IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 15
	)	
	)	Case No. 12-10947(CSS)
Elpida Memory, Inc.,	)	
	)	
Debtors.	)	
	)	

OPINION[1]

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[1] This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

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Sontchi, J._____

INTRODUCTION

The issue before the Court, which appears to be a matter of first impression, is what legal standard applies in a Chapter 15 case to the transfer of assets located in the United States pursuant to a "global" transaction previously approved by another Court in a foreign main proceeding. Based upon the plain meaning of the statue supported by the legislative history, this Court must review the transaction to the extent it impacts assets located in the United States under the legal standards governing a transfer by a trustee outside the ordinary course of business, i.e., is the transaction a sound exercise of the trustee's business judgment.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M), (N) and (O).

STATEMENT OF FACTS[2]

On February 27, 2012, Elpida Memory, Inc. ("Elpida") filed a petition for commencement of corporation reorganization proceedings under the Japan Corporate Reorganization Act (Kaishu Kosei Ho) in the Tokyo District Court, Civil Division (the "Tokyo Court"). On March 23, 2012, the Tokyo Court entered its Court Decision on Commencement of Reorganization Proceeding dated March 23, 2012 (the "Commencement Order"). The Commencement Order appointed Messrs. Yukio Sakamoto and Nobuaki Kobayashi as trustees ("Trustees") for Elpida's corporate reorganization proceeding in Japan. On March 23, 2012, the Tokyo Court also appointed Mr. Atsushi Toki as examiner of Elpida.

On March 19, 2012, Mr. Sakamoto filed a verified petition pursuant to sections 1504 and 1515 of the Bankruptcy Code commencing this chapter 15 case. On March 21, 2012, the Court entered the Order Granting Provisional Relief, Scheduling Recognition Hearing and Specifying Form and Manner of Notice Pursuant to Sections 105(a) and 1519 of the Bankruptcy Code [Docket No. 25]. On April 24, 2012, the Court entered its Order Pursuant to U.S.C. §§ 105, 1504, 1515, 1517, 1520, and 1521 Recognizing Foreign Representatives and Foreign Main Proceeding [Docket No. 65] (the "Recognition Order"). Under the Recognition Order, the Court recognized Elpida's reorganization

[2] The Court has scheduled a hearing on the Rambus Motion and Micron Motion (as defined below) for December 5-6, 2012. Given the necessity that a ruling on the applicable legal standard be entered sufficiently prior to the hearing so that counsel can properly prepare the case for trial, this Court has undertaken to issue this opinion on an expedited basis. As such, the Statement of Facts is not as thorough as the Court would prefer but believes it is sufficient to resolve the issues presently before it.

proceeding in the Tokyo Court as a "foreign main proceeding" and Messrs. Sakamato and Kobayashi as Elpida's foreign representatives (the "Foreign Representatives").[3]

In mid-September, the Foreign Representatives filed four motions under section 363 of the Bankruptcy Code seeking authorization to enter into four related transactions: (i) Foreign Representatives' Motion for Approval of the Pledge of Certain United States Registered Patents to Apple Inc. [Docket No. 157] (the "Apple Motion"); (ii) Foreign Representatives' Motion for Approval of Security Agreements in Connection with Obtaining Postpetition Financing [Docket No. 143] (the "DIP Financing Motion"); (iii) Foreign Representatives' Motion to Approve Sale of Certain Patents to Rambus Inc. [Docket No. 163] (the "Rambus Motion"); (iv) Foreign Representatives' Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Docket No. 165] (the "Micron Motion," collectively, the "363 Motions"). All of the transactions under the 363 Motions had been previously approved by the Tokyo Court.

The Steering Committee of the Ad Hoc Group of Bondholders (the "Steering Committee") initially objected to all of the 363 Motions but subsequently withdrew (reluctantly) its objection to the Apple Motion and the DIP Financing Motion. The

[3] Messrs. Sakamato and Kobayashi are both the Trustees of Elpida in the Japan proceeding and the Foreign Representatives of Elpida in the Chapter 15 proceeding. Even though they are the same persons they have different jobs. The Court will refer to these gentlemen as Trustees in connection with actions in Japan and Foreign Representatives for actions in this Court.

Court entered orders granting those motions on October 31, 2012.[4] The Steering Committee continues to object to the Rambus Motion and the Micron Motion.

