[redacted]

[redacted]

B. Elpida

Elpida is a Japanese company based in Tokyo, Japan, and is a leading manufacturer of DRAM integrated circuits. For the year ended March 31, 2010, Elpida earned revenues of ¥ 466.9 billion (approximately $5 billion), a 41% increase over revenues earned in 2009. *See* QAG Ex. 27, Elpida 2010 Annual Report at 6. From 2006 to 2009, DRAM sales accounted for 100% of Elpida's semiconductor revenue. *See* QAG Ex. 11 at Ex. 20. In 2010, 17% of Elpida's global revenues arose from sales in the United States. *Id.* at 58.

[redacted]

[redacted]

C. Hynix

Hynix is a Korean company, with total semiconductor revenue in 2009 of approximately $ 6.2 billion. [redacted]

D. Infineon

Infineon is a German company headquartered near Munich, Germany. Before Infineon spun-out QAG, it was one of the leading semiconductor companies. Infineon engages in the design, manufacturing and marketing of semiconductors for use in various industries. For the year ended September 30, 2009, Infineon earned revenues of approximately $4.4 billion. *See* QAG Ex. 195, Infineon 2009 Annual Report at 13-14.

E. Nanya

Nanya is a Taiwanese company based in TaoYuan, Taiwan that engages in research and development, design, manufacturing and sales of DRAM products. Nanya's main shareholder is the Formosa Plastics Group, a Taiwanese conglomerate. In 2009, Nanya earned revenues of NT$ 42.5 billion, a 17% increase over 2008. *See* QAG Ex. 339, Nanya 2009 Annual Report at 1.

[redacted]

[redacted]

F. **Micron**

Micron is a U.S. semiconductor company based in Boise, Idaho, with manufacturing facilities in China, Italy, Japan, Puerto Rico, Singapore, and the U.S. In 2009, Micron earned approximately $4.8 billion in net revenues. *See* QAG Ex. 235, Micron 2009 Form 10-K at 44.

[redacted]

[redacted]

G. **IBM**

IBM is a U.S. company that provides semiconductor technology, products and packaging solutions to clients and for IBM's own internal use. Its Microelectronics Division is responsible for semiconductor design and manufacturing. *See* QAG Ex. 134, IBM 2009 Form 10-K at 3. In 2009, IBM reported revenues of $ 95.7 billion, of which the Microelectronics Division contributed approximately $1.5 billion. [redacted]

H. Intel

Intel is a U.S.-based company with headquarters in California. It is the largest semiconductor manufacturer based on revenue. In 2009, Intel earned $35.1 billion in net revenues.

IV. PATENTS PROVIDE INVENTORS WITH THE ABILITY TO EXCLUDE COMPETITORS

All World Trade Organization members have reached an agreement that patent protection is "available for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application." 2-1 *Baxter, World Patent Law and Practice* § 1. "A patent confers the right to exclude others from making, using or selling the claimed invention in the United States for a period of 17 [or 20] years from the issue date." *Chisum on Patents* at OV-2. "The purpose of a patent is to define and give public notice of the patent holder's exclusive rights in the claimed invention so as to exclude other inventors and competitors from making, using or selling the invention." *King Instruments Corp. v. Perego*, 65 F.3d 941, 947 (Fed. Cir. 1995). Thus, the goal of a patent is exclusionary – it is to prevent other parties from using an invention without compensating the owners of that invention.

PROCEDURAL HISTORY

I. QAG FILES FOR INSOLVENCY IN GERMANY AND SEEKS CHAPTER 15 STATUS IN THE UNITED STATES

QAG filed an application with the Amtsgericht München – Insolvenzgericht (Local Court Munich - Insolvency Court) ("Munich Court") on January 23, 2009, to open insolvency proceedings under the insolvency laws of Germany. QAG operated under preliminary insolvency proceedings until April 1, 2009, when the Munich Court entered an order commencing insolvency proceedings and appointing Dr. Michael Jaffé as the Insolvency Administrator over the estate of QAG.[13] From the outset of insolvency, intense efforts were made by QAG and Dr. Jaffé to try to save QAG by finding new investors to keep the company as a going concern, but those attempts ultimately proved unsuccessful in the summer of 2009. Consequently, the creditors' committee decided to liquidate QAG.

On June 15, 2009, the Insolvency Administrator petitioned this Court for Chapter 15 status. Docket No. 1. Judge Mayer granted that petition on July 22, 2009. Docket No. 56. On the same day, Judge Mayer entered a Supplemental Order that, among other things, included Section 365 as an additional provision applicable to this case in spite of the fact that the Insolvency Administrator did not request that such Code provision be applicable. Docket No. 57.

II. MOTION FOR LEAVE TO AMEND

On October 8, 2009, the Insolvency Administrator moved to amend the Supplemental Order to remove the reference to Section 365 or to mandate that Section 365(n) only applied if the Insolvency Administrator rejected an executory contract pursuant to that section, rather than exercising his rights pursuant to the German Insolvency Code. Docket No. 96. Seizing on the

[13] Dr. Jaffé also served as the preliminary insolvency administrator from January 23, 2009 through April 1, 2009.

miscue, certain of the former licensees of QAG objected to that motion. Docket Nos. 181, 187, and 188. On November 11, 2009, Judge Mayer granted the Insolvency Administrator's motion, and entered an Amended Supplemental Order, making clear that Section 365(n) did not apply unless the Insolvency Administrator expressly sought relief under Section 365 of the Bankruptcy Code. *See* Docket Nos. 178, 179 and 180.

III. DISTRICT COURT REMAND

The Objectors appealed Judge Mayer's decision. On appeal, the District Court held that Section 365(n) does not automatically apply in a Chapter 15 proceeding. *See* Mem. Op. at 19. The District Court remanded the case to this Court to develop the record regarding: (1) whether it is "manifestly contrary" to U.S. public policy to grant comity to the foreign main proceeding and defer to that proceeding's treatment of executory cross-license agreements (*see* Mem. Op. at 26); and (2) whether, in granting comity to the foreign main proceeding, any conditions should be imposed pursuant to Section 1522 of the Bankruptcy Code to sufficiently protect the debtor, its creditors and the Objectors. *See* Mem. Op. at 13-14.

IV. THE INSOLVENCY ADMINISTRATOR DID NOT ASK FOR SECTION 365 TO BE APPLIED IN THIS CHAPTER 15 PROCEEDING

Neither in his petition for Chapter 15 recognition, nor subsequently, did the Insolvency Administrator seek the inclusion of Section 365 as part of any relief sought from the Court. In Judge Mayer's Memorandum Opinion granting the Insolvency Administrator's Motion to Amend, the Court acknowledged that "[i]t is clear that the inclusion of § 365 in the supplemental order was improvident." Mem. Op. at 4.

V. THE INSOLVENCY ADMINISTRATOR'S OFFER TO LICENSE QAG'S GLOBAL PORTFOLIO

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Clarifying and memorializing an offer made at the initial hearing before Judge Mayer after remand, on November 8, 2010, the Insolvency Administrator filed a Supplement to his Motion to Amend the Supplemental Order (the "Supplement"). Docket No. 374. The Supplement confirms the Insolvency Administrator's commitment to license the QAG patent portfolio to the former licensees at a reasonable royalty to be determined through good faith negotiations with each such licensee. In the event that the parties are not able to reach an agreement on a reasonable royalty, the Insolvency Administrator has committed to submit that issue to a neutral, third party arbitrator appointed by the World Intellectual Property Organization ("WIPO"), for a binding determination of a reasonable cash royalty for a non-exclusive global license to QAG's patent portfolio. *Id.*

ARGUMENT

I. THROUGH CHAPTER 15, THE UNITED STATES CONFIRMED ITS COMMITMENT TO A UNIVERSALIST APPROACH TO THE BANKRUPTCY OF MULTINATIONAL CORPORATIONS.

Although the Court will be shown at the hearing the specific facts and circumstances justifying the relief requested by the Insolvency Administrator, it is important to place this case in a larger policy context. That context is not only important to frame the issues presented here, but to emphasize the position of this case as the first one addressing the treatment of executory contracts in a Chapter 15 case in the face of a public policy attack.

Chapter 15 represents the adoption by the U.S. of "modified universalism." The traditional treatment of a multinational bankruptcy in most countries, including the U.S., was called "territorialism" or the "grab rule," where each country seized local assets and distributed bankruptcy dividends with little attention to what was happening in other countries. This system was inefficient, made reorganization difficult, meant great loss of asset value in liquidation, and simply did not fit a global economy. It was opposed by the idea of "universalism," meaning management of an insolvency in a single proceeding worldwide. The middle ground between these two extremes was the idea of "modified universalism." The American Law Institute's Transnational Insolvency Project explained this idea as follows: "Modified universalism is universalism tempered by a sense of what is practical at the current stage of international legal development[.]"[14] The American Law Institute went on to note that "modern academic and professional opinion has come down overwhelmingly on the side of universalism."[15]

Even the opponents of Chapter 15 have conceded that by its adoption the U.S. has officially embraced modified universalism.[16] Thus, it is the goal of Chapter 15 to achieve the same results in the bankruptcy of a multinational corporation as would be achieved in a single worldwide proceeding.

II. GRANTING COMITY TO THE GERMAN MAIN PROCEEDING SUPPORTS THE GOALS OF CHAPTER 15 AND IS NOT MANIFESTLY CONTRARY TO A FUNDAMENTAL U.S. PUBLIC POLICY.

A. Once Chapter 15 Status Is Granted, Requests For Comity Must Be Granted.

Under Section 1509 of the U.S. Bankruptcy Code, once the court grants recognition under § 1517, it "shall grant comity or cooperation to the foreign representative." 11 U.S.C. § 1509(b)(3). Judge Ellis stated that "under the plain terms of § 1509(b)(3), the Bankruptcy Court lacked the discretion to deny the Foreign Administrator's request for comity; rather the Bankruptcy Court could only have refused to defer to German Insolvency Code § 103 on the ground that applying German law, instead of § 365(n), would be 'manifestly contrary' to the

[14] *See* American Law Institute, *Transnational Insolvency: Principles of Cooperation* at 8.
[15] *Id.* (footnote omitted).
[16] *See, e.g.*, Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev. 2216, 2217 (2000) (opponent of universalism states that Model Law essentially adopts that approach).

public policy of the United States under § 1506." Mem. Op. at 26. Thus, Chapter 15, as is clear from the reasons for its enactment, mandates the accordance of comity to a foreign representative. As Judge Ellis noted, Congress' mandate reflected in Section 1509 is subject only to the narrow exception of Section 1506.

B. The Public Policy Exception Of Section 1506 Sets An Extraordinarily High Standard.

Section 1506 provides that nothing in Chapter 15 "prevents the 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." The "manifestly contrary to public policy" exception is an exceedingly narrow one, under both domestic and foreign precedent[17] and is narrowly construed. *See, e.g.*, *In re Metcalfe and Mansfield Alternative Inv.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010); *see also In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333 (Bankr. S.D.N.Y. 2006). This public policy exception should only be "invoked when the most fundamental policies of the United States are at risk." *In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008); *see also Ephedra*, *supra*, at 336 (holding that denial of constitutional right to jury trial was not manifestly contrary to U.S. public policy where claimants were assured of fair hearing).

As 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. To the contrary, Chapter 15's enacting legislation expressly stated that the public policy exception applies only to the most fundamental U.S. policies:

> [t]his provision follows the Model Law article 5 exactly, is standard in UNCITRAL tests, and has been narrowly interpreted on a consistent basis throughout the world. The word "manifestly" in international usage

[17] 11 U.S.C. § 1508 states that "[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

> restricts the public policy exception to the most fundamental policies of the United States.

H.R. Rep. No. 109-31, at 109 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 172.

1. U.S. Courts Narrowly Construe The Public Policy Exception In Many Different Contexts.

In harmony with this Congressional mandate, courts have narrowly construed this exception. For example, in *Metcalfe, supra*, the court found that, in making an analysis under the public policy exception, "[a] U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court ... The key determination required by the court is whether the procedures used in Canada meet our fundamental standards of fairness." *Id.* at 697.

In *Ephedra, supra*, the court considered a Canadian bankruptcy procedure for resolving claims that did not provide claimants with their constitutional right to a jury trial they would have had if their claims were heard in the U.S. *Id.* at 335-336. In an effort to provide greater clarity and procedural fairness regarding the resolution of claims in the Canadian proceeding, the Canadian court approved certain amendments to the court's claims resolution procedure that allowed the reception of evidence and an opportunity for interested parties to be heard. *Id.* at 335. Considering the issue of whether the Canadian claim resolution process ran afoul of Section 1506, the court cited authority commenting that foreign judgments should be "accorded comity if 'its proceedings are according to those of civilized jurisprudence', *i.e.*, fair and impartial." *Id.* at 336 (internal citations omitted). The court found that while "the constitutional right to a jury trial is an important component of our legal system ... the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world." *Id.* at 337. The *Ephedra* court concluded that the procedure adopted by the

Canadian court "plainly affords claimants a fair and impartial proceeding. Nothing more is required by § 1506 or any other law." *Id.* at 337.

Courts have also found that the public policy exception has a limited scope in other contexts. For example, the Western District of Pennsylvania extended comity to a judgment of a Canadian court, based upon the fact that "United States courts have long extended comity to foreign bankruptcy actions ... so as to enable the 'assets of the debtor to be disbursed in an equitable, orderly, and systemic manner, rather than in a haphazard, erratic or piecemeal fashion.'" *Raddison Design Mgmt., Inc. v. Cummins*, C.A. No. 07-92 Erie, 2008 U.S. Dist. LEXIS 466, at *6 (W.D. Pa. Jan. 3, 2008) (internal citations omitted). The court further stated that "American federal courts have uniformly and consistently granted comity to Canadian bankruptcy proceedings because the Canadian Bankruptcy and Insolvency Act, like the United States Bankruptcy Code, 'contains a comprehensive procedure for the orderly marshaling and equitable distribution of the Canadian debtor's assets.'" *Id.* at *7. There should be no argument but that the German Insolvency Code likewise provides a similar, comprehensive procedure for the equitable distribution of a debtor's assets. *See* QAG Ex. 13 at 5-9. U.S. Courts have consistently found that German courts provide a fundamentally fair and impartial system to litigants participating in proceedings in Germany. "Germany's legal system clearly follows procedures that ensure that litigants will receive treatment that satisfies American notions of due process." *Turner Entm't Co. v. Degeto Film GMBH*, 25 F.3d 1512, 1520 (11th Cir. 1994).

In *Raddison*, the court also addressed an argument that the Canadian judgment should not be accorded comity because it was against the public policy of the State of Pennsylvania. *Raddison*, 2008 U.S. Dist. LEXIS 466, at *7. The court reasoned that the public policy exception had a limited scope and extended only to those foreign policies that are "so injurious or critical to public health and morals to trigger the narrowly-defined public policy exception." *Id.* at *11. Here, Section 365(n) is not a statute "critical to public health and morals" sufficient to justify a refusal to accord comity contrary to the clear mandate to do so under Chapter 15.

Other courts have reached similar conclusions. In *Metcalfe*, the court found that a Canadian proceeding should be granted comity even though it effectuated a release of non-debtors that would not be allowed under the Bankruptcy Code because the Canadian proceedings comported with fundamental standards of fairness in the U.S. *See Metcalfe*, 421 B.R. at 697 (citing *Cunard S.S. Co. Ltd. v. Salen Reefr Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985)). *Metcalfe* is particularly significant because it did not involve a procedural issue, but a question of substantive law where the rule that would have applied in a U.S. bankruptcy was the opposite of the rule applied in the Canadian court.

Similarly, in the context of parties seeking to compel arbitration, U.S. courts have found that public policies prohibiting dealings with countries such as Cuba and Libya do not warrant the application of the public policy exception because it would contravene the "supra-national" policy of promoting the enforcement of international arbitration agreements." *See, e.g.*, *Belship Navigation, Inc. v. Sealift, Inc.*, 95 Civ. 2748 (RPP), 1995 U.S. Dist. LEXIS 10541, at *17-18 (S.D.N.Y. July 28, 1995), and authorities cited therein. The *Belship* court further held that "[p]ublic policy should be invoked to bar enforcement only when enforcement would 'violate the forum state's most basic notions of morality and justice.'" *Id.* at *18 (citations omitted).

U.S. courts have also found that the foundations of comity underlying Chapter 15 must sometimes result in the application of foreign law contrary to our own because the application of comity very often has the effect of overriding domestic legal doctrines or rules. *See, e.g.*, *Ephedra*, 349 B.R. at 337 (recognizing Canadian order as an exercise of comity even though it overrode a defendant's constitutional right to a civil jury trial).[18]

Thus, it has been universally held, in both the Chapter 15 context and other contexts, that the public policy exception is narrowly-construed and should only apply when public health and welfare is at stake or the foreign jurisdiction's law and procedures do not comport with American notions of due process. This case raises no such grievous concerns.

2. <u>The Construction Of The Public Policy Exception In The UNCITRAL Model Law, Upon Which Chapter 15 Is Based, Is Extremely Limited.</u>

Chapter 15 of the Bankruptcy Code itself takes the unusual step of requiring that "[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." *See* 11 U.S.C. § 1508. The discussion surrounding the Model Law on Cross-Border Insolvency, which served as the basis for Chapter 15, powerfully confirms the narrow construction of the public policy exception by U.S. courts. In the legislative history of Chapter 15, the House Judiciary Committee noted that the United Nations General Assembly Guide to Enactment of the UNCITRAL Model Law on Cross Border Insolvency (the "UNCITRAL Guide") "should be consulted for guidance as to the meaning and purpose of [Chapter 15's] provisions." *Ephedra*, 349 B.R. at 336, citing H.R. Rep. No. 109-31(I), at 106 n. 101, *as reprinted in* 2005 U.S.C.C.A.N. 169 n.101. In the UNCITRAL Guide, the drafters noted that the term "manifestly" was meant to emphasize the restrictive nature of the exception:

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[18] *See also Triton Container Int'l Ltd. v. Cinave S.A.*, 1997 U.S. Dist. LEXIS 16075, at *4 (E.D. La. Oct. 10, 1997) (granting comity to Argentine proceedings and vacating *Rule B* attachments); ABC Learning Centres, Ltd., No. 10-11711 (KG), 2010 Bankr. LEXIS 4091 (Bankr. D. Del.)(same); and *In re Atlas Shipping A/S*, 404 B.R. 726, 737-738 (Bankr. S.D.N.Y. 2009) (holding Danish court to decide validity and priority of New York attachments against Danish debtor).

> The purpose of the expression "manifestly", used also in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6[19] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.[20]

In addition, the UNCITRAL Guide noted that the "public policy" that would support an exception to the presumption of the application of foreign law to foreign main proceedings has a specific meaning in the international context, and thus should be similarly construed under Chapter 15. "Public policy," in the context of the Model Code and Chapter 15, has a narrow meaning, and only includes fundamental principles of law, such as constitutional guarantees:

> In some States the expression "public policy" may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.

UNCITRAL Guide, ¶ 87.

"Public policy" in the context of the Model Law, and thus Chapter 15, does not mean generally-held concepts regarding domestic issues:

> For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation

[19] "'Article 6' refers to Article 6 of the Model Law, from which section 1506 is taken virtually verbatim." *Ephedra*, 349 B.R. at 336.

[20] [redacted]

> and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if "public policy" were to be understood in an extensive manner.

UNCITRAL Guide, ¶ 88 at 326.

Thus, it is clear from the Guide to the Model Law that the "manifestly contrary to public policy" exception should be applied in only the most narrow of circumstances. Taken together with the discussion of these issues in U.S. courts, the public policy exception should only extend to those instances where the law of the forum state for the main proceeding does not provide a fair and impartial system to litigants, fails to provide fundamental standards of fairness, or violates certain fundamental constitutional guarantees. Those instances are not present here.

C. <u>Section 103 InsO Is Actually Consistent With General U.S. Law And Policy And, As A Matter Of Law, A Decision By This Court To Grant Comity To This German Insolvency Law Would Not Be Manifestly Contrary To A Fundamental U.S. Public Policy.</u>

One of the fundamental principles of U.S. bankruptcy policy is the equal treatment of creditors of the same class. *See e.g.*, *Raddison*, 2008 U.S. Dist. LEXIS 466, at *7 (holding that equal treatment of similarly-situated creditors is a fundamental principle of U.S. bankruptcy law). The equal treatment of creditors is also one of the fundamental principles of German law. *See* QAG Ex. 13, at 12-13. The German Insolvency Code section at issue in this proceeding, Section 103 InsO, supports this shared fundamental principle of equal treatment.

D. <u>Section 103 InsO</u>

1. <u>Section 103 Inso Supports The Equal Treatment Of Creditors.</u>

U.S. courts have recognized that German insolvency law affords extremely limited priorities to common classes of creditors. *See, e.g.*, *In re Petition of Eberhard Braun*, Case No.

02-52351-LMC, (Docket No. 63), at fn 15 (Bankr. W.D. Tex. July 16, 2004) (holding that the German Insolvency Code "admiringly, does not, in fact, afford any priority to local creditors over foreign creditors, it affords no priorities at all"). Section 103 InsO is one method through which Germany accomplishes that goal.

