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.	:	
	:	**Hearing Date: September 6, 2012 at 2:00 p.m.**
	:	**Objection Date: August 30, 2012 at 4:00 p.m.**
	:	**Re: Docket No. 65**

MOTION OF THE STEERING COMMITTEE OF THE AD HOC GROUP OF BONDHOLDERS OF ELPIDA MEMORY, INC. TO MODIFY THE ORDER RECOGNIZING FOREIGN REPRESENTATIVES AND FOREIGN MAIN PROCEEDING

Certain members[1] of the steering committee of the Ad Hoc Group of Bondholders (the "Bondholders") of Elpida Memory, Inc. ("Elpida"), by and through their undersigned counsel, respectfully submit this motion (the "Motion") for entry of an order[2] modifying the Court's Order Pursuant to 11 U.S.C. §§ 105, 1504, 1515, 1517, 1520, and 1521 Recognizing Foreign Representatives and Foreign Main Proceeding, dated April 24, 2012 (Dkt. No. 65) (the "Recognition Order") (i) to condition the relief granted in the Recognition Order by requiring certain protections with respect to all property of Elpida's estate within the territorial jurisdiction of the United States (the "Elpida U.S. Assets") and (ii) to clarify that the automatic stay imposed by the Recognition Order does not prevent the Bondholders from commencing, if necessary and appropriate, an involuntary bankruptcy case against Elpida under 11 U.S.C. § 303. In connection with the Motion, the Bondholders respectfully represent as follows:

[1] These members are Linden Advisors, LIM Advisors, Owl Creek Asset Management, L.P. and Taconic Capital Advisors LP, which collectively owned approximately 23 billion yen (USD $293 million) of bonds issued by Elpida as of July 31, 2012.

[2] Attached hereto as Exhibit A is a proposed form of order.

PRELIMINARY STATEMENT

On April 24, 2012, this Court entered the Recognition Order, which recognizes Elpida's ongoing Japanese restructuring proceeding as a foreign main proceeding under chapter 15. That Order also extends the protections of sections 361 and 362 of title 11 of the United States Code (the "Bankruptcy Code") to property of Elpida within the territorial jurisdiction of the United States. Entry of the Recognition Order was based in part on Elpida's representation to the Court that this chapter 15 case was "filed in an effort to maximize recoveries to, and provide for an equitable distribution of value among, all creditors." (Dkt. No. 2 at ¶ 28.)

Following the entry of the Recognition Order, however, significant concerns have arisen as to whether, in fact, Elpida is attempting to maximize the value of its estate and recoveries to its prepetition creditors (who the Bondholders understand hold in excess of USD $5.4 billion in allowed claims against Elpida). Specifically, on July 2, 2012, Elpida announced that it had entered into a sponsorship agreement (the "Sponsorship Agreement") pursuant to which it will sell its stock to Micron Technology, Inc. ("Micron"). That stock sale (the "Proposed Sale") will be made free and clear of all of Elpida's prepetition liabilities, and prepetition creditors will receive cash and new paper issued by the reorganized entity, which the Bondholders anticipate will be worth less than USD $1.8 billion.

Despite the drastic consequences of the Proposed Sale on Elpida's secured and unsecured creditors, virtually no disclosures have been made regarding, among other things, the fair market value of Elpida and its subsidiaries, the terms of the Proposed Sale, or the range of post-sale recoveries to Elpida creditors. The unwillingness of Elpida, its court-appointed trustees and Micron to discuss material aspects of their proposed arrangement creates significant concern for any Elpida creditor. The minimal information that the Bondholders have obtained to date,

including a highly redacted version of the Sponsorship Agreement, raises serious red flags regarding the substantive propriety of the Proposed Sale. These concerns include:

- Elpida's two court-appointed Trustees, one of whom will apparently be employed by Micron post-emergence, effectively precluded themselves by the terms of the Sponsorship Agreement from discussing any alternate transactions or disclosing material information without Micron's consent.

- No other creditor representative with any meaningful power and with fiduciary duties owed to creditors participated in, or signed off on, Elpida's sale decision.

- No transparent or stalking-horse bid process has taken, or is scheduled to take, place, and the Trustees have repeatedly rebuffed the Bondholders' attempts to discuss creditor-led initiatives to provide substantially more value to Elpida's creditors and estate. The Bondholders are willing to "put their money where their mouths are," but neither they nor any other creditor are being given access to Elpida's most basic financial information.

- The total headline consideration for the Proposed Sale is 200 billion yen, comprised of an upfront cash payment of 60 billion yen (subject to certain downward purchase price adjustments) and 140 billion yen to be paid out of future revenue streams generated by a portion of Elpida's reorganized business. Even assuming that Micron intends to cause the installment payments to be made in full on the scheduled dates, the net present value of the Proposed Sale, discounted using the weighted average cost of capital of Micron, would not exceed 143 billion yen (USD $ 1.8 billion).

