

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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| In re |) | Chapter 15 |
| Elpida Memory, Inc., |) | Case No. 12-10947 (CSS) |
| Debtor in a Foreign Proceeding. |) | Obj. Deadline: October 12, 2012 at 4:00 p.m. (EDT) |
| |) | Hearing Date: October 24, 2012 at 2:00 p.m. (EDT) |

**FOREIGN REPRESENTATIVES' MOTION
FOR APPROVAL OF SECURITY AGREEMENTS
IN CONNECTION WITH OBTAINING POSTPETITION FINANCING**

Mr. Yukio Sakamoto and Mr. Nobuaki Kobayashi, as foreign representatives (the “Foreign Representatives”) of Elpida Memory, Inc. (“Elpida”), a Japanese company that is the subject of reorganization proceedings under Japanese law currently pending before the Tokyo District Court, Eighth Civil Division (the “Japan Proceeding”), hereby submit this motion (the “Motion”) pursuant to sections 363 and 1520 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 6004-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) for approval of various security agreements with Shinseigin Finance Co., Ltd. (the “DIP Lender”) by which Elpida pledged and/or assigned to the DIP Lender interests in assets located within the territorial jurisdiction of the United States as security for the loan facility with a maximum commitment amount of ¥15,000,000,000, provided by the DIP Lender to Elpida in the Japan Proceeding. In support of the Motion, the Foreign Representatives respectfully state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion in this District is proper under 28 U.S.C. § 1410.

BACKGROUND

A. Elpida's Insolvency Cases

2. Elpida is a corporation organized and existing under the laws of Japan. It is a leading manufacturer of dynamic random access memory integrated circuits. Its principal office is located at 2-1, Yaesu 2-chome, Chuo-ku, Tokyo 104-0028, Japan.

3. 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 Tokyo District Court, Eighth Civil Division (the "Tokyo Court").

4. On March 14, 2012, the Tokyo Court-appointed supervisor of the Japan Proceeding, pursuant to the general powers conferred upon him under the JCRA and by order of the Tokyo Court, issued a consent empowering Mr. Yukio Sakamoto, Elpida's President and Chief Executive Officer and a member of its Board of Directors, to file this chapter 15 case as the foreign representative of Elpida.

5. 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 April 24, 2012, the Court entered its *Order Pursuant to 11 U.S.C. §§ 105, 1504, 1515, 1517, 1520, and 1521 Recognizing Foreign Representatives and Foreign Main Proceeding* (the "Recognition Order") [ECF No. 65]. Pursuant to the Recognition Order, the Foreign Representatives are authorized to administer Elpida's assets and affairs in the United States.

B. The DIP Financing and Pledge

6. On April 27, 2012, the Foreign Representatives, in their respective capacities of trustees of Elpida in the Japan Proceeding, entered into a Facility Agreement (the “Facility Agreement”) between Elpida and the DIP Lender pursuant to which the DIP Lender agreed to provide Elpida with financing through December 28, 2012 and up to a maximum commitment amount of ¥15,000,000,000 (the “DIP Facility”).¹

7. To collateralize the DIP Facility, Elpida and certain of its subsidiaries, including, but not limited to Elpida Memory (USA), Inc. (“Elpida USA”), Elpida’s subsidiary based in the United States, entered into separate security agreements and related agreements, each with respect to the respective assets of Elpida and its subsidiaries. As set forth herein, certain of these security agreements created liens on assets of Elpida that are located in the United States. Specifically, (a) Elpida, pursuant to a Security Assignment Agreement (the “Assignment Agreement”), assigned to the DIP Lender certain trade receivables owing to Elpida from Elpida USA, under a Sales and Purchase Agreement, dated March 1, 2001, between Elpida as seller and Elpida USA as purchaser (the “Sales and Purchase Agreement”); (b) Elpida, pursuant to a Participation Agreement (the “Participation Agreement”), granted the DIP Lender a participation interest in certain trade receivables from customers of Elpida, including, but not limited to, a customer of Elpida based in the United States; and (c) Elpida pledged to the DIP Lender its shares in Elpida USA pursuant to a Share Pledge Agreement (the “Pledge Agreement”).² Each of these agreements is described in more detail herein.

¹ Applying the JPY/USD foreign exchange rate as of September 20, 2012, the equivalent USD amount is approximately \$190,000,000.

² Additionally, certain of Elpida’s non-debtor subsidiaries jointly and severally guaranteed the DIP Facility.

8. A unofficial translated copy of the Facility Agreement is attached hereto as Exhibit A, and unofficial translated copies of the Assignment Agreement, the Participation Agreement, and the Pledge Agreement are attached hereto as Exhibits B, C, and D, respectively.