The Foreign Representatives also filed related motions under section 107(b) of the Bankruptcy Code to redact confidential information related to the 363 Motions. The motions to seal in connection with the DIP Financing Motion and Apple Motion were granted without objection. In addition, the motion to seal in connection with the Rambus Motion was withdrawn. The Steering Committee continues to object to the Foreign Representatives' Motion Pursuant to Section 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 9018-1 for Authority to (A) Redact Certain Portions of, and (B) File Under Seal Certain Exhibits to, Foreign Representatives' Motion to Approve Patent License Agreement and Technology Transfer and License Agreement [Docket No. 166] (the "Micron Motion to Seal").

In connection with the Rambus Motion, Elpida is selling certain of its patents, some of which are registered in the United States, to Rambus Inc. ("Rambus") under a Patent Purchase Agreement ("PPA"). Under the PPA, Rambus is granting a royalty-free, perpetual license to Elpida. The PPA was approved by the Japanese Court on August 10, 2012.

In connection with the Micron Motion, Elpida is granting Micron Technology Inc. ("Micron") a license in the patents being sold to Rambus under a Patent License Agreement ("PLA"). Under a sponsorship arrangement between Elpida and Micron

[4] Order Approving Pledge of Certain United States Registered Patents to Apple Inc. [Docket No. 249]; and Order Approving Security Agreements In Connection With Obtaining DIP Financing [Docket No. 250].

that was approved in Japan on July 2, 2012 (and which is not before this Court), the patents cannot be sold to Rambus absent Micron's consent. Micron agreed to consent to the Rambus patent sale, provided that Elpida provide Micron with a non-exclusive, royalty-free, non-sublicensable, perpetual and irrevocable license to the Rambus patents. The PLA was approved by the Japanese Court on August 10, 2012. Earlier, on July 12, 2012, the Japanese Court approved a related Technology Transfer and License Agreement ("TTLA") between Elpida and Micron. The PPA, PLA and TTLA all include a transfer of Elpida's property located within the territorial jurisdiction of the United States.

Elpida's reorganization proceeding before the Tokyo Court has continued to move forward, albeit with the opposition of certain of Elpida's bondholders (the "Japanese Bondholders"). On August 14, 2002, the Japanese Bondholders submitted to the Tokyo Court a competing plan proposal (the "Japanese Bondholders' Plan"), pursuant to the Commencement Order authorizing, "reorganization creditors" to submit reorganization plan proposals. On August 21, 2012, Elpida's Trustees submitted to the Tokyo Court a reorganization plan proposal (as amended, the "Trustees' Plan"), pursuant to the Commencement Order authorizing the Trustees to submit a reorganization plan proposal.

On October 29, 2012, the Examiner issued his opinion regarding the Trustees' Plan. Immediately thereafter, on October 31, 2012, the Tokyo Court entered an order referring the Trustees' Plan for creditor voting. The same day, the Tokyo Court entered an order determining that the Japanese Bondholders' Plan would not be referred for

creditor voting. As of the date of this opinion, the Court understands that the Trustees are preparing the vote solicitation package that will be sent to all secured and unsecured reorganization creditors of Elpida.

PROCEDURAL POSTURE

The Court has bifurcated its review of the Rambus Motion and the Micron Motion. A hearing on the merits of those motions is scheduled for December 5-6, 2012. At the request of the parties, however, the Court conducted a hearing on November 8, 2012, as to what legal standard would apply to the Court's review of the motions. The Court also considered the Micron Motion to Seal at the November 8th hearing. At the conclusion of the hearing, applying section 107(b) of the Bankruptcy Code, the Court granted in part and denied in part the Micron Motion to Seal. The Court reserved judgment, however, on whether the Court's decision on the Motion to Seal, in whole or in part, should be based upon principles of comity.

This is the Court's decision on the issues before it on November 8th.