- The 143 billion yen present value of the Proposed Sale is a best case view of the transaction, yet the value appears to be substantially less than Elpida's liquidation value. For example, the current assets (including cash, accounts receivable and inventory) of Elpida (excluding its subsidiaries) were last reported as approximately 145.7 billion yen. Moreover, as set forth below, Elpida's 65% stake in Rexchip Electronics Corporation ("Rexchip") that Micron will be obtaining in connection with the Proposed Sale has a public market value of 45 billion yen and an implied private value of 72.3 billion yen. Additionally, Elpida's property, plant and equipment ("PP&E") was recently valued by the Trustees at 93.5 billion yen. No disclosures have been made which would explain why the Trustees would agree to a sale at 143 billion yen when the demonstrable value of a portion of Elpida's assets exceeds 284 billion yen.

At this time, the Bondholders are not seeking to debate in this Court the substantive merits of the Proposed Sale to Micron. This Motion, however, is occasioned out of a mounting concern that the Proposed Sale may turn out to be an illegitimate transfer of enterprise value

from old equity to new equity at the expense of existing creditors, without any protections of a fair, open or rational sale and reorganization process. If that proves true, the Bondholders have serious doubts that this or any other U.S. court would continue to allow the Recognition Order to remain in full effect and to forestall U.S. creditors from recovering on claims against Elpida through its assets within the United States. See, e.g., Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (in re Vitro, S.A.B. de C.V.), No. 11-33335, Adv. No. 12-03027, 2012 WL 2138112 (Bankr. N.D. Tex. June 13, 2012) (denying enforcement of a Mexican judgment, which would have permanently enjoined suits in the United States against the chapter 15 debtor's non-debtor subsidiaries, as contrary to United States public policy). As a result, and merely as a means of maintaining the status quo, the Bondholders now seek narrow modifications to the Recognition Order. Those modifications are related solely to those assets protected by the Order – property of Elpida within the territorial jurisdiction of the United States – and will allow the Court to protect U.S. creditors by imposing the following conditions to the continued relief granted therein, as follows:

1. Elpida must promptly file a schedule listing the nature, amount and location of the Elpida U.S. Assets (a) at the time of the filing of the chapter 15 petition and (b) as of the date of entry of the order granting the Motion;

2. Elpida must provide the Court and parties-in-interest with periodic written status reports as to its intent to transfer, transfer control of, or otherwise dispose of any Elpida U.S. assets, either directly or indirectly to any third person;

3. Elpida must not, without this Court's approval, transfer, transfer control of, or hypothecate outside of the territorial jurisdiction of the United States any Elpida U.S. Assets, directly or indirectly, without thirty days' notice to the Court and parties-in-interest, with such notice to be shortened for good cause shown;

4. Elpida must not, without this Court's approval, sell or otherwise transfer control of, directly or indirectly, any Elpida U.S. Assets to any third party without thirty days' written notice to the Court and parties-in-interest, with such notice to be shortened for good cause shown; and

5. The Court will retain jurisdiction to provide for additional restrictions should future circumstances warrant.

These conditions, the Bondholders believe, will serve to level the playing field, allowing U.S. creditors to protect their recoveries if the Court lifts the Recognition Order, without adversely affecting Elpida's reorganization efforts. Moreover, because the Bondholders anticipate that Elpida might contest this Court's power to implement the foregoing relief in this proceeding, the Bondholders request that the Court issue an order clarifying that the automatic stay imposed under the Recognition Order does not prevent the Bondholders from commencing, if necessary and advisable, an involuntary bankruptcy case against Elpida in this Court.

For the reasons set forth below, the Bondholders respectfully request that the Court grant the Motion.

STATEMENT OF FACTS

A. Procedural History

1. Elpida is a manufacturer of Dynamic Random Access Memory ("DRAM") integrated circuits. Its principal office is located in Tokyo, Japan, and it is a parent company with four Japanese subsidiaries, nine non-Japanese subsidiaries, and two equity-method affiliates. (Declaration of Yukio Sakamoto, executed on March 19, 2012 (Dkt. No. 5) ("Sakamoto Decl.") ¶ 3.)

2. Elpida is the subject of a proceeding (the "Japan Proceeding") in the Tokyo District Court (the "TDC") under the Corporate Reorganization Law of Japan (the "CRJ"). The TDC has appointed Mr. Yukio Sakamoto, Elpida's President and Chief Executive Officer, and Mr. Nobuaki Kobayashi, a Tokyo insolvency attorney, to serve as co-trustees in the Japan Proceeding (the "Trustees").

