IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

1. Before the Court are (a) the Foreign Representatives' Motion to Approve the Sale of Certain Patents to Rambus [Docket No. 163] and (b) the Foreign Representatives' Motion to Approve the Patent License Agreement and Technology Transfer and License Agreement [Docket No. 165] (the "363 Motions"). In support of those motions, the Foreign Representatives submitted the Declaration of Seiji Nakashima in Support of Foreign Representatives' Motion to Approve Sale of Certain Patents to Rambus Inc. [Docket No. 216], the Declaration of Seiji Nakashima in Support of Foreign Representatives' Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Docket No. 217], the Declaration of Kosei Watanabe [Docket No. 307], and the Foreign Representatives' Reply to the Steering Committee's Objection to (I) Motion to Approve Sale of Certain Patents to Rambus Inc. and (II) Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Docket No. 309].

2. This Court issued its decision on the standard to be applied to the 363 Motions on November 16, 2012 (as modified on November 20, 2012, the "363 Standard Decision").

3. The 363 Motions seek this Court's approval of the use or sale of certain of Elpida's U.S. assets or interests in connection with three agreements:

i. the Technology Transfer and License Agreement (the "TTLA"), dated July 2, 2012, entered into between Elpida and Micron Technology, Inc. ("Micron");

ii. the Patent Purchase Agreement (the "PPA"), dated August 10, 2012, entered into between Elpida and Rambus Inc. ("Rambus"); and

iii. the Patent License Agreement (the "PLA"), dated August 10, 2012, entered into between Elpida and Micron.

4. As set forth below, although the use or sale of Elpida's U.S. assets or interests that this Court has been asked to approve are governed by agreements, or a series of related agreements, whose main focus is not the use or sale of those assets or interests, in this Chapter 15 proceeding, this Court has been asked for its approval of the TTLA, PPA, and PLA to the extent such agreements involve the use or sale of Elpida's U.S. assets or interests.

5. For the reasons described below, the 363 Motions are granted and the Bondholders' Objection is overruled.

PROCEDURAL HISTORY

6. Elpida is a corporation organized and existing under the laws of Japan. It

is a leading manufacturer of dynamic random access memory ("DRAM") integrated circuits, which are used to store data in many devices, including personal computers, servers, mobile devices, and digital consumer electronics.

7. On February 27, 2012, Elpida filed a petition for commencement of corporate reorganization proceedings under the Japan Corporate Reorganization Act (*Kaisha Kosei Ho*) (the "JCRA") in the Tokyo District Court, Eighth Division (the "Tokyo Court"). Declaration of Kosei Watanabe, dated Nov. 30, 2012 (the "Watanabe Decl.")[1] ¶ 30. Elpida's reorganization proceeding is currently pending before the Tokyo Court (the "Japan Proceeding"). Id. ¶ 1. The Tokyo Court entered its Court Decision on Commencement of Reorganization Proceeding, dated March 23, 2012, which appointed Mr. Yukio Sakamoto, Elpida's president and chief executive officer, and Mr. Nobuaki Kobayashi, outside counsel to Elpida, as trustees for Elpida's corporate reorganization proceeding (each a "Trustee" and, collectively, the "Trustees"). Id. ¶ 30. The Trustees work with certain lawyers who have been appointed as Elpida's deputy trustees, and together they form the essential reorganization team (the "Trustee Team"). Id. ¶ 31. Each of the Trustees and deputy trustees owes fiduciary duties to Elpida and its creditors. Id.

8. By separate order, the Tokyo Court appointed Mr. Atsushi Toki as Elpida's examiner (the "Examiner"). Id. ¶ 32. The Examiner, among other things, provides the Trustees with his opinion on items for which the Trustees are seeking the

[1] The Declaration of Kosei Watanabe, dated Nov. 30, 2012, was entered into evidence, in lieu of direct testimony, at the hearing before the Court on December 5, 2012. See Transcript of Dec. 5, 2012 Hearing ("Hr'g Tr.") 192:18.

Tokyo Court's approval. See id. ¶¶ 33-34.

9. On March 19, 2012, Elpida commenced a proceeding in this Court under Chapter 15 of the Bankruptcy Code, by filing a Verified Petition for Recognition and Chapter 15 Relief [Docket No. 2]. On April 24, 2012, this Court entered an Order that, among other things, recognized Mr. Sakamoto and Mr. Kobayashi as Foreign Representatives under Bankruptcy Code section 101(24), and recognized the Japan Proceeding as a Foreign Main Proceeding under Bankruptcy Code sections 1517(a) and 1517(b)(1) [Docket No. 65].

REORGANIZATION PROCEEDINGS IN JAPAN

10. On March 16, 2012, Mr. Sakamoto and his business team commenced the process of selecting a sponsor for Elpida's reorganization in Japan. (Bondholders' Exhibit ("BX") 1 at ELPDF000000134.)

11. With the Tokyo Court's approval, the Trustees appointed a financial advisor to provide information to eleven companies that had expressed interest in being Elpida's sponsor and participating in the first round of bidding. See Watanabe Decl. ¶ 45. In that first round, which concluded on March 30, 2012, six of those companies submitted letters of interest. After consultation with the Tokyo Court and the Examiner, the Trustees narrowed down the candidates to proceed to a second round of bidding. See id.

12. Of the potential sponsors selected for the second round, only Micron submitted a letter of intent in the second round of bidding. Watanabe Decl. ¶ 46. Although SK Hynix, Inc. ("Hynix") initially expressed interest in becoming Elpida's

sponsor, it withdrew from the bidding process. Hr'g Tr. 161:25-162:13. On May 10, 2012, Mr. Sakamoto and his team "decided to commence exclusive [sponsorship] negotiations with Micron."[2] (BX 2 at ELPDF000000659.) As a result, the Trustees negotiated with Micron, and upon receiving the Examiner's and Tokyo Court's approval, entered into a Sponsorship Agreement with Micron on July 2, 2012 (the "Sponsorship Agreement"). Watanabe Decl. ¶ 46.

13. Subsequently, the Foreign Representatives and Micron agreed upon a "sponsorship agreement" dated July 2, 2012, pursuant to which Micron has agreed to purchase the outstanding stock of Elpida subject to various terms and conditions expressed therein. (BX 18.)

14. On October 31, 2012, the TDC entered an order referring Elpida's plan of reorganization for creditor voting. (Watanabe Decl. [Dkt. No. 307] ¶ 53.)

THE 363 MOTIONS AND THE HEARING

15. On September 14, 2012, the Foreign Representatives disclosed to the Court and the parties in interest in the Chapter 15 Case that they had entered into several transactions involving Elpida's U.S. assets without this Court's approval.[3] (Status

[2] On or around May 21, 2012, the press reported that the Bondholders had begun talks with Hynix regarding a potential alternative reorganization plan. (BX 13 (Nakashima Dep. Ex. 14).)

According to Mr. Kenji Morimoto, the head of the Legal Group at Elpida, a discussion took place at Elpida immediately after news came out regarding the possibility of an alternative plan. (Morimoto Dep. Designations 7:3-5, 204:22-205:25.)

[3] These transactions included the transactions at issue in the 363 Motions as well as transactions relating to Elpida's debtor-in-possession financing and its pledge of certain of Elpida's U.S. assets to one of its largest customers, Apple Inc. (Status Report [Dkt. No. 131].) The Bondholders did not object to the transactions involving the debtor-in-possession financing or Apple, but reserved rights with respect to the present transactions. (Bondholders' Omnibus Response [Dkt No. 202].)

Report [Dkt. No. 131].)

16. On September 28, 2012, the Foreign Representatives filed the Micron Motion, seeking approval of the TTLA and PLA, and filed the Rambus Motion, seeking approval of the PPA.

17. The Foreign Representatives filed the TTLA, the PLA, and the PPA under seal and filed motions to redact or seal information concerning such agreements. (Rambus Seal Motion [Dkt. No. 164]; Micron Seal Motion [Dkt No. 166].) By order dated November 13, 2012, the PPA was unsealed. (Order [Dkt No. 273].) At the Hearing, the Court ruled that the PLA will not be sealed in any way and that the TTLA will be filed in the redacted form proposed by the Bondholders. (December 5, 2012 Hr'g Tr. ("Hr'g Tr.") 7:3-6, 17-19.)

18. On November 29, 2012, the Bondholders filed an omnibus objection to the Rambus and Micron Motions [Dkt No. 304] (the "Bondholders' Objection"). On December 3, 2012, the Foreign Representatives filed a reply to the Objection. (Foreign Representatives' Reply [Dkt No. 309].) On December 5, 2012, the Court held an evidentiary hearing on the Motions (the "Hearing").