LEGAL ANALYSIS

1. Chapter 15 In General

Chapter 15 of the Bankruptcy Code, which adopted the substance and most of the text of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross–Border Insolvency ("Model Law"), provides a comprehensive scheme for recognizing and giving effect to foreign insolvency proceedings.[5] The

[5] UNCITRAL Model Law on Cross-Border Insolvency, U.N. GAOR 52d Sess., U.N. Doc. A/52/17 (1997). Congress implemented the Model Law through the enactment of Chapter 15 and directed that the Guide to the Model Law be used to instruct its interpretation. *See In re Ephedra Prods. Liab. Litg.*, 349 B.R. 333, 336

purpose of Chapter 15 is to adopt the Model Law with the objective of encouraging and increasing the cooperation between U.S. courts and authorities and foreign courts and authorities in cross-border insolvency cases; providing greater certainty and consistency in the law for trade and investment; promoting fair and efficient administration of cross-border insolvencies while protecting the interests of all creditors and other interested parties, including the debtor; protecting and maximizing the value of a debtor's assets; and facilitating the rescue of financially troubled businesses.[6]

Chapter 15 begins with the filing of a petition for recognition.[7] Where the foreign case is recognized as a foreign main proceeding,[8] certain mandatory relief goes into effect automatically.[9] The mandatory relief includes the applicability of section 363 of the Bankruptcy Code "to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States *to the same extent that the section would apply to property of the estate*."[10] After recognition, the Court has discretion to grant a foreign representative relief as provided in section 1521. In addition to relief available after recognition, the foreign representative may request preliminary relief under

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(S.D.N.Y. 2006)("the House Judiciary Committee, in enacting Chapter 15, specifically indicated that the Guide should be consulted for guidance as to the meaning and purpose of [Chapter 15's] provisions"') (quoting H.R. Rep. No. 109-31)(I), at 106 n. 101).

[6] 11 U.S.C. § 1501

[7] 11 U.S.C. § 1515.

[8] A "foreign main proceeding" is defined as "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4).

[9] 11 U.S.C. § 1520.

[10] 11 U.S.C. § 1520(a)(2) (emphasis added).

section 1519, in order to "protect the assets of the debtor or the interests of the creditors" pending the order of recognition.[11]

Section 1507 further provides that the Court is authorized to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set out in the statute. The relationship between section 1507 and section 1521 is not entirely clear; one court has stated that such post-recognition assistance is "largely discretionary and turns on subjective factors that embody principles of comity."[12] In any event, there is no doubt that the relief available under 1519, 1521, and particularly additional assistance granted pursuant to section 1507 should, when possible, be consistent with the principle of comity. Section 1507 specifically so provides with respect to "additional assistance," and more broadly, section 1509(b)(3) directs that once a foreign representative obtains recognition, "a court in the United States shall grant comity or cooperation to the foreign representative."

3. The Standard Governing A Sale Of Assets In Chapter 15

a. Setting the Table

In Chapter 15, a "'debtor' means an entity that is the subject of a foreign proceeding."[13] A foreign proceeding can be either a "foreign main proceeding" or a

[11] 11 U.S.C. § 1519(a).

[12] *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y.2008), *aff'd* 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

[13] 11 U.S.C. § 1502(1).

"foreign nonmain proceeding."[14] A foreign main proceeding is "a foreign proceeding pending in a country where the debtor has the center of its main interests."[15] Recognition "means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter." Where the foreign proceeding is a foreign main proceeding, section 1520(a) becomes applicable "upon recognition."[16]

In this case, Elpida is the "debtor" and its Japan reorganization proceeding is a "foreign main proceeding." The Japan reorganization proceeding was "recognized" by this Court on upon entry of the Recognition Order on April 24, 2012 at which time section 1520(a) became applicable to the Chapter 15 case.

Section 1520(a)(2) provides that section 363 of the Bankruptcy Code applies "to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the section would apply to property of the estate."[17] Section 363(b)(1), in turn, provides that the "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Under section 1520(a)(3), "the foreign representative may operate the

[14] 11 U.S.C. § 1502(4) and (5).

[15] 11 U.S.C. § 1502(4).

[16] 11 U.S.C. § 1520(a).

[17] Under section 1502(a)(8), "'within the territorial jurisdiction of the United States'", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States."

debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by section[] 363."

In this case, the Foreign Representatives (Messrs. Sakamoto and Koboyashi) are the trustees under section 363(b)(1) and they are seeking authority under the Rambus Motion and the Micron Motion to transfer property within the territorial jurisdiction of the United States outside the ordinary course of business to Rambus and Micron, respectively. They clearly have the power to make the request but what standard should be applied?

b. Plain Meaning

In interpreting a statute, the Court must start with an analysis of its plain meaning. "[C]ontemporary Supreme Court jurisprudence establishes that the purpose of statutory interpretation is to determine congressional intent."[18] To that end, the starting point is to examine the plain meaning of the text of the statute.[19] As the Supreme Court observed in *Hartford Underwriters Ins. Co. v. Union Planters Bank*, "when a statute's language is plain, the sole function of the courts, at least where the disposition by the text is not absurd, is to enforce it according to its terms."[20]

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[18] Hon. Thomas F. Waldron and Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 211 (2007).