3. On March 19, 2012 (the "Petition Date"), Mr. Sakamoto, on behalf of Elpida, filed a chapter 15 petition for recognition of the Japan Proceeding in this Court. (Dkt. No. 1.) In his Verified Petition for Recognition and Chapter 15 Relief, dated March 19, 2012 (Dkt. No. 2), Mr. Sakamoto represented that "[t]his Chapter 15 case is being filed in an effort to maximize recoveries to, and provide for an equitable distribution of value among, all creditors." (Dkt. No. 2 at ¶ 28.) Mr. Sakamoto also represented as follows regarding Elpida's connections to the United States:

> Elpida sells its DRAM products in the United States through its wholly-owned subsidiary Elpida Memory (USA) Inc., which is a Delaware Corporation ("Elpida USA"). . . . Elpida's principal assets in the United States include the stock of its subsidiary, Elpida USA, accounts receivable from Elpida USA, certain patents registered in the United States, and license or sublicense (or other) agreements involving United States patents, patent applications, or intellectual property rights.

(Sakamoto Decl. ¶ 5.) Elpida has made no further disclosures in this Court regarding Elpida's assets in the United States.

4. As of the Petition Date, the Japan Proceeding had just commenced, and there appeared to be no basis for questioning representations being made to the Court. Thus, on April 17, 2012, the Bondholders filed a limited statement and reservation of rights in respect of Elpida's petition, highlighting the concerns the Bondholders had with respect to the lack of procedural protections for creditors in the TDC and the fact that the lack of such procedural safeguards could be detrimental to case constituents if not carefully managed. (Dkt. No. 52.)

5. On April 24, 2012, this Court entered the Recognition Order, which provides, among other things, for (i) recognition of the Japan Proceeding as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code, (ii) application of the automatic stay pursuant to section 362 of the Bankruptcy Code with respect to Elpida and Elpida's property in the

territorial jurisdiction of the United States, (iii) an injunction against attempts to seize or attach Elpida's assets in the United States without the consent of its foreign representatives, and (iv) application of the automatic stay pursuant to section 362 of the Bankruptcy Code to Elpida's wholly owned subsidiary in the United States, Elpida Memory (USA) Inc., and certain Down-stream Customers (as defined in the Recognition Order). (Dkt. No. 65.) The Recognition Order further provides that parties may move the Court for relief from the automatic stay provisions of the order for "good cause" shown and that the Court retains jurisdiction with respect to modification of the order. (Recognition Order at ¶¶ 5, 14.)

B. The Proposed Sale

6. Following entry of the Recognition Order, events began to unfold in the Japan Proceeding. On July 2, 2012, the Trustees, Elpida's wholly-owned subsidiary, Akita Memory, Inc. ("Akita"), and Micron entered into a definitive sponsor agreement for Micron to acquire and support Elpida. (Elpida and Micron 7/2/2012 joint press release, a copy of which is attached hereto as Exhibit B; Micron 7/2/2012 8-K, a copy of which is attached hereto as Exhibit C.) Elpida's and Micron's joint press release announcing the Proposed Sale provided the following description:

> Under the agreement, 200 billion Yen (approximately USD $2.5 billion assuming 80 Yen/USD) total consideration, less certain reorganization proceeding expenses, will be used to satisfy the reorganization claims of Elpida's secured and unsecured creditors. Micron will acquire 100 percent of the equity of Elpida for 60 billion Yen (approximately USD $750 million) to be paid in cash at closing. In addition, 140 billion Yen (approximately USD $1.75 billion) in future annual installment payments through 2019 will be paid from cash flow generated from Micron's payment for foundry services provided by Elpida, as a Micron subsidiary. As a result of these payments, all pre-petition debt obligations of Elpida will be fully discharged under the corporate reorganization proceedings. The agreement also calls for Micron to provide certain financing

> support for Elpida capital expenditures, subject to specified conditions, and to maintain Elpida's operations and employees.

(Elpida and Micron 7/2/2012 joint press release (Exhibit B).) Micron, in its most recent quarterly filing, explained the timeline for the Proposed Sale:

> The trustees of the Elpida Companies are currently required to submit plans of reorganization to the court on or before August 21, 2012, which plans will then be subject to court and creditor approval under applicable Japanese law. The sponsor agreement provides that the plans of reorganization submitted by the trustees are to contain terms consistent with the provisions of the sponsor agreement.
>
> The consummation of the sponsor agreement is subject to various closing conditions, including but not limited to approval by the Tokyo District Court of Elpida's reorganization plans and receipt of regulatory approvals. The transaction is currently anticipated to close in the first half of calendar 2013.

(Micron 7/9/2012 10-Q, a copy of which is attached hereto as Exhibit D.)

7. On July 31, 2012, Micron filed a form 8-K/A with the Securities and Exchange Commission attaching as an exhibit a redacted English translation of the Sponsorship Agreement[3] (the "Redacted Translation;" a copy of the 8-K/A including such agreement is attached hereto as Exhibit E). The Redacted Translation omits entire portions of the agreement, including key definitions, as well as numerous attachments thereto. (Redacted Trans. at 3.) To date, neither Elpida nor the Trustees have publicly disclosed an unredacted version of the Sponsorship Agreement.