RELIEF REQUESTED

9. By this Motion, the Foreign Representatives seek Court approval, under section 363 and 1520 of the Bankruptcy Code, of those portions of the Assignment Agreement, the Participation Agreement, Pledge Agreement that relate to assets of Elpida that are located within the territorial jurisdiction of the United States. A proposed form of Order is attached hereto as Exhibit E.

10. Elpida needed the DIP Facility in order to continue business operations during the Japan Proceeding and to maximize value for its creditors. A condition of obtaining the DIP Facility pursuant to the terms set forth in the Facility Agreement was the granting of security interests to the DIP Lender to secure Elpida's obligations. The Foreign Representatives, in their capacity as trustees for Elpida in the Japan Proceeding, determined, in their business judgment, that the granting of these security interests was in the best interest of Elpida and its creditors because it enabled Elpida to obtain financing that was crucial to Elpida surviving during its reorganization proceedings, which is in the best interest of Elpida and its creditors. The Foreign Representatives submit that Elpida, after a period of due diligence, could not have obtained financing on terms as beneficial to Elpida without granting security interests in certain of Elpida's assets located within the territorial jurisdiction of the United States.

SUMMARY OF THE AGREEMENTS

11. Below are summaries of the pertinent terms of the Facility Agreement, the Security Agreement, the Participation Agreement, and the Pledge Agreement.³

A. The Facility Agreement

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| <u>Effective Date</u> | April 27, 2012 |
| <u>Maximum Commitment Amount</u> | ¥15,000,000,000 (equivalent to approximately \$190 million as of Sept. 20, 2012) |
| <u>Amount Outstanding</u> | ¥8,000,000,000 (equivalent to approximately \$102 million as of Sept. 20, 2012) |
| <u>Maturity Date</u> | December 28, 2012 |
| <u>Use of Proceeds</u> | The proceeds of each borrowing shall be used for operating capital. |
| <u>Interest Rate</u> | 9.45% per annum (subject to adjustment) |
| <u>Arrangement Fee</u> | ¥52,500,000 (equivalent to approximately \$650,000 as of Sept. 20, 2012) |
| <u>Governing Law</u> | Japan |

B. The Assignment Agreement

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| <u>Effective Date</u> | May 18, 2012 |
| <u>Assignor</u> | Elpida Memory, Inc. |
| <u>Assignee</u> | Shinseigin Finance Co., Ltd. |

³ These summaries are provided for informational purposes only. To the extent there is a discrepancy between any summary and the terms of the applicable agreement, the terms of the agreement shall control.

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| <u>Assigned Receivables</u> | Assignment by way of security of (i) any and all receivables (including future receivables), to be received by Elpida from Elpida USA under or pursuant to the Sales and Purchase Agreement, and (ii) all rights of Elpida against Elpida USA regarding such receivables pursuant to the Sales and Purchase Agreement. |
| <u>Secured Obligations</u> | All obligations and liabilities due by Elpida to the DIP Lender under the Facility Agreement. |
| <u>Application of Receivables</u> | The DIP Lender shall apply any receivables received pursuant to the Assignment Agreement to repayment of Elpida's obligations under the Facility Agreement. |
| <u>Application of Receivables</u> | The DIP Lender shall apply any receivables received pursuant to the Assignment Agreement to repayment of Elpida's obligations under the Facility Agreement. |
| <u>Governing Law</u> | Japan |

C. The Participation Agreement

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| <u>Effective Date</u> | May 18, 2012 |
| <u>Assignor</u> | Elpida Memory, Inc. |
| <u>Assignee</u> | Shinseigin Finance Co., Ltd. |
| <u>Interests Subject to Participation</u> | Any and all financial profits and losses on receivables (including future receivables), to be received by Elpida from customers. |
| <u>Secured Obligations</u> | All obligations and liabilities due by Elpida to the DIP Lender under the Facility Agreement. |
| <u>Governing Law</u> | Japan |

D. The Pledge Agreement

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|-----------------------|---------------------------------------|
| <u>Effective Date</u> | May 18, 2012 |
| <u>Pledgor</u> | Elpida Memory, Inc. |
| <u>Pledgee</u> | Shinseigin Finance Co., Ltd. |
| <u>Pledged Assets</u> | 100% of Elpida's shares in Elpida USA |

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| <u>Pledge Exercise Event</u> | The occurrence of (1) acceleration of the Facility Agreement, or (2) the passing of the Facility Agreement maturity date without the secured obligations of the DIP Facility being paid in full. |
| <u>Secured Obligations</u> | All obligations and liabilities due by Elpida to the DIP Lender under the Facility Agreement and all obligations and liabilities due by Elpida under the Pledge Agreement. |
| <u>Governing Law</u> | New York |

