $100 million. In addition, the settlement provides QUS with an "earn out" based on the exploitation of QAG's patent portfolio pursuant to which QUS is entitled to: (a) 7.5% of the patent proceeds in excess of $100 million and up to $150 million; (b) 10% of Patent Proceeds in excess of $150 million and up to $200 million; and (c) 2% of Patent Proceeds in excess of $200 million. *See In re Qimonda Richmond, LLC*, 09-10589 (MFW), Docket #1692.

Upon the decision to liquidate QAG, the Insolvency Administrator determined that the best way to monetize QAG's most valuable remaining asset, its global patent portfolio, was through licensing. He had adopted a similar strategy in a large insolvency he administered of Kirch Media,[12] and it has proved very successful for the creditors. Thus, as he commits in the Supplement, the Insolvency Administrator adopted the same strategy for the QAG estate.

III. OBJECTORS' BACKGROUNDS

A. Samsung

Samsung, one of the largest consumer electronics manufacturers in the world, is based in Seoul, Korea and generated $119.1 billion in net sales in 2009. *See* QAG Ex. 198, Samsung 2009 Annual Report at 44. In 2009, "despite the economic recession and fierce competition, Samsung Electronics achieved the greatest performance in its history." *Id.* at 11. "In the memory semiconductor business, demand was greater and steadier than expected. [Samsung] recorded a performance well above forecasts." *Id.* In 2009, Samsung expanded its global lead in the world DRAM market, increasing its share to 33%. *Id.* at 36. In 2009, Samsung's semiconductor business generated nearly one-fifth of Samsung's consolidated net sales. *Id.* at 89. It earned $17.5 billion in 2009 from semiconductor sales, with DRAM sales accounting for 45%-53% of that revenue.

[redacted]

[12] The Kirch Group insolvency in which Dr. Jaffé was appointed Insolvency Administrator of the core companies, was commenced in 2002, is still pending, and is expected to continue several more years. That insolvency was the largest in Germany since 1945 at the time of filing. Kirch Media owned approximately half of the broadcasters of German televisions, half of Formula One racing, and the rights to the 2002 and 2006 World Cup and over 23,000 movies. Dr. Jaffé has successfully licensed those rights since 2002 by maintaining the insolvent entity for the duration of the license agreements.