C. Efforts of the Bondholders to Obtain Information from the Trustees

8. Even before the Court entered the Recognition Order, the Bondholders' advisors began a dialogue with the Trustees and their deputies concerning the Bondholders' interest in

[3] The Micron 7/31/12 8-K/A describes the Redacted Translation as follows: "English translation of Agreement on Support for Reorganization Companies with Nobuaki Kobayashi and Yukio Sakamoto, the trustees of Elpida Memory, Inc. and its wholly-owned subsidiary, Akita Elpida Memory, Inc. dated July 2, 2012."

working cooperatively with Elpida to agree upon a consensual plan of reorganization. Beginning in March 2012, the Bondholders' advisors made numerous requests for information concerning Elpida's financial condition and the sale process, including at two in-person meetings with Elpida's deputy trustees, in April and May 2012. The Bondholders also indicated that they would, at the appropriate time, be willing to execute a confidentiality agreement so that they could receive the requested information regarding Elpida. Nevertheless, to date, Elpida and its Trustees have refused to disclose material information, including key basic information such as consolidated balance sheets reflecting cash on hand and other working capital balances, information regarding other bids received during the sale process, and the complete terms of the Proposed Sale.[4]

JURISDICTION AND VENUE

9. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(P). Venue is proper before this Court pursuant to 28 U.S.C. § 1410. The statutory predicates for the relief requested herein are sections 105(a), 1522(a) and (c), and 1528 of the Bankruptcy Code.

RELIEF REQUESTED

10. By this Motion, the Bondholders request entry of an order, pursuant to sections 105(a), 1522(a) and (c), and 1528 of the Bankruptcy Code and paragraphs 5 and 14 of the Recognition Order, substantially in the form attached hereto as Exhibit A. That proposed order modifies the Recognition Order such that it (i) imposes narrow disclosure and notice conditions

[4] The redacted Sponsorship Agreement may explain the Trustees' silence. The Sponsorship Agreement prevents the Trustees from disclosing certain "Confidential Information" (as defined in an undisclosed confidentiality agreement that predates the Japan Proceeding) presumably concerning the Proposed Sale to creditors, either publicly or privately, without first consulting with Micron and requires the Trustees to attempt to limit the scope of information provided to the minimum required. (Redacted Trans. Art. 26(4)(ii).) Of even more concern, the Sponsorship Agreement prevents the Trustees from even discussing alternative transactions with creditors or other parties. (Redacted Trans., Art. 10(13).)

on the automatic stay relief granted to Elpida, and (ii) clarifies that the automatic stay does not prevent the Bondholders from commencing a plenary chapter 11 case against Elpida under section 303 of the Bankruptcy Code.

ARGUMENT

I.

THE COURT SHOULD MODIFY THE RECOGNITION ORDER TO PROTECT INTERESTS OF U.S. CREDITORS

11. The Recognition Order currently exists as a one-way street. Most critically, it shelters all of the Elpida U.S. Assets and precludes any attempt to recover against those assets, including any attempts by U.S. creditors to commence collection actions or to obtain preliminary relief in courts in the United States. At the same time, it places no conditions on the broad protections granted to Elpida. The Order does not prohibit transfer or disposition of Elpida's assets; it does not require the posting of a bond (as expressly contemplated by section 1522(b) of the Bankruptcy Code); it does not even require Elpida to disclose what assets are being protected by the Order. As it stands, nothing in the Recognition Order expressly prevents Elpida from transferring all of its assets outside the United States, away from the reach of its U.S. creditors, without notice to the Court or any party-in-interest in this proceeding.

12. The Bondholders' concern is that, in light of the significant deficiencies in the Proposed Sale, circumstances may arise in which the Court will not continue to recognize the Japan Proceeding (or aspects of that proceeding) and will vacate or materially modify the Recognition Order. In such an event, Elpida's U.S. creditors should not be disadvantaged and should be placed in no worse a position than if the Court had never entered the Recognition Order at all. The modifications requested herein are intended to effectuate just that result.

A. The Court Has Authority To Grant the Requested Modifications

13. There is ample authority for the Court to require appropriate modifications to the Recognition Order. First, the Recognition Order itself provides for modification, stating that "any party may move the Court for relief from the restrictions of paragraph 3 and 4 [containing the automatic stay provisions] for such good cause shown" (Recognition Order at ¶ 5) and that the Court retains jurisdiction over any request by an entity for relief from the provisions of this Order, for cause shown (Recognition Order at ¶ 14). (The Recognition Order does not provide any definition of "cause" nor does there appear to have been any discussion at the time of entry of the Order as to what might constitute cause.)

14. Second, even in the absence of paragraphs 5 and 14 of the Recognition Order, section 1522 of the Bankruptcy Code specifically authorizes courts to modify recognition orders:

> (a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.
>
> * * *
>
> (c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief. . . .