Under Section 103 InsO, at the commencement of an insolvency case, all mutual contracts where obligations remain for both parties to the agreement at the date the insolvency proceedings are opened are automatically rendered unenforceable by operation of law. *See* Section 103 InsO; *see also* QAG Ex. 13 at 13-14. The insolvency administrator appointed to the proceeding, however, much like a debtor-in-possession or Chapter 11 trustee invoking the rights afforded by Section 365, may elect to perform the agreement and claim the other party's consideration. *Id.*

If the insolvency administrator is not going to perform under an agreement subject to Section 103 InsO, the other party is "entitled to its claims for non-performance only as a creditor of the insolvency proceedings." Section 103(b) InsO. In the event that the other party requires the insolvency administrator to opt for performance or non-performance, the insolvency administrator is obligated to make that election "without negligent delay." *Id.* If the insolvency administrator fails to do so, he or she may no longer insist on performance. *Id.* The normal manner in which an insolvency administrator notifies parties to these agreements of his or her election of performance or non-performance is by sending those parties a letter in the early stages of the insolvency proceedings. In exceptionally large cases such as this insolvency proceeding, however, it might take a while time to identify and analyze all existing contractual relationships. Therefore, it is not unusual that it might take the insolvency administrator months to send out the non-performance letters.

This process frees the debtor from burdensome agreements, and is not unlike the treatment of executory contracts under Section 365 of the Bankruptcy Code. It also treats all creditors equally, because all non-debtor contract parties are treated the same – including licensees of IP rights. No party obtains administrative priority or other preferential treatment while other similarly-situated parties are treated as general unsecured creditors. *See* Paulus Report at 14. The German Federal Court of Justice (Bundesgerichtshof or "BGH") confirmed that license agreements fall within the scope of Section 103 InsO and that is not an issue that has been raised in this Court in any event. *See* BGH Nov. 17, 2005, Docket no. IX ZR 162/04 (F.R.G.) 229 NZI (2006); *see also* QAG Ex. 13 at 15 n. 9.

If an agreement will not be performed by the insolvency administrator, an aggrieved party is entitled to file a damage claim with the insolvency court. *See* QAG Ex. 13 at 16. If a party believes that Section 103 InsO is not applicable to its agreement, it may petition the competent court to protect it, either by suing the insolvency administrator and foreclosing on the assets of the estate or by seeking a declaratory judgment that the agreements are still in place and that Section 103 InsO is not applicable. *Id.*

[redacted] Infineon filed a declaratory judgment action in the Munich District Court, claiming that Section 103 InsO is not applicable to its license agreement with QAG. [redacted] Thus, German law clearly provides for parties to contest the operation of Section 103 InsO, as the Objectors' own actions establish.

2. <u>The German Legislature Considered Adopting A Provision Similar To Section 365(n), But Rejected It Because It Would Allow For Unequal Treatment Of Creditors.</u>

In 2007, the German legislature considered an amendment to the German Insolvency Code that would adopt an exception to Section 103 InsO for intellectual property licenses similar to Section 365(n). *See* QAG Ex. 13 at 17. But bankruptcy practitioners and the judiciary in Germany objected to the proposed amendment, arguing that the adoption of such an amendment would violate the principle of the equal treatment of creditors. *Id.* at 18. In full awareness of, and having carefully considered, the U.S. solution to the treatment of intellectual property licenses, Section 365(n), the German legislature did not adopt a similar proposition. Instead, German insolvency law placed more of an emphasis on the equal treatment of creditors and allowing the parties the freedom to develop contractual solutions to any such issues to protect against the potential loss of those licenses. *Id.*

3. The Alteration Of Contractual Rights In Bankruptcy Is Well-Recognized In The U.S. Bankruptcy Code And Consistent With U.S. Public Policy.

The alteration of contractual rights is specifically authorized by the Bankruptcy Code and consistent with U.S. public policy; in fact, that is often the reason companies avail themselves of bankruptcy protection. For example, Section 365 allows debtors to avoid agreements that, outside of bankruptcy, would result in a breach of those agreements. Section 365(n) is an exception to the normal rule for the treatment of contracts under the Bankruptcy Code.

It is routine for U.S. bankruptcy courts to approve rejection of executory contracts for the purchase or sale of goods, although that rule is not followed in every country around the world. Conversely, Section 365 permits assumption of contracts despite the presence of *ipso facto* clauses or provisions permitting termination upon the existence of certain defaults or even a mere decline in financial strength. It also voids anti-assignment clauses that would prevent contract rights from passing to the estate. A number of countries have quite different rules with regard to their bankruptcy proceedings, rules that the U.S. would hope would not be applied when the debtor is a U.S. multinational in Chapter 11 in our country.

Thus, to the extent that a U.S. statute is a representation of U.S. public policy, the predominant public policy in Section 365 of the U.S. Bankruptcy Code is that contractual relationships may be changed, and likely will be, by the institution of bankruptcy proceedings. Section 365(n) represents a limited exception to that general rule, which cannot possibly rise to the level of a fundamental public policy.

4. <u>A Finding That An Extension Of Comity To The Foreign Main Proceedings Would Be Manifestly Contrary To A Fundamental U.S Public Policy Would Exalt An Exception To The General Rule Over The Entire Purpose Of Chapter 15.</u>

As discussed above, the U.S. adopted Chapter 15 to centralize the bankruptcy process as far as practicable so as to maximize recoveries in bankruptcy and improve the efficiency of the post-bankruptcy economic results. That efficiency requires minimizing conflicting decisions about title to property and rights under contracts that were part of the global estate. Here, the licenses are with counterparties from several major commercial countries that produce and distribute their products all over the world.

In this case, the Insolvency Administrator seeks to protect the most valuable asset remaining in the QAG estate, the QAG patent portfolio, from the assertion by companies from Korea, Germany, Japan, Taiwan, and the U.S., of a U.S. statutory provision related to license agreements, which is an exception to a general U.S. statutory rule permitting the termination of agreements. He seeks to treat all licensees of QAG's patents equally. Section 365 recognizes the general policy under U.S. bankruptcy law that a debtor-in-possession or Chapter 11 trustee may assume or reject any executory contract of the debtor. *See* 11 U.S.C. § 365(a). Section

365(n) represents an exception to this general rule in the context of certain types of intellectual property license agreements.

The purpose of Chapter 15 is stated expressly in Section 1501. Its purpose is to incorporate the Model Law on Cross-Border Insolvency into U.S. law, and to provide mechanisms for cooperation, and the fair and efficient administration of cross-border insolvencies. *See, e.g.*, 11 U.S.C. § 1501(a). The stated goal of Section 365(n) from its legislative history is to protect innovation in the U.S. by ensuring that inventors are not undercompensated. *See* S.R. 100-505, 100th Cong. 2d Sess. at 4. As discussed above, that goal, although laudable, plainly does not rise to the level of a fundamental U.S. policy or constitutional guarantee, nor should it outweigh what U.S. courts have described as a "supra-national" policy of promoting international cooperation. *See, e.g.*, *Belship*, *supra*, at *17-18 (holding that, in response to a "contrary to U.S. public policy argument" raised by an objector, a national policy not to deal with Cuba was outweighed by the supra-national policy of the promotion of the enforcement of international arbitration agreements); *see also Threkeld & Co. v. Metalgesellschaft, Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991) (underscoring the importance of the promotion of smooth flow of international transactions).

Balancing the equities of these interests leads to the conclusion that the notions of comity reflected in Chapter 15 and intended to ensure cooperation in international commerce should outweigh any parochial interest contrary to the law of the foreign main proceeding. And in light of the Insolvency Administrator's agreement to license the <u>entire</u> QAG patent portfolio at a reasonable royalty determined, if the parties cannot reach a business solution, by a neutral third party, the scales of equity tip even further in favor of comity because the only interest left on the Objectors' side of the balance is their interest in not paying a cash license fee in lieu of the cross-license previously provided as consideration for use of the QAG patents. **Thus, this entire complicated case boils down to whether the interests of the promotion of international cooperation explicitly set forth by Congress in Chapter 15 warrants the payment of a fair, reasonable and non-discriminatory royalty by global corporate entities that have profited immensely from the departure of one of their major competitors in the semiconductor industry.** The Insolvency Administrator's position is that the interests protected by Congress in Chapter 15 should prevail and that must be the just, fair result of these proceedings.

Importantly, it appears that Congress has already made the determination that Section 365(n) is not a fundamental U.S. public policy. In enacting Chapter 15 we can assume that Congress made reasoned determinations as to the structure of the Chapter and what Bankruptcy Code provisions should or should not apply. At the same time Congress was adopting the narrow public policy exception set forth in the Model Law, they also were enumerating the sections of the Bankruptcy Code that automatically would apply in Chapter 15. Section 1520 lists important manadatory provisions of the Bankruptcy Code such as Sections 362 (automatic stay), 361 and 552 (secured creditor protections), 363 (requiring court approval of non-ordinary course sales and providing additional creditor protections) and 549 (preventing unauthorized post-petition transfers). Significantly, there is no mention of Section 365, let alone 365(n). Judge Ellis noted that the application of Section 365(n) is not mandated in Chapter 15 proceedings. Thus, it seems apparent that in enacting the public policy exception in Section 1506, Congress was referring to non-bankruptcy U.S. policies. If the policy underlying Section 365 (and specifically Section 365(n)) was truly a fundamental U.S. public policy, then surely Congress would have mandated its application in Chapter 15 proceedings, just as it did with other key provisions of the Bankruptcy Code.

E. **<u>Even If Section 103 InsO Is "Manifestly Contrary" To A Fundamental U.S. Public Policy, The Relief Requested Here By The Administrator Through The Supplement Clearly Is Not.</u>**

As set forth above, U.S. and international precedent establishes that it would not be "manifestly contrary" to a fundamental U.S. public policy to accord comity to the German main proceedings. But, as discussed in more detail below, even if the Court found that the public policy exception should be applied in this case, the Insolvency Administrator's offer, reflected in the Supplement, makes it clear that the specific relief sought here is not manifestly contrary to U.S. public policy, or even at all contrary to U.S. public policy for the following reasons. *See*, *infra*, pp. 35 - 50.

First, the Objectors will not be put out of business and the industry will not be adversely affected if the Court enters the relief sought by the Insolvency Administrator in the Supplement. Rather, the Objectors will be provided the opportunity to re-license the worldwide QAG patents at a reasonable royalty as determined by an independent third party, if the parties cannot agree on a business solution.

Second, the adoption of the resolution offered by the Insolvency Administrator cannot be against U.S. public policy because the payment of a royalty is consistent with, and expressly contemplated by, Section 365(n)(2)(A). As sophisticated international companies, the Objectors should have foreseen that their contracts with QAG would be governed by German insolvency law. In fact, other industries such as the software and pharmaceutical industries realized the problem long ago and engaged in finding contractual solutions to the problem. The Objectors' advocacy for a different result ignores the policy of Chapter 15.

Third, this is not an issue about U.S. property rights; rather, it concerns *contracts* that pertain to intellectual property of many countries. It would be improper for this Court to parse those unitary contracts and interfere with the German court's administration of the debtor's estate by requiring that some aspects of each contract be governed by an exception under U.S. bankruptcy law.

For these reasons, it would not be manifestly contrary to a fundamental U.S. policy to grant comity to the German main proceedings, and to permit the application of German law to the assets of a German debtor in a German insolvency proceeding.

III. THE OBJECTORS ARE SUFFICIENTLY PROTECTED IN THIS CASE, EITHER BY THE PROCEDURES AND RELIEF AFFORDED BY GERMAN COURTS OR THROUGH THE INSOLVENCY ADMINISTRATOR'S OFFER OF A LICENSE.

The relief proposed by the Insolvency Administrator in amending the Court's order will sufficiently protect the interests of the Objectors, as well as those of the Insolvency Administrator and the creditors of QAG. As an initial matter, it is inequitable that an order in which Judge Mayer admittedly improvidently included a reference to Section 365 would provide an opportunity to the Objectors to interfere with the German main proceeding through this ancillary proceeding. But notwithstanding that initial issue, the relief sought by the Insolvency Administrator in this case provides sufficient protection to the Objectors, while still preserving the rights of the Insolvency Administrator to adhere to his duties under German law and protection to the other creditors, in two ways.

First, German law and procedure provide similar protections to litigants to those of U.S. law, and the Objectors can take advantage of those protections to ensure that any rights they may have under German insolvency law are preserved. In the event that the Objectors disagree that Section 103 InsO applies to their license agreements, and desire to avoid its operation, they are free to challenge its application in German courts. In fact, two of the Objectors, [redacted]

[redacted] have already availed themselves of the opportunities to challenge the operation of Section 103 InsO through a declaratory judgment filed in Germany [redacted]

Second, to the extent that the Court finds that the judicial system in Germany does not provide the Objectors with sufficient protection, a result that would be contrary to copious U.S. precedent finding that German law provides the type of protections required by Section 1522 of the Bankruptcy Code, the relief sought by the Insolvency Administrator set forth in the Supplement categorically provides sufficient protection to the Objectors. The Insolvency Administrator's offer of a license at a reasonable royalty to QAG's entire patent portfolio, an offer broader in scope than this Court could grant the Objectors by invoking Section 365(n), which applies only to the U.S patents, also provides sufficient protection to the Objectors, the debtor and its creditors because it resolves, on a global basis, all issues concerning the licensing of that patent portfolio and ensures that QAG's estate will receive fair value for the use of its patents. Under either of these scenarios, the parties to these proceedings will be sufficiently protected upon the granting of the relief sought by the Insolvency Administrator in his Motion.

A. **The Objectors Could Not Have Received The Relief They Are Seeking If Judge Mayer Had Not "Improvidently" Included A Reference To Section 365 In The Original Order Because Only The Foreign Representative Can Seek Relief Under Section 1521.**

Neither in his petition for Chapter 15 recognition, nor subsequently, did the Insolvency Administrator seek the inclusion of Section 365 as part of any relief sought from the Court. In Judge Mayer's Memorandum Opinion granting the Insolvency Administrator's Motion to Amend, the Court stated that "[i]t is clear that the inclusion of § 365 in the supplemental order was improvident." Docket No. 178, Mem. Op. at 4. Thus, this entire litigation stems from the improvident inclusion of a reference to Section 365 in the Supplemental Order, because under Section 1521 only the foreign representative may request additional relief upon the recognition of a foreign proceeding. *See, e.g.*, Section 1521(a). The Objectors have brazenly sought to capitalize on a ministerial mistake and their inappropriate attempt should be soundly rejected. Because the Insolvency Administrator never requested that Section 365 be included as relief in this Chapter 15 proceeding, the Objectors would have had no ability to raise the sufficient protection issue but for the improvidently-granted relief. Thus, the Objectors should have no standing to raise these issues because the inclusion of Section 365 in the Supplemental Order was improvident in the first instance. At a minimum, the context in which the sufficient protection issue arose here should provide guidance to this Court as to the type of protection that should be required to protect the interests of the parties.

B. Section 1522 Does Not Provide An Independent Basis Not To Apply Foreign Law.

The concept of "sufficient protection" set forth in Section 1522 should not be used as the basis of any decision not to accord comity to the German main proceeding. In the context of Chapter 15, Section 1522 applies to the granting or modification of relief sought under the U.S. Bankruptcy Code, not to considerations of whether foreign law should be applied in the first instance. Nor should "sufficient protection" considerations override the fundamental principle of Chapter 15 that U.S. bankruptcy courts should accord comity to foreign main proceedings, except in the exceedingly narrow circumstances discussed above. Above all, "sufficient protection" must not be confused with imposing the same result as if this case were a plenary case under the other chapters of the Bankruptcy Code and U.S. law were applicable. It is crystal clear from the jurisprudence under Chapter 15 and its predecessor, section 304, that protection of creditors does not mean guaranteeing each creditor the same result as if U.S. bankruptcy law applied. If the Code did that, Chapter 15 would be of little or no value in most cases. If every relevant country imposes its own rules, other than the fundamental ones, then the international cooperation and modified universalism embodied in Chapter 15 can never be accomplished.

Rather, Section 1506, the public policy exception, is the section of Chapter 15 meant to govern the issue of whether or not a court in a Chapter 15 case should follow the mandate of Section 1509(b)(3), through which "a court in the United States shall grant comity or cooperation to the foreign representative." As set forth above, it is a limited exception meant to apply in only the most narrow circumstances, such as when constitutional guarantees are at stake. No constitutional guarantees are at stake in this case. Section 1522, in contrast, applies only where the court is to grant or modify relief under Sections 1519 or 1521. It has nothing to do with whether or not foreign law should be applied.

In fact, no decisions of any U.S. court support the application of Section 1522 in the context the Objectors raise through their opposition to the Insolvency Administrator's Motion. As of the writing of this brief, the Insolvency Administrator has not identified a single case construing Section 1522 that provides a basis by which a court has selectively applied a subsection, representing an exception to the U.S. statute, to a foreign main proceeding. The purpose of Section 1522 is to mold relief provided to the foreign representative under Sections 1519 or 1521. In this case, the relief sought by the Insolvency Administrator was to correct the improvident inclusion of Section 365 in the Court's initial order. It should not be used as a point of leverage to insert U.S. law into foreign main proceedings or to insist that each creditor, domestic and foreign, get exactly what it would get in a U.S. bankruptcy proceeding.

Assuming that the Court agrees that deference to Section 103 InsO to the QAG patent portfolio is not manifestly contrary to a fundamental U.S. public policy, the question remaining is whether any protections are necessary as a result of the application of Section 103 InsO under

Section 1522 (assuming that section applies at all in light of the improvident inclusion of Section 365 in the order in the first instance). That question does not figure into the Court's calculus of whether to grant comity, which has to be decided under Sections 1506 and 1509.

C. Even Assuming That The Objectors Are Entitled To Relief Under Section 1522, Case Law Construing What Constitutes "Sufficient Protection" Makes Clear That The Types Of Protection Required Are Procedural Protections Designed To Afford Due Process Treatment Of Creditors.

The central issue regarding what constitutes "sufficient protection" under Section 1522 is whether the foreign law to which the creditors of a debtor will be subject is consistent with U.S. notions of procedural fairness or that cannot be cured by the adoption of additional protections.

Sufficient protection in Chapter 15 means procedural fairness in the country where the foreign main proceedings are being held. As the leading bankruptcy treatise notes:

> This section is not intended to provide priority or preferential treatment to United States creditors, but is intended to assure that they are not prejudiced by the turnover [of assets to the foreign administrator under Section 1521(b)] beyond being subject to the same situation as creditors in the country in which the distribution will be made.

Collier on Bankruptcy, § 1521.03 (emphasis added). For example, if U.S. creditors were not allowed to file claims or participate in a distribution under foreign law, then Section 1522 allows the court to fashion a remedy to protect the interests of those creditors. *Id.*

No additional protections are necessary here because German law provides the Objectors with sufficient protection and several different avenues of relief. First, if the Insolvency Administrator has not elected performance of the Objectors' license agreements, which is true for all Objectors, those Objectors are entitled to file a damages claim. *See* InsO § 103(b); *see also* QAG Ex. 13 at 16. Second, if one of the Objectors believes that the application of Section 103 is improper, they can petition the competent courts in Germany. *See* QAG ex. 13 at 16-17.

It is also an important consideration under Section 1522 that any relief granted in this case does not work to the detriment of QAG's creditors in Germany. Otherwise, any decision that provided additional protections to the Objectors would create a class of creditors with more rights than other similarly-situated parties, which would violate not only the fundamental German policy of the equal treatment of creditors, but also U.S. bankruptcy doctrine. For example, in *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 637 (E.D. Cal. 2006), the court noted that:

> Standards that inform the analysis of § 1522 protective measures in connection with discretionary relief emphasize the need 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.

A decision to apply Section 365(n) in this case would improvidently favor the Objectors over similarly-situated creditors in the German main proceedings.

D. <u>The Harm To QAG And Its Creditors Outweighs The Speculative Harm Identified By The Objectors.</u>

QAG and its creditors will be substantially harmed if Section 365(n) is applied to a portion of QAG's patent portfolio. It is indisputable that such an action would provide less in return to QAG's creditors during subsequent licensing negotiations regarding QAG's non-U.S. patents, and would effectively splinter QAG's portfolio by applying U.S. law to a portion of that portfolio, while the laws of Germany would apply to the rest of the portfolio. It would give the Objectors the benefit of licenses to QAG's U.S. patents, without payment or any other corresponding benefit to the estate. It is the essence of bankruptcy law that contract bargains change fundamentally when one party files for bankruptcy, especially in liquidation of an insolvent entity. The circumstances of the original bargain are altered profoundly. Here the estate can get none of the benefits that flowed to an operating entity that could benefit from reciprocal licensing while the Objectors seek to become free riders on the strength of the old bargain. It is precisely those sorts of inefficient and unfair results that permit the termination of contracts under most bankruptcy laws across the world.

1. QAG's Estate And Its Creditors Will Be Harmed If Licenses To U.S. Patents Are Treated Differently Than Foreign Patents.

The U.S. is an important jurisdiction to the worldwide system of patents and international commerce. If U.S. courts rule in a parochial fashion, applying U.S. law anytime foreign law conflicts with it, this will have global effects because it will undercut the value of a global patent portfolio such as QAG's portfolio. Insolvency law attempts to maximize return for creditors, but granting parochial exceptions as requested by the Objectors will undercut that effort. The license agreements all relate to global portfolios; thus, granting the Objectors the relief they are seeking would effectively pick apart those agreements, imposing one rule for U.S. patents and other rules for other jurisdictions – a result directly contrary to the purpose of Chapter 15.