BASIS FOR RELIEF REQUESTED

12. The granting of a security interest in certain of Elpida’s assets located within the territorial jurisdiction of the United States was in the best interests of Elpida and its creditors because it enabled Elpida to secure financing that was and continues to be essential to Elpida’s ability to continue business operations during the Japan Proceeding. Section 363(b) provides, in pertinent part, 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.” 11 U.S.C. § 363(b)(1). With respect to a case commenced under chapter 15 of the Bankruptcy Code, section 363 is made applicable to property of a debtor that is “within the territorial jurisdiction of the United States” pursuant to section 1520 of the Bankruptcy Code. 11 U.S.C. §1520(a)(2).

13. Although section 363 of the Bankruptcy Code does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, courts in this district and elsewhere have found that a debtor’s sale or use of assets outside the ordinary course of business should be approved if the debtor can demonstrate a sound business justification for the proposed transaction. See, e.g., In re Eagle Picher Holdings, Inc., 2005 Bankr. LEXIS 2894, at ¶ 3 (Bankr. S.D. Ohio 2005); In re Martin, 91 F.3d 389, 395 (3d Cir. 1996); In re Abbotts Dairies of Penn., Inc., 788 F.2d 143 (3d Cir. 1986); In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983). Once the Foreign Representatives, on behalf of Elpida, articulate a valid business justification, “[t]he business judgment rule ‘is a presumption that in

making the business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” In re S.N.A. Nut Co., 186 B.R. 98 (Bankr. N.D. Ill. 1995); see also In re Integrated Res., Inc., 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992); In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“a presumption of reasonableness attaches to a Debtor’s management decisions”).

14. The use of a debtor’s assets is appropriate where there are sound business reasons behind such a determination. See Myers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996); see also Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp., (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (Bankr. D. Del. 1999); In re Del. & Hudson Ry. Co., 124 B.R. 169, 176 (D.D.C. 1991); Stephens Indus., Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986) (sale of substantially all assets of estate authorized where “a sound business purpose dictates such action”). Elpida has a sound business justification for granting the security interests set forth in the Assignment Agreement, the Participation Agreement, and the Pledge Agreement.

15. Upon the commencement of the Japan Proceeding, Elpida was in critical need of substantial financing to continue business operations. Elpida approached seven different financial institutions, but only two submitted proposals to provide Elpida with financing. Both of these proposals required Elpida’s entry into security agreements similar to those described herein. Elpida and its advisors reviewed the proposals and determined that the terms and conditions of the proposal submitted by the DIP Lender were the most advantageous to Elpida because, among other things, the interest rate was lower. The DIP Lender required that the DIP Facility be secured by all of the assets set forth in the various security agreements attached to the

Facility Agreement, and guaranteed by Elpida's non-debtor subsidiaries because nearly all of Elpida's tangible assets which were eligible to be collateralized, such as its factory, were already subject to liens, and Elpida's other asset, its intellectual property, is not easily monetizable and not an asset class that the DIP Lender was prepared to give full credit for in determining a borrowing base. For these reasons it was determined that it was necessary for Elpida to grant the security interests set forth in the attachments to the Facility Agreement, including those relating to Elpida's assets located in the United States, as set forth in the Assignment Agreement, the Participation Agreement, and the Pledge Agreement.

16. Additionally, based on Elpida's current financial condition and the current path of Elpida's reorganization proceedings, the Foreign Representatives submit that Elpida should have sufficient liquidity to satisfy all of its obligations under the Facility Agreement in the ordinary course while still providing unsecured creditors with a material recovery on account of their claims. Granting the relief requested herein will enable Elpida to continue its restructuring efforts to the benefit of its estate and creditors.

NOTICE

17. Notice of this Motion has been given via first-class United States mail 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) the DIP Lender, (iv) all parties entitled who have requested notice pursuant to Bankruptcy Rule 2002 and (v) all parties that have filed a notice of appearance in Elpida's chapter 15 case. The Foreign Representatives submit that no other or further notice need be given in light of the circumstances of this chapter 15 case.

NO PRIOR REQUEST

18. No previous request for the relief requested herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Foreign Representatives respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit E, (i) granting the relief sought herein and (ii) granting the Foreign Representatives such other and further relief as the Court deems just and proper.

Dated: September 21, 2012
Wilmington, Delaware

RICHARDS, LAYTON & FINGER, P.A.

By: /s/ Lee E. Kaufman

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