11 U.S.C. § 1522. Section 1522 of the Bankruptcy Code "gives the bankruptcy court broad latitude to mold relief to meet specific circumstances." In re Int'l Banking Corp. B.S.C., 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010) (declining to vacate attachment orders and release funds until validity of creditors' attachment orders had been resolved) (citation omitted). When considering whether to modify or terminate any discretionary relief, courts must "tailor relief and conditions as to balance the relief granted . . . and the interests of those affected by such relief." In re Tri-Cont'l Exch. Ltd., 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006). One court has also

stated that "section 1522(a) implements and harmonizes with section 1501(a)'s policy statement: in light of section 1501(a), the Court shall protect the parties' interests by implementing fair, efficient and, it is hoped, cooperative procedures designed to maximize the value of the debtor's assets for distribution." In re SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006).

15. Third, section 105(a) of the Bankruptcy Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Courts have invoked their section 105(a) powers in modifying prior court orders. See, e.g., In re Argose, Inc., 377 B.R. 148, 150-51 (Bankr. D. Del. 2007) (modifying a court order in light of considerations of equity); In re Bearingpoint, Inc., 453 B.R. 486, 495-98 (Bankr. S.D.N.Y. 2011) (modifying a court order, finding "good reason" therefor in light of a previous mistake of fact and new considerations brought to the court's attention).

16. As set forth below, modification of the Recognition Order is warranted under the terms of the Recognition Order itself as well as sections 105(a), 1522(a) and (c), and 1528 of the Bankruptcy Code.

B. There Is a Substantial, Growing Risk That This Court Might Not Recognize the Effects of an Order in the Japan Proceeding Approving the Proposed Sale

17. In its petition for recognition and chapter 15 relief in this Court, Elpida represented to the Court that it sought chapter 15 relief in an effort to "maximize recoveries" for "all creditors." For reasons set forth below, the Proposed Sale does not appear to do that. Further, although the Bondholders have actively sought to protect their rights in the TDC, including by attempting to work toward a consensual reorganization with the Trustees and by filing position papers (translated copies of which were filed in this Court (Dkt. Nos. 72, 73, 90)) with the TDC, they may have no meaningful means under the CRJ to compel Elpida to maximize value. The CRJ does not require that creditors be given notice and a reasonable opportunity to

be heard before the Proposed Sale is approved. Creditors have virtually no influence in the process other than their ability to vote on a plan at the end of a case for which they may, as here, lack adequate information. Moreover, under the CRJ, the Trustees would be permitted to move the Elpida U.S. Assets outside the United States in order for Elpida to recover possession of such assets and, as long as Elpida maintained ownership of such assets, would not need to provide creditors with notice and an opportunity to be heard. Most egregiously, based on currently available information, the Proposed Sale could be consummated at a price substantially lower than liquidation value of the estate with substantially all of the value of the enterprise accreting to new equity and old management at the expense of creditors holding valid claims.

18. Under such circumstances, this Court could properly refuse to recognize a TDC order approving the flawed Proposed Sale. See, e.g., In re Sivec SRL, No. 11-80799, 2011 WL 3651250, at *4 (Bankr. E.D. Okla. Aug. 18, 2011) (lifting the stay of an action between the debtor and a contract counterparty that was imposed in connection with a chapter 15 petition in order "[t]o insure that [counterparty] Zeeco's fundamental rights of notice and opportunity to be heard are protected"); Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (in re Vitro, S.A.B. de C.V.), No. 11-33335, Adv. No. 12-03027, 2012 WL 2138112, at *11-13 (Bankr. N.D. Tex. June 13, 2012) (concluding that "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States" and denying a motion to enforce a Mexican judgment that extinguished such claims against non-debtors).

1. The Bondholders Have Legitimate Concerns with Respect to the Proposed Sale

a. Elpida Has Made Almost No Disclosure with Respect to the Proposed Sale

19. The hallmark of a fair reorganization process is transparency. In re Funk, 146 B.R. 118, 123 (D.N.J. 1992) ("There is nothing which goes more to the heart of the integrity of the bankruptcy process than the obligation of debtors and their attorneys to make full and fair disclosure of the debtor's financial affairs."); see also Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.), 25 F.3d 1132, 1136 (2d Cir. 1994) ("Of prime importance in the reorganization process is the principle of disclosure. . . . 'Full and fair' disclosure is required during the entire reorganization process; it begins 'on day one, with the filing of the Chapter 11 petition.'") (citation omitted, emphasis in original); Jacobowitz v. Cadle Co. (In re Jacobwitz), 309 B.R. 429, 435 (S.D.N.Y. 2004) (stating that "[t]he debtor's creditors are entitled to fair treatment during this liquidation process and the longstanding rule in bankruptcy that '[c]omplete disclosure by the debtor is a quid pro quo for discharge of debts' stems from this duty of fair treatment") (citing Norton Bankr. L. & Prac. § 74:9 (2d. ed. 2003)). To date, the Bondholders (and, upon information and belief, Elpida's other creditors) have not received information to evaluate fully the propriety and fairness of the Proposed Sale, even though such sale could have severe consequences on their rights.[5] Certainly, disclosure under Japanese restructuring law is not as broad as in the United States. For example, the CRJ requires only minimal mandatory reporting and disclosure during the pendency of a case and does not