Thus, application of U.S.-centric Section 365(n) will not create "patent peace," as asserted by the Objectors. All that will be accomplished if the Objectors are successful is reducing the price they will be required to pay to relicense from QAG (which is really their only goal in undertaking this litigation). This reduction in price will clearly hurt the potential return on the investments in research and development made by QAG during its solvency all while providing the Objectors with the benefit of a royalty-free license to QAG's patent portfolio and the freedom to operate in a marketplace buoyed by the exit of one of its major competitors.

The carving-out of the U.S. patents from the QAG patent portfolio would injure the estate because it would splinter that portfolio. The creation and maintenance of a global patent portfolio is extremely expensive. In addition to the research and development that results in the creation of the invention underlying each patent, the patent needs to be prepared, prosecuted and maintained in each jurisdiction in which it is registered. Due to that expense, patents are not filed in every jurisdiction across the world. Patents are carefully filed where they are needed, for example, manufacturing patents are filed where manufacturing takes place, and additional patents might be filed where products are sold. This is a process that companies such as QAG conduct carefully in order not to incur unnecessary costs. The result of this careful process is a global patent portfolio, providing patent protection where the company needs it and allowing QAG to offer its licensees a global system of patents, providing global protection to those licensees to practice the claims of QAG's inventions. If Section 365(n) is applied to only the U.S. patents, this carefully-constructed patent portfolio would be disrupted. Such a result would be inequitable to both the Insolvency Administrator and the creditors of QAG.

2. The Objectors Have Not Established Any Reasonable Harm.

The Objectors' expert reports and argument on the potential harm to the semiconductor industry present a "parade of horribles," but there is simply no evidence to support their speculative claims of harm, and they do not even attempt to provide any evidence of harm specific to the loss of QAG's U.S. patents. In fact, all of the Objectors admitted that they conducted no such inquiry. In addition, Dr. William Kerr will testify that [redacted]

3. Notion Of "Patent Peace" Is Incorrect.

Since the beginning of these remanded proceedings, the Objectors have often cited to a purported "patent peace" that exists in the semiconductor industry. This "patent peace," according to the Objectors, is the result of the many cross-licenses entered into by certain participants in the semiconductor industry and leads to reduced litigation and the freedom to operate. But the actual state of the semiconductor industry soundly demonstrates that "patent

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peace" is a misnomer, and the semiconductor industry is strife with patent infringement lawsuits regarding semiconductor products. Since 2000, there have been no less than thirty patent infringement lawsuits in U.S. courts involving the Objectors alone relating to semiconductor patents, including two such cases after the filing of this Chapter 15 case. There have been twenty patent infringement investigations involving the Objectors relating to semiconductor patents in the International Trade Commission, including six filed after the filing of this case. Thus, the actual state of the semiconductor industry is, in fact, extremely litigious, and the claims of "reduced" litigation ring hollow. In fact, certain of the Objectors have even sued one another. For example, Infineon instituted an investigation before the International Trade Commission against a plethora of DRAM companies, including Elpida. *See Certain Dynamic Random Access Memory Semiconductors and Products Containing Same, Including Memory Modules*, U.S. I.T.C. Inv. No. 337-TA-707 (Mar. 22, 2010).

Confronted with the dramatic amount of litigation in the semiconductor industry, Dr. Hausman later retreated from his assertion that cross-licenses "reduce" the amount of litigation, claiming that this rampant litigation is actually "a potential means by which two parties sometimes achieve patent peace." It is difficult to comprehend that an industry that produces so much litigation could be characterized as "peaceful."

4. Dr. Jaffe Is Not A Patent Troll, And This Consistent Claim By The Objectors Is Merely An Inflammatory Ruse, Contradicted By The Objectors' Own Dealings With Trolls.

Another persistent theme of the Objectors is that Dr. Jaffe is acting as a "patent troll" or that the "potential" for him to sell the QAG patent portfolio to a patent troll is a sufficient ground to deny the relief sought here. This argument is completely misplaced and the facts surrounding this argument underscore the hypocritical positions taken by the Objectors.

Dr. Jaffe is the fiduciary of an insolvent German company that was one of the premier semiconductor companies in the world and is now trying to sell the most valuable asset of the company that researched, developed, marketed and sold semiconductor products – its patent portfolio. In that role, he is no different than a Chapter 11 trustee is U.S. proceedings. Yet, the Objectors seek to have this Court view him in a negative light, one that is unjustified and contrary to the facts of this case. One example of this is their consistent use of the term "patent troll" to describe this Court-appointed representative. The term "patent troll" is pejorative in the technology industry, and its generally-accepted meaning is that of an entity that engages in no sales or manufacturing activities and did not use its own resources to research and develop the technology at issue, but instead, purchases patents in order to license those patents through the threat of litigation. It does not mean a fiduciary appointed by a court in an insolvency proceeding tasked with the responsibility of returning value to the entity's creditors.

Although Dr. Jaffe has never sold any of QAG's patents to a troll, the Objectors have repeatedly claimed that the potential that he might warrants the application of Section 365(n) to a portion of the QAG patent portfolio. That position is ironic because Dr. Jaffe has not sold the QAG patents to any patent trolls, but certain of the Objectors themselves have done so and have invested in the "trolls" the Objectors paint as "harbingers of doom" for the technology industry.

For example, in December 2009, Micron sold 4,500 patents to Round Rock Research LLC. Round Rock is commonly described as a "patent troll" or a "non-practicing entity" and was created by a former Kirkland and Ellis' patent litigation partner, John Demarais. *See* QAG Ex. 12 at 11, ¶ 24. [redacted]

[redacted] The Objectors' argument that the semiconductor industry might suffer harm because of the potential that the Insolvency Administrator might sell the QAG patent portfolio, including any essential patents under a JEDEC standard, to a patent troll, and the Objectors' portrayal that their interests are on behalf of the industry as a whole, is belied by the fact [redacted]

[redacted]

Thus, under the Objectors' theory of the case, on the one hand the specter of a sale to a patent troll by Dr. Jaffe would shake the semiconductor industry to its core, yet on the other hand, the Objectors themselves are free to conduct business with these same entities, selling them essential patents, entering into discussions with them, and investing in them so as to profit from their aggressive licensing efforts. This entire line of argument also misses the point because, through the Supplement, the Insolvency Administrator has offered each and every one of the Objectors the opportunity to license the QAG patents at a reasonable royalty, to be determined by an independent third party if necessary.

5. The Only Real Ramification To The Objectors Is The Requirement To Pay A Reasonable Royalty.

Even if one were to assume that all of the harm alleged by the Objectors was valid, there is not any harm that would befall the Objectors if they took a license agreement as offered by the Insolvency Administrator. The Objectors' experts speculate that having to enter into new licenses could increase costs and prices for consumers, but the Objectors' designated representatives expressly denied those claims in deposition.

The Objectors' experts claim that [redacted] While the license agreements that existed between the Objectors and QAG prior to QAG's insolvency indeed had consideration, it was continuing consideration – the exchange of cross-licenses to each party's patent portfolio. All that the Insolvency Administrator seeks is to replace the value of the consideration of the cross-license received by QAG with the payment of a reasonable cash royalty as a substitute for the cross-license. This is no real harm to the Objectors, as the value of the cross-license would simply be replaced by the value of the royalty paid to QAG for the license to QAG's patent portfolio.

6. <u>The Specter Of Patent Litigation Is Purely Hypothetical.</u>

The Objectors further speculate that if they are left without licenses to the QAG patents, they will be subject to patent litigation and potential injunctions. But they are subject to potential patent litigation every day in the ordinary course of their business. None of the Objectors is a stranger to patent litigation because they have all been involved in numerous patent litigations, including with one another. And while the Objectors claim that they might be subject to patent litigation by QAG on the one hand, they claim that they do not know if they are using the QAG patents in their products on the other hand. Several of the Objectors, including [redacted]

[redacted] Thus, their assertion of potential patent litigation is inherently speculative.

The Objectors' claim that they will be subject to potential injunctions as a result of putative patent litigation is based upon speculative assumptions and incorrect readings of the current state of the law. The first assumption is that the Objectors would not reach an agreement with the Insolvency Administrator on a reasonable royalty, and that they would reject the offer to take any such disputes to a neutral third party. The next assumption is that the Objectors' products infringe QAG patents and that the Insolvency Administrator would win any such patent litigation. Assuming that the Insolvency Administrator would win those patent infringement cases, the next question is the relief awarded. Generally, the result of patent infringement litigation is the establishment of a reasonable royalty by the Court. That would provide the QAG estate with the stream of revenue it seeks to satisfy its creditors. The notion that the Insolvency Administrator would then proceed to seek an injunction to prevent the sales of the very products that would generate that revenue stream is spurious – the relief that the Insolvency Administrator would seek is a financial one, and the creditors would gain no benefit from additional relief.

Moreover, even the Objectors would not argue that the Insolvency Administrator is manufacturing or selling products in the U.S., so the likelihood of the Insolvency Administrator receiving an injunction in this hypothetical, successful patent litigation is extremely unlikely, and even more so under the current state of the law. Since 2006, the prospect of injunctions in patent cases for entities that do not manufacture or sell products has been dramatically diminished, as a result of the U.S. Supreme Court's decision in *Ebay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). In that case, the U.S. Supreme Court unanimously determined that an injunction should not automatically issue based upon a finding of patent infringement. *Id.* at 392-393. The *Ebay* decision makes it extremely difficult for non-practicing entities to obtain an injunction for patent infringement, as noted in Justice Kennedy's comments in his concurring opinion in *eBay*:

> In cases now arising trial courts should bear in mind ... the economic function of the patent holder present considerations quite unlike earlier cases. An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees ... For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. See ibid. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.

Id. at 396-397 (emphasis added) (internal citations omitted).

Therefore, practical considerations militate against trying to obtain an injunction prohibiting the sale of the same products that would form the basis for the stream of revenue that would accrue to QAG's creditors. In addition, as a legal matter, the notion of an injunction in favor of an entity that is in liquidation and has no products in the U.S. stream of commerce to protect, and would only benefit from economic relief sought in a patent litigation, undercuts any specter of imminent harm to the Objectors through the use of an injunction.

Thus, to the extent that the Objectors would be harmed at all by entering into new license agreements with the Insolvency Administrator, that harm is simply the requirement to pay a royalty for the use of QAG's patents, a cost of doing business that all participants in the global semiconductor industry must bear when faced with the insolvency of a licensor and is not outweighed by the substantial harm to QAG's estate.

E. Even If Sufficient Protection Beyond What German Law Affords Is Required In This Instance, The Offer To Re-License The Patents At A Reasonable Royalty As

Determined By An Independent Third-Party More Than Sufficiently Protects Any Of The Objectors.

Although it is the Insolvency Administrator's position that the Objectors' interests are sufficiently protected by German law and procedure, the Objectors' allegations of grievous harm are completely undercut by the offer made by the Insolvency Administrator in his Supplement. Docket No. 374.[21] In the Supplement, the Insolvency Administrator offers the Objectors the opportunity to license the entire QAG patent portfolio. *Id.*

The procedures outlined in the Supplement are designed to give the parties a quick resolution to any disputes regarding a reasonable royalty to the global QAG patent portfolio. Initially, the Insolvency Administrator will engage in good-faith negotiations regarding the determination of a cash royalty with any entities interested in negotiating a license agreement to the QAG patent portfolio. *See* Docket No. 374 at 2, ¶ 4. If the parties are unable to reach an agreement on a reasonable royalty, the Insolvency Administrator is willing to commence expedited, binding arbitration proceedings before the World Intellectual Property Organization. *Id.* at 3. Thus, even if, as Objectors allege, the Insolvency Administrator is not offering a reasonable royalty, a binding determination of such a royalty will be made by a neutral, third-party expert experienced in patent licensing matters.

The Insolvency Administrator has also offered to agree not to assign the license agreements during their terms. This would prevent the unlikely situation the Objectors raise that they might, down the road, be faced with the same situation again in the event that a German entity buys the QAG patent portfolio and also becomes insolvent. In the event of any future sale of the QAG patent portfolio, the Objectors are already protected by the decision of this Court in its order under Section 363 of the Bankruptcy Code, which requires approval from the Court, and

[21] Additonally, the Insolvency Administrator, as promised in the Supplement, will submit a Proposed Amended Order with an attached proposed term sheet for the new licenses.

the opportunity for the Objectors to object, to any proposed sale in the future. The Objectors, at that time, would have the opportunity to conduct due diligence on any proposed purchasers of the QAG patent portfolio to determine the economic wherewithal of that proposed purchaser. Thus, the purported situation of a future insolvency is not only speculative, but highly unlikely, and, in any event, the provisions of Section 363(e) (requiring adequate protection of an interest in property that is sold) should adequately protect the Objectors from any such scenario.

In addition, the alleged harm from the prospect of facing this same situation in the future can easily be avoided by retaining the patents in the estate. Unlike in the U.S., in Germany, insolvent entities can exist for years after the filing of insolvency. One of the reasons that insolvent entities may remain in insolvency for long periods of time is to provide a return for creditors when that return will take an extended period, such as for the life of a license. The Insolvency Administrator has used this strategy successfully in the past through his experience with the Kirch Group insolvency proceedings in Germany and believes that a similar strategy may be successful in his efforts for QAG.

Thus, the Insolvency Administrator's offer, as set forth in the Supplement, not only provides the Objectors with sufficient protection under § 1522, but the offer is far more broad than the Objectors could obtain from a favorable ruling of this Court because the offer includes a license to QAG's global patent portfolio.

F. Conversely, Even If The Court Held That Section 365(n) *Should* Be Imposed On These Contracts With Respect To The U.S. Patents, Mandating The Relief Sought In The Supplement Will Be The Only Way To "Sufficiently Protect" QAG And Its Creditors.

One of the assumptions of Section 365(n) is that any licensee electing to retain its rights under a license agreement must continue to pay royalties due under that agreement. *See* 11 U.S.C. § 365(n)(2)(B). Obviously the inclusion of this provision ensures the continued benefit to

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the debtor-licensor's estate arising from that license agreement. Thus, in this case, because the Objectors' licenses with QAG were primarily cross-licenses with no royalty payments, one of the basic assumptions of Section 365(n) – the continued payment of royalties – is not satisfied. Consequently, even if Section 365(n) is applied to this case, the relief sought in the Supplement regarding establishing a reasonable royalty is still necessary because it would be the only way to sufficiently protect the estate and its creditors. QAG's creditors would be protected because they would derive some value from the license agreements, as Section 365(n) clearly contemplates, while still allowing the Objectors to continue to enjoy the benefits of the license.

IV. PRACTICAL CONCERNS MILITATE IN FAVOR OF ADOPTING THE OFFER MADE IN THE SUPPLEMENT.

From a practical perspective, the result sought by the Objectors in this case will not end this dispute because it can apply only to QAG's U.S. patents. The Objectors will still need to reach agreement with the Insolvency Administrator regarding the use of the foreign patents, which in large part cover the same ideas or invention. The only way to provide some closure to all the parties to this dispute would be to adopt the procedures outlined in the Supplement.

CONCLUSION

For these reasons, the Insolvency Administrator respectfully requests the Court grant his motion striking the reference to Section 365 from the improvidently-entered order and stating that Section 365(n) only applies if the Insolvency Administrator seeks to terminate a license under Section 365.

EXHIBIT 9

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

IN RE: QIMONDA AG, Debtor in a foreign proceeding.	Case No. 09-14766-SSM (Chapter 15)

OBJECTORS' JOINT PRE-HEARING BRIEF

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> 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 [365(n)] will immediately remove that burden and its attendant threat to the development of American Technology . . . .
>
> —1988 Senate Report 100-505 at 1-2 (referring to the Fourth Circuit's *Lubrizol* decision)
>
> Half a century ago, when the Soviets beat us into space with the launch of a satellite called Sputnik, we had no idea how we'd beat them to the moon. The science wasn't there yet. NASA didn't even exist. But after investing in better research and education, we didn't just surpass the Soviets; we unleashed a wave of innovation that created new industries and millions of new jobs. This is our generation's Sputnik moment.
>
> —President Obama's 2011 State of the Union Address

As Judge Ellis of the District Court already found, "Lubrizol's public policy argument was substantial," and (quoting the Fourth Circuit) "allowing rejection in this and comparable cases could have a general chilling effect upon the willingness of parties to contract at all with businesses in possible financial difficulty." *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 566 (E.D. Va. 2010) (quoting *Lubrizol Ent. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985)). The District Court went on: "it is clear that Congress carefully considered *Lubrizol*'s public policy implications and, by overturning *Lubrizol*, took affirmative steps to protect patent licensees from debtors' termination of patent licenses in bankruptcy proceedings." *Id.* at 567. The sole remaining question is, according to Judge Ellis, not whether there was an important economic and legal public policy at stake, but whether the failure to apply § 365(n) under the rubric of comity to German law would be "manifestly contrary" to that public policy.

As such, this case tests the sanctity of Congress's express findings about the public policy of the United States, as embodied in the U.S. Bankruptcy Code's protections for licensees to U.S. patents and patent applications. The critical question is whether licensees of U.S. patents and applications owned by an insolvent *foreign* entity will be given different treatment from those licensees of U.S. patents and applications owned by U.S. entities. It is not an overstatement to say that the Court's answer to that question implicates the entire technology industry and has profound implications for the U.S. economy. Indeed, while the focus of this proceeding is patent cross-licenses covering semiconductor technology—a core component of myriad high-technology products—the interests at issue here extend to the foundations of the U.S. economy: innovation, competition, and consumer welfare.

In 1988, when the *Lubrizol* decision was abrogated by the enactment of § 365(n) , fewer than half (47%) of U.S. patents were issued to foreign companies.[1] In 2010, a majority of U.S. patents were issued to foreign companies for the second year in a row.[2] This phenomenon underscores the fact that a decision to sacrifice the protections of § 365(n) in the interests of comity will have an enormous impact on the protection of investment and innovation in the American technology industry. [redacted] The threat to investments in the semiconductor industry is particularly pernicious because semiconductors are a fundamental component of modern technology. Indeed, the semiconductor industry has driven the innovation and growth in every other technology sector—including cell phones, computers, and the Internet, which are three of the most important innovations in the last 30 years.[3]

As explained below, a failure to protect patent cross-licenses in which U.S. patents are held by foreign entities may have severely negative consequences not just for the Objectors but also for U.S. interests, U.S. industry, and U.S. consumers alike. Among other things, a result

1 http://pubs.acs.org/doi/abs/10.1021/cen-v067n013.p005a.

2 http://www.ificlaims.com/IFIPatents010909.htm.

3 *See* Phyllis Korkki, THE COUNT; These Things Went From New To Much-Used, The New York Times (Mar. 8, 2009) (listing survey results from a panel of judges at the Wharton School of the University of Pennsylvania); (Ex. 1, 2/15/2011 Hausman Dep. Tr. at 71:25-72:17.)

that undercuts the sanctity of patent licenses would, in turn, threaten innovation across the economy as a whole just at the time that President Obama is calling for job-creating investments and innovation in biomedical research, information technology, and clean energy technology—industries all dependent on intellectual property licensing.

This dispute arises from the purported effects of German insolvency law on the Objectors' patent cross-licenses due to the opening of the insolvency proceedings of the failed German semiconductor company, Qimonda AG. The estate's foreign representative, Dr. Michael Jaffé ("Jaffé," the "Foreign Representative," or "FR"), claims that the license agreements with Qimonda became unenforceable as of the opening of Qimonda's insolvency proceedings in Germany in April 2009 and that he was, thereafter, entitled to strip the Objectors of their patent licenses by "electing non-performance" of the underlying agreements.[4] These patent cross-licenses are held by many of the most significant participants in the semiconductor industry to Qimonda's U.S. patents and patent applications (collectively, the "U.S. Qimonda Patents"). Specifically, in October 2009, the FR sought to modify the relief set forth by this Court's Supplemental Order, issued pursuant to § 1521 of the Bankruptcy Code, to remove that Order's express protection of § 365. Removal of § 365(n) ("§ 365(n)"), would give the FR—according to his version of German law— the ability to unilaterally cancel the licensing rights to the U.S. Qimonda Patents held by the Objectors and innumerable other licensees.

While the District Court held that this Court has discretion to remove § 365 from its Supplemental Order governing Qimonda's Chapter 15 proceeding, it made clear when it remanded the proceedings here that this Court must weigh the interests of the Licensees—and

[4] Two of the Objectors are actively litigating in Europe the question of whether their perpetual patent licenses are part of the Qimonda estate and thus subject to the Foreign Representative's rights under Section 103 of the German Insolvency Code or were permanently and irrevocably separated from the estate at the time they were granted. Nevertheless, there can be no doubt that the FR has acted and continues to act as if the Objectors have no valid rights to use the U.S. Qimonda patents. Accordingly, Judge Mayer assumed for purposes of the FR's motion that German law and U.S. law may be in conflict. (Docket Nos. 178, 179 at 4 (Nov. 19, 2009).)

other interested entities[5]—against the interests of the debtor and determine whether, in the absence of the protection afforded by § 365(n), the Objectors' interests can be adequately protected pursuant to 11 U.S.C. § 1522. If the Court can answer that question in the affirmative, which the Objectors submit it cannot, the Court must still determine whether the removal of § 365(n) protection from the Supplemental Order, and deference to the purported German treatment of licenses to U.S. patents, is manifestly contrary to U.S. public policy.