19. At the Hearing, Elpida called Mr. Nakashima and Mr. Watanabe to testify. Mr. Nakashima is the head of Elpida's intellectual property group. (Hr'g Tr. 33:18-21.) Mr. Watanabe is one of Elpida's deputy trustees. No other witnesses testified.[4]

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[4] The Bondholders requested that Mr. Sakamoto appear and testify at the Hearing. The Court denied those requests, but specifically noted that (a) the Foreign Representatives bore the burden of proof on the Motion s and (ii) that the failure to testify could lead to a denial of the Motions. (Nov. 26, 2012 Hr'g Tr. 17:13-1820, 21:5-18.) An adverse inference may be drawn where a party fails to exercise its power to produce witnesses whose testimony would elucidate the transactions at issue. See Revson v. Cinque &

20. The Foreign Representatives' exhibits 1 through 11 were admitted into evidence, and Bondholders' exhibits 1 through 24 were also admitted into evidence. (Hr'g Tr. 186:19-21; 188:18-23; 188:24-189:17.)

21. Designations and counter-designations from the transcript of the deposition of Mr. Morimoto, the head of Elpida's legal group, were also admitted into evidence. (Morimoto Dep. Designations and Counterdesignations 6:19-7:8, 9:11-17, 12:10-13:8, 20:18-24, 125:3-126:16, 183:20-184:9, 191:3-20, 204:14-205:25, 249:6-14, 250:10-252:9, 253:23-255:14, 266:6-16.)

THE TRANSACTIONS

22. The negotiations of all three of the agreements at issue in the 363 Motions commenced after Micron was approved as Elpida's plan sponsor, but before the TDC approved Elpida's plan of reorganization, before the plan was sent to creditors for voting purposes and before appropriate approvals of that plan were sought or obtained

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Cinque, P.C., 221 F.3d 71, 81-82 (2d Cir. 2000) (finding that a party's failure to call a witness may permissibly support an inference that the witness's testimony would have been adverse to that party); Carroll, III v. Unicom AP Chem. Corp. (In re MGL Corp.), No. 00-10804DWS, 2001 WL 204729, at *3 (Bankr. E.D. Pa. Feb. 5, 2001) ("[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.'") (quoting Graves v. United States, 150 U.S. 118, 121 (1893)). See also S.E. Nichols, Inc. v. McGohan (In re McGohan), 75 B.R. 10, 13 (Bankr. N.D.N.Y. 1986) ("As bankruptcy adversary proceedings are civil proceedings, an adverse inference may be drawn against a party when they refuse to testify in response to probative evidence offered against them."); The Callaway Bank v. Asbury (In re Asbury), Adv. Proc. No. 09-02012, 2011 WL 44911, at *6 (Bankr. W.D. Mo. Jan. 6, 2011) (the defendant's failure to appear and testify "was strategic and deliberate, and that her testimony would have been unfavorable to her case" was an appropriate inference).
Mr. Sakamoto and Mr. Kobayashi are the Foreign Representatives and executed each of the agreements at issue in the 363 Motions. Mr. Matsui was the deputy trustee responsible for the amendment of the Rambus patent license agreement, the TTLA and the PLA. (Hr'g Tr. 118:1-11.)

Notwithstanding that neither Messrs. Sakamoto, Kobayashi or Matsui testified at the Hearing, the Foreign Representatives have met their burden of proof. The testimony of Messrs. Nakashima and Watanabe, the deposition designations of Mr. Morimoto and the documentary evidence provided a sufficient factual record in support of the Foreign Representatives' case.

from the TDC and this Court. (Hr'g Tr. 168:6-12; BX 15; BX 3; Foreign Representatives' Exhibit ("FRX") 3; FRX 4; FRX 5.) Indeed, closing of the Micron sponsorship agreement is subject to the TDC's and this Court's approval, as well as regulatory approval. (BX 18 at Art. 20(1)(3), Art. 35; Micron Form 8-K filed 10/31/2012 at 1.)

23. These included the TTLA, which offers Elpida the opportunity to achieve substantial cost savings by permitting it to use certain of Micron's testing technology, see, e.g., Nakashima Micron Decl. ¶¶ 13-15, the PPA, which provides for Elpida's sale of certain patents to Rambus, see, e.g., Nakashima Rambus Decl. ¶¶ 7-8, and the PLA, which grants Micron a license in those patents to be sold to Rambus, see, e.g., Nakashima Micron Decl. ¶ 9.

24. For each of the TTLA, PPA, and PLA, the agreements are presented to the Court for approval with respect to only the use or sale of Elpida's U.S. assets or interests, because those assets or interests are contained within agreements addressing matters related to Elpida's Japan and non-U.S. assets and interests as well. Each transaction was presented in its entirety to and approved by the Examiner and the Tokyo Court in the Japan Proceeding. Certified Translation of Application for Approval of the Tokyo District Court (24-58) Transfer of Patents and Other Property to Rambus ("Rambus TDC App.");[5] Certified Translation of Application for Approval (24-49) Execution of the Technology Transfer and License Agreement ("Micron TDC

[5] The Rambus TDC App. was entered into evidence as Foreign Representatives' Ex. 6 at the December 5, 2012 Hearing.

App.");[6] accord Nakashima Rambus Decl. ¶ 13; Nakashima Micron Decl. ¶ 20.

25. Seiji Nakashima, head of Elpida's Intellectual Property Group, led Elpida's negotiations of the PPA, PLA, and TTLA. Hr'g Tr. 33:20-21, 35:8, 54:12; Nakashima Micron Decl. ¶ 11. Mr. Nakashima has been the head of Elpida's intellectual property group since January 2008 and has worked at Elpida since 2004. Hr'g Tr. 33:14-17, 33:20-21, 34:5-7. He has worked in the intellectual property field, with a focus on licensing, since graduating from university in 1989. Hr'g Tr. 34:3-8, 34:17-21. Before joining Elpida, he worked in the legal divisions of NEC Corporation, Olympus Corporation, Open Wave Limited, and Accenture Japan. Hr'g Tr. 34:7-21.

26. As an Elpida vice president, Mr. Nakashima directly reports to both Elpida's chief financial officer, Mr. Shirai, and to Mr. Sakamoto, one of Elpida's two Trustees appointed by the Tokyo District Court. Hr'g Tr. 33:23-34:1.

A. The Technology Transfer and License Agreement with Micron

27. On July 2, 2012, Elpida and Micron entered into the TTLA. The TTLA enables Elpida to make use of certain Micron testing technology to test the production of DRAM products more cost-effectively, while implementing such cost-effective technology immediately. Nakashima Micron Decl. ¶ 13. Specifically, the agreement grants Elpida a "non-exclusive, worldwide, perpetual, irrevocable (subject to certain termination rights), non-transferable, non-sublicensable and royalty-bearing (with certain exceptions) license" to certain Micron technology. Id. ¶ 14. In so doing, the TTLA allows Elpida to expend resources more efficiently by reducing testing time for

[6] The Micron TDC App. was entered into evidence as Foreign Representatives' Ex. 6 at the December 5, 2012 Hearing.

next generation products. Id. ¶¶ 14-15. Micron estimated that the agreement could save Elpida $200 to $300 million. Hr'g Tr. 40:3-5. Elpida undertook to evaluate Micron's estimate and confirmed the possibility of substantial savings, though perhaps not as great as Micron had estimated. Hr'g Tr. 40:6-9, 41:25-42:4.

28. Under the TTLA, Micron is required to provide certain technology and software to Elpida and Elpida is required to share certain technology with Micron so that Micron can conform Elpida's technology, where necessary, to the technology Micron is providing. TTLA § 1.1 (definitions of "Disclosed Elpida Technology" and "Implementations"); see also Nakashima Micron Decl. ¶ 16. As a result, during the implementation of the TTLA among Elpida's and Micron's technical teams, there is a risk of "technology contamination" for both parties. See Hr'g Tr. 43:17-19, 44:6-13; Micron TDC App. §§ II.1(2), II(2)(1)(iii). Elpida and Micron were thus concerned that, in implementing the testing technology, they would come into contact with each other's technology and intellectual property, including, possibly, technology beyond that which is necessary to implement the TTLA. See Hr'g Tr. 43:17-19; June 21, 2012 E-mail from Steven Arnold to Seiji Nakashima, ELPDF000006048 (explaining need for cross-license).[7] The parties protect themselves from any exposure that could result from this technology contamination with certain licenses, whereby Micron and Elpida grant each other licenses to the disclosed technology as well as cross-licenses in their respective patents. TTLA §§ 3.3-3.5; Hr'g Tr. 44:6-13; Micron TDC App. § II.2(1)(iii). The cross-license is thus a prophylactic measure, incidental to the stated "Project Goal" of

[7] This e-mail was entered into evidence as Bondholders' Ex. 15 at the December 5, 2012 hearing.

transferring Micron's technology to Elpida to enable Elpida to use that technology in manufacturing its products. See TTLA § 2.1. It was *not* intended to provide Micron the opportunity to start manufacturing Elpida's products. Cf. Hr'g Tr. 44:17-19 ("[W]hen it comes to . . . Elpida's technology, then we have control over which technology [is] to be disclosed."); June 21, 2012 E-mail from Steven Arnold to Seiji Nakashima, ELPDF000006048 ("Micron believes that having the patent cross-license in place is an important component of ensuring the timely success of these programs, including the TTLA . . . while minimizing the risk of intellectual property contamination."). Also, not only does Elpida retain the ability to control, with limited exception, which technology it discloses to Micron, but the technology Elpida will ultimately disclose to Micron under the TTLA is very limited. See Hr'g Tr. 44:17-19. Because Elpida will remain the owner of the intellectual property licensed to Micron under the TTLA, the agreement will not harm Elpida's ongoing business operations or its ability to reorganize. Nakashima Micron Decl. ¶ 18; see Hr'g Tr. 44:17-19, 49:3-7, 51:7-17.