[19] *Id.* at 229 ("Statutory analysis . . . must start with the text at issue to determine if its meaning can be understood from the text."). *See also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.").

[20] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). *See also United States v. Ron Pair Enters.*, 489 U.S. 235, 240 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.").

Additionally, the Supreme Court has repeatedly stated that "[t]he United States Congress says in a statute what it means and means in a statute what it says there."[21]

Notwithstanding the foregoing, applying the plain meaning of the statute is the default entrance – not the mandatory exit.[22] If the statute is ambiguous, the Court must use other canons of statutory construction, including legislative history where available, to determine the purpose of the statute.[23]

The result here under a plain meaning analysis is straight forward. Section 1520(a) unequivocally states that "sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States *to the same extent that the sections would apply to property of an estate."* (emphasis added). The emphasized language clearly provides that section 363 and, by implication, its standards are applicable to the transfer of assets located in the United States by a foreign debtor in a foreign main proceeding outside the ordinary course of business. The section 363(b) standard is well-settled. A debtor may sell assets outside the ordinary course of business when it has demonstrated that the sale of such assets represents the sound exercise of business judgment. In determining whether a sale

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[21] *Hartford Underwriters Ins. Co.*, 530 U.S. at 6 (quoting *Connecticut Nat. Bank,* 503 U.S. at 254).

[22] Waldron and Berman, *supra* note 18, at 232.

[23] *See Price v. Delaware State Police Fed. Union (In re Price)*, 370 F.3d 362, 369 (3d Cir. 2004) ("Thus, ambiguity does not arise merely because a particular provision can, in isolation, be read in several ways or because a Code provision contains an obvious scrivener's error. Nor does it arise if the ostensible plain meaning renders another provision of the Code superfluous. Rather, a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive. In such situations of unclarity, 'where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived,' including pre-Code practice, policy, and legislative history.") (internal citations omitted).

satisfies this standard, the courts in this Circuit require that a sale satisfy four requirements (1) a sound business purpose exists for the sale; (2) the sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the purchaser has acted in good faith.[24] Thus, under the plain meaning of section 1520(a)(2), this test is applicable to the Rambus Motion and the Micron Motion.

c. Legislative Intent

Notwithstanding the Supreme Court's repeated admonition that courts are to interpret statutes according to their plain meaning, one could argue that in Chapter 15 cases plain meaning should be subservient to legislative history or more general principles of comity. To that end, section 1508 provides that in interpreting Chapter 15, "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."[25] "As each section of Chapter 15 is based on a corresponding article in the Model Law, if a textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider the Model Law and foreign interpretations of it as part of its 'interpretive task.'"[26]

Section 1520 of the Bankruptcy Code is adopted from Article 20 of the Model Law.[27] Article 20 of the Model Law provides in relevant part that:

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[24] *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D. Del. 1991).

[25] 11 U.S.C. § 1508.

[26] *In re Loy*, 432 B.R. 551, 560 (E.D. Va. 2010) (footnote omitted) (citing 11 U.S.C. § 1508); *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010)).

[27] See The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 143, U.D. Doc. A/CN.9/422 (1997) (the "Guide to the Model Law").

1. Upon recognition of a foreign proceeding that is a foreign main proceeding,

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The parallels between Article 20 and section 1520 are striking.[28]

Article 20		**Section 1520**	
Section	**Text**	**Text**	**Section**
(1) intro.	Upon recognition of a foreign proceeding that is a foreign main proceeding,	Upon recognition of a foreign proceeding that is a foreign main proceeding--	1520(a)
(1)(a)	Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;	sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;	1520(a)(1)
(1)(b)	Execution against the debtor's assets is stayed; and		
(1)(c)	**The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.**	**sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;**	**1520(a)(2)**
(2)	The scope, and the modification or termination, of the stay and suspension referred to in	unless the court orders otherwise, the foreign representative may operate	1520(a)(3)

[28] Italics in original; bold added.

	paragraph 1of this article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article]*.	the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552;	
(3)	Paragraph 1 *(a)* of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor	Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.	1520(b)
(4)	Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.	Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.	1520(c)

Article 20 of the Model Law has two basic and related concepts aimed at protecting and preserving a multinational debtor's assets: (i) stopping all actions, proceedings and executions against the debtor's assets in all jurisdictions;[29] and (ii) stopping the debtor from transferring disposing of any of its assets pending further court order.[30] The drafters of the Model Law considered the stay of actions and enforcement proceedings "necessary to provide 'breathing space' until appropriate

[29] See Model Law, Art 20(1)(a),(b).