With respect to the first issue, because the harm that the removal of § 365(n) protection would cause to the Objectors, the semiconductor industry, and the U.S. economy as a whole, so heavily outweighs any minimal harm to the estate, the Objectors' interests cannot be "sufficiently protected" absent the application of § 365(n) . In particular, the removal of § 365(n) protection will damage the Objectors:

- Jeopardizing the billions of dollars in sunk investments made in reliance on the freedom to operate that the Qimonda patent licenses afforded the Objectors;
- Ensuring that the FR will continue to attempt to "hold up" the Objectors for a new license to the Qimonda patents—a position the Objectors are in as a consequence of having relied on the cross-licenses to the Qimonda patents in conducting their businesses, in some cases for more than 15 years;
- Putting the Objectors, the semiconductor industry and the entire U.S. economy, in a position in which they may be "held up" in the future by any other existing license partner who commences, or even threatens to commence, a foreign insolvency proceeding in a jurisdiction without § 365(n) -type protections;
- Removing the certainty in patent license agreements that Congress intended to create when it passed § 365(n), and thereby giving rise to a "chilling effect" on licensing that will reduce investments in the semiconductor industry and beyond;
- Directly and negatively impacting industry participants' ability to establish and maintain standards in the semiconductor industry, which are fundamental to the interoperability of electrical components and facilitate competition in the industry;
- Potentially forcing the Objectors to pay again for licenses for which they have already paid in an arms-length transaction with agreed-upon terms, and as a result, taking away funds from innovative activities;

5 While there is no case law interpreting this phrase in § 1522(a) , at a minimum, other interested entities must include semiconductor manufacturers who have not appeared as objectors and the U.S. customers of the Objectors, [redacted] It may very well also include U.S. consumers.

- [redacted]
- Causing each of the Objectors to bear an unmanageable burden of determining whether any of their past, current, or future products practice any of the Qimonda patents and if a license agreement with the FR (or any subsequent owner) is necessary;
- Incentivizing U.S. semiconductor manufacturers to consider moving manufacturing activities and IP assets outside of the United States;
- Incentivizing the proliferation of patent trolls who can move their patent assets to countries like Germany and benefit from seeking multiple "hold up" opportunities vis-à-vis the Objectors and other practicing entities; and
- Threatening the supply of commodity semiconductor products (*e.g.*, DRAM and NAND Flash) to some Objectors in the U.S. and to customers of the Objectors in the U.S., such a[redacted]

Turning to the second issue, the removal of § 365(n) would be manifestly contrary to U.S. public policy by creating uncertainty with respect to patent licenses which, in turn, will cause an immediate and substantial reduction in investment and reliance upon standards in the semiconductor industry. This is the very result that Congress sought to avoid when it enacted § 365(n) . That reduction in investment and reliance upon standards would, consequently, undermine innovation in not only the semiconductor industry, but ultimately in all high-technology sectors across the U.S. economy. Specifically, as set forth more fully below, if all existing and future licenses to U.S. patents held by foreign companies are subject to cancellation in the event of the bankruptcy of the foreign licensor, the reliance upon cross-licensing that has fueled massive innovation in the technology industry for decades will be greatly diminished because firms will no longer have the certainty (that they will not be held up) that underpins the multi-billion dollar investments needed to develop and produce semiconductor products.

In particular, the removal of § 365(n) protection would be manifestly contrary to the very U.S. public policies expressly or impliedly addressed in the legislative history of § 365(n) :

- The fundamental U.S. public policy in promoting investment and innovation in the technology industry, a primary driver of this nation's economic growth;
- The fundamental U.S. public policy in promoting economic productivity;

- The fundamental U.S. public policy in protecting consumer welfare; and
- The fundamental U.S. public policy in promoting competition.

Thus, the Court should deny the FR's request to amend the Supplemental Order for this separate and independent reason.

Furthermore, as explained below, the FR's proposal for a "reasonable" royalty re-license does not in any way address, let alone alleviate, these harmful consequences of a failure to extend § 365(n) protections to U.S. patents and applications held by foreign bankrupt entities. Indeed, that litigation-driven position was adopted only after the FR found no buyers for the patents given the uncertainty of their encumbered status caused by this proceeding. The FR's newly-minted commitment to be "reasonable" in his unjustified licensing demands does not in any way change the fact that finding that licenses to U.S. intellectual property can be repudiated in a foreign insolvency proceeding will dislocate and undermine a system of cross-licensing that is the bedrock of investment, innovation, and competition in the entire semiconductor industry.

Accordingly, this Court should deny the FR's Motion to Amend The Supplemental Order for either of two reasons: (i) because the Objectors' interests cannot be sufficiently protected without the FR's full compliance with § 365(n) ; and (ii) because the failure to apply § 365(n) would be manifestly contrary to fundamental public policies of the United States.

BACKGROUND

I. THE PARTIES

A. Qimonda, Its Patents, And The FR

Qimonda A.G. is a bankrupt German corporation with its principal place of business in Munich, Germany. Qimonda was formed in May 2006 when Infineon spun off its memory products business.[6] As part of the spinoff, Infineon and Qimonda entered into a Carve-Out and Contribution Agreement ("COCA"), pursuant to which Infineon contributed substantially all of the tangible assets, facilities, and employees of its previously existing Memory Products Division

6 Memory products generally refer to both Dynamic Random Access Memory ("DRAM" or "DRAM memory") integrated circuits, a type of volatile memory, and NAND/NOR flash memory, a type of non-volatile memory.

to Qimonda. (OBJ Ex. GJ; *see also* OBJ Ex. A, Expert Report of Jerry A. Hausman ("Hausman Rep.") at ¶ 29.)[7] [redacted]

After the spin-off and prior to bankruptcy, Qimonda operated a semiconductor business that primarily made DRAM memory products, a type of volatile memory for high-speed data storage and retrieval used in mobile phones, computers, and other consumer products around the world. (*Id.* at ¶ 83.) In April 2009, Qimonda opened insolvency proceedings in Germany, and Dr. Michael Jaffé was appointed as the Insolvency Administrator of Qimonda's estate. In June 2009, Dr. Jaffé filed a Chapter 15 petition in this Court seeking recognition of the German insolvency proceedings and the authority to act on behalf of Qimonda's German estate as a foreign representative. (*Mem. Op.* at 3.) At the time of its insolvency, Qimonda owned over 12,000 patents worldwide, including over 4,000 U.S. patents and 1,000 U.S. patent applications, and cited its U.S. patents as the basis of the Court's jurisdiction to open the Chapter 15 case. (*Id.* at 2.) [redacted]

7 Citations to "OBJ Ex. __" refer to the Objectors' Trial Exhibits, and citations to "Ex. __" refers to exhibits attached to this brief.

[redacted]

B. The Objectors

Each of the Objectors has a significant presence in the worldwide semiconductor industry and holds cross-licenses to Qimonda's worldwide patent portfolio. Notably, the Objectors here comprise only a subset of the entities that would be adversely affected by the removal of § 365(n) protection, because dozens of other entities hold license rights to the Qimonda U.S. patents. (*See, e.g.*, OBJ Ex. PZ.) Nevertheless, the Objectors account for over 90% of the worldwide DRAM memory industry and four of the five major worldwide producers of another type of memory chip known as NAND flash memory.[8] (OBJ Ex. A, Hausman Rep. ¶¶ 10, 11.) The Objectors represent more than a third of the worldwide semiconductor industry (*e.g.*, 34.6 % according to McClean report 2011).

1. Infineon

Infineon is a semiconductor manufacturing company with a wide range of products spanning its three business divisions: Automotive, Industrial & Multimarket, and Chip Card & Security. Infineon's Automotive Division designs, manufactures, and sells microcontrollers, sensors, and other automotive-application semiconductors that are found [redacted] Infineon is one of the world's leading manufacturers of automotive semiconductor chips. Infineon's Industrial & Multimarket Division designs, manufactures, and sells power semiconductors promoting energy generation, transmission, and conversion. These semiconductors have diverse uses and can be found in a variety of products like domestic appliances, lighting, medical electronics, consumer electronics, computers, and communications. Infineon is the world leader for power semiconductor devices, and customers of these products include [redacted]

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8 [redacted]

Infineon's Chip Card & Security Division designs, manufactures, and sells semiconductor chips used globally in applications such [redacted] Infineon is the world leader in security chip card semiconductor devices, and its customers in this area include [redacted] Infineon's former Wireless Solutions Division, which designed and manufactured mobile phone baseband processors sold primarily to [redacted] was recently sold to Intel.

Infineon was formed in 1999 when Siemens AG spun off its semiconductor division. Infineon's headquarters are located in Neubiberg, Germany, and its manufacturing facilities are located in Germany, the United States, Austria, and Malaysia. As of September 2010, Infineon had approximately 25,000 employees worldwide, approximately 640 of which were located in North America. [redacted] Under the COCA, Infineon retained rights and licenses and Qimonda granted perpetual and irrevocable licenses to the patents and patent applications that were contributed to and created at Qimonda and Infineon granted licenses to Qimonda for the patents that remained with Infineon or were created thereafter. (*See* OBJ Ex. GJ, QAG20810-834 at Sec. 4.) In addition, under the COCA, Infineon retained rights to the Qimonda patents that included the continued licensing of the patents to Infineon's existing cross-licensees. [redacted]

2. *Intel*

Intel is the world's largest semiconductor manufacturer, principally manufacturing microprocessors and chipsets. (OBJ Ex. A, Hausman Rep. at ¶ 53.) Intel's headquarters is located in Santa Clara, California, and its manufacturing facilities are located worldwide, [redacted]

In 2005, Intel entered into a patent cross-licensing agreement with Infineon. (OBJ Ex. EU.) [redacted]

3. *Samsung*

Samsung is the world's largest manufacturer both of DRAM memory and NAND flash memory and, as such, a major supplier to many U.S. technology companies. Samsung's headquarters is located in Seoul, South Korea, and it maintains manufacturing facilities in South Korea and the United States. In June 2010, Samsung announced plans to invest $3.6 billion to expand the capacity of its Austin, Texas fabrication and semiconductor research facility. This facility will employ 1,500 employees upon completion of the expansion. [redacted]

In 1995, Samsung entered into a patent cross-licensing agreement with Siemens AG, in which Samsung secured a perpetual and irrevocable license to Siemens' patents. (OBJ Ex. IH.)

Following Siemens AG's spin off of Infineon and Infineon's subsequent spin off of Qimonda, Samsung retained license rights to Qimonda's patents and patent applications. (OBJ Ex. GV.) In 2006, Qimonda expressly promised to be bound by the license agreement Samsung had with Siemens and Infineon.

4. *IBM*

IBM is a computer, technology, and IT consulting company with headquarters in Armonk, New York. Among other things, IBM manufactures microprocessors and application-specific integrated circuits, which are essential components to computer servers, consumer electronics, and video gaming systems. [redacted] IBM's Semiconductor Research Development Center is located in Fishkill, New York. IBM also has semiconductor fabrication facilities in Fishkill and in Burlington, Vermont, as well as semiconductor R&D facilities in Albany, New York and Yorktown, New York. [redacted] IBM is the single largest holder of U.S. patents, having topped the U.S. Patent Office records for most patents awarded for the eighteenth consecutive year.[9] [redacted]

In August 2003, IBM entered into a cross-licensing agreement with Infineon and its subsidiaries, securing an irrevocable, fully paid-up license to Infineon patents and patent applications for the life of the licensed patents. (OBJ Ex. HL.) Because of the broad cross-license between IBM and Infineon and the nature of the patents transferred to Qimonda, IBM

9 *See* Press Release, IBM Shatters U.S. Patent Record; Tops Patent List for 18th Consecutive Year (Jan. 10, 2011) available at http://www-03.ibm.com/press/us/en/presskit/33325.wss (last visited Feb. 16, 2011).

had rights and licenses to the Qimonda patents. (OBJ Ex. A, Hausman Rep. at ¶ 31.) In 2006, IBM entered into a Joint Development Agreement with Infineon and its subsidiaries (including Qimonda) to develop certain types of cutting-edge semiconductor technology, including a type of "DRAM" technology referred to as "trenched DRAM." (OBJ Ex. DG.) The agreement included a provision that any patents resulting from the joint development work would be cross-licensed by and between each of the contributing parties. (*Id.*) [redacted]

5. *Nanya*

Nanya is principally a manufacturer of DRAM memory products with its headquarters in Taiwan. (Ex. 7, Pai Dep. Tr. at 29:4-6, 43:2-4.) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

6. Micron

Micron was founded in 1978 and maintains its corporate headquarters in Boise, Idaho. (OBJ Ex. OW, Micron's 2010 10-K, p. 1.) Micron designs, manufactures, and sells DRAM, NAND Flash and NOR Flash memory, CMOS image sensors, and other semiconductor products. (*Id.*) Currently, Micron is the largest (if not the only) manufacturer of DRAM in the U.S.

[redacted]

[redacted]

7. *Elpida*

Elpida is a leading manufacturer of DRAM memory chips and its headquarters is located in Tokyo, Japan. [redacted]

[redacted]

8. *Hynix*

Hynix is a manufacturer of DRAM, SRAM, and NAND flash memory with its headquarters located in Icheon, South Korea. [redacted]

[redacted]

[redacted]

II. THE SEMICONDUCTOR INDUSTRY

A. Features Of The Semiconductor Industry That Make Stable Cross-Licensing Essential

1. A "Patent Thicket" Exists In The Semiconductor Industry.

As explained at length in a report published by the Federal Trade Commission in 2003, the semiconductor industry has been and continues to be built on cumulative, or follow-on, innovation: each discovery is built on a foundation of previous discoveries. (OBJ Ex. D, Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003) (hereinafter, "FTC Rep."), ELP 00224337-651 at 224480 (noting that, due to the "complex nature of computer hardware technology," "semiconductors contain an incredibly large number of incremental innovations").) One commentator has described innovation in the semiconductor industry as a huge pyramid, with each new inventor standing on top of many sets of shoulders to ascend the pyramid of new ideas and place a block at the top. (OBJ Ex. JC, C. Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting* (hereinafter "Shapiro") at p. 120.) Given the astonishing rate of innovation over the last several years, and the framework of cumulative, building-block innovation, it may be no surprise that today it is estimated that a single DRAM chip uses technology covered by hundreds, if not thousands, of different patents owned by dozens, if not hundreds, of different entities. (*Id.* at ELP 00224479 (estimating "approximately 420,000 semiconductor and systems patents held by more than 40,000 parties").) This dense web of overlapping patent rights, known as a "patent thicket," requires that those seeking to commercialize new technology or to enter the market for semiconductors to obtain licenses from multiple patentees or risk patent infringement lawsuits. (*See id.* at ELP 00224467; *see also* OBJ Ex. A, Hausman Rep. at ¶ 8; OBJ Ex. R, 2/4/2011 Expert Report of Walter Bratic ("Bratic Rep.") at ¶ 57.)

While the patent system is designed to encourage innovation, a patent thicket can actually have the perverse effect of stifling innovation. (*See* OBJ Ex. D, FTC Rep. at ELP 00224434; OBJ Ex. R, Bratic Rep. at ¶ 57.) No single entity can afford to devote resources to analyzing each of the many thousands of patents that may potentially cover a new commercial technology or research activities. (OBJ Ex. D, FTC Rep. at ELP 00224434 ("In some situations, the transaction costs of learning about and individually licensing all existing relevant patents are high enough to undermine significantly the economic incentive to develop follow-on innovation and production.").) Even if a company could somehow identify the many patents that cover a new product, it remains all but impossible to design-around each and every patented technology used in any new semiconductor product. Given these restrictions, the threat of patent infringement is ever-present in an industry defined by a patent thicket. (*Id.* at ELP 00224434 (finding that, absent a solution, firms "may have to choose between the risk of being sued for infringement after they sink costs into invention or production, or dropping innovative or productive activities altogether"); *see also id.* at ELP 00224482 ("[W]ith so many patents at issue . . . infringing *someone's* patent may be inevitable, but there may be no economically feasible way, prior to making sunk investments, to identify and obtain rights to all the relevant patented technologies.").) Here, all of the parties agree that a patent thicket exists in the semiconductor industry. (*See, e.g.* OBJ Ex. A, Hausman Rep. at ¶ 8; OBJ Ex. R, Bratic Rep. at ¶6, p. 10; OBJ Ex. QE, 2/4/2011 Expert Report of Dr. William Kerr at ("Kerr Rep.") at ¶ 159.)

2. *Standards Are Important In The Semiconductor Industry.*

The semiconductor industry relies heavily on standards to promote the interoperability of semiconductor products, to improve design and production efficiencies, to reduce the uncertainty of investments, to encourage innovation, and to facilitate market entry. (*See* OBJ Ex. A, Hausman Rep. at ¶¶ 9-12; OBJ Ex. R, Bratic Rep. at ¶ 40.) Standards, which are industry-accepted requirements, allow manufacturers to invest in products for the standardized markets without facing the uncertainty of whether a non-standardized approach will be adopted by the market. (OBJ Ex. A, Hausman Rep. at ¶ 9.) Resolution of this uncertainty reduces socially-wasteful investments, thereby decreasing costs to both manufacturers and consumers. (*Id.*) Because the semiconductor industry requires significant sunk-cost investments for market entry, standards also facilitate competition by giving new companies access to standardized technology and by providing the incentive for new companies to improve upon that standardized technology. (*Id.*) [redacted]

The benefits of standardization yield lower prices and improved consumer choice over myriad products like cell phones, computers, and even automobiles that rely on and incorporate semiconductors. (OBJ Ex. A, Hausman Rep. at ¶ 9.) Indeed, standards are particularly useful for consumer electronics products that consist of a large number of individual components made by different manufacturers. (*Id.*; OBJ Ex. R, Bratic Rep. at ¶ 40.)

Recognizing these benefits, the semiconductor industry has formed standard-setting organizations to govern standardization of semiconductors generally and DRAM technology in particular. (OBJ Ex. A, Hausman Rep. at ¶ 10.) An organization called JEDEC Solid State Technology Association ("JEDEC") sets the standards for DRAM technology.[10] (*Id.*; OBJ Ex. R, Bratic Rep. at ¶ 40.) These JEDEC standards allow DRAM products from various manufacturers to work together and with other components by dictating the timing, speed, format, and means of data transfer for DRAM memory. (OBJ Ex. A, Hausman Rep. at ¶ 10.) To facilitate the widespread use of DRAM standards, many of which are covered by patented

[10] JEDEC also sets standards for flash memory, a type of non-volatile memory used to store user-generated content as well as the operating system on mobile phones, laptop computers, and digital cameras.

technology, JEDEC has implemented a patent policy requiring its members, prior to the adoption of any standard, to (1) disclose any patents that may be "essential" to practice a proposed standard, and (2) agree to license those essential patents on FRAND (fair, reasonable, and non-discriminatory) terms. (*See id.* at ¶ 16; OBJ Ex. CR; OBJ Ex. CV; OBJ Ex. CW; *see also* OBJ Ex. D, FTC Rep. at ELP 00224434 (noting that "standard-settings organizations (SSOs) can clear patent thickets that otherwise might stand in the way of follow-on innovation").) By obtaining a FRAND assurance ***prior to*** a proposed standard being adopted, members of JEDEC can consider whether to develop around that proposed standard or to change the proposed standard instead of paying a royalty—even if it is offered at a FRAND rate. Today, over 95% of all DRAM chips are compliant with one or more JEDEC standards. (OBJ Ex. A, Hausman Rep. at ¶ 10.) [redacted]

3. *Innovation and Production In The Semiconductor Industry Requires Large, Sunk Investments.*

The semiconductor industry's extraordinary rate of innovation has been characterized by "Moore's Law," which holds that the number of components on a chip doubles approximately every one to two years. (OBJ Ex. A, Hausman Rep. at ¶ 13.) To keep pace with that innovation and to provide state-of-the art products, semiconductor companies have had to rebuild, retool, and even entirely replace their existing manufacturing facilities every couple years at incredible expense. It costs a semiconductor company roughly \$2 to \$4 billion to construct a new fabrication facility ("fab"). Today that cost can exceed \$5 billion. (*Id.*; OBJ Ex. R, Bratic Rep. at ¶ 70.) Yet even the most advanced fabs can become obsolete in less than five years, and less sophisticated fabs become obsolete even more quickly. (OBJ Ex. A, Hausman Rep. at ¶ 13.)

Substantial investments in R&D are also required to compete in the semiconductor industry. (OBJ Ex. A, Hausman Rep. at ¶ 13; OBJ Ex. R, Bratic Rep. at ¶ 43.) Indeed, the semiconductor industry typically invests somewhere between 10% and 20% of its total sales on R&D, second only to the biotechnology industry. (OBJ Ex. A, Hausman Rep at ¶ 13.)