29. If the Micron Sponsorship Agreement fails to close, and if Elpida is not acquired by a Memory Competitor as defined in the TTLA,[8] Elpida can elect to retain the rights to the technology transferred pursuant to the TTLA by paying a 3% royalty. Nakashima Micron Decl. ¶ 17. At that later point in time, Elpida would have had the opportunity to evaluate the savings from Micron's technology in order to determine

[8] "'Memory Competitor' means (i) Samsung Electronics Co, Ltd., Sandisk Corporation, SK Hynix, Inc., Toshiba Corporation, Xian Sinochip Semiconductors Co. Ltd.," and their affiliates and successors, and any "company that manufacturers [sic] semiconductor memory products in wafer form and that derives (either on a consolidated or standalone basis) at least 51% of its revenue from the manufacture of semiconductor memory products as of the date of the associated Change of Control." TTLA § 1.1.

whether it made business sense to pay the royalty. Hr'g Tr. 48:2-4, 48:16-20. If the Micron sponsorship does not close and Elpida is acquired by a Memory Competitor, the impact on Elpida will be limited. Hr'g Tr. 51:7-17, 52:2-4. Although Elpida would lose the ability to continue using Micron's technology, Hr'g Tr. 50:17-25; TTLA § 10.2(p), nothing in the TTLA would prevent or impede Elpida from continuing to use its original technology, Hr'g Tr. 49:3-7, 51:15-17. In negotiating the TTLA, Elpida expressly maintained this option in light of the possibility that Micron might not become Elpida's sponsor. Id. Further, the cross-licenses expire on the fifth anniversary of the effective date of the TTLA, at the latest. Hr'g Tr. 45:6-10; see also TTLA § 1.1 (definition of "License Term"); Micron TDC App. § II.3. If either Elpida or Micron is acquired by a Memory Competitor, however, the acquired party loses its license to the other party's patents. TTLA § 10.2(p). If either Elpida or Micron is acquired by any other company, it retains its license to the other party's patents, as long as it survives as a legal entity and operates as a subsidiary of its acquirer. TTLA §§ 10.2(q)-(r).

30. The TTLA provides Elpida with "the big opportunity to have [Micron's] technology for free" prior to the close of the Micron Sponsorship Agreement (or until such time as it is determined that the Micron Sponsorship Agreement will not close. Hr'g Tr. 52:5-6. If Elpida ever were to be acquired by a Memory Competitor, causing it to lose its Micron licenses, even though Micron would retain a license in Elpida's patents, the impact on Elpida would be limited. See Hr'g Tr. 51:7-17, 52:2-4. Mr. Nakashima negotiated and recommended the TTLA based on the business assumption that there was a high probability the Micron Sponsorship Agreement would close, Hr'g

Tr. 124:2-10, but he also took steps to protect Elpida in the unlikely event the agreement did not close: the term of the license granted to Micron is limited to five years, Hr'g Tr. 52:2-4; TTLA § 1.1; the license granted to Elpida survives in the event Elpida is acquired by someone other than a Memory Competitor, TTLA § 10.2(q), which makes Elpida attractive to other potential acquirers; Elpida retains the right to continue its license from Micron and pay a 3% royalty, Hr'g Tr. 47:24-25; TTLA § 5.1; and if Elpida is liquidated, Micron must pay Elpida 800 million Japanese yen if it wishes its license in Elpida's patents to continue, Hr'g Tr. 149:9-13; TTLA § 10.2(o). Additionally, Elpida would remain protected if it lost its license to Micron's technology because it could "easily switch" back to its own technology, "so the impact would be minimal." Hr'g Tr. 51:15-17. These provisions were the product of negotiation and compromise: Micron initially wanted a life license for the patents, but Elpida successfully negotiated for a shorter term, Hr'g Tr. 51:20-52:4, and Mr. Nakashima convinced Micron to concede to paying 800 million yen to Elpida for continued use of the license after a possible Elpida liquidation, Hr'g Tr. 149:9-23.

31. Before executing the TTLA, Elpida and Micron engaged in extensive negotiations. Nakashima Micron Decl. ¶ 19; see Hr'g Tr. 45:18-46:9. Mr. Nakashima negotiated the TTLA for Elpida, with the assistance of other Elpida employees and outside counsel. Hr'g Tr. 35:8-21; Nakashima Micron Decl. ¶ 19. Micron also used in-house counsel for the negotiations. Nakashima Micron Decl. ¶ 19. Several key provisions of the agreement represent concessions obtained from Micron during the negotiation process. In addition to obtaining the free use of very desirable technology

with no additional royalties, Mr. Nakashima negotiated the term of the cross-license down to a five-year term of the cross-license from the life term Micron originally sought. Hr'g Tr. 46:5-7, 52:2-4; see supra ¶ 21. Additionally, through negotiation, Elpida also obtained agreement from Micron to make an 800 million yen payment in the event Elpida goes into liquidation and Micron desires to continue the use of the patent license granted to Micron by Elpida. Hr'g Tr. 149:9-13; TTLA § 10.2(o); see supra ¶ 21.

32. The TTLA, although negotiated at the same time as the Sponsorship Agreement, was negotiated and executed so as to be independent from the Sponsorship Agreement, Hr'g Tr. 53:6-8, and was favorable for Elpida whether or not the deal with Micron was actually consummated, Hr'g Tr. 52:8-53:12; 160:22-161:1. The five-year cross-license provisions were negotiated so as not to impair Elpida's value in the event the Micron transaction does not close, compared to the life-term license Micron initially requested, Hr'g Tr. 51:7-17. In fact, Micron is not the only Memory Competitor to which Elpida has granted a license. See Hr'g Tr. 59:1-3. Further, Elpida negotiated the contract terms such that terminating the agreement would not be prohibitively expensive, and that Elpida has the option to revert back to its own technology rather than pay the 3% royalty fee. Hr'g Tr. 160:22-161:1. Elpida recognized that there is a possibility that the deal with Micron will not close, and determined that it would be relatively easy to switch back to its original testing technology, at little to no cost. Hr'g Tr. 47:20-49:12.

33. Mr. Nakashima recommended the TTLA for approval by the Trustees as a "good and well balanced deal" because it provides the opportunity to use the Micron

technology for free and without delay. Hr'g Tr. 52:17-25; see also Hr'g Tr. 53:14-16 ("[W]e are always looking for the opportunity to have that chance to reduce a cost in the development."). Elpida views the technology it is licensing from Micron under the TTLA as "very important," Hr'g Tr. 52:19-20, as it "will enable Elpida to substantially reduce costs both in the production of current DRAM products and in the eventual production of certain next generation devices," Nakashima Micron Decl. ¶ 15. Indeed, Elpida is "always looking for the opportunity to have [the] chance to reduce" development costs and therefore viewed the TTLA as "a very good chance" to do so. Hr'g Tr. 53:14-16.

34. Mr. Nakashima expressed no concerns about entering into the TTLA before the Sponsorship Agreement closed. Hr'g Tr. 53:6-8. The Trustees approved the agreement, and the TTLA was approved by the Examiner and the Tokyo Court on July 2, 2012. See Micron TDC App. (stamp at top "certify[ing] that this application was approved on July 2, 2012"); id. at p. 3 ("The Examiner has approved this application for approval.").

B. The Patent Purchase Agreement with Rambus

35. In 2010, before filing for reorganization, Elpida and Rambus had entered into a Memory Products Patent License Agreement (the "License Agreement"), pursuant to which Elpida was required to make quarterly royalty payments to Rambus in exchange for the right to use certain of Rambus's patents to manufacture DRAM products. Hr'g Tr. 55:7-17; Nakashima Rambus Decl. ¶ 3; Rambus TDC App. §

II.2(1)(c); License Agreement §§ 3.1, 5.2.[9]

36. Under JCRA Article 61, Section 1, Elpida is allowed to reject certain executory contracts it had entered into before commencing the Japan Proceeding. Nakashima Rambus Decl. ¶ 5; see Hr'g Tr. 56:10-21. The License Agreement is one such contract. See Hr'g Tr. 56:17-21; Nakashima Rambus Decl. ¶ 5.