[30] See Model Law, Art.20(1)(c).

measures are taken for reorganization or fair liquidation of the assets of the debtor," and the suspension on transfer "necessary because in a modern, globalized economic system it is possible for multinational debtors to move money and property across boundaries quickly."[31] Accordingly, the Model Law protects both multinational debtors by forestalling their creditors in a foreign, ancillary jurisdiction from exercising their remedies, and creditors in the ancillary jurisdiction by suspending the debtor's ability to transfer its assets in that jurisdiction without authorization from their own court system.[32] Importantly, following the recognition of a foreign main proceeding, the Model Law expressly imposes the laws of the ancillary forum - not those of the foreign main proceeding - on the debtor with respect to transfers of assets located in such ancillary jurisdiction. The Guide to the Model Law explains that:

> The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding. *In order to achieve those benefits, it is justified to impose on the insolvent debtor the consequences of article 20 in the enacting State (i.e., the country where it maintains a limited business presence), even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State.* This approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. *Recognition, therefore has its own effects*

[31] Guide to the Model,¶ 32.

[32] See Model Law, Art. 20(2); Guide to the Model Law, at ¶ 33 ("Exceptions and limitation to the scope of the stay and suspension … and the possibility of modifying or termination the stay or suspension are determined by provisions governing comparable stays and suspension in insolvency proceeding under the laws of the enacting State (article 20, paragraph 2).").

> *rather than importing the consequence of the foreign law into the insolvency system of the enacting State.*[33]

In essence, the Model Law follows an *in rem* division of labor between competing sovereignties - tasking the domestic courts with responsibility over and for assets in their jurisdiction. Chapter 15's legislative history leads to the same conclusion as the plain meaning anaylsis – the sound exercise of business judgment test is applicable.

d. Comity

Comity has been defined as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws."[34] Granting comity to judgments in foreign bankruptcy proceedings is appropriate as long as U.S. parties are provided the same fundamental protections that litigants in the United States would receive.[35]

Notwithstanding the direction that a U.S. court grant comity or cooperation to a recognized foreign representative in insolvency matters, "[t]he principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws,

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[33] Guide the Model Law ¶ 143 (emphasis added).

[34] *Hilton v. Guyot,* 159 U.S. 113, 163–64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895).

[35] *See id.* at 202–03, 16 S.Ct. at 158–59.

public policies, or rights of the citizens of the United States."[36] Consistent with the traditional limits of comity, all relief under chapter 15 is subject to the caveat in section 1506, providing the court with authority to deny the relief requested where such relief would be "manifestly contrary to the public policy of the United States."[37]

Decisions relating to Chapter 15 routinely invoke the principle of comity. Nonetheless, only two provisions in Chapter 15 actually mention comity. Section 1507 provides that the Court is authorized to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set out in the statute.[38] In addition, section 1509(b)(3) directs that once a foreign representative obtains recognition, "a court in the United States shall grant comity or cooperation *to the foreign representative*." Indeed, section 1508, which establishes a rule of interpretation for Chapter 15, does not mention nor invoke comity.

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[36] *In re Treco,* 240 F.3d 148, 157 (2d Cir. 2001); *see also Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru,* 109 F.3d 850, 854 (2d Cir. 1997); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 713 (2d Cir. 1987); *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 457 (2d Cir. 1985).

[37] 11 U.S.C. § 1506; *In re Ephedra Prods. Liability Litig.,* 349 B.R. 333 (S.D.N.Y. 2006).

[38] Section 1507(b) sets forth several factors for the Court to consider: "whether such additional assistance, *consistent with the principles of comity*, will reasonably assure—(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns."(emphasis added). These are five of the six factors that a court was directed to consider in determining whether to grant relief under former § 304 of the Bankruptcy Code, which was repealed when chapter 15 was adopted. The sixth factor was comity. By moving the reference to the introduction, Congress has specified that comity should be considered in connection with all five of the section 1507(b) factors.