Economists refer to the large fraction of investments that must be spent on both fabs and R&D as "sunk costs" because a company cannot recover the costs it incurred as a result of its original investments if it decides to exit the business. (*Id.*) These sunk costs significantly increase the risk of an investment project in the semiconductor industry. (*Id.*) [redacted]

B. The Hold-Up Problem And The Cross-Licensing Solution

1. Semiconductor Manufacturers Face The Threat Of A "Hold Up."

The sunk costs necessary to operate and compete in the semiconductor industry give rise to what economists refer to as the "hold up" problem. (OBJ Ex. A, Hausman Rep. at ¶ 14; OBJ Ex. R, Bratic Rep. at ¶ 70.) The hold up problem occurs when "'each party to a contract worries about being forced to accept disadvantageous terms later, after it has sunk an investment, or worries that its investment may be devalued by the actions of others . . . . The party that is forced to accept a worsening of the effective terms of the relationship once it has sunk an investment has been *held up*.'" (OBJ Ex. A, Hausman Rep. at ¶ 14 (quoting OBJ Ex. KD, P. Milgrom and J. Roberts, *Economics, Organization and Management*, at 136 (Prentice Hall 1992).) The hold up threat adversely affects a company's incentive to invest in innovation because it increases uncertainty and reduces expected returns. (*Id.* at ¶ 17; OBJ Ex. D, FTC Rep. at ELP 00224482 ("Patent thickets also can harm innovation by creating uncertainty, which affects investment decisions.").) Hold up is a significant concern of producers of DRAM, NAND flash memory, and semiconductors generally, due to the sophisticated production requirements and massive sunk costs necessary to compete in the industry. (OBJ Ex. A, Hausman Rep. at ¶ 17.)

The threat of being held up is exacerbated by the presence of the patent thicket in the semiconductor industry. (*Id.* at ¶ 15; OBJ Ex. R, Bratic Rep. at ¶ 70.) With so many patents potentially implicated in the manufacture of even a single chip, not to mention the many pending patent applications that have not yet issued as patents, no economically feasible way exists to identify and obtain rights to all patent technologies prior to investment. (OBJ Ex. R, Bratic Rep. at ¶ 70.) A company which has sunk billions of dollars into a fab and R&D can be held up by a single patent covering only a small portion of the product or manufacturing process. (OBJ Ex. A, Hausman Rep. at ¶ 15.) The "hold up" patent owner can extract a large license payment from the manufacturer due to the threat of an injunction or a very costly design around of the "hold up" patent. (*Id.*; OBJ Ex. R, Bratic Rep. at ¶ 71; OBJ Ex. D, FTC Rep. at ELP 00224435 ("If an innovator or producer learns that it has infringed a patent only after it has committed sunk costs to its innovation and production . . . the patentee may be in a position to demand supra-competitive royalty rates.").)

Standards in the semiconductor industry also magnify the hold up problem. (OBJ Ex. A, Hausman Rep. at ¶ 16.) To be compatible with certain standards, some patented technologies become "essential" and must be used, placing a premium on certain "essential" patents. (*Id.*) The threat of being held up becomes even greater for these essential patents to the standard. (*Id.*) Because of the increased risk for hold up from essential patents, JEDEC requires participating companies to disclose all potentially essential patents that they own, control, or are known to them, prior to the adoption of any standard. (*Id.*) JEDEC further requires that participating companies agree to license their essential patents on fair, reasonable, and non-discriminatory (FRAND) terms. (*Id.*) [redacted]

[redacted]

2. *Semiconductor Manufacturers Rely On Cross-Licensing To Prevent A Hold Up.*

Patent cross-licensing has emerged as a solution to the hold up problem. (OBJ Ex. A, Hausman Rep. at ¶ 20; OBJ Ex. R, Bratic Rep. at ¶ 57; OBJ Ex. D, FTC Rep. at ELP 00224486.) In a typical patent cross-license agreement, each party licenses to the other party a broad portfolio of patents. (OBJ Ex. A, Hausman Rep. at ¶ 20; OBJ Ex. R, Bratic Rep. at ¶ 57.) The agreement often has a "capture period," in which each party obtains a perpetual license to any patent that issues or is applied for during this capture period. (OBJ Ex. A, Hausman Rep. at ¶ 20) If the value of the two parties' patent portfolios or their market positions differ, the agreement may call for the party with the lesser portfolio or market position to make a fixed "balancing payment" to the other party. (*Id.*) Patent cross-license agreements provide stability and certainty to the semiconductor industry by providing manufacturers with what is referred to as "freedom to operate," "freedom of action," and/or "design freedom." (*Id.* at ¶ 23; OBJ Ex. R, Bratic Rep. at ¶ 58.) This means that manufacturers' scientists and engineers can work freely to come up with the best inventions without an undue risk of not being able to commercialize the resulting products due to hold up. While freedom of action is never 100%, and parties may fight about fair compensation for their licenses, the certainty established by cross-licensing in the semiconductor industry has led to a high level of innovation to the benefit of consumers.[11]

In short, by removing the threat of being held up by cross-licensees, these licenses provide relative certainty and restore incentives for investment and innovation. (OBJ Ex. A, Hausman Rep. at ¶ 21.) Moreover, patent cross-licenses also reduce the transaction costs associated with negotiating licenses on a patent-by-patent basis. (*Id.*; OBJ Ex. R, Bratic Rep. at ¶ 59.) Licensing also promotes competition and lower prices because multiple companies can

[11] While patent litigation still exists in the semiconductor industry, it is not inconsistent with the goal of achieving "patent peace" and freedom to operate, and indeed, such litigations often result in cross-license agreements. (OBJ Ex. A, Hausman Rep. at ¶ 23[redacted]

compete to produce similar products instead of one company exploiting its patent monopoly. (OBJ Ex. A, Hausman Rep. at ¶ 21; OBJ Ex. R., Bratic Rep., at ¶ 59.) Lastly, licensing promotes R&D by allowing for specialization with access to other areas of cross-licensed technology and by increasing the freedom to research without fear that research outcomes may invoke patent violations. (OBJ Ex. A, Hausman Rep. at ¶ 21.)

Patent cross-licenses also encourage innovation by facilitating joint development work in the semiconductor industry. (*Id.* at ¶ 22.) Joint Development Agreements ("JDAs") are common in the semiconductor industry because the investment required for technology development may often be too large for one company to undertake. (*Id.*) JDAs provide opportunities for companies with different areas of expertise to work together, leading to an increase in innovation through collaboration. (*Id.*) Patent cross-licenses are a key component of JDAs because they guarantee that each party will have the opportunity to use any technology developed as part of the joint development efforts. (*Id.*) Frequently, new patents developed as a result of a JDA are held jointly by all of the collaborating companies. (*Id.*)

[redacted]

C. The Objectors' Cross-License Agreements To The Qimonda Patents

Each of the Objectors currently holds a perpetual and irrevocable license to Qimonda's U.S. patents either by entering into patent cross-license agreements with Siemens, Infineon, or directly with Qimonda.[12] (*Id.* at ¶¶ 24, 29-31.) [redacted]

III. QIMONDA'S INSOLVENCY AND THE FR'S ATTEMPT TO EXPLOIT THE QIMONDA PATENTS.

1. German Bankruptcy Law Regarding The Insolvency Administrator.

According to the FR, German insolvency proceedings seek to collectively settle creditors' claims by realizing the debtor's estate in the best possible manner and distributing the proceeds to the creditors. (OBJ Ex. OH, Declaration of Dr. Stefan Blum in Support of the Insolvency Administrator's Motion to Establish Procedures for the Sale of Certain Patents at ¶ 4.) The overriding objective of the insolvency proceeding is to maximize the liquidation proceeds or value of the estate. (*Id.* at ¶ 8.) Indeed, the insolvency administrator is bound by a statutory duty to "maximize the debtor's estate and optimize the chances of satisfying the creditor's claims." (*Id.* at ¶ 6; Ex. 9, [redacted]

2. The FR Issues Non-Performance Letters.

Upon his appointment, the FR sent letters to certain of the Objectors[13] explaining that he has chosen to elect non-performance of the cross-licenses between Qimonda and each Objector,

12 As described above, many of the Objectors did not contract directly with Qimonda, but possess licenses to what are now known as the Qimonda patents by virtue of the original spin-out of Infineon from Siemens and then the later spin-out of Qimonda from Infineon.

13 [redacted]

which, in the FR's view, renders the licenses unenforceable against Qimonda's estate according to § 103 of the German Insolvency Code . (OBJ Ex. R, Bratic Rep. at ¶ ¶ 26, 91.) In attempting to elect non-performance, the FR intends to terminate the patent cross-licenses and destroy the licensing rights that the Licensee's obtained to Qimonda's U.S. Patents. (*Id.*).

3. [redacted]

[redacted]

[redacted]

[redacted] Hence, the FR now proposes to relicense the patents to the Objectors for a "reasonable royalty" agreed upon by the parties or arbitrated before the World Intellectual Property Organization, although he has been unable to define what such an alleged reasonable royalty would be, explain why the Objectors should pay again for licenses, or how this would protect the Objectors from paying yet again in the event of future insolvencies.

IV. PROCEDURAL HISTORY

A. The Supplemental Order Governing Qimonda's Chapter 15 Proceedings And The FR's Motion To Amend The Supplemental Order

Shortly after Dr. Jaffé filed this Chapter 15 proceeding and was given authority to act as Qimonda's foreign representative, this Court, upon Dr. Jaffé's own motion, issued a Supplemental Order (1) authorizing the FR to be the sole and exclusive representative of Qimonda in the United States and to administer the assets of Qimonda within the territorial jurisdiction of the United States, and (2) directing, *inter alia*, that § 365 "is applicable in this proceeding." (Docket No. 57.) Over two months later, on October 8, 2009, the FR filed a

Motion to Amend the Supplemental Order, seeking removal of § 365 from the Supplemental Order or, in the alternative, inclusion of a "proviso" limiting the application of § 365(n) solely to a § 365 rejection of the cross-license agreements. (Docket No. 96.)

On October 21, 2009, Samsung, Infineon, and Elpida Memory—all licensees to Qimonda's U.S. intellectual property—filed an Objection to the FR's Motion to Amend the Supplemental Order and a Cross-Motion for Relief Under §§ 365 and 363 of the U.S. Bankruptcy Code. (Docket No. 108.) Micron and Nanya filed separate objections to the FR's motion that same day. (Docket Nos. 100, 105.)

B. The Bankruptcy Court's Modification Of The Supplemental Order

On November 19, 2009, the Court granted the FR's motion and issued an Amended Supplemental Order. (Docket Nos. 178, 179.) Specifically, the Court added a proviso in the Amended Supplemental Order stating: "provided, however, Section 365(n) applies 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)." (Docket No. 179.) The Bankruptcy Court explained that, in its view, (i) the application of § 365 to Qimonda's patent portfolio would substantially undermine German Insolvency Code § 103, (ii) that § 365 must give way to the German Insolvency Code because "[a]ncillary proceedings such as the Chapter 15 proceeding pending in this court should supplement, but not supplant, the German proceeding," (iii) that "[i]f the patents and patent licenses are dealt with in accordance with the bankruptcy laws of the various nations in which the licensees or licensors may be located or operating, there will be many inconsistent results," and (iv) that such inconsistent treatment of Qimonda's patents may result in the portfolio being "splintered" or "shattered into many pieces that can never be reconstructed." (Docket No. 178 at 2-3.)

C. The District Court's Reversal And Remand

After five of the Objectors appealed the Court's decision to enter the Amended Supplemental Order, on July 6, 2010, the District Court vacated the Court's Amended Supplemental Order and ordered a remand hearing for further factual development. In its

Memorandum Opinion, the District Court first affirmed the finding that application of § 365 was discretionary pursuant to § 1521. (*Mem. Op.* at 12.) But notwithstanding that finding, the District Court held that this Court did not address or resolve two significant issues which must be considered before granting the Foreign Representative's request for comity to German law.

First, the District Court found that Judge Mayer erred in failing to ensure that the Objectors' interests were sufficiently protected as required by 11 U.S.C. § 1522(c) such that it was proper to modify the relief previously granted in the Supplemental Order. (*Id.* at 14.) The District Court explained that the analysis set forth in *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006), should govern the remand proceeding. Specifically, the District Court made clear that to sufficiently protect the interests of the parties, this Court on remand should balance the relief granted to the respective parties, and in doing so, "articulate more fully and explicitly its basis for modifying the discretionary relief previously granted, consistent with the requirements of § 1522 and *In re Tri-Continental*." (*Mem. Op.* at 14.)

Notably, the District Court faulted Judge Mayer for concluding, without support, that the application of § 365(n) would somehow "splinter" or "shatter" the Qimonda patent portfolio "into many pieces that can never be reconstructed." (*Id.* at 13.) Questioning that conclusion, the District Court noted that "the continuation of [Objectors'] non-exclusive licenses for an unspecified percentage of the Qimonda patent portfolio would preclude neither the sale of the patents themselves nor the grant of additional, non-exclusive licenses." (*Id.*) Further, the District Court emphasized that despite the Bankruptcy Code's purpose to provide debtors a "fresh start," the Code "nonetheless limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor, as statutory provisions governing non-dischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debt." (*Id.* at 14 (internal quotations and citation omitted).)

Second, the District Court found that Judge Mayer had not resolved the "significant issue . . . [of] whether conditioning the applicability [of] § 365(n) was a prohibited action 'manifestly contrary to the public policy of the United States' under § 1506." (*Id.* at 36 (quoting 11 U.S.C. §

1509(b)(3).) The District Court, after analyzing the legislative history of § 1506 and the relevant caselaw, determined that § 1506 "should be invoked when fundamental policies of the United States are at risk" (*id.* at 30), and remanded so that this Court could, "determine whether the relief granted violates fundamental U.S. public polices under § 1506." (*Id.* at 35.) The District Court noted that the analysis "must focus sharply on whether § 365(n) embodies the fundamental public policy of the United States, such that subordinating § 365(n) to German Insolvency Code § 103 is an action 'manifestly contrary to the public policy of the United States' under § 1506." (*Id.* at 26 (quoting 11 U.S.C. § 1506).)

D. Remand Proceedings And The FR's Supplement To His Motion To Amend

On remand, the parties, guided by the District Court's remand opinion, engaged in substantial fact and expert discovery focused on (1) identifying the parties' interests in the application of § 365(n) to Qimonda's Chapter 15 proceedings, and (2) the public policies of the United States that would be implicated in the event that § 365(n) did not apply. On November 8, 2010, the Foreign Representative filed a Supplement to his Motion to Amend the Supplemental Order, allegedly offering a "reasonable royalty" proposal to the Objectors to re-license the Qimonda patent portfolio in the event that the protections of § 365(n) were held not to apply. (Docket No. 374.) Importantly, this proposed dispute resolution procedure would not permit the Licensees to challenge the terms of a new license but only to litigate the amount due for terms—undisclosed as of now— unilaterally set by the Foreign Representative. More importantly and as explained below, the offer itself is, by definition, a "hold up" because each of the Objectors already bargained for and achieved a license to the Qimonda patents and then conducted its business with the "freedom of action" such a license provides. Finally, the Foreign Representative makes no assurances that he will not sell some or all of the Qimonda portfolio to third parties, and expressly recognized that such a sale was a distinct possibility, thus exposing the Licensees to the risk of future attempts at hold ups with respect to the same Qimonda patents if the future licensor were to become insolvent. (*Id.* at 8.)

ARGUMENT

This Court should deny the Foreign Representative's Motion to Amend the Supplemental Order because (1) the Objectors' interests cannot be "sufficiently protected" absent the protection afforded by Section 365(n) as required by 11 U.S.C. § 1522, and/or (2) granting comity to German law on the treatment of intellectual property licenses would be "manifestly contrary to the public policy of the United States" in violation of 11 U.S.C. § 1506.

I. THE OBJECTORS' INTERESTS CANNOT BE SUFFICIENTLY PROTECTED IN THE ABSENCE OF SECTION 365(N).

Before it may modify or amend the Supplemental Order governing Qimonda's Chapter 15 proceedings under 11 U.S.C. §§ 1519 or 1521, this Court must first find, pursuant to 11 U.S.C. § 1522, that "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." *In re Qimonda*, 433 B.R. at 557. Thus, the Court's ability to modify its prior discretionary relief is limited to ***only*** situations where relevant interests are "sufficiently protected." *See* 11 U.S.C. § 1522(a) . To ensure that the rights of the relevant parties are sufficiently protected, the Court must consider "the need 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." *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006).[14] The District Court remanded the case here so that this Court could perform the requisite balancing of the parties' interests.

As described below, the interests of the Objectors, [redacted] would be gravely damaged were this Court to remove the protections of § 365(n). The Objectors interests thus heavily outweigh any interest the FR growing the estate by commanding additional royalties. In light of this clear imbalance, the Court should deny the FR's motion to amend the Supplemental Order and keep the Objectors' § 365(n) rights firmly in place.

[14] All emphases added unless otherwise indicated.

A. Failure To Apply Section 365(n) Would Undermine Every Intellectual Property License Covering U.S. Patents Held by Foreign Parties.

The removal of the protection afforded the Objectors by Section 365(n) would, based on the FR's view of the German Bankruptcy Law,[15] allow the FR to unilaterally cancel the Objector's patent licenses to the Qimonda U.S. Patents, not to mention the many entities not represented here. This would immediately put at risk the billions of dollars in investments that Qimonda's licensees each has made in reliance on the security and freedom of action that those agreements afforded their businesses. It would do so by fatally undermining the value of the licenses that the Objectors have obtained in an industry built on cumulative innovations and defined by a patent thicket. The design freedom and certainty obtained through such licensing is required to make the massive investments necessary to produce semiconductors, and its elimination will thus call into question the prudence of making such investments in the future.

Further, given the resulting chilling effect that failing to enforce § 365(n) would have on patent licensing—a result that Congress sought to avoid when it enacted this provision— the harm of such a decision would extend beyond this case to all future cases where U.S. semiconductor patents (and other patents) are held by a bankrupt foreign entity. This precedent would affect the decision-making of every party to a potential patent license agreement.

Prof. Hausman will explain how firms us the concept of a hurdle rate, or a minimum acceptable rate of return, when deciding whether or not to make an investment. Economists have recognized that increases in uncertainty that make investments more risky have a very large impact on hurdle rates. Thus, relatively small increases in uncertainty can mean that the firm will not invest and the effect of increased uncertainty is especially significant when the investment is sunk and thus cannot be recovered if the venture fails.

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15 As noted above, the Objectors do not concede that the FR's view of German Bankruptcy law is correct, and, in fact, Infineon and Samsung are currently challenging that view in German Court and arbitration, respectively.

[redacted]

[redacted]

[redacted]

[redacted][16]

Moreover, all of the Objectors have substantial manufacturing facilities and/or sales facilities in the United States and employ hundreds to thousands of U.S. workers:

Objector	Notable U.S. Facilities
Infineon	Manufacturing Facility, Morgan Hill, California; automotive R&D facility near Detroit, Michigan
Intel	Headquarters, Santa Clara, California; two fabs and R & D facility in Hillsboro, Oregon; two fabs, R & D and assembly/test facilities in Chandler, Arizona; R & D facility in Folsom, California; fab and R & D facility in Hudson, Massachusetts; fab in Rio Rancho New Mexico; R & D facility in Dupont, Washington
Samsung	Fabrication Facility, Austin, Texas
IBM	Headquarters, Armonk, New York; fabrication and manufacturing facilities in East Fishkill, New York and Burlington, Vermont; R & D facility in Albany, New York; advanced technology research facility in Yorktown, New York
Micron	Headquarters, Boise, Idaho; fabrication, manufacturing and test facilities in Lehi, Utah, Boise, Idaho, Nampa, Idaho, and Manassas, Virginia

16 These figures likely understates the amount of investment by the Objectors because, given the age of some of the patent cross-licenses at issue (for example, Samsung's license dates to 1995 when it entered an agreement with Siemens for a license to its semiconductor patents), records of all of the investments are not available.

Elpida	Sales Offices, California, Texas, North Carolina, and Massachusetts
Nanya	Design and Sales Offices, California and Texas
Hynix	R&D and Sales Offices, California, Texas, North Carolina, New York, Illinois, Georgia, Colorado, and Arizona

The massive combined value of the sunk costs that the Objectors have invested into developing their products and building production facilities would all be exposed in the event the FR terminated the cross-license agreements. In addition, the massive combined value of the Objectors' U.S. operations would inevitably expose these companies to the risk of being held up in the event that the FR terminates the Qimonda cross-license agreements. (OBJ Ex. A, Hausman Rep. ¶ 19; *see also id.* at Exs. 4-9.) Indeed, if the FR unilaterally terminates the license agreements and sells the patents to one or multiple non-practicing entities (commonly referred to as "patent trolls"), these patent trolls may attempt to hold up some of the Objectors in light of their massive investments, without fear of any countervailing exposure. (*Id.* at ¶ 26; OBJ Ex. D, FTC Rep. at ELP 00224437 ("NPEs can threaten other firms with patent infringement actions, which, if successful, could inflict substantial losses, without fear of retaliation.").) This hold up action is the very scenario that the Objectors sought to avoid when creating "patent peace" or "freedom of action" through cross-licensing. (OBJ Ex. A, Hausman Rep. at ¶¶ 23 n.45, 39, 46, 51, 59, 70, 77, 82; OBJ Ex. R, Bratic Rep. at ¶¶ 70-72, 84, 95.) Indeed, it was on this foundation of patent peace and the certainty that the cross-license agreements afforded the Objectors that each made the significant investments necessary to innovate, design, and produce their products. [redacted]

Second, the precedent that this case would establish if the FR were allowed to cancel Qimonda's patent cross-license agreements would immediately threaten the status of every single intellectual property license covering a U.S. patent held by a foreign firm, and put a chilling effect on future licensing negotiations involving U.S. intellectual property. As explained more fully below in the discussion on public policy, this would immediately devalue existing investments made in reliance on intellectual property licenses, and reduce the incentive to innovate and invest in the future. This would in turn directly translate into decreased productivity, economic efficiency, and ultimately U.S. jobs and consumer surplus.