37. With its reorganization ongoing, Elpida wished to reduce its "cash out" and thus sought to reduce its royalty payments owed under the License Agreement, which it now believed to be too high. Hr'g Tr. 56:2-7; Nakashima Rambus Decl. ¶ 5. Initially, Elpida explored the possibility of terminating the License Agreement under the JCRA if Rambus did not agree to amend the agreement to reduce the royalty rate; however, Rambus indicated that it might have the ability to sue Elpida if Elpida terminated the License Agreement pursuant to the JCRA. Hr'g Tr. 58:2-10; see also Rambus TDC App. § II.2(2).

38. Though Rambus would not agree to a reduced royalty rate, it indicated it would be willing to purchase a small number of Elpida's patents. This would have the effect of reducing Elpida's overall cash outflow. Hr'g Tr. 58:11-15; Nakashima Rambus Decl. ¶ 5; Rambus TDC App. § II.2(2). Elpida had a one-to-two-month time frame in which to close such a deal with Rambus because it was scheduled to make a payment under the License Agreement in mid-August: Elpida worried that if it made the payment, it would lose its termination right under JCRA Article 61, but if it did not

[9] The License Agreement was entered into evidence, under seal, as Foreign Representatives' Ex. 1 at the December 5, 2012 Hearing.

make the payment, Rambus would sue. Hr'g Tr. 68:8-9, 73:14-74:6, 142:23-25. Moreover, Mr. Nakashima knew at the time that asking Rambus to postpone the payment date under the License Agreement would not have been "acceptable to Rambus." Hr'g Tr. 137:1-8. Elpida would thus have lost its opportunity to amend the License Agreement if it did not act before the next payment was due. Hr'g Tr. 74:2-6.

39. Mr. Nakashima understood that licensing companies, like Rambus, seek to "monetize" the patents they purchase by enforcing them against or licensing them to a "target" company, which is already infringing or is likely to infringe on those patents. Hr'g Tr. 59:16-60:6. Rambus was a "good potential buyer" because of its "long history" of enforcing patents offensively against infringing companies, and therefore Elpida was "very lucky" that Rambus was interested in purchasing Elpida's patents. Hr'g Tr. 63:2-8.

40. As part of Elpida's initial negotiation with Rambus, Mr. Nakashima explained to Rambus that Elpida's patent portfolio consists of memory patents, so Rambus would be purchasing patents to "enforce" against another memory company. Hr'g Tr. 58:22-59:1, 64:22-25. Elpida's patents were unenforceable against Samsung because Elpida and Samsung have a long-term cross-license. Hr'g Tr. 59:1-6. The only realistic "targets" were believed to be Micron and Hynix, but Micron, as Elpida's likely sponsor, could have withheld consent for Elpida's entry into the PPA if Elpida had sold patents for use against Micron. Hr'g Tr. 59:7-10, 84:2-8. Hynix was therefore the only "target" company if Elpida wanted to sell patents for any meaningful amount. Hr'g Tr. 59:10-15.

41. Elpida's sale of patents enforceable against Hynix would not weaken Elpida's portfolio of patents enforceable against Hynix, which currently includes 30-40 of such patents. Hr'g Tr. 158:20-23, 159:6-11. In pursuing a patent infringement action or patent licensing transaction, Elpida would only need up to ten enforceable patents. Hr'g Tr. 83:6-12.

42. Elpida reasonably believed that Rambus was the only company with which a timely agreement for the purchase of the patents at a fair value could be reached because "among [the] licensing companies, only Rambus has [an] amicable relationship with" Elpida, and other memory companies would only use Elpida's patents for "a defensive purpose," which is less lucrative than a sale to a licensing company that would seek to license or enforce the patents. Hr'g Tr. 69:4-12. Additionally, Elpida was currently engaged in disputes with other licensing companies, and so Elpida was precluded from negotiating with them. Hr'g Tr. 69:9-12.

43. In selecting the patents to sell to Rambus, Mr. Nakashima searched for three to five "very good" patents whose combined value would roughly equal the $16 million Elpida would owe Rambus over the next year in royalty payments under the License Agreement. Hr'g Tr. 61:16-62:1.

44. These "very good" patents were classified as "EA class," short for "Enforceable A" (and sometimes just referred to as "A-class patents"), which are patents for which Mr. Nakashima's team had found "actual evidence of infringement by [a] third party previous[ly]," or for which they believed they "could easily find the evidence of the infringement." Hr'g Tr. 62:5-12. Ultimately, Mr. Nakashima and his

team arrived at four A-class patents and 36 non-A-class patents. Hr'g Tr. 65:12-17. The patents they selected were "redundant of other patents within Elpida's patent portfolio." See Nakashima Rambus Decl. ¶ 9. Thus, the sale does not impair Elpida's patent portfolio. See Hr'g Tr. 83:6-10, 158:20-23, 159:6-11.

45. Mr. Nakashima had an understanding of how to value patents based on his substantial experience in the licensing and intellectual property fields and his prior experience working with a licensing company, brokers, legal advisors, and outside counsel. Hr'g Tr. 69:20-70:6. His understanding is that the value of a patent to a non-practicing entity ("NPE"), which purchases a patent that it intends to enforce, is based on a formula whereby the NPE will typically pay about 10% of the expected income it believes it will obtain from enforcing or licensing the patents, which falls within a range that is less than 1% of the target company's annual sales. See Hr'g Tr. 63:9-65:6. In his testimony, Mr. Nakashima used 0.2% to approximate Elpida's valuation of the patents. Hr'g Tr. 63:12-13. Hynix's annual sales are roughly $7-10 billion; 0.2% of that is approximately $20 million; and the expected income from a five-year license (which is industry-standard) under those patents would be roughly $70-100 million. Hr'g Tr. 63:9-19.[10] Therefore, the patents could be estimated as worth approximately 10% of $70-100 million, or $7-10 million. See Hr'g Tr. 64:22-65:3.

46. After Elpida informed Rambus of the four A-class patents it had designated for sale (the "Patents"), Rambus proposed $8 million as a purchase price for

[10] To perform these mental calculations quickly on the witness stand, Mr. Nakashima used 0.1% and then doubled the figures in arriving at the ultimate value of the patents. It is clear from his testimony, however, that 0.2% is the actual figure used in deriving the patents' value. See Hr'g Tr. 63:12-13 ("So say here, if it is .2, it's a lower range . . . .").

those Patents and the 40 patent families that would be part of the sale. Hr'g Tr. 65:15-17; July 12, 2012 PowerPoint Presentation from Rambus to Elpida, at ELPDF000003222.[11] Mr. Nakashima believed this offer to be on the lower end of a fair and reasonable price, Hr'g Tr. 66:10-14, and he made a counteroffer after discussing with Mr. Sakamoto, Hr'g Tr. 66:19-67:5.

47. Rambus and Elpida continued with a substantial and lengthy negotiation process over the price of the patents at issue, with a number of offers and counteroffers exchanged by the parties.[12] Hr'g Tr. 66:19-67:24, 68:1-2; July 19, 2012 E-mail from Seiji Nakashima to Jared Smith of Rambus, at ELPDF000006326;[13] July 25, 2012 PowerPoint Presentation from Rambus to Elpida, at ELPDF000002189.[14] Ultimately, Elpida and Rambus settled on a $15 million purchase price. Rambus TDC App. § II.3(1)(b); Hr'g Tr. 68:9-16. On August 10, 2012, Elpida and Rambus memorialized that agreement by signing the PPA. See Foreign Representatives' Ex. 3, PPA. That same day, the Tokyo Court approved the PPA. Nakashima Decl. ¶ 13; Rambus TDC App. (stamp at top "certify[ing] that this application was approved on August 10, 2012").

48. Mr. Nakashima recommended that the Trustees sign the PPA because he felt it would reduce Elpida's "cash out." Hr'g Tr. 86:4-13. Elpida expects payments under the PPA to begin shortly after this Court's approval of that agreement. See Hr'g

[11] This presentation was entered into evidence as Bondholders' Ex. 4 at the December 5, 2012 hearing.

[12] In addition to Mr. Nakashima, Elpida's negotiating team included Mr. Takemura and Mr. Yugi, both members of Elpida's Intellectual Property Group, as well as Elpida's outside counsel, Nagashima Ohno & Tsunematsu. Nakashima Decl. ¶ 6.

[13] This e-mail was entered into evidence as Bondholders' Ex. 11 at the December 5, 2012 hearing.

[14] This presentation was entered into evidence as Bondholders' Ex. 12 at the December 5, 2012 hearing.

Tr. 157:18-20.

49. Mr. Nakashima believed that the purchase price of $15 million was toward "the higher end" of reasonable. Hr'g Tr. 69:17-19; see also Hr'g Tr. 68:17-69:17. In addition to the prior advice of counsel, brokers, and licensing companies, see supra ¶ 36, Mr. Nakashima valued the patents based on his prior experience at Elpida, Hr'g Tr. 75:9-76:2. That experience included a transaction in 2011 whereby Elpida entered into a revenue-sharing deal with a licensing company that involved ten A-class patents usable against Hynix, for which Elpida received less than $1 million. Hr'g Tr. 75:25-76:21. Mr. Nakashima therefore believed "that $15 million is far, far better than the previous deal." Hr'g Tr. 76:14-16.