[5] Nor have the Bondholders received meaningful disclosures with respect to the Elpida U.S. Assets, which are protected by the automatic stay Elpida obtained in this Court. Indeed, the only information the Bondholders have received concerning these assets is the generic description set forth supra paragraph 3. Thus, the Bondholders are requesting a detailed schedule of such assets, as set forth in the attached form order, and the Bondholders reserve the right to seek discovery pursuant to Bankruptcy Rule 2004 concerning the Elpida U.S. Assets or request the appointment of an examiner.

require Elpida to provide any disclosures comparable to a disclosure statement in the United States that would enable creditors to make an informed vote on a proposed plan of reorganization. In response to the lack of material mandatory reporting, the Bondholders have met formally with the Trustees' deputies on two occasions and have repeatedly asked them for greater disclosure and transparency, including concerning Elpida's financial condition. Elpida and the Trustees refused to provide information. In fact, when the Bondholders requested disclosure of the terms of the Proposed Sale itself, the Trustees denied the request on the ground that the terms of the sale were subject to a non-disclosure agreement (presumably the same agreement referenced in the Sponsorship Agreement with Micron), despite the fact that the Bondholders offered to enter into a non-disclosure agreement on substantially the same terms.

20. Micron has now filed a redacted version of the Sponsorship Agreement, as a result of its SEC reporting obligations, but such agreement omits key terms and raises more questions than it answers. For example, Micron and Elpida previously disclosed that Micron would pay 60 billion yen to purchase Elpida's equity. Under Article 3 of the Redacted Translation, however, that 60 billion yen payment is subject to reduction by a term called the "Adjustment Amount," which is defined as follows:

> The amount equal to the sum of (x) the amount of Prepaid Claims in excess of 30 oku Yen, (y) the amount paid or payable in respect of [*] Claims, together with any other amounts with respect to [*] Claims as agreed between the Trustees and the Sponsor and (z) an amount equal to the Net Available Cash Shortfall determined in accordance with Attachment 20.2 hereto.

(Redacted Trans., Art. 2.)

21. Such definitions and redactions make it impossible for creditors to determine what the actual value of the initial upfront payment by Micron will be or to whom it will go. First, the type or name of the "Claims" in subsection (y) of the definition is redacted, making it

impossible to determine by how much the 60 billion yen will be reduced. Second, even after working through the complex web of definitions[6] that makes up "the Net Available Cash Shortfall" in Attachment 20.2, it is still impossible to gauge the potential amount of this adjustment. With little to no information regarding Elpida's current and projected cash position, accounts receivable, inventory, or accounts payable, creditors cannot even speculate what the impact of this adjustment might be on the supposed 60 billion yen payment for Elpida's stock.

22. Moreover, unlike in typical working capital adjustments in the United States, here, the adjustment is only downward, meaning that the upfront payment at closing cannot exceed 60 billion yen. (Redacted Trans. at 55 ("'Net Available Cash Shortfall' means (i) if Net Available Cash is positive, zero; or (ii) if Net Available Cash is negative, the lesser of (a) 160 oku yen and (b) the absolute value of Net Available Cash.").) Thus, if actual working capital is less than projected, Micron benefits from a decrease in its purchase price; if actual working capital is greater than projected, Micron's purchase price will remain the same despite the increased working capital position of the reorganized entity. Further, the Sponsorship Agreement requires the initial payment of 60 billion yen less the Adjustment Amount to be applied to pay all "Specified Common Benefit Claims" first and then to use the remaining amounts, if any, to pay Elpida's reorganization claims. (Redacted Trans., Art. 3(2).) The Redacted Translation defines "Specified Common Benefit Claims" to include, in addition to the Trustee's professional fees and expenses, "any amounts paid or payable in respect of [Elpida's and Akita's] [*]" and "any amounts paid or payable by [Elpida and Akita] in respect of the proposed settlement to be entered into between the [Elpida and Akita] and [*]." (Redacted Trans. Attachment 1, Art. 1.)

[6] Indeed, the majority of the Redacted Translation involves a complex web of definitions, making it (along with the fact that this is a translation from Japanese) very difficult to clearly understand the precise terms of the Proposed Sale from just this document and without the aid of further disclosures from Elpida, the Trustees, or Micron.

23. Similarly, Elpida and Micron have described the purchase price as including 140 billion yen in future installment payments to creditors, which, as described below, raises questions which the Redacted Translation only amplifies. For example, although the installment payments are to be used to satisfy creditor claims, the agreement does not include any mechanism for ensuring that the installment payments will be made on the scheduled dates. The Sponsorship Agreement does not provide that Micron will guarantee the installment payments. Nor does it provide that any interest will accrue on payments not timely made or that creditors will have any remedies if the payments are not timely made. While the Sponsorship Agreement prevents principal payments from being made on indebtedness to Micron within 60 days of the scheduled date of installment payments if cash is insufficient to make such payments (Redacted Transl., Art. 7(7)), there is no prohibition or restriction on Micron causing Elpida to dividend to Micron or layer additional debt. All of this makes the payment of the installment payments highly uncertain.