Third, the termination of the Qimonda cross-license agreements will directly and negatively impact the semiconductor industry's ability to create and maintain standards. [redacted] At the time, manufacturers producing products relating to the proposed standard had the option of either (i) designing around the standard, or (ii) entering into negotiations for a RAND rate prior to the adoption of the standard. [redacted] The destruction of industry standards would increase the barrier to entry, decrease competition, and harm the Objectors and U.S. consumers (consumer surplus would decrease because of the reduction in the interoperability of different products).

Fourth, each of the Objectors has already provided significant value and paid fair consideration for their license agreements to the Qimonda U.S. Patents based upon arms-length negotiations. Forcing the Objectors to a pay again for licenses that they have already purchased would damage the Objectors' economic interests and, ultimately, affect investments in, among other things, R&D and production. Some, if not all, of that expense may be passed directly to consumers through higher prices for products like cell phones and laptop computers increase.

Fifth, the cancellation of the Qimonda patent cross-license agreements would have a chilling effect on the formation of new semiconductor companies, and the accompanying innovations, as businesses would be less willing to transfer patents to new companies in light of the precedent that this case would establish. This would have a further negative effect on innovation and the development of new technologies.

Sixth, certain of the Objectors face additional harm based upon their unique reliance on a cross license with Qimonda. [redacted]

[redacted]

[redacted]

[redacted]

B. The FR's Offer Of A New License Is An Attempt To Get This Court To Sanction a Hold Up And Does Not Mitigate The Harm To The Objectors.

The FR has purported to offer the Objectors a "reasonable royalty" to re-license again the same patent portfolio to which the Objectors all currently have rights to under the cross-licensing agreements that the FR seeks to terminate. As an initial matter, this alleged solution does nothing to alleviate the significant harm attendant with the uncertainty of possible future license terminations, which uncertainty will cause reduced investment and therefore reduced innovation, and thus affect not only the Objectors, but every single entity doing business in the United States. Nor would the re-licensing at a "reasonable royalty" of the Qimonda patent portfolio mitigate the many other harms specifically faced by the Objectors and discussed above.

[redacted]

17 [redacted]

Reb. Rep. at ¶ 5.) For example, Qimonda could re-license each of the Objectors and then turn and sell its patent portfolio to another entity in Germany or some other foreign jurisdiction that does not protect intellectual property license agreements. (*Id.*; OBJ Ex. A, Hausman Rep. at ¶ 27; OBJ Ex. S, Bratic Reb. Rep. ¶ 5.) For example, that purchasing entity could finance the purchase of the patent portfolio with debt and then, subsequently, file for bankruptcy and extinguish the Objectors' licenses all over again. Without the protection of § 365(n) , nothing protects the Objectors from this outcome, and the next time the Objectors are put in this very scenario all over again, nothing guarantees that the next entity will offer a "reasonable" royalty again. (*Id.*) [redacted] In other words, even if the FR did not work some crippling hold up litigation against the Objectors in the current proceeding, nothing is stopping the next party in the FR's position down the road from doing so.

Second, the FR's offer to negotiate a so-called "reasonable" royalty cannot possibly be deemed to protect sufficiently the interests of the Objectors because he has never disclosed what his offer actually is. Rather, his expert calculates a hypothetical "reasonable" royalty that is irrelevant to the terms of the WIPO proposal and is so riddled with deficiencies as to be utterly meritless for the purpose of assessing what might happen in an actual negotiation between the FR and any Objector. Thus, setting aside the myriad fatal flaws in Dr. Kerr's analysis, his calculation cannot be used to assess whether or not there may be sufficient protection for the Objectors because it has no connection whatsoever to the WIPO proposal made by the FR and does not bind the estate to any particular "term sheet" after this proceeding is over.

[redacted]

Remarkably, under Dr. Kerr's so called "reasonable royalty" analysis, but hidden from plain view by a series of omissions and clever packaging, [redacted][18] (OBJ Ex. B, 2/13/2011 Rebuttal Expert Report of Jerry A. Hausman at ¶ 40 ("Hausman Reb. Rep.") These figures are anything but reasonable—indeed they exceed the claims of creditors against Qimonda by billions and they well exceed the book value of Qimonda while it was an operating company. The truth is that there is no agreed-upon definition or consensus of what constitutes a "reasonable royalty," and payments deemed "reasonable" can run the gamut. (OBJ Ex. A, Hausman Rep. at ¶ 25.)

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18 Because this is a contested matter before the Court, the Objectors have not filed a motion in *limine* to exclude the FR's main expert witness, Dr. William O. Kerr. Nevertheless, as will become evident during the hearing, his reports provide no assistance to the Court regarding either of the issues relevant to this proceeding. [redacted]

[redacted]

[redacted]

Moreover, here it is even less clear how the FR will be able to provide a "reasonable royalty" while still fulfilling the duty he owes the creditors to maximize the value of the estate. (*Id.*)

Third, the offer of a "reasonable royalty" relicense may not preserve the current competitive balance between the competitors in the semiconductor industry. (*Id.*) [redacted] If each of the Objectors were to receive identical "reasonable royalty" offers, some Objectors are in a better position to pay than others, resulting in harm to certain Objectors even in the event of a "fair" re-license offer. (*Id.*)

C. The FR's Assertion That The Qimonda Insolvency Destroyed License "Equivalence" That Must Be Restored Is Incorrect And Inconsistent With Both The Purpose Of Cross-Licenses And The Bargains Struck By Qimonda.

In his report, the FR's expert contends that the Qimonda cross-license agreements "represented value streams going in both directions over the life of each agreement" and that, because Qimonda no longer practices any patents, "Qimonda's insolvency ended that equivalence." (OBJ Ex. QE, Kerr Rep. at ¶ 151.) The only way to restore that "equivalence," according to the FR, is to force Qimonda's cross-licensees to pay for a continued license to the Qimonda U.S. patents. (*Id.* at ¶¶ 153-156.)

The FR's contention, however, is based on a mistaken understanding of cross-licensing in the semiconductor industry. As already discussed, semiconductor manufactures enter into patent cross-license agreements to obtain freedom of action, ensuring that they will not be subject to litigation over those licensed patents for the duration specified in the agreement. (OBJ Ex. B, Hausman Reb. Rep. at ¶ 20.) That goal of obtaining licensing certainty and freedom of action is inconsistent with the FR's assumption that patent cross-licenses seek to create some type of *ex post* "equivalence." Indeed, the FR's contention ignores that many cross-licenses are of long duration, that the relative positions of the licensing parties invariably change over time, and that none of the Qimonda cross-licenses contain any complicated provisions attempting to adjust for future "value streams." (*Id.*) No sophisticated negotiator would have expected that the licensing parties would have enjoyed "equivalence" of value streams over any extended period, let alone the life of the agreement. (*Id.*) Because these agreements are not designed to ensure any such "equivalence," the FR's claim that either termination or a royalty payment is necessary to restore equivalence is without basis.

D. The Harm, If Any, To The Estate Is Negligible.

In stark contrast to the interests of the Objectors, the interests of the FR are solely to maximize payments from the Objectors and from third-parties to the bankrupt estate. (OBJ Ex. A, Hausman Rep. at ¶ 83.) That interest, which is nothing more than a transfer of money from companies having substantial U.S. operations to creditors of an insolvent German company, has no consequences for economic efficiency or employment. (*Id.*) Moreover, the application of § 365(n) will not preclude the FR from selling the patents themselves or from granting any number of additional, non-exclusive licenses to one or all of the patents in the Qimonda portfolio. [redacted]

[redacted]

[redacted]

II. THE FAILURE TO APPLY SECTION 365(N) WOULD BE MANIFESTLY CONTRARY TO U.S. PUBLIC POLICY.

As Judge Ellis explained, under the bankruptcy laws, even if the parties in interest can be sufficiently protected under § 1522, the Court cannot grant discretionary relief in a Chapter 15 proceeding pursuant to § 1521 if that relief is "'manifestly contrary to the public policy of the United States' under § 1506." *In re Qimonda AG*, 433 B.R. at 564 ("Nor did the Bankruptcy Court address or resolve a significant issue raised by the parties, namely whether conditioning the applicability of § 365(n) was a *prohibited action* 'manifestly contrary to the public policy of the United States' under § 1506.") (emphasis added). As such, the District Court has charged this Court on remand with determining whether § 365(n) embodies a fundamental policy of the United States, such that subordination of § 365(n) to the German Insolvency Code is "manifestly contrary to the public policy of the United States." *Id.* § 1506. Here, the removal of § 365(n) would be manifestly contrary to U.S. public policy as expressly or impliedly addressed in the legislative history of § 365(n), including: promoting investment and innovation in the technology industry (a primary driver of this nation's economic growth), promoting economic productivity, protecting consumer welfare, and promoting competition.

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[19] Nevertheless, if this Court declines to apply § 365(n) to the cross-licenses to which Qimonda is not a party, a foreign court might seek to apply § 103 of the German Insolvency Code to them. That possibility could give the FR substantial "hold up" power over those licensees, particularly in light of Dr. Kerr's opinion that a RAND rate "might possibly be as high as 1.0%." (OBJ Ex. QE, Kerr Rep. at ¶ 185.)

A. Failure To Apply Section 365(n) Is Manifestly Contrary To The Policy Behind Congress' Enactment Of The IPBPA of 1988.

It is already established by the enactment of § 365(n) that U.S. public policy requires the enforcement of intellectual property licenses notwithstanding the insolvency of any U.S. licensor. The question here is whether U.S. public policy requires the same result when the licensor is foreign. To determine whether the failure to apply § 365(n) is manifestly contrary to the public policy of the United States, this Court must first consider the purpose and history of § 365(n). That purpose and history conclusively reveal that the very harms that will necessarily occur here—the creation of uncertainty, the disincentive to invest in research and development, harm to competition, and harm to consumer surplus, jobs, and economic efficiency—are what prompted Congress to create and enact into law § 365(n). Under these circumstances, removal of § 365(n) protection here would be manifestly contrary to the fundamental policy embodied in the statute, the purpose of the statute, and Congressional intent.

Congress passed § 365(n) in direct response to the Fourth Circuit's decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), which concerned whether an insolvent party should be allowed to reject an executory technology licensing agreement. In holding that the insolvent party could reject that technology licensing agreement because it was in its business interests, the *Lubrizol* court recognized the "obvious adverse consequences for contracting parties." The court thus explained that "allowing rejection in this and comparable cases could have a general chilling effect upon the willingness of such parties to contract at all with businesses in possible financial difficulty." *Id.* at 1048.

Recognizing the severe adverse consequences that the *Lubrizol* court identified, and the public policy concerns the decision implicated, Congress enacted the *Intellectual Property Bankruptcy Protection Act of 1988* ("IPBPA"), Pub. L. No. 100-506, 102, Stat. 2538, which put the current version of § 365(n) in place. The House Report on the IPBPA recognized the fundamental public policy in promoting innovation through intellectual property licensing:

> [T]here is under the present state of the bankruptcy law a potential chilling effect on the licensing of intellectual property. Because of the seriousness of

> this problem, ***the need to foster the development in the United States of new technology and new ideas, and the need to maintain the United States' world leadership in the area of new technology development***, the Committee is persuaded that the overall interests of the economy are best served by creating another exception to section 365 now . . . . [T]he Lubrizol case has had a chilling effect on licenses of intellectual property and [] businesses are becoming reluctant to rely on licensed technology as the basis for an entire business . . . .

House Report 100-1012 at 4. The House report confirms that "[t]he purpose of the legislation is ***to promote the development and licensing of intellectual property by providing certainty to licensees in situations where the licensor files bankruptcy and seeks to reject the license agreement***." *Id.* at 6.

The Senate Report echoed the concerns of the House Report, confirming that Congress' intent in passing the IPBPA and § 365(n) in particular was to further the U.S. fundamental public policy in promoting innovation through intellectual property licensing:

> 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 . . . . [The Lubrizol view] leaves licensees in a precarious position and thus threaten[s] the very flexible and beneficial system of intellectual property licensing which has developed in the United States . . . . [Lubrizol and other court decisions] threaten an end to the system of licensing of intellectual property (discussed below) that has evolved over many years to the mutual benefit of both the licensor and the licensee and to the country's indirect benefits. Because of the instability that Section 365 has introduced into the licensing relations, parties who would have formerly accepted licenses—the right to use another's intellectual property—are now forced to demand assignments—outright transfer of ownership of the intellectual property. This change in basic format is ***wasteful and cumbersome and is especially chilling to small business technologists***.

Senate Report 100-505 at 1-2. The Senate Report concludes, "[i]t is not an overstatement to say that ***[the Lubrizol holding] is a fundamental threat to the creative process that has nurtured innovation in the United States***." *Id.* at 2.

The Department of Commerce similarly commented that:

> Under [the Lubrizol] approach, a ***substantial investment by a licensee would be jeopardized*** if the licensor petitioned in bankruptcy. This risk will make licensing less attractive to investors, who may require licensors to demonstrate financial stability, and limit its availability as a means to secure development and commercialization of new technology. . . . Even for established enterprises, the financial stability of the licensing partner may introduce unacceptable levels of risk and preclude significant investment in technology that must be acquired by license.

Id. at 7; *see also In re Quad Sys. Corp.*, No. 00-35667F, 2001 WL 1843379, at *11 (E.D. Pa. Mar. 20, 2001) ("***[M]any businesses were faced with financial ruin due to the precedent which the Lubrizol case established.***") (quoting David. M. Jenkins, *Licenses, Trademarks, and Bankruptcy, Oh My: Trademark Licensing and the Perils of Licensor Bankruptcy*, 25 J. Marshall L. Rev. 143, 151-54 (Fall, 1991)). In short, Congress passed § 365(n) in order to protect licensee's investments, to "evenly balance the interests of the debtor with the rights of the licensee," and to deny the debtor's ability to "terminate and strip the licensee of rights the licensee had bargained for." *In re Szombathy*, Nos. 94-15536, 95-01035, 1996 WL 417121, at *9 (Bankr. N.D. Ill. July 9, 1996) *rev'd on other grounds,* 1997 WL 189314 (N.D. Ill. Apr. 14, 1997).

The United States' fundamental public policy in promoting innovation is as old as the Republic itself yet continues as one of the most important public policies of the day. Indeed, that policy is embodied in Article I, Section 8, clause 8, of our Constitution, which gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Jumping forward, it was mere weeks ago that President Obama in his State of the Union Address so heavily emphasized that "[t]he first step in winning the future is encouraging American innovation." (1/25/2011 Remarks by the President In State of Union Address, transcript available at http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address (last visited Feb. 21, 2011).) The President stressed that to compete for "the jobs and industries of our time," "[w]e need to out-innovate, out-educate, and out-build the rest of the world. We have to make America the best place on Earth to do business." (*Id.*) "In America, innovation doesn't just change our lives. It's how we make a living." (*Id.*) "Maintaining our leadership in research and technology is crucial to America's success." (*Id.*) "All these investments – in innovation, education, and infrastructure – will make America a better place to do business and create jobs." (*Id.*)

Likewise, the Federal Trade Commission has long recognized the fundamental policy of promoting this country's innovation:

> Innovation benefits consumers through the development of new and improved goods, services, and processes. An economy's capacity for invention and innovation helps drive its economic growth and the degree to which standards of living increase. Technological breakthroughs such as automobiles, airplanes, the personal computer, the Internet, television, telephones, and modern pharmaceuticals illustrate the power of innovation to increase prosperity and improve the quality of our lives.

(OBJ Ex. D, FTC Report, at ELP 00224337.)

Finally, § 365(n) protects the Objectors' U.S. patent rights, which are—by their express nature—assets located within the United States, and assets which only have effect within the United States. *See Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454-55 (2007) ("The presumption that United States law governs [patents] domestically . . . is embedded in the Patent Act itself, which provides that a patent confers exclusive rights in an invention within the United States."); *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531 (1972) ("Our patent system makes no claim to extraterritorial effect; these acts of Congress do not, and were not intended to, operate beyond the limits of the United States, and we correspondingly reject the claims of others to such control over our markets.") (internal citations omitted); *Voda v. Cordis Corp.*, 476 F.3d 887, 902 (Fed. Cir. 2007) (noting that the Patent Act declares that patents have the attributes of personal property within the territorial jurisdiction of the United States). As the Supreme Court has recognized, "[f]oreign conduct is [generally] the domain of foreign law," and with respect to patents in particular, "foreign law may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions." *Microsoft*, 550 U.S. at 455. Here too, this Court should give effect to the policy judgments of Congress embodied in this country's patent system and protected in the Bankruptcy Code, and refuse to grant comity to German law, which embodies different policy judgments on patents.

B. Failure To Apply Section 365(n) Is Manifestly Contrary To Promoting This Country's Economic Efficiency And Productivity Growth Through Innovation.

Removing the protection afforded by § 365(n) will be manifestly contrary to the fundamental U.S. public policy in promoting investment and innovation in the semiconductor industry, increasing economic productivity, promoting competition, increasing the standard of U.S. living, protecting consumer surplus, and preventing U.S.-based operations from relocating abroad. (*See* Ex. 1, Hausman Dep. Tr. at 120:6-121:21.)

Patent cross-licensing has developed in the semiconductor industry as a necessary solution to the patent thicket that exists, and works to reduce the threat of a patent holder seeking a hold up and to promote "patent peace" or "freedom of action." (*Id.*; OBJ Ex. R, Bratic Rep. at ¶ 57-58.) It is necessary for continued innovation and economic growth. (OBJ Ex. A, Hausman Rep. at ¶ 85; OBJ Ex. R, Bratic Rep. at ¶ 57.) The freedom of action that patent cross-licenses enable allows semiconductor manufacturers to invest the billions of dollars necessary for the production and innovation of newer, faster, and more efficient semiconductor chips. (*Id.*)

A reduction in investment and innovation in the semiconductor industry would lead to a reduction in innovation across the economy as a whole. Semiconductors are an important input into many high-technology sectors, and it is recognized that the semiconductor industry has driven the innovation and growth in those other technology sectors, including cell phones, computers, and the Internet—three of the most important innovations in the last 30 years. (*Id.*)

Further, a failure to apply § 365(n) not only would decrease the value of licenses, it would also decrease the value of patents. (*Id.* at ¶ 86.) Innovators will receive decreased returns to their patents because potential licensees will be unwilling to pay as much for a license due to the risk that the patents might subsequently become the property of a bankrupt entity that can terminate the license. (*Id.*) Decreased patent value will lead to a decrease in innovation, leading to higher costs and fewer new and improved products in the economy. (*Id.*)

The policy of allowing termination of patent cross-licenses would also reduce innovation by destabilizing and making less attractive Joint Development Agreements, which are common in the semiconductor industry and critical to innovation. (*Id.* at ¶ 87.) Currently, the combination of resources and expertise in JDAs leads to increased innovation for the benefit of consumers, particularly in the U.S. (*Id.*) That increased innovation would be placed at risk if companies are less willing to enter into JDAs because cross-licenses cannot be relied on.[20] (*Id.*)

A policy of allowing termination of licenses would also create an incentive for distortion-like behavior in which patents would be transferred to highly leveraged firms (with a high bankruptcy risk) in jurisdictions that allow bankrupt companies to unilaterally terminate licenses to U.S. patents. (OBJ Ex. A, Hausman Rep. at ¶ 89.) This incentive would further increase uncertainty and reduce incentives for investment in the semiconductor industry. (*Id.*) These firms could hold up existing licensees, even if they had already signed perpetual licenses. (*Id.*)

The reduction in investment in innovation would lead to a reduction in this country's economic productivity, which is among the most important determinants of the U.S. standard of living. (*Id.* at ¶ 85.) The termination of the patent cross-licenses would undermine the system of licensing upon which the Objectors rely for the "freedom to operate." (*Id.*) Regardless of any current or future license agreements, semiconductor manufacturers would be perpetually at risk that those licenses could be unilaterally terminated in the future by their contracting partner. In turn, the unilateral termination of a cross-license agreement that affords the manufacturer freedom to operate would lead to a potentially crippling hold up scenario, which increased risk will lead to a significant reduction in investment and innovation. (*Id.*)

The harm to the licensing system that would be caused by allowing license termination and the resulting disincentive to innovation would also have negative effects on competition.

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20 Allowing the termination of licenses would also have a chilling effect on innovation by reducing the incentive for companies to transfer patents to companies that they spin off. (*Id.*) Indeed, it is likely that Infineon would never have transferred its memory portfolio to Qimonda during the spin-off if there was a possibility that Qimonda could unilaterally cancel that license agreement in bankruptcy. (Infineon Resp. to Interrogatory No. 11.)