50. To protect Elpida from future infringement claims Rambus could bring based on the patents it purchased under the PPA, the PPA includes a "license back" provision, PPA § 4.1, which is a "typical provision in selling patents," Hr'g Tr. 77:5-10; Nakashima Rambus Decl. ¶ 12, and provides Elpida and its subsidiaries a "worldwide, non-transferable, fully paid-up, royalty-free, irrevocable (subject to certain carveouts), perpetual (subject to certain carveouts) license," Nakashima Rambus Decl. ¶ 11; Rambus TDC App. § II.3(1)(d). Rambus has the option to terminate the license back if Hynix or any of its affiliates gains control of Elpida (the "Change of Control Provision"). PPA § 4.1; Hr'g Tr. 77:13-16; Rambus TDC App. § II.3(1)(d). The inclusion of the Change of Control Provisions was crucial to Rambus, which was purchasing patents to use against Hynix and knew that, without the Change of Control Provision, it would lose the ability to enforce the Patents against Hynix if Hynix acquired Elpida,

which would mean that the value of the Patents it had paid $15 million to acquire would have been completely lost. See Hr'g Tr. 78:3-9.

51. Elpida did not consider the Change of Control Provision to be a major threat, since the probability that Hynix would acquire Elpida was, at the time, believed to be "very low." Hr'g Tr. 78:17-22. Furthermore, Hynix and Rambus are "already having [a] severe battle . . . [so the] big picture would not be changed" if Hynix were to acquire Elpida. Hr'g Tr. 79:16-19.

52. Additionally, Rambus had the right to terminate its preexisting license of patents to Elpida upon *any* change of control. See Foreign Representatives' Ex. 1, License Agreement § 7.4. The PPA's Change of Control Provision is actually *more* protective of Elpida than similar provisions Elpida had bargained for in the past. See Hr'g Tr. 80:23-81:7. Furthermore, because any change of control that would trigger the PPA's Change of Control Provision would also trigger section 7.4 of the License Agreement, Elpida would already have faced exposure to infringement claims for the patents licensed thereunder regardless of entering into the PPA. See Hr'g Tr. 79:9-21. Thus, the impact of the PPA's Change of Control Provision is marginal in the grand scheme of the Elpida-Rambus relationship.

53. At the same time it closed the PPA, Elpida also reached an agreement with Rambus to amend the License Agreement, which grants Elpida the option, in the event that it is acquired by Micron, to terminate the License Agreement without penalty, at any time after June 30, 2013. See Amendment No. 1 to Memory Products Patent License Agreement Between Rambus Inc. and Elpida Memory, Inc. ("Amendment No. 1") § 2.6;

Hr'g Tr. 80:23-81:4; Rambus TDC App. § II.3(2)(b). Rambus has no corresponding termination right. See Amendment No. 1 § 2.6. The amendment also permits Micron to obtain control of Elpida without violating section 7.4 of the License Agreement. See Amendment No. 1 § 2.5;[15] Hr'g Tr. 80:23-81:4; Rambus TDC App. § II.3(2)(a). Amendment No. 1 also changed Rambus's termination rights under the License Agreement by obligating Rambus to negotiate in good faith with any non-Micron acquirer of Elpida for a period of 180 days. Amendment No. 1 § 2.5; Hr'g Tr. 79:6-8. In exchange for these various benefits in Amendment No. 1, Elpida agreed not to exercise its termination right under JCRA Article 61. Amendment No. 1 § 2.7; Rambus TDC App. § II.3(2)(c); see Hr'g Tr. 81:5-7.

54. In negotiating the PPA, Mr. Nakashima and his team gave substantial consideration to the benefits Elpida would receive under the agreement, including the cash it would receive to offset the royalty due Rambus under the License Agreement, Hr'g Tr. 58:11-21, the ability to continue operating free of any claim of infringement by keeping the License Agreement in place, Hr'g Tr. 79:12-16, 80:2-4, as well as the need to close the deal before the next royalty payment was due under the License Agreement, Hr'g Tr. 74:2-6. They also gave substantial consideration to the protection Elpida would have in the event that the Sponsorship Agreement with Micron did not close, including if the Change of Control Provision is triggered and terminates the license back. Hr'g Tr. 78:17-80:5. As Mr. Nakashima testified, Elpida did not perceive such an occurrence as a

[15] Amendment No. 1 was entered into evidence as Foreign Representatives' Ex. 2 at the December 5, 2012 Hearing.

major threat sufficient to outweigh the benefits Elpida would receive by selling these patents. See supra ¶ 42.

55. Mr. Nakashima recommended to the Trustees that Elpida enter into the PPA together with Amendment No. 1. Hr'g Tr. 85:4-10, 86:4-11. He would not have recommended amending the License Agreement and thereby committing Elpida to continue royalty payments if Elpida had not closed the PPA, and in fact he contemplated the two agreements in tandem, as "a set deal." Hr'g Tr. 80:16-20, 85:17-22, 86:10-11. The amendment benefits Elpida by allowing it to have "the termination right under the [License Agreement], based on the negotiation." Hr'g Tr. 86:13-15.

C. The Patent License Agreement with Micron

56. On August 10, 2012, Elpida and Micron entered into the PLA. Nakashima Micron Decl. ¶ 8. The PLA grants Micron a non-exclusive, royalty-free, "non-transferable, non-sublicensable (with certain exceptions), perpetual, and irrevocable license" to the Patents. Id. The PLA thus released the claims that Elpida might have had against Micron under the patents that were transferred to Rambus. Hr'g Tr. 158:11-14.

57. Pursuant to the Sponsorship Agreement, Elpida is required to obtain Micron's consent before selling any of its patents. Nakashima Micron Decl. ¶ 7. As a condition to its consent for Elpida to enter into the PPA, Micron required protection from suit by Rambus in connection with the Rambus patents in the form of a license agreement between Elpida and Micron. Id. ¶ 8; see Hr'g Tr. 81:14-82:1. Thus, in order to reduce its cash out and obtain the benefit of the $15 million sale it had negotiated

with Rambus, Elpida needed Micron's consent, which it obtained through the PLA. Hr'g Tr. 87:5-8, 158:4-7; Nakashima Micron Decl. ¶¶ 7-8.

58. The PLA between Elpida and Micron was negotiated by Mr. Nakashima, Mr. Yugi, and Mr. Takemura, as well as their outside counsel. Mr. Nakashima negotiated the PLA's terms with Micron's in-house counsel. Nakashima Micron Decl. ¶ 11.

59. The releases in the PLA pertain only to the patents transferred to Rambus. Hr'g Tr. 158:11-14. They do not concern the 30 to 40 other patents that Mr. Nakashima and his team determined could be enforceable against Micron. Hr'g Tr. 158:15-19. Elpida thus still maintains the ability to enforce patents against Micron in the event that Micron does not purchase Elpida. Hr'g Tr. 158:24-159:1-11. In addition, Elpida is still able to sell its patents to an interested party that could then enforce those patents against Micron. Hr'g Tr. 159:19-24. Thus, the PPA has not affected the ability of Elpida to enforce the non-Rambus patents against Micron. Hr'g Tr. 159:1-11.

60. Because Micron's consent was necessary to execute the PPA between Rambus and Elpida, Micron's consent formed part of the consideration and value for the PLA between Elpida and Micron. See Hr'g Tr. 83:13-84:5. Elpida could not have extracted further payment from Micron because Elpida needed approval for the transaction, which allowed it to enter into a value-adding deal with Rambus. Hr'g Tr. 83:18-84:5. Further, because Micron had already essentially agreed to pay for Elpida's patent portfolio by agreeing to purchase Elpida, Elpida could not have convinced Micron to pay for the licenses again. Hr'g Tr. 84:4-5. As such, Elpida did not request

anything further from Micron. Hr'g Tr. 83:24-84:5.

CONCLUSIONS OF LAW[16]

A. Jurisdiction and Venue

61. This Court has jurisdiction to consider and determine this matter pursuant to 28 U.S.C §§ 157 and 1334.

62. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

63. Venue is proper before this Court pursuant to 28 U.S.C. § 1410.

B. Legal Standard

64. The Court has set out the standards to be applied to the 363 Motions in its 363 Standard Decision. In re Elpida Memory, Inc., No. 12-10947 (CSS), 2012 WL 6090194 (Bankr. D. Del. Nov. 20, 2012). "In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the [trustee or] debtor to show that a sound business purpose justifies such actions." Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999) (citing In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983); In re Del. & Hudson Ry. Co., 124 B.R. 169, 175 (D. Del. 1991)).