24. Thus, in light of the further questions and uncertainty raised by the information found in the Redacted Translation, and the fact that key information has been redacted from the translation purportedly due to confidentiality concerns, U.S. creditors are still missing key information concerning the sale. Similarly, to date, creditors have been unable to obtain key information concerning Elpida's financial condition, such as Elpida's current consolidated cash and working capital balances, that would allow creditors to attempt to evaluate the fairness of the Proposed Sale. Indeed, as the Trustees have refused to discuss the terms of the Proposed Sale or discuss alternative transactions, the Bondholders intend to file a competing plan of reorganization, but their efforts to do so have been significantly impaired by their lack of information concerning Elpida's financial condition and the Proposed Sale.

25. To the extent that disclosure remains so slight, it is unclear how this Court could evaluate, much less approve, the terms of a sale order affecting the Elpida U.S. Assets.

b. The Publicly Disclosed Terms of the Proposed Sale Raise Substantial Concerns as to Whether Elpida Is Maximizing Value for Creditors

26. Using the limited information available, the Bondholders have determined that the Proposed Sale could grossly undervalue Elpida and result in the shift of hundreds of millions of dollars of assets to Micron.

27. As an initial matter, the value of the consideration outlined in the Sponsorship Agreement is substantially less than the 200 billion yen purchase price announced. Of that amount, only 60 billion yen (which, as explained above, is subject to potentially material downward purchase price adjustments) is payable in cash on the closing date, while the remaining 140 billion will be paid out in six annual installments by Elpida and its wholly-owned subsidiary Akita. Those installment payments, as thus far disclosed, are highly contingent in nature. While the Redacted Translation includes a provision concerning an effort to ensure "more stable operating cash flows" to satisfy installment payment obligations through the adoption of a cost plus model (Redacted Trans. Art. 7(1)), as Micron has previously disclosed, "there can be no assurance that the [Elpida and Akita] will be able to generate sufficient cash flows to satisfy their installment payment obligations."[7] (Micron 7/9/2012 10-Q (Exhibit D) at 30.)

28. Given this apparent lack of certainty and the deferred timing of the installment payments, one has to discount the installment payments to reflect the time value of money and the risk associated with nonpayment. Using Micron's current weighted average cost of capital of

[7] Moreover, while Micron's and Elpida's joint press release states that the installment payments "will be paid from cash flow generated from Micron's payment for foundry services provided by Elpida, as a Micron subsidiary" (Elpida and Micron 7/2/2012 joint press release (Exhibit B)), no agreement setting forth the terms of such arrangement has been disclosed to the Bondholders.

10.67%[8] – a conservative discount rate here considering that only Elpida and Akita, and not Micron, are obligated to make the installment payments – the value of the installment payments as of December 31, 2012 is approximately 83 billion yen. Using the conservatively discounted installments, then, the total purchase price is only 143 billion yen, not 200 billion.

29. The discounted price bears almost no rational relation to the known value of Elpida's assets. Elpida has current assets that, standing alone, far exceed the purchase price. For example, the Bondholders understand that Elpida's most recently disclosed balance sheet (which does not include the assets of its subsidiaries) shows that Elpida's current assets (including cash, accounts receivables and inventory) exceeded 145.7 billion yen as of March 23, 2012. Moreover, Elpida holds a 65% stake in Rexchip, a manufacturing joint venture with Powerchip Technology Corporation ("Powerchip"), which has a public market value of 45 billion yen. As part of the Proposed Sale, Micron is also purchasing Powerchip's 24% of the venture for approximately 26.7 billion yen in an arms'-length transaction. (Elpida and Micron 7/2/2012 joint press release (Exhibit B).) That purchase price imputes a private market value of 72.3 billion yen for Elpida's corresponding 65% stake, without taking into consideration any control premium. Additionally, the Bondholders understand that Elpida's PP&E was recently valued by the Trustees at approximately 93.5 billion yen. Combined, the value of just these three categories of assets substantially exceeds the present value of Micron's purchase price.

c. The Proposed Sale Is the Product of a Flawed Process

30. In addition to concerns as to information and price, the Bondholders have serious concerns with respect to the process that led to the Proposed Sale, particularly the Trustees' approval of a transaction that is detrimental to Elpida's existing creditors. First, no official

[8] Micron's current weighted average cost of capital as reported by Bloomberg Financial on August 9, 2012 at 2:30 p.m. EST (a screenshot is attached hereto as Exhibit F).

unsecured creditors' committee or similar creditor body has been appointed or recognized under the CRJ. Although a neutral examiner, Mr. Atsushi Toki, has been appointed in the Japan Proceeding, he does not have the power or influence of an official creditors' committee and plays only a limited role in the proceedings. Upon information and belief, even the committee of secured creditors has been prevented from playing an active role in the sale process or receiving meaningful information regarding the Proposed Sale.