One of the benefits of cross-licensing is that it allows for competition among multiple firms, each of which have the ability to develop and sell patented technology, instead of having a single firm exploiting a patent monopoly. With less cross-licensing, companies would have an incentive to turn their development efforts towards proprietary products based on their own intellectual property instead of standardized products that require others' patents to be licensed. The result would be less competition, which would have negative effects on the economy and consumers.

Failure to apply § 365(n) would also have a negative impact on standards, further damaging competition in the semiconductor industry. Standard setting organizations, like JEDEC, require their members to disclose relevant and potentially essential patents prior to adopting a standard so that other members can determine whether to change the proposed standard to avoid the allegedly essential patent, design around the proposed standard, or negotiate with the patent holder a FRAND rate to practice the allegedly essential patent. But were this Court to create a precedent in which patent cross-licenses could be unilaterally terminated, the resulting chilling effect on intellectual property agreements would lead to the diminished importance of standards. *See, e.g. In re Negotiated Data Solutions, LLC*, File No. 051-0094, 2008 WL 258308, at *5 (F.T.C. Jan. 22, 2008) (finding that the termination of a patent license agreement covering patents to standardized technology would lead to "decreased reliance, or willingness to rely, on standards established by industry standard setting organizations"). That is, companies would attempt to avoid using patented technology in standards because they could not rely on the validity of the license to the patented technology and, thus, would fear being held-up after relying on the license and implementing the standard. In turn, innovation and competition would further decrease, and consumers and the U.S. economy would suffer billions of dollars in harm.[21]

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[21] Standards have an importance far beyond semiconductors. (OBJ Ex. A, Hausman Rep. at ¶ 91.) Standards are crucial for cell phone technology, where the number of essential patents exceeds 1,000 and those patents are held by numerous firms.

The failure to protect cross-licenses would also have negative effects on U.S. jobs and manufacturing activity. Many of the Objectors have made significant investments in manufacturing facilities in the U.S., and have thousands of U.S. employees. In the absence of 365(n) protection, patent licensees would have an incentive to locate their manufacturing facilities outside of the U.S. so that their potential exposure would be reduced if a bankruptcy of one of their licensors caused them to lose their licenses to U.S. patents.

Each of these harms in turn reduces consumer welfare and decreases consumer surplus. Consumer surplus is the value consumers receive from a product after taking into account the price they pay for the product. (OBJ Ex. A, Hausman Reb. Rep. at ¶ 7.) It has been estimated, for example, that the benefits provided in 2010 by a single innovative product, the Apple iPhone, provided almost $5 billion in consumer surplus worldwide and approximately $1.9 billion in the U.S. alone. (*Id.* at ¶ 7 n.10.) Because innovation in the semiconductor industry is worth billions of dollars to the U.S. economy, and is a key driver of innovation in other sectors, a failure to apply § 365(n) will lead to a significant reduction in consumer surplus for years to come.

C. Application Of The Public Policy Exception Is Consistent With Legal Precedent.

Despite, as the District Court noted, the relatively scant precedent on the application of the public policy exception embodied in 11 U.S.C. § 1506, the several cases that have analyzed that provision make clear that the circumstances here dictate application of the exception.

In *Gold & Honey*, for example, the court found that the recognition of a foreign proceeding, prosecuted by one creditor against the debtor in violation of the automatic stay entered when the debtors filed for Chapter 11 protection, would be "manifestly contrary to the public policy of the United States." *In re Gold & Honey, Ltd.*, 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009). That holding was based on the finding that to recognize the foreign proceeding would "reward and legitimize [the creditor's] violation of both the automatic stay and this Court's Orders regarding the stay." *Id.*

As in *Gold & Honey*, the failure to apply § 365(n) here would be manifestly contrary to the public policy of the United States, and allow a foreign bankrupt entity to flout the protection of § 365(n) merely to increase payments to the estate, all the while destroying the carefully designed incentives to patent cross-licensing that Congress created when it enacted § 365(n) . Further still, the ensuing derogation of the incentive for innovation and investment in technology in the United States has far greater implications here than were present in *Gold & Honey*, which was arguably limited to scenarios involving bankrupt entities. This case will touch on the decision-making process for every company that has an intellectual property license agreement, that currently relies on such an agreement, or that plans to enter into such an agreement.

The few cases finding the § 1506 public policy exception not applicable are inapposite. In *Ernst & Young*, for example, the court dismissed the claim that fundamental public policy is implicated in the relative distributions between domestic and foreign creditors, finding that "[a]ll wronged investors should share in the assets accumulated . . . regardless of nationality or locale." *In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Col. 2008). The court there also dismissed the claim that merely increasing costs and depletion of assets in some way involved the fundamental public policy of the United States. *Id. Accord In re Metcalfe & Mansfield Alt. Instruments*, 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010) (finding narrow jurisdictional differences between U.S. Courts and Canadian Courts did not implicate a fundamental public policy of the U.S.); *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006) (holding that § 1506 does not prevent a U.S. court from recognizing a foreign insolvency procedure "simply because the procedure alone does not include a right to jury" in view of the many court decisions that "regularly dismiss[] U.S. cases in favor of foreign forums despite the objection that the foreign forum provides no trial by jury").

CONCLUSION

For the reasons above, the Objectors respectfully request that the Court deny the FR's request to remove the protection of Section 365(n) from the Supplemental Order governing Qimonda's Chapter 15 bankruptcy proceeding.

EXHIBIT 10

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 15
Elpida Memory, Inc., Debtor in a Foreign Proceeding.	Case No. 12-10947 (CSS)
	Hearing Date: TBD
	Objection Date: TBD

EMERGENCY MOTION OF THE STEERING COMMITTEE OF THE AD HOC GROUP OF BONDHOLDERS OF ELPIDA MEMORY, INC. FOR APPOINTMENT OF COURT REPRESENTATIVE PURSUANT TO 11 USC §§ 105(a), 1525, 1526 AND 1527 TO FACILITATE COOPERATION AND DIRECT COMMUNICATION WITH THE JAPANESE COURT

The Steering Committee of the Ad Hoc Group of Bondholders (the "Bondholders") of Elpida Memory, Inc. ("Elpida"), by and through its undersigned counsel, respectfully submits this motion (the "Motion") in the above-reference chapter 15 case of Elpida, pursuant to 11 U.S.C §§ 105(a), 1525, 1526 and 1527 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), for entry of an order appointing a Court representative (a "Court Representative") to facilitate cooperation and direct communication with the Japanese court (the "Japanese Court") administering Elpida's Japanese reorganization proceedings (the "Japanese Proceeding") and to ensure a more open flow of information between the two Courts at this critical juncture of the two cases. In connection with the Motion, the Bondholders respectfully represent as follows:

PRELIMINARY STATEMENT

This chapter 15 case was commenced on March 19, 2012, and this Court entered an order recognizing the Japanese Proceeding on April 24, 2012. Despite obvious and material developments in the Japanese Proceeding since that date, the Foreign Representatives made no attempt to keep this Court voluntarily apprised of the transactions and developments of such proceeding, despite their obligations to do so under section 1518 of the Bankruptcy Code. That lack of disclosure has at times been glaring. Last week, the Foreign Representatives filed a motion seeking permission to file under seal a "Status Report" that includes, among other things, a description of certain post-petition agreements involving Elpida that clearly affect Elpida's assets in the United States. Those agreements, although purportedly approved in the Japanese Proceeding on an *ex parte* basis and pursuant to an order filed under seal, were effected without any disclosure to this Court, much less this Court's approval. The Foreign Representatives' belated disclosure—which was only prompted in response to the Bondholders' affirmative efforts to obtain information related to Elpida's U.S. assets—highlights the present inadequacy of the information flow and the urgent need for coordination between this Court and the Japanese Court. Indeed, this Court has already expressed concerns regarding the lack of communication in this case, and there can be little doubt that none of these post-petition transactions would have been consummated without prior approval if there had been a mechanism in place ensuring that information flowed between the Japanese Court and this Court.

Chapter 15 itself provides a remedy for these information and reporting deficiencies. Under section 1525(b) of the Bankruptcy Code, "[t]he court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation." Moreover, to implement such cooperation and direct communication, the court may appoint "a person or body, including an examiner, to act at the direction of the court[.]" 11 U.S.C. § 1527(1). Thus, the Bondholders request that the Court immediately appoint a Court Representative to act at the Court's direction in facilitating cooperation and direct communication between this Court and the Japanese Court. Among other things, the Bondholders respectfully request that the Court Representative be directed by the Court to implement the forms of cooperation and communication expressly specified in section 1527 of the Bankruptcy Code, including the following:

- Communication of information by any means considered appropriate by the Court;
- Coordination of the administration and supervision of Elpida's assets and affairs;
- Approval or implementation of agreements concerning the coordination of proceedings; and
- Coordination of concurrent proceedings regarding Elpida.

For the foregoing reasons and as explained further herein, the Court should grant the Motion.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C §§ 157 and 1334. This matter is core proceeding under 28 U.S.C. § 157(b)(2)(P). Venue is proper before this Court pursuant to 28 U.S.C. § 1410. The statutory predicates for relief requested herein are sections 105(a), 1525, 1526 and 1527 of the Bankruptcy Code.

RELIEF REQUESTED

2. By this Motion, the Bondholders request entry of an order pursuant to sections 105(a), 1525, 1526 and 1527 of the Bankruptcy Code, appointing a Court Representative substantially in the form attached hereto as Exhibit A.

ARGUMENT

3. As Congress has made clear, the purpose of chapter 15 of the Bankruptcy Code is to foster and promote cooperation between U.S. Courts, foreign courts and debtors, with the objectives of, among other things, fair and efficient administration of cross-border insolvencies

that protects the interests of all interested parties, and protection and maximization of value of the debtor's assets. See 11 U.S.C. § 1501; In re SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) ("[I]n light of section 1501(a), the Court shall protect the parties' interests by implementing fair, efficient and, it is hoped, cooperative procedures designed to maximize the value of the debtor's assets for distribution."). "The express purpose of Chapter 15 is to promote cooperation between the courts of foreign nations and the United States in the efficient administration of cross-border insolvencies." In re Grand Prix Assocs., Inc., No. 09-16545, 2009 WL 1850966 at *3 (Bankr. D.N.J. Jun. 26, 2009) (citing 11 U.S.C. § 1501; In re Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525, 532 (Bankr. S.D.N.Y. 2008)). In furtherance of that purpose, chapter 15 arms the Court with the power, either directly or through a court-appointed representative, to mandate cooperation and communication necessary to carry out the Court's affirmative duty to ensure that actions taken by a foreign debtor with respect to United States assets are consistent with applicable U.S. law.

4. Section 105(a) of the Bankruptcy Code provides the Court may issue any order that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. Pursuant to sections 1525 and 1526 of the Bankruptcy Code, the Court, the trustee, or other person authorized by the Court (consistent with the scope and purpose of chapter 15 as laid out in section 1501) are instructed and authorized to "***cooperate to the maximum extent possible*** with a foreign court or a foreign representative" and "***communicate directly*** with a foreign court or a foreign representative." 11 U.S.C. §§ 1525, 1526 (emphasis added). Section 1527 further provides that the cooperation referred to in sections 1525 and 1526 may be implemented by "***any appropriate means***," including—

> (1) appointment of a person or body, including an examiner, to act at the direction of the court;

(2) communication of information by any means considered appropriate by the court;

(3) coordination of the administration and supervision of the debtor's assets and affairs;

(4) approval or implementation of agreements concerning the coordination of proceedings; and

(5) coordination of concurrent proceedings regarding the same debtor.

11 U.S.C. § 1527 (emphasis added). "Sections 1525 and 1527 specifically require communication and cooperation between the Court, the [foreign court], and the foreign representative with respect to the supervision and administration of the [f]oreign [d]ebtors' assets including the approval of agreements related to the coordination of proceedings." In re Grand Prix Assocs., Inc., 2009 WL 1850966 at *3 (citing 11 U.S.C. §§ 1525, 1527).

5. In this chapter 15 case, Elpida and its Foreign Representatives have failed to keep this Court adequately apprised of material information regarding the Japanese Proceeding and its direct and indirect impact on Elpida's U.S. assets (which are under the direct supervision of this Court). Indeed, the Foreign Representatives only recently disclosed to the Court and counsel (on a confidential basis and in a status report Elpida seeks to file under seal) the details of a number of material post-petition transactions and agreements impacting Elpida's U.S. assets, which purportedly were approved by the Japanese Court on an *ex parte* basis pursuant to an order filed under seal, but were neither disclosed nor submitted to this Court for approval. See Motion for Order Pursuant to Section 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 9018-1 Authorizing the Foreign Representatives to File Report on Foreign Main Proceeding And Request for Status Conference Under Seal [Dkt. No. 131]. Indeed, the Foreign Representatives have submitted a declaration in which its Japanese counsel asserts that the proposed sale to Micron Technology, Inc. ("Micron") "does not in any way involve this Court's

jurisdiction over Elpida's U.S. assets and Elpida does not expect to seek relief from this Court." Supp. Decl. of Kosei Watanabe ¶ 26 (Aug. 30, 2012) [Dkt. No. 108].

6. To ensure cooperation and direct communication to the maximum extent possible between this Court and the Japanese Court as mandated by chapter 15, and to allow this Court to be able to exercise its own jurisdiction over Elpida's U.S. assets with a clear understanding of the Japanese Proceeding, the Bondholders request that the Court immediately appoint a Court Representative in accordance with sections 11525, 526 and 1527 of the Bankruptcy Code. Given the fact that the Japanese Proceeding is already well under way and in the plan process, time is of the essence. Elpida is a multi-billion dollar company contemplating a purported sale of its entire business to a U.S. competitor, Micron. The disposition of Elpida's U.S. assets is a critical component to any sale or reorganization of Elpida, which necessarily invokes not only the Japanese Court's jurisdiction over Elpida's assets in Japan, but also this Court's jurisdiction over Elpida's U.S. assets. Thus, timely and efficient cooperation and coordination between this Court and the Japanese Court are not only appropriate, but absolutely necessary given the facts of this particular case.

EMERGENCY RELIEF IS WARRANTED

7. The Motion should be heard on an emergency basis by the Court, given the present circumstances. The Japanese Proceeding is moving rapidly—as Elpida's Japanese counsel has stated, "[t]he Japan Proceeding is nearing the final stages of approving a plan, with the Tokyo Court having received the Trustee's reorganization plan on August 21, 2012 and the Steering Committee's competing plan on August 14, 2012." Supp. Decl. of Kosei Watanabe ¶ 24 (Aug. 30, 2012). Moreover, the Bondholders understand that Elpida's examiner in the Japanese Proceeding will recommend as early as the end of this month whether a plan will be

submitted to Elpida's creditors for a vote. Accordingly, a Court Representative as expressly contemplated and authorized by Congress in chapter 15 should be appointed immediately.

NOTICE

8. Notice of this Motion has been provided to (a) the attorneys for Elpida; (b) the Office of the United States Trustee for the District of Delaware; and (c) all parties who have requested notice in this Chapter 15 Case.

WHEREFORE, the Bondholders respectfully request pursuant to sections 105(a), 1525, 1526, and 1527 of the Bankruptcy Code that the Court appoint a Court Representative as set forth herein.

Dated: September 19, 2012
Wilmington, Delaware

THE STEERING COMMITTEE OF THE AD HOC GROUP OF ELPIDA BONDHOLDERS

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EXHIBIT 11

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re Elpida Memory, Inc., Debtor in a Foreign Proceeding.	Chapter 15 Case No. 12-10947 (CSS) **Re: Docket No. 139** **Hearing Date: Oct. 24, 2012 at 9:00 a.m.**

FOREIGN REPRESENTATIVES' OBJECTION TO EMERGENCY MOTION OF THE STEERING COMMITTEE OF THE AD HOC GROUP OF BONDHOLDERS OF ELPIDA MEMORY, INC. FOR APPOINTMENT OF COURT REPRESENTATIVE PURSUANT TO 11 U.S.C. §§ 105(a), 1525, 1526, AND 1527 TO FACILITATE COOPERATION AND DIRECT COMMUNICATION WITH THE TOKYO COURT

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Mr. Yukio Sakamoto and Mr. Nobuaki Kobayashi, as foreign representatives (the "Foreign Representatives") of Elpida Memory, Inc. ("Elpida," or the "Debtor"), an entity subject to insolvency proceedings in Japan (the "Japan Proceeding") under the jurisdiction of the Tokyo District Court (the "Tokyo Court"), and having been recognized as such in Elpida's chapter 15 proceedings (the "Chapter 15 Proceeding") before this Court, submit this Objection (the "Objection") to the Emergency Motion (the "Motion") by the Steering Committee (the "Committee") of the Ad Hoc Group of Bondholders (the "Bondholders"), pursuant to sections 105(a), 1525, 1526 and 1527 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), requesting entry of an order appointing a court representative empowered to "coordinate" this proceeding with Japan Proceeding. The Foreign Representatives respectfully submit that the Motion should be denied for the reasons set forth below.

PRELIMINARY STATEMENT

Despite the appointment of the Foreign Representatives in the Japan Proceeding, and their recognition in this Court, the Bondholders ask this Court to appoint an additional representative that would have the power to:

- Coordinate the administration and supervision of Elpida's assets and affairs;
- Make recommendations to this Court regarding the approval or implementation of agreements concerning the coordination of proceedings;
- Communicate with the Tokyo Court concerning any matters in the Chapter 15 Proceeding or the Japan Proceeding; and
- Coordinate concurrent proceedings regarding Elpida.

But Elpida is a Japanese company that is currently subject to an insolvency case in Japan, where its center of main interest is located. Coordination is necessarily centered in that case. This Court has recognized the Japan Proceeding as a foreign main proceeding under Chapter 15, and has granted it comity. The Japan Proceeding has reached an advanced stage, in which competing reorganization plans are being considered – one of which was proposed by the Bondholders, who asked for and received a delay so that they could request additional information in the Japan Proceeding and amend their proposed plan accordingly. Those same Bondholders – who hold yen-denominated bonds issued in Japan – now ask this Court to assume the role of overseeing the main case through a representative who would be given powers entirely inconsistent with the jurisdiction of the Tokyo Court and with the functions accorded to foreign representatives under chapter 15.

No such appointment is authorized, and none is warranted. The Bondholders' demand cannot be justified upon the unfounded claim that additional cooperation and communication between the U.S. and Japanese courts are needed. This Court is receiving regular updates regarding the Japan Proceeding. *See* Supplemental Decl. of Kosei Watanabe [Docket No. 108], Aug. 30, 2012; Supplemental Decl. of Kosei Watanabe [Docket No. 39], Apr. 13, 2012; Decl. of Kosei Watanabe [Docket No. 7], Mar. 19, 2012. Nor is the appointment of a representative with extraordinary powers required to protect U.S. creditors. To the extent appropriate, Elpida's Foreign Representatives have already sought this Court's approval of agreements approved by the Tokyo Court that implicate assets within the territorial jurisdiction of the United States. Those assets are owned by the Japanese entity and held for the benefit of *all* of Elpida's creditors. This Chapter 15 case does not give U.S. creditors, or the Bondholders, any priority rights in those assets. Finally, this Court's September 18, 2012 Interim Order (the "Interim Order") precludes Elpida from taking any action outside of the ordinary course of business with respect to such assets without notice or further order of this Court.

The Bondholders' real objective appears to be to obtain discovery for use in the Japan Proceeding, on the argument that the Japanese reorganization process is different from the U.S. chapter 11 regime. But the fact that there are differences between the two regimes does not give the Bondholders any right to use this Court to obtain relief unavailable in the Tokyo Court. Indeed, unless an objecting creditor can demonstrate, in cases where the foreign representative is asking the chapter 15 court to take an action governed by chapter 15, that a main proceeding in another jurisdiction lacks *fundamental* due process, or is *inherently prejudicial* to U.S. creditors, as a consequence of the insolvency regime in that country, a bankruptcy court is required under chapter 15 to afford comity to a foreign main proceeding to which it has already granted recognition. Appointment of a representative with powers designed to supersede that grant of comity would be entirely inconsistent with the letter of chapter 15 and the spirit of such comity.

ARGUMENT

The Bondholders have presented no legal or factual basis for the unprecedented appointment of a representative empowered to take over coordination of this ancillary case with the foreign main proceeding pending in Japan, and any such appointment would be inconsistent with the scheme of cooperation and coordination implemented in the United States by chapter 15, and in Japan through the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law").[1]

I. This Court Has Recognized the Foreign Representatives and the Japan Proceeding As the Foreign Main Proceeding

On April 24, 2012, this Court entered its Order Recognizing Foreign Representatives and Foreign Main Proceeding [Docket No. 65] (the "Recognition Order"). Pursuant to the

[1] For the status of enactment of the Model Law, see http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited October 12, 2012).

Recognition Order, this Court found that the Foreign Representatives are the "foreign representatives" for Elpda (Recognition Order, Finding No. 7), recognized the Japan Proceeding as the foreign main proceeding to which this ancillary case would provide assistance (*id.* ¶¶ 2-3), and ordered that the Foreign Representatives were authorized to take all actions necessary to effectuate the relief granted in the Recognition Order (*id.* ¶ 13). S*ee* 11 U.S.C. § 1517. Upon entry of that order, certain provisions of the Bankruptcy Code became applicable within the territorial jurisdiction of the United States. *See, e.g.*, 11 U.S.C. § 1520. However, the Tokyo Court, as the court presiding over Elpida's foreign main proceeding, has plenary jurisdiction over Elpida's reorganization and all of its assets (wherever located). The proceeding before this Court is designed to provide assistance to the Japan Proceeding by the extension of cooperation and comity to the Tokyo Court. *See, e.g.*, 11 U.S.C. §§ 1507, 1507, 1525.