65. To meet the business judgment standard under section 363, a sale of assets must satisfy four requirements: "(1) a sound business purpose exists for the sale; (2) the sale price is fair; (3) the debtor has provided fair and reasonable notice; and (4) the

[16] To the extent any findings of fact constitute conclusions of law, they are adopted as such, and vice versa.

purchaser has acted in good faith." In re Elpida, slip op at *5.[17]

66. The threshold for "establishing that the [trustee or debtor] made a business judgment in good faith upon a reasonable basis" is a "relatively light evidentiary burden." In re Nellson Nutraceutical, Inc., 369 B.R. 787, 800 (Bankr. D. Del. 2007). "In evaluating whether a sound business purpose justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a 'business judgment test.'" In re Montgomery Ward Holding Corp., 242 B.R. at 153. These factors include:

> the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan or reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition on the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the property; and whether the asset is decreasing or increasing in value.

In re Del. & Hudson Ry. Co., 124 B.R. at 175-76 (citing In re Lionel Corp., 722 F.2d at 1071). The "bankruptcy court may consider several [such] factors, none of which are dispositive in and of themselves, and all of which are intended to merely guide the bankruptcy judge in assessing a Section 363(b) motion in light of the particular facts and circumstances of each case." In re Montgomery Ward Holding Corp., 242 B.R. at 155.

67. As determined by the Court in its November 20, 2012 opinion, the Court will review requests for the use or sale of U.S. assets *de novo* under Section 363(b). In re Elpida, slip op. at *9. The Court held that the Foreign Representatives "must prove by a

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[17] "A 'good faith' purchaser is one who buys property in good faith and for value, without knowledge of adverse claims." Mark Bell Furniture Warehouse, Inc. v. D.M. Reid Assocs. Ltd. (In re Mark Bell Furniture Warehouse, Inc.), 992 F.2d 7, 9 (1st Cir. 1993); accord In re Abbotts Dairies of Penn., Inc., 788 F.2d 143, 147 (3d Cir. 1986).

preponderance of the evidence that Elpida's entry into the transactions subject to the Rambus Motion and the Micron Motion *as it pertains to assets located in the territorial jurisdiction of the United States* was a sound exercise of the Trustees' business judgment." Id. (emphasis in original). Consistent with that decision, the Court takes judicial notice that the use and sales of U.S. assets presently before the Court are in connection with agreements that also involved additional assets beyond the Court's jurisdiction. See generally Rambus TDC App.; Micron TDC App.

C. All Three Agreements Before The Court Satisfy the 363(b) Standard

68. The Foreign Representatives have established that they, as the Trustees for the Debtor in the Japan Proceeding, exercised their sound business judgment in negotiating and executing the agreements that are the subject of the 363 Motions. See In re Montgomery Ward Holding Corp., 242 B.R. at 153. The testimony of Mr. Nakashima, who negotiated these agreements at the direction of Mr. Sakamoto, is sufficient to establish the Trustees' reasonable business judgment, and the testimony of the Trustees themselves is not necessary in order for the Court to fully evaluate these agreements. See id. at 155 (authorizing certain of debtor's employee retention contracts under the business judgment standard based on testimony of one of debtor's vice presidents).[18] Together with the extensive documentary evidence on the record, Mr. Nakashima's testimony demonstrates that (1) there was a sound business purpose for the use or sale of U.S. assets; (2) the sale price was fair; (3) fair and reasonable notice was provided; and (4) the purchasers acted in good faith. See In re Elpida, slip op. at *5. See also,

[18] See also, supra, at pp. 6-7, n.4.

supra at pp. 6-7 n. 4.

a. Reasonable Business Purpose

69. First, the Trustees had a sound business purpose for entering into the TTLA with Micron. The TTLA would allow Elpida's estate to achieve substantial savings in advance of the closing of the Sponsorship Agreement, as much as $200 to $300 million. See supra ¶ 23. The TTLA provides this cost-saving technology to Elpida for free, without requiring Elpida to surrender any valuable consideration. Further, Elpida evaluated this technology on its own merits and determined that there were sound business reasons independent of its relationship with Micron to acquire this technology. By contrast, the risks to Elpida of entering into the TTLA were not significant. Even if Micron were not to become Elpida's sponsor, Elpida would have the option of either continuing to use the technology, if its value to the company was greater than the 3% royalty, or returning to its original technology without paying an additional royalty. See supra ¶¶ 29-33.

70. Second, the Trustees' decision to sell the Patents pursuant to the PPA was also justified by a sound business purpose. See In re Lionel Corp., 722 F.2d at 1071; In re Montgomery Ward Holding Corp., 242 B.R. at 153; In re Del. & Hudson Ry. Co., 124 B.R. at 175-76. Additionally, the PPA's Change of Control Provision did not expose Elpida to any additional risk of suit by Rambus, or Hynix (simply as a result of the Change of Control Provision) in the event that Hynix became its sponsor, as Rambus was already involved in long-running patent litigation against Hynix regardless of the Patents in the PPA. See supra ¶ 51. The record demonstrates that the Trustees had

several sound business reasons to negotiate and execute the PPA with Rambus, most notably the goal of decreasing Elpida's cash outflow by offsetting its royalty commitments under a preexisting license agreement with Rambus. See, e.g., supra ¶¶ 35-49. Further, it was reasonable for the Trustees to conclude that Elpida's business would not be impeded by the sale of these Patents in any meaningful way. The PPA allowed Elpida to continue using these Patents pursuant to a license-back provision terminable only in the event that Micron failed to close the sponsorship deal and a specific bidder that had previously withdrawn its sponsorship bid, SK Hynix Inc., purchased Elpida. See supra ¶¶ 50-54.

71. Third, entering into the PLA was a proper exercise of the Trustees' reasonable business judgment. Sound business reasons supported the decision to negotiate a new non-exclusive, royalty-free license agreement with Micron over the Patents to be sold to Rambus. Elpida required the permission of Micron, its sponsor, in order to enter into the PPA, and the granting of this license to protect Micron from litigation over the Patents was a reasonable condition for Micron's consent. See supra ¶¶ 57-60.

72. Further, the Trustees did not surrender any consideration of significant value in granting Micron a license to these Patents. In the event that Micron withdrew or was replaced as the company's sponsor, Elpida retained sufficient class A patents to enforce against Micron or sell to other purchasers. See supra ¶ 59. The Trustees therefore had sound business reasons to grant Micron the requested license in the PLA in order to secure the benefits of the PPA, without requiring further royalty payments

from its sponsor.

73. Moreover, it was not unreasonable, in light of the fact that Micron was the only party to have submitted a viable proposal to become Elpida's sponsor after the bidding process was complete, for negotiations of each of these agreements to have been conducted based on the premise that an agreement with Micron was more likely than not to close. See Watanabe Decl. ¶¶ 45-46; supra ¶¶ 12-13. After the negotiation of the TTLA, the PPA, and the PLA, the Trustees submitted Elpida's plan of reorganization to the Tokyo Court. See Watanabe Decl. ¶ 48. Since that time, the Examiner has issued his opinion on the Trustees' plan (which includes the Sponsorship Agreement), and the Tokyo Court has entered an order referring the Trustees plan to creditors for voting. See Watanabe Decl. ¶¶ 52-53; Certified Translation of Examiner's Opinion Regarding Draft Reorganization Plan Submitted by Trustees;[19] Certified Translation of 10.31.12 Court Decision to Refer Trustees' Plan to a Resolution.[20]

b. Fair Price/Fair Terms

74. First, the consideration received under the TTLA was fair and reasonable. The benefits to Elpida of implementing the TTLA are substantial; the cross-licenses and change-of-control provisions contained in the TTLA are reciprocal, balanced, and designed to protect both parties from legal risk as they share technology and patents. See supra, ¶ 42. The TTLA offers Elpida the opportunity to license valuable cost-saving

[19] The Examiner's Opinion was entered into evidence as Foreign Representatives' Ex. 8 at the December 5, 2012 Hearing.

[20] The Court Decision was entered into evidence as Foreign Representatives' Ex. 10 at the December 5, 2012 Hearing.

technology from Micron, virtually "for free." See supra ¶ 29. As consideration for this technology, Micron requested costless cross-licenses to Elpida's patents for the limited purpose of minimizing each party's exposure to technology contamination. See supra ¶ 30. Particularly given the Trustees' and Mr. Nakashima's reasonable judgment that the Micron Sponsorship Agreement was likely to close, the short-term cross-licenses granted to Micron are reasonable and necessary as consideration for Micron's grant to Elpida of access to and use of Micron's valuable testing technology. See supra ¶¶ 27-28; see also Hr'g Tr. 44:6-13, 52:5-6, 52:20-25. Under these cross-licenses, Elpida retains control over which technology to disclose to Micron, and nothing in the agreement enables, or was intended to enable, Micron to begin manufacturing Elpida products. See supra ¶ 28; see also Hr'g Tr. 44:17-19. Further, these licenses of Elpida's technology and patents will not prevent Elpida from realizing the value of its patent portfolio, as the patent license term is limited to five years and Elpida will still have sufficient patents to enforce against Micron in the event the Sponsorship Agreement does not close. See supra ¶ 59. The limited term of the cross-license also serves to protect Elpida's value if the Micron sponsorship does not close, and nothing in the cross-license impedes or restricts Elpida from returning to its original technology in that scenario. See supra ¶¶ 30-32; see also Hr'g Tr. 49:3-7, 51:12-17.