Elpida's Foreign Representatives urge the Court, in the interest of comity, to defer completely to the Tokyo Court. In other words, this Court should approve the transactions under section 363 because they were previously approved by the Tokyo Court. At most, they urge, this Court's review is limited to that of section 1506 of the Bankruptcy Code –"[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." Moreover, in making the "manifestly contrary to the public policy" inquiry they argue that the Court should examine the Japanese insolvency regime as a whole rather than the actual transactions before the Tokyo Court.

There can be no doubt that promoting comity is a general objective of Chapter 15. But it is not the end all be all of the statute. To require this Court to defer in all instances to foreign court decision would gut section 1520. It is important to note that Section 1520 is mandatory. Sections 1507, 1519, 1521, and 1522 provide the Court with broad discretion to "grant any appropriate relief." While those sections cross reference each other they do not mention, let alone authorize, amendment of section 1520 to make section 363 inapplicable. This is not surprising. To do so would be akin to a bankruptcy court holding that section 1129 does not apply to plan confirmation, which would clearly be impermissible.

Section 1507(b) is inapplicable here because the Foreign Representatives are not seeking "additional assistance." Section 1509(b)(3) is not applicable either. The purpose of section 1509, as expressed in the legislative history and case law, is to allow the

foreign representative access to, and standing in, courts in the United States *other than the chapter 15 court*.[39] Importantly, section 1509(b)(3) requires only that a court grant comity to the *foreign representative* – not to the foreign court or the orders entered by such court. Thus, when read in the context of the remainder of section 1509 (entitled "Right of direct access"), it is clear that section 1509(b)(3) does not require this Court to grant comity to orders of the Japanese court; but, instead, is meant only to streamline the foreign representatives' access to, and cooperation from, other, non-bankruptcy courts in the United States following recognition. The intent is that a foreign representative should be afforded standing in those courts – just as sections 323 and 1107 provide trustees and debtor-in-possession with standing where such standing would not otherwise exist.

Thus, principles of comity either do not apply or must defer to the plain meaning and legislative history. Again, the sound exercise of business judgment test controls.[40]

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[39] Section 1509(b) provides:

> [i]f *the court* grants recognition under section 1517, and subject to any limitations that *the court* may impose consistent with the policy of this chapter-
>
> (1) the foreign representative has the capacity to sue and be sued in *a court* in the United States;
> (2) the foreign representative may apply direct to *a court* in the United States for appropriate relief in that court; and
> (3) *a court* in the United States shall grant comity or cooperation to the foreign representative.

11 U.S.C. § 1509(b) (emphasis added). The phrase, "the court," is used in the introductory clause of section 1509(b) to refer specifically to the chapter 15 court granting recognition. In contrast, subsections (1), (2) and (3) use the phrase "a court," in reference to other non-bankruptcy courts, where the rights granted thereby had not previously existed. Section 1509(b)(3), thus, instructs other U.S. courts to grant comity or cooperation to foreign representatives so that they may have direct access to U.S. courts to exercise to fullest extent the rights granted under chapter 15.

[40] As the Court's decision relates solely to the application of section 363 under section 1520, it has not addressed nor decided the standard governing application of section 1506.

CONCLUSION

While this Court is cognizant of the importance of comity, especially in the context of Chapter 15, it cannot ignore the plain meaning of section 1520(a). Moreover, the legislative history behind Chapter 15 supports finding that this Court must, in effect, review the motion *de novo* as it relates to assets in the United States and, in so doing, must apply the well-settled standard governing a sale of assets under section 363 of the Bankruptcy Code.

In order for the Foreign Representatives to prevail they must prove by a preponderance of the evidence that Elpida's entry into the transactions subject to the Rambus Motion and Micron Motion *as it pertains to assets located in the territorial jurisdiction of the United States* was a sound exercise of the Trustees' business judgment.[41]

An order will be issued.

[41] Section 107(b) is applicable to Chapter 15. *See* 11 U.S.C. § 103(a) (This chapter, *i.e.*, Chapter 1, applies in a case under chapter 15). For the reasons set forth above, the Court must review the Micron Motion to Seal under section 107(b) and not under general principles of comity. Thus, the Court will grant in part and deny in part the Micron Motion to Seal for the reasons and to the extent set forth on the record at the November 8 hearing.