Courts in the U.S. have repeatedly extended comity to foreign bankruptcy proceedings, respecting the foreign court's valid interests in presiding over the insolvency and reorganization of domestic businesses. *See, e.g.*, *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005) ("We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding."); *Stonington Partners v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002) ("The principles of comity are particularly appropriately applied in the bankruptcy context because of the challenges posed by transnational insolvencies and because Congress specifically listed 'comity' as an element to be considered in the context of such insolvencies [under 11 U.S.C. § 304, the predecessor to chapter 15]."); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) (citations omitted) ("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings."); *Remington*

Rand Corp. v. Business Systems, Inc., 830 F.2d 1260, 1271 (3d Cir. 1987) ("American courts have recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities."). Chapter 15 explicitly codifies this policy, requiring U.S. courts to "grant comity or cooperation to [a duly recognized] foreign representative." 11 U.S.C. § 1509(b)(3). Chapter 15 courts have routinely recognized Japanese insolvency proceedings. *See Iida v. Kitahara (In re Iida)*, 377 B.R. 243 (9th Cir. B.A.P. 2007) (extending comity and recognition under chapter 15 to Japanese bankruptcy proceedings); *In re Kyoshin Name Plate Kogyo Co., Ltd.*, Ch. 15 Case No. 10-00168 (RJF) (Bankr. D. Haw. Jan. 21, 2010) (same); *In re Japan Airlines Corp.*, Ch. 15 Case No. 10-10198 (JMP) (Bankr. S.D.N.Y. Jan. 19, 2010) (same); *In re Kiyoshi Nagai*, Ch. 15 Case No. 09-01619 (RJF) (Bankr. D. Haw. July 17, 2009) (same); *In re Nanbu, Inc.*, Ch. 15 Case No. 09-01274 (RJF) (Bankr. D. Haw. June 8, 2009) (same); *In re Spansion Japan Ltd.*, Ch. 15 Case No. 09-11480 (KJC) (Bankr. D. Del. Apr. 30, 2009) (same); *In re Namirei-Showa Co., Ltd.*, Ch. 15 Case No. 08-13256 (BRL) (Bankr. S.D.N.Y. Aug. 21, 2008) (same); *In re Three Estates Co., Ltd.*, Ch. 15 Case No. 07-23597 (TH) (Bankr. E.D. Cal. May 15, 2007) (same); *In re Yoshihiko Kokura*, Ch. 15 Case No. 06-00849 (RJF) (Bankr. D. Haw. Nov. 21, 2006) (same); *In re Gestion-Privee Location L.L.C.*, Ch. 15 Case No. 06-80071 (WLS) (Bankr. M.D.N.C. Jan. 18, 2006) (same).

Even before the implementation of chapter 15, courts consistently held that "deference to [a] foreign court is appropriate so long as the foreign proceedings are procedurally fair and . . . do not contravene the laws or public policy of the United States." *JP Morgan Chase Bank*, 412 F.3d at 424; see also *Victrix S.S.*, 825 F.2d at 713 ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.") (citations omitted). These exceptions to deference are very narrow and are not to be employed by U.S. creditors to gain an unfair advantage over other creditors. "The public policy and procedural fairness exceptions to the exercise of comity, under both New York and federal law, are intended as shields to protect American citizens and corporations from fundamentally unfair treatment abroad. They are not swords to be wielded by . . . creditors to frustrate and evade foreign bankruptcy laws." *Ecoban Fin. Ltd. v. Grupo Acerero del Norte, S.A. de C.V.*, 108 F. Supp. 2d 349, 354 (S.D.N.Y. 2000), *aff'd sub nom. Ecoban Fin. Ltd. v. Altos Hornos de Mexico, S.A. de C.V.*, 2 Fed. Appx. 80 (2d Cir. 2001).

Chapter 15 was specifically designed to promote the grant of comity to foreign proceedings unless the foreign country's insolvency regime violates fundamental U.S. principles, and once the foreign proceeding is recognized and comity granted, the U.S. court is not empowered to review the acts of the foreign court. A recent decision discussed the standard for a bankruptcy court's inquiry into the foreign insolvency proceeding:

> [I]n *Victrix*, the Second Circuit looked only to whether the "foreign laws" at issue comported with due process and not whether the specific individual proceeding afforded due process. [*Victrix*, 825 F.2d at 714]; *see also Cunard Steamship Co. v. Salen Reefer Servs. A.B.*, 773 F.2d 452 (2d Cir. 1985) (analyzing Swedish bankruptcy law to determine whether the foreign bankruptcy proceeding should be accorded comity); *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (holding that a U.S. bankruptcy court "is not required to make an independent determination about the propriety of individual acts of a foreign court."). 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." Chapter 15's directive that courts be guided by principles of comity was intended to avoid such a result. St. James is no more entitled to SNP's assets than any other creditor of SNP outside the determinations of the foreign insolvency proceeding. Thus, it was an abuse of the bankruptcy court's discretion to order discovery for the purposes of determining whether St. James' interests were sufficiently protected in the specific French *sauvegarde* proceeding. St. James has not advanced the argument

> that creditors' interests are not sufficiently protected under French *sauvegarde* law and this Court has no reason to determine otherwise. In concluding that jurisdiction is limited to a determination that French *sauvegarde* proceedings generally are sufficient to protect creditors' interests, it follows that a bankruptcy court is without jurisdiction to inquire whether a particular creditor's interests are sufficiently protected in any specific foreign proceeding.

SNP Boat Serv. S.A. v. Hotel Le St. James, No. 11-cv-62671-KMM, 2012 U.S. Dist. LEXIS 54615, at *26-28 (S.D. Fla. Apr. 18, 2012).

Comity is particularly warranted where, as here, relief is sought by entities that have both voluntarily acquired unsecured bonds of a Japanese issuer, and participated in the Japanese plan process. The Bondholders cannot now claim an entitlement to beneficial treatment, unavailable in Japan to other creditors, because the Japanese insolvency regime is not identical to chapter 11. "A person who contracts with a foreign entity is subjected to the laws of the foreign government that affect 'the powers and obligations of the corporation with which he voluntarily contracts.' This includes bankruptcy laws." *In re Bd. of Dirs. of Telecom Argentina S.A.,* No. 05 Civ. 8803 (SAS), 2005 U.S. Dist. LEXIS 28640, at *8 (S.D.N.Y. Nov. 18, 2005), *aff'd sub nom. Argo Fund Ltd. v. Bd. of Dirs. of Telecom Argentina S.A.*, 528 F.3d 162, 175 (2d Cir. 2008) (quoting *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 537 (1883)).

II. The Order Sought By the Bondholders Would Violate Principles of Comity

The order sought by the Bondholders is entirely inconsistent with both chapter 15 and with its mandate that comity be extended.

The Bondholders request that this Court appoint an independent representative or examiner, paid for by the Debtor, who would: (1) coordinate the administration and supervision of Elpida's assets and affairs; (2) make recommendations to this Court regarding the approval or implementation of agreements concerning the coordination of proceedings; (3) communicate with the Tokyo Court concerning any matters in the chapter 15 case or the Japan Proceeding; and (4) coordinate concurrent proceedings regarding Elpida. *See* Bondholders' Proposed Order ¶¶ 1-2.

But this Court has already recognized the Japan Proceeding and has recognized two individuals as Foreign Representatives of the Debtor. *See* Recognition Order ¶¶ 2-3, 10-11. These Foreign Representatives are granted a range of powers under chapter 15. *See, e.g.*, 11 U.S.C. §§ 1511, 1512, 1521, 1523, 1524. The Bondholders' proposed order would essentially supplant the Foreign Representatives and replace them with a different foreign representative who would be subject to the Bondholders' oversight, and thereby take from the Tokyo Court the right to maintain its jurisdiction over Elpida's foreign main proceeding. No such right is permitted, let alone mandated, under chapter 15.

To contend that a new entity be appointed with the extraordinary powers sought by the Bondholders because of a purported need for communication is particularly inapposite.[2] This Court needs no exotic means by which to communicate with the Tokyo Court. As noted, regular

[2] The Court may request additional information about the Japan Proceeding, as provided by chapter 15, either through the Foreign Representatives or through the neutral examiner appointed in the Japan Proceeding. *See, e.g.*, 11 U.S.C. § 1525(b); *see also* Guide to the Enactment of the UNCITRAL Model Law on Cross-Border Insolvency ("Guide to the Model Law") ¶ 178 (emphasizing "[t]he importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives" and noting that the Model Law, the precedent for chapter 15, contemplates that cross-border "means of communication include, for example, telephone, facsimile, electronic mail facilities and video"), attached hereto as Exhibit A and available online at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf (last visited October 12, 2012).

Because this Court is granted wide discretion, but no creditor is granted a specific right, 11 U.S.C. § 105(a) is of no application. The power conferred under Section 105(a) is only to be used where necessary to "preserve an identifiable right conferred elsewhere in the Bankruptcy Code." *Id.* It does not authorize a court to issue remedies that "reach results inconsistent with the statutory scheme established by the Code." *Missoula Fed. Credit Union v. Reinertson (In re Reinertson)*, 241 B.R. 451, 455 (9th Cir. B.A.P. 1999) (internal quotation marks omitted). Employing a "coordinator" to usurp the role of the court presiding over a foreign main proceeding and the role of the foreign representatives would be inconsistent with the statutory scheme of chapter 15.

updates about the Japan Proceeding have been, and will continue to be, provided in accordance with section 1518 of the Bankruptcy Code. *See* Supp. Decl. of Kosei Watanabe, Aug. 30, 2012; Supp. Decl. of Kosei Watanabe, Apr. 13, 2012; Decl. of Kosei Watanabe, Mar. 19, 2012. Therefore, to burden the estate with the cost of a novel and unnecessary court representative is unwarranted and contravenes the core chapter 15 policies of promoting the "protection and maximization of the value of the debtor's assets," 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); *accord In re Oversight & Control Comm'n of Avanzit, S.A.*, 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008) ("The purpose of chapter 15 is to encourage cooperation between domestic and foreign courts, . . . promote fairness and efficiency, protect and maximize value and facilitate the rescue of financially troubled businesses.").

And of course the Bondholders do not simply seek to shift the locus of decision making in this case to the United States, they seek discovery not available in Japan, through the powers they wish the Court to grant to the proposed representative. In that, they seek not protection, but favoritism. They are not entitled to special treatment just because some of Elpida's assets are in the United States. *See, e.g.*, *SNP Boat Serv.*, 2012 U.S. Dist. LEXIS 54615, at *27 ("St. James is no more entitled to SNP's assets than any other creditor of SNP outside the determinations of the foreign insolvency proceeding.").

Finally, a court representative is superfluous under chapter 15 where, as here, the jurisdiction of the foreign main proceeding has also adopted the Model Law, which facilitates cross-border communication and coordination among the Court, the Foreign Representatives, the examiner appointed by the Japanese court in the foreign main proceeding, and the Japanese court. Indeed, appointing an unnecessary court representative in this case risks divesting the

Foreign Representatives of their legitimate statutory role, subverting the scheme of cooperation and comity envisioned in the Model Law and enacted in chapter 15.

To date, there is no reported case in which a U.S. bankruptcy court has used chapter 15 to appoint a court representative or examiner with the authority to coordinate ancillary U.S. proceedings with foreign main proceedings abroad, and in fact the Bondholders have not provided a citation for one. The reason is simple: the Model Law, as implemented in chapter 15, provides several tools for cross-border coordination that obviate the need for such relief. *See generally* 11 U.S.C. § 1501(a) ("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 . . . ."). For example, Article 25 of the Model Law gives bankruptcy courts the statutory authority "to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative," without the need for an intermediary. Model Law art. 25; *accord* 11 U.S.C. § 1525(b). As the UNCITRAL Guide to the Enactment of the Model Law explains, "[t]he ability of courts, with appropriate involvement of the parties, to communicate '*directly*' and to request information and assistance '*directly*' from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory." Guide to the Model Law ¶ 179 (emphasis added).

The Guide to the Model Law also highlights the important role that a debtor's administrator-representatives can and should play in communicating and coordinating between proceedings, which the Committee's proposed court representative threatens to usurp. *See, e.g.*, *id.* ¶ 180 ("Article 26 on international cooperation between persons who are appointed to administer assets of insolvent debtors reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority.").

In particular, the Model Law authorizes a debtor's representative in one proceeding to "act in a [foreign court] on behalf of" that proceeding. *See id.* ¶ 84 ("The intent [of the Model Law] is to equip administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings."); *see also id.* ¶ 100 (giving the foreign representative standing "to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding"). This provides a direct basis for courts to recognize the authorized representatives of debtors and foreign courts, obviating the need to appoint yet another representative to mediate between the courts. In delineating foreign representatives' access to the courts of the enacting state, the Guide to the Model Law states:

> An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State. The Model Law avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be used. This facilitates a coordinated, cooperative approach to cross-border insolvency and makes fast action possible.

Guide to the Model Law ¶ 28.

Section 1525 furthers this aim by instructing courts and foreign representatives to cooperate with one another "to the maximum extent possible." *See* 11 U.S.C. §§ 1525 (requiring the chapter 15 court to cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee, and entitling the court "to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative"); *see also* Guide to the Model Law ¶ 174 ("Articles 25 and 26 not only authorize cross-border cooperation, they also mandate it by providing that the court and the insolvency administrator [or foreign representative] 'shall cooperate to the maximum extent possible.'").

In this case, both the United States and Japan have implemented the Model Law, and Elpida's Foreign Representatives have duly petitioned for, and received recognition and authorization to, represent the Tokyo Court and the Japan Proceeding before this Court. The relief sought by the Bondholders would be a wholly improper use of chapter 15, which is intended to promote cooperation rather than conflict and tension with foreign insolvency proceedings.

CONCLUSION

For the foregoing reasons, the Foreign Representatives respectfully request that the Motion be denied.

Dated: October 12, 2012
Wilmington, Delaware

RICHARDS, LAYTON & FINGER, P.A.

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EXHIBIT 12

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re Elpida Memory, Inc., Debtor in a Foreign Proceeding.	Chapter 15 Case No. 12-10947 (CSS) **Hearing Date: October 24, 2012 at 9:00 a.m.** **Re: Docket Nos. 139 and 190**

REPLY OF THE STEERING COMMITTEE OF THE AD HOC GROUP OF BONDHOLDERS OF ELPIDA MEMORY, INC. IN SUPPORT OF EMERGENCY MOTION FOR APPOINTMENT OF COURT REPRESENTATIVE PURSUANT TO 11 U.S.C. §§ 105(a), 1525, 1526, AND 1527 TO FACILITATE COOPERATION AND DIRECT COMMUNICATION WITH THE JAPANESE COURT

The Steering Committee of the Ad Hoc Group of Bondholders (the "Bondholders") of Elpida Memory, Inc. ("Elpida"), by and through its undersigned counsel, respectfully submits this reply (the "Reply") to the Foreign Representatives' objection (the "Objection") to the Bondholders' motion (the "Motion"), pursuant to sections 105(a), 1525, 1526 and 1527 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), for entry of an order appointing a Court Representative[1] to facilitate cooperation and direct communication with the Tokyo District Court (the "TDC") administering Elpida's Japanese reorganization proceedings (the "Japanese Proceeding") and to ensure a more open flow of information between the two courts. In connection with the Reply, the Bondholders respectfully represent as follows:

REPLY

1. To read the Objection, one would think that the Bondholders had asked this Court to usurp the Japanese Proceeding. No one expects that here—least of all the Bondholders. Instead, the Motion requests a simple application of Bankruptcy Code sections 1525, 1526 and

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

1527 to the facts at hand and the appointment of someone to act as a liaison between this Court and the TDC when and how this Court deems appropriate.

2. That relief is hardly "inconsistent" with chapter 15, as the Foreign Representatives now claim. The chapter mandates cooperation between this Court and the TDC administering Elpida's Japanese Proceeding, "*to the maximum extent possible.*" 11 U.S.C. §§ 1525(a), 1526(a) (emphasis added). Cooperation may be implemented by *any* appropriate means, but the Bankruptcy Code specifically lists the following:

> (1) appointment of a person or body . . . to act at the direction of the court;
>
> (2) communication of information by any means considered appropriate by the court;
>
> (3) coordination of the administration and supervision of the debtor's assets and affairs;
>
> (4) approval or implementation of agreements concerning the coordination of proceedings; and
>
> (5) coordination of concurrent proceedings regarding the same debtor.

11 U.S.C. § 1527.

3. Moreover, the appointment of a Court Representative is patently necessary to coordinate communication between this Court and the TDC. Following the entry of the order[2] approving the Motion to Modify the Recognition Order,[3] the Foreign Representatives filed four motions with this Court seeking approval of certain post-petition agreements under section 363

[2] Interim Order Modifying Order Recognizing Foreign Representatives and Foreign Main Proceeding, entered on September 18, 2012 [Dkt. No. 138] (the "Modification Order").

[3] Motion of the Steering Committee of the Ad Hoc Group of Bondholders of Elpida Memory, Inc. to Modify the Order Recognizing Foreign Representatives and Foreign Main Proceeding [Dkt. No. 93] (the "Motion to Modify the Recognition Order").

of the Bankruptcy Code.[4] Each of those agreements was previously approved by the TDC on an *ex parte* basis, without any creditor notice, and filed under seal in the Japanese Proceeding. Critically, the Foreign Representatives continue to take the position that all of their communications with the TDC are entitled to blanket immunity and that they are permitted to continue to proceed on an *ex parte* basis in the Japanese Proceeding.

4. This type of procedure, although it may be appropriate under Japanese law, stands in stark contrast to the expectations previously expressed by this Court:

> We do this all the time in cross border cases. Usually, in my experience with Canada, we have joint hearings, we listen to, jointly listen to evidence, and we make rulings that deal with the assets in our control. So for example, if a Canadian company owns a US asset, and it's one of the, it's the property of the Canadian company, land in Washington, and if there's a disposition of that company in a Canadian proceeding, this Court, nonetheless, has jurisdiction over the asset owned by the Canadian company in the United States.

(Sept. 6, 2012 Hr'g Tr. 39:8-39:17). Nothing in the Modification Order, or any other order of this Court, however, addresses how that level of coordination will be achieved, particularly if the Foreign Representatives will continue to proceed on an *ex parte* basis in the Japanese Proceeding. Indeed, it is entirely unclear how this Court can hold open hearings and the TDC can hold closed hearings on the same issue in the absence of some intermediary. Accordingly, a Court Representative will be critical for this Court to have any role other than waiting for the TDC to act.

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4 See Foreign Representatives' Motion For Approval of Security Agreements in Connection with Obtaining Postpetition Financing [Dkt. No. 143]; Foreign Representatives' Motion For Approval of the Pledge of Certain United States Registered Patents to Apple Inc. [Dkt. No. 157]; Foreign Representatives' Motion to Approve Sale of Certain Patents to Rambus Inc. [Dkt. No. 163]; Foreign Representatives' Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Dkt. No. 165] (collectively, the "363 Motions").

5. The only other objection put forth by the Foreign Representatives is that the appointment of a Court Representative would run afoul of comity. Yet, principals of comity are simply irrelevant to this Court exercising its power under unambiguous provisions of the Bankruptcy Code.

6. The explicit goal of subchapter IV of chapter 15 is to foster communication and coordination between courts. That is exactly the purpose for appointing a Court Representative. The implementation of any form of cooperation listed under section 1527, including appointing a Court Representative, requires no showing concerning the sufficiency of a specific foreign proceeding or otherwise. The absence of any such requirement illustrates this Court's flexibility to promote cooperation and communication without the need to assess the sufficiency of protection the Japanese Proceeding offers creditors. Accordingly, the Court need only consider the level of coordination between courts, and whether the appointment of a Court Representative would be perceived as intrusive. Comity simply does not prevent the Foreign Representatives, Elpida and the TDC from exchanging information regarding the disposition of Elpida's U.S. assets over which this Court has indisputable jurisdiction. Indeed, inhibiting communication and cooperation, invoking principles of comity or otherwise, is wholly inconsistent with the purpose of chapter 15. See 11 U.S.C. § 1501.

7. In sum, the role of the Court Representative, as contemplated by the Bankruptcy Code, would be to facilitate cooperation and coordination between courts; not to oversee or supplant the Japanese Proceeding, as the Foreign Representatives suggest. The Court Representative would act as a steward of the Court. And as a "person . . . act[ing] at the direction of the court," 11 U.S.C. § 1527, the Court Representative would ensure cooperation and direct communication to the maximum extent possible and would allow this Court to

exercise its jurisdiction over Elpida's U.S. assets with a clear understanding of the Japanese Proceeding—especially as it has reached an advanced stage in the plan process.

WHEREFORE, the Bondholders respectfully request that this Court enter an order granting the Motion and grant such other and further relief as the Court deems just.

Dated: October 19, 2012
Wilmington, Delaware

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