75. The consideration received under the TTLA constitutes reasonably equivalent value and fair consideration.

76. The terms of the TTLA resulted from a good faith, arm's-length bargaining process between the parties. Elpida was represented in its negotiations by

experienced business personnel as well as outside counsel in its negotiations with Micron's in-house counsel. The parties' negotiations exhibited the type of back-and-forth, mutual exchange of compromises and concessions typical of negotiations conducted at arm's length and in good faith. See supra ¶¶ 28-33. The terms of the TTLA are therefore the product of a fair and impartial process of good-faith, arm's-length negotiation.

77. Second, the sale price and terms negotiated for the PPA were fair and reasonable. In re Del. & Hudson Ry. Co., 124 B.R. at 176. The Trustees and the Debtor determined that the consideration to be received under the PPA, including the purchase price of $15 million offsetting Elpida's royalty obligations to Rambus, was the best value available for the Patents. See supra ¶¶ 46-49. In particular, the Trustees were not aware of any prospective purchasers besides Rambus with which Elpida could reach a similar or better agreement for the Patents. Indeed, since the terms of the PPA were released publicly on September 28 and unredacted on November 13, 2012,[21] no other entity has come forward with a better or higher offer for the Patents. See supra ¶ 42. The Trustees and the Debtor further determined that this price was appropriate based on their experience with similar transactions in the industry. See supra ¶¶ 31, 37. The terms of the PPA therefore represent fair and reasonable consideration for the sale of the Patents.

78. The payment for the Patents constitutes reasonably equivalent value and

[21] See Order with Respect to Foreign Representatives' Motion Pursuant to Section 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 90181 for Authority to Redact (A) Foreign Representatives' Motion to Approve Sale of Certain Patents to Rambus Inc. and (B) "Exhibit A" Thereto (Nov. 13, 2012) [Docket No. 273].

fair consideration.

79. The process by which the Trustees and the Debtor negotiated the sale to Rambus was fair, proper, and reasonably calculated to result in the best return to the Debtor for the Patents. The Trustees determined, in their business judgment, that Rambus was the only available purchaser for the particular Patents it had an interest in acquiring. In light of the circumstances, it was reasonable for the Trustees and the Debtor to negotiate the terms of a private sale with Rambus rather than attempting to market the Patents to other prospective purchasers. See supra ¶¶ 40-49.

80. The Trustees and the Debtor were under no obligation to market the Patents to other buyers after they determined, in the exercise of their reasonable business judgment, that no other purchasers were available for the Patents and that a private sale to Rambus would yield the highest and best consideration to the Debtor. See, e.g., In re Capmark Fin. Grp. Inc., No. 09-13684 (CSS) (Bankr. D. Del. July 14, 2010) [Docket Nos. 1345, 1444] (approving private sale of all outstanding shares of debtor's subsidiary where debtors determined in their business judgment that a formal, costly marketing process was unnecessary); In re Visteon Corp., No. 09-11786 (CSS) [Docket No. 1709] (Bankr. D. Del. Jan. 20, 2010) (approving private sale where debtors determined that an auction process was not likely to result in higher or better offer). Under the circumstances, the Trustees had sound business reasons to conclude that a private sale to Rambus was "the most advantageous to the estate, basing [their] decision on a totality of relevant considerations." In re Bakalis, 220 B.R. 525, 532 (Bankr. E.D.N.Y. 1998).

81. The PPA was proposed, negotiated, and entered into by Rambus without collusion, in good faith, and from an arm's-length bargaining position. The testimony demonstrated that the negotiations between Elpida and Rambus were extensive and sometimes contentious, and both parties made substantial concessions from their original positions to reach final agreement. See supra ¶¶ 40-54.

82. Third, the terms of the PLA are fair and reasonable. The Debtor and its estate received substantial consideration from the PLA because issuing this license was essential for Micron to grant Elpida permission to enter into the PPA. As found above, the benefits from selling the Patents to Rambus under the PPA are considerable, including $15 million in additional liquidity over the next year. See supra ¶ 48. By contrast, Elpida will surrender almost nothing of value in exchange for Micron's consent to enter the PPA. The license granted under the PLA does not reduce the value of Elpida's patent portfolio, and Elpida will retain sufficient patents enforceable against Micron. See supra ¶ 59.

83. The consideration given to Elpida for the license constitutes reasonably equivalent value and fair consideration.

c. Fair and Reasonable Notice

84. The Foreign Representatives have provided interested parties with adequate and reasonable notice of the PPA, PLA, and TTLA. See In re Del. & Hudson Ry. Co., 124 B.R. at 176. As evidenced by the affidavits of service filed with the Court, reasonable notice of the Foreign Representatives' Motion to Approve the Sale of Certain Patents to Rambus and the Foreign Representatives' Motion to Approve the Patent

License Agreement and Technology Transfer and License Agreement was properly provided to (i) the United States Trustee for the District of Delaware, (ii) United States counsel to the Steering Committee for the Ad Hoc Group Bondholders of Elpida, (iii) United States counsel to the counterparties to the agreements, and (iv) all parties entitled who have requested notice pursuant to Bankruptcy Rule 2002.[22]

d. Good Faith of Counterparty

85. First, the TTLA was proposed, negotiated, and entered into by Micron without collusion, in good faith, and from an arm's-length bargaining position. Each party negotiated in good faith and made substantial concessions in order to reach a final agreement. See supra ¶¶ 29-32.

86. Micron is a good-faith purchaser under section 363(m) of the Bankruptcy Code and as such is entitled to all of the protections afforded thereby. Micron has acted in good faith in all respects in connection with the TTLA, in that: (i) Micron negotiated the TTLA with Elpida in order to provide Elpida with certain of Micron's technology that would allow Elpida to realize substantial cost savings and not for any improper purpose; (ii) Micron had a reasonable basis to request a cross-license in the disclosed

[22] Notice or, more appropriately, lack of it, have been a continuing issue in this case. The Foreign Representatives did not reveal the transactions at issue until well after they were entered. Moreover, the Foreign Representatives have aggressively asserted that documents and testimony are confidential. As a result there has been a troubling lack of transparency in this case. Partly, this arises from differences between the law and practice under the Bankruptcy Code and the JCRA where an extraordinary amount of the Japan Proceeding has been *ex parte* or kept under seal. But, part results from the fact that the Foreign Representatives had to be dragged kicking and screaming into Court even though they ultimately were seeking the Court's approval of these transactions. Regardless of the laws and customs of a foreign jurisdiction, Chapter 15 representatives must comply with the Bankruptcy Code and due process under the United States Constitution when appearing in the U.S. Bankruptcy Court. Ultimately, the Court has become satisfied by the notice and transparency of these proceedings but it has been a difficult path.

technology to protect against technology contamination; and (iii) the negotiation and execution of the TTLA were performed in good faith and constituted an arm's-length transaction.

87. Second, Rambus is a good faith purchaser under section 363(m) of the Bankruptcy Code and as such is entitled to all of the protections afforded thereby. Rambus acted in good faith in all respects in connection with the sale of the Patents, in that: (i) Rambus did not prevent the Debtor from negotiating with other any party interested in acquiring its patents; (ii) Rambus negotiated the Change of Control Provision in good faith in order to protect the value of the Patents to its operations, not to interfere in any way with the Debtor's reorganization in the Japan Proceeding; (iii) all payments to be made by Rambus in connection with the PPA have been disclosed; (iv) the negotiation and execution of the PPA were performed in good faith and constituted an arm's-length transaction; and (v) the disclosure requirements of Local Rule 6004-1 have been satisfied.

88. Third, the PLA was proposed, negotiated, and entered into by Micron and Elpida without collusion, in good faith, and from an arm's-length bargaining position. See supra ¶ 58.

89. Micron is a good faith purchaser under section 363(m) of the Bankruptcy Code and as such is entitled to all of the protections afforded thereby. Micron has acted in good faith in all respects in connection with the negotiation of the PLA, in that: (i) Micron negotiated the PLA with the Debtor in order to protect itself from patent enforcement litigation by the Patents' acquirer, Rambus, and not for any improper

purpose; (ii) Micron had a reasonable basis to insist upon receiving a non-exclusive license to the Patents before giving its consent for Elpida to enter the PPA; (iii) all payments to be made by Rambus in connection with the PLA have been disclosed; (iv) the negotiation and execution of the PLA were performed in good faith and constituted an arm's-length transaction.

D. The Bondholders' Objections Are Not Supported by the Evidence

90. Once the Trustees have established their reasonable business judgment, the Bondholders, as objectors, were required to produce evidence supporting their objections. See In re Montgomery Ward Holding Corp., 242 B.R. at 155 ("[A]n objectant [to a use, sale or lease of estate property] is required to produce some evidence supporting its objections.") (citing In re Lionel Corp., 722 F.2d at 1071; In re Del. & Hudson Ry. Co., 124 B.R. at 176). They have not done so.

91. The Bondholders' legal assertion, that section 363(b) required the Trustees to market the Patents more broadly or conduct a public auctioning process, is incorrect under the facts and circumstances of this case. This Court has authorized private sales of assets in past cases without ordering a formal marketing, bidding or auction process, particularly where, as here, the debtors were selling far less than substantially all of their assets. See, e.g., In re Capmark Fin. Grp. Inc., No. 09-13684 (CSS) (Bankr. D. Del. July 14, 2010) [Docket No. 1345, 1444]; In re Visteon Corp., No. 09-11786 (CSS) [Docket No. 1709] (Bankr. D. Del. Jan. 20, 2010); In re Printing Solutions LP, No. 09-10266 (CSS) [Docket No. 436] (Bankr. D. Del. July 22, 2009).

92. The Bondholders have not introduced any evidence, for example, that the

Trustees could have obtained a higher offer on better terms for the Patents in the PPA by marketing them to other purchasers. Nor did they introduce evidence that Elpida undervalued the particular Patents sold in the PPA or that these Patents may have attracted a higher price from other counterparties.

93. There is no evidentiary support for the Bondholders' argument that the agreements were negotiated and entered into with the purpose of entrenching Micron as Elpida's sponsor. Mr. Nakashima's testimony was consistently and directly to the contrary. See Hr'g Tr. 52:5-6 ("[TTLA provides Elpida] the big opportunity to have [Micron's] technology for free, if there is closure. And the closure possibility is very high, even at the time of the negotiation."); Hr'g Tr. 52:17-21 ("[Mr. Nakashima recommended the Trustees sign the TTLA] [b]ecause it is good—it was—well, actually is very good in balance . . . . They are very important technology, and—if the closure is—there is a closure, then we could use the technology for free. And even if it is—if there is no closure, then we could have several options . . . as I explained. So it is very good and well balanced deal."); Hr'g Tr. 58:11-15 (Rambus proposed PPA as a way for Elpida to "save . . . cash out" and "effectively help Elpida"); Hr'g Tr. 85:17-22 (Mr. Nakashima recommended that the Trustees sign the PPA to "reduce the . . . actual cash out from Elpida" and gain benefits from Amendment No. 1 to the License Agreement);Hr'g Tr. 87:5-8 (Mr. Nakashima recommended that the Trustees sign the PLA "[b]ecause this is actually the basis or the basic condition to go . . . forward with the patent purchase agreement"). Mr. Nakashima's testimony is consistent with and confirmed by documents entered into evidence by the Foreign Representatives and the

Bondholders. See, e.g, June 21, 2012 E-mail from Steven Arnold to Seiji Nakashima, ELPDF000006048 (explaining the benefits *Elpida* would receive from the patent cross-license under the TTLA); June 12, 2012 E-mail from Seiji Nakashima to Steven Arnold, ELPDF000002026 (negotiating with Micron over cross-license and royalty rate in TTLA);[23] June 22, 2012 E-mail from Seiji Nakashima to Chris Pickett and Jared Smith, and June 23, 2012 Response E-mail from Chris Pickett to Seiji Nakashima, ELPDF000004341-ELPDF000004342 (reflecting that Elpida "is considering termination" of the License Agreement, but "more preferably would like to find an amicable way to renew the existing contract to reduce the payment," and showing Rambus's "interest in Elpida's patent portfolio" as a potential resolution);[24] E-mail Chain Between Seiji Nakashima and Jared Smith, ELPDF000004457-ELPDF000004461 (showing negotiation between Elpida and Rambus over the terms of the PPA);[25] July 31, 2012 E-mail from Seiji Nakashima to Joel Poppen, ELPDF000006399 (explaining to Micron Elpida's purpose in entering into the PLA, including the receipt of "USD15 million" and amending the License Agreement, and "recognize[ing] Micron's need to obtain [a license] for those patents to be transferred to Rambus before such transfer occurs").[26]

94. The Bondholders have also failed to establish that the Trustees negotiated these agreements without adequately guarding against the risk of the Micron sponsorship's not closing. The testimony in the record indicates that Elpida's managers

[23] This e-mail was entered into evidence as Bondholder's Ex. 3 at the December 5, 2012 hearing.

[24] These e-mails were entered into evidence as Bondholders' Ex. 19 at the December 5, 2012 hearing.

[25] This e-mail chain was entered into evidence as Bondholders' Ex. 7 at the December 5, 2012 hearing.

[26] This e-mail was entered into evidence as Bondholders' Ex. 21 at the December 5, 2012 hearing.

took this risk into account and negotiated the transactions with appropriate safeguards. See supra ¶¶ 30-32, 51-54, 59. Moreover, there is simply no evidence that the PPA, PLA or TTLA would subject Elpida to severe adverse consequences if the Micron sponsorship failed to close. To the contrary, the TTLA, for example, preserves for Elpida the option to take advantage of significant technological benefits and cost savings that would survive the replacement of Micron as Elpida's sponsor, in certain circumstances. See supra ¶¶ 27-31. The licenses granted to Micron under the TTLA are limited to a term of only five years and, because Elpida would only disclose limited technical information, does not give Micron the capability to reproduce Elpida's products and would not impede Elpida's business if Micron became its creditor rather than its sponsor. See supra ¶¶ 27-32. Further, Elpida's license-back to the Patents would only terminate if Hynix, in particular, replaced Micron as Elpida's sponsor, and the Trustees reasonably considered this possibility to be unlikely in light of Hynix's demonstrated unwillingness to match Micron's sponsorship bid. See supra ¶¶ 12, 50-54. Also, contrary to the Bondholders' suggestion, in no event would Elpida be forced to pay a royalty to Micron; Elpida has the option to pay such a royalty if its cost savings would justify the royalty expense. See supra ¶¶ 29-30.

95. Nor have the Bondholders produced evidence demonstrating that the agreements would diminish the value of Elpida's estate or discourage other potential sponsors from bidding for Elpida in the event that the Micron sponsorship does not close. The record demonstrates that the agreements were negotiated so as to limit the impact on Elpida in the event the transactions contemplated by the Micron Sponsorship

Agreement did not close. See supra ¶¶ 28-32, 50-54, 56-59. The TTLA, for example, limits Micron's cross-license to Elpida's technology and patents to a term of only five years. Further, the cross-licenses do not require Elpida to disclose significant technology to Micron, whereas the Micron technology that Elpida is licensed to use is substantially more valuable. See supra ¶¶ 28-31. Similarly, under the PLA, Elpida still retains sufficient A-class patents to enforce against Micron or to sell to other parties in the event that Micron is no longer its sponsor. See supra ¶ 59. Further, the Change of Control Provision in the PPA would not materially affect Elpida's value upon a change in sponsorship, as its preexisting license agreement with Rambus would have terminated upon any change of control. See supra ¶¶ 51-54.

96. Nothing in the record reveals any collusion or improper motives in the negotiations over these agreements. To the contrary, the testimonial and documentary evidence consistently demonstrates that all three agreements were negotiated at arm's length and in good faith, rather than for any impermissible purpose. See supra ¶¶ 30-31, 46-47, 58, 60.

97. The Bondholders have not provided any evidence or raised any questions of fact or issues of law in connection with Micron's or Rambus's good faith in connection with the transactions for which the Foreign Representatives seek this Court's approval.

98. In sum, the Bondholders do not cite any facts to contest the proof that these agreements confer substantial benefits on Elpida's estate. While the Bondholders may have preferred for certain individual terms of these agreements to be different,

they cannot, as a matter of law, substitute their own preferences for the business judgment of the Trustees, who are entitled to represent all the estate's creditors as their fiduciaries. See In re Shubh Hotels Pittsburgh, LLC, 439 B.R. at 641 ("In determining whether the Debtor has exercised its sound business judgment . . . , the question is not whether . . . any individual creditor [such as the particular creditor challenging the sale] would [have made] a better business decision."). The Bondholders' objections to the Motions are therefore overruled.

CONCLUSION

The Foreign Representatives have demonstrated the proper exercise of business judgment and that the testimony of Mr. Nakashima, who reported to and acted at the direction of Mr. Sakamoto, was sufficient. The testimony of the Trustees themselves was not needed for the Court to be able to fully evaluate the agreements that are the subject of the 363 Motions. The Court therefore makes the foregoing findings of fact and conclusions of law with respect to the Foreign Representatives' Motions, and grants the Foreign Representatives' Motion to Approve the Sale of Certain Patents to Rambus and the Foreign Representatives' Motion to Approve the Patent License Agreement and Technology Transfer and License Agreement.

An order will be issued.

The Honorable Christopher S. Sontchi
United States Bankruptcy Court
for the District of Delaware

Dated: January 16, 2013