31. Second, the CRJ does not require a stalking-horse bid process to ensure public and transparent market testing of proposed sale values within the Japan Proceeding. And, the restrictions in the Sponsorship Agreement preventing the Trustees from even discussing alternative transactions with parties-in-interest, despite their fiduciary duties (Redacted Trans., Art 26(4)(ii)), suggest that no parties will be afforded the opportunity to outbid Micron in connection with the plan or sale approval practice. For example, the Redacted Translation effectively prevents the Trustees from discussing alternative plans of reorganization as follows:

> Unless and until this Agreement is terminated in accordance with its terms, the Trustees shall not, and shall make efforts as much as possible to a reasonable extent to cause Both Reorganization Companies not to, engage in any discussions or negotiations regarding or seek, support, approve or enter into any reorganization plan proposal or other transaction or arrangement that is inconsistent with the terms or purposes of this Agreement (any such plan, proposal, transaction or arrangement, an "Alternative Proposal").

(Redacted Trans., Art. 10(13) (emphasis added).) These types of provisions are particularly troubling given that the information disclosed thus far indicates that the purchase price grossly undervalues Elpida as set forth above, and the Bondholders understand that Micron stated in its July 2, 2012 conference call with investors that the DRAM market has significantly improved in recent months and is projected to continue to generate large profits.

32. Third, unlike most reorganization cases in Japan, the TDC has permitted Elpida to act as a debtor-in-possession. This is one of the few cases of which the Bondholders are aware in which such an arrangement was permitted. In light of these circumstances and the terms of the agreement accepted by Elpida, questions have arisen as to whether any fiduciary was advocating for the interests of creditors when the sale was approved. Indeed, the Trustees have bound themselves to a deal based on an inadequate purchase price and have been unwilling and apparently even contractually prohibited from discussing with other parties (including creditors) the possibility of developing other transactions that will generate greater value for creditors.

33. The Redacted Translation also apparently impairs the ability of the Trustees to share information with anyone outside Elpida or Micron, as the Redacted Translation provides that the Trustees may disclose Confidential Information (which is defined in an undisclosed confidentiality agreement that predates the Japan Proceeding) to:

> other recipients that need to know Confidential Information to carry out Both Companies' Reorganization Proceedings, provided that the Trustees shall consult with the Sponsor prior to disclosure of any such Confidential Information and make efforts as much as possible to a reasonable extent to limit the scope of such information to the minimum required . . .

(Redacted Trans., Art. 26(3)(4)(ii) (emphasis added).) These provisions have apparently had the effect of preventing the disclosure of key information to creditors, such as the Bondholders and the secured lenders, and blocking the Bondholders' attempts to discuss with Elpida consensual plans of reorganization that would benefit all constituents. Neither the Trustees nor Elpida has provided an explanation for why such onerous provisions, which have the effect of locking up the Proposed Sale without appropriate "fiduciary outs," have been accepted.[9]

[9] Finally, questions have arisen as to whether Elpida Trustee, Mr. Sakamoto, was acting under a conflict of interest when Elpida approved the Proposed Sale. Mr. Sakamoto has acted as Elpida's CEO both before and after the filing of the Japan Proceeding, and it appears that Micron intends to employ him in a high-level capacity after the

C. Reporting Requirements and Asset Transfer Conditions Can Protect U.S. Creditors in the Event the Recognition Order Is Later Vacated

34. In light of all the foregoing, the Court should modify the Recognition Order in order to provide at least minimal protections for the interests of Elpida's U.S. creditors. By granting the relief sought herein, the Court will implement fair and efficient procedures with respect to the Elpida U.S. Assets and ensure that the interests of all interested parties, including the Bondholders, are sufficiently protected. See In re SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) (recognizing that section 1522(a) calls for courts to "protect the parties' interests by implementing fair, efficient and, it is hoped, cooperative procedures designed to maximize the value of the debtor's assets for distribution"); see also In re Sivec SRL, No. 11-80799, 2012 WL 2953725, at *13 (Bankr. E.D. Okla. July 19, 2012) (granting modification or termination of initial relief granting a freezing of any funds held by U.S. creditors); In re Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009) (describing "sufficient protection" as embodying three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law.").[10]

Proposed Sale is consummated. This also raises concerns as to whether anyone was truly advocating for Elpida's creditors, and further disclosure is necessary regarding this issue.

[10] For the same reasons, the Recognition Order should also be modified pursuant to section 105. The requested relief is "necessary or appropriate" to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a). Relief granted under chapter 15 is to be narrowly tailored to serve the purposes of the chapter. See 11 U.S.C. §§ 1501(a)(1)(B)-(a)(4) ("The purpose of this chapter is to . . . provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of cooperation between the courts and other competent authorities of foreign countries involved in cross-border insolvency cases . . . [and] protection and maximization of the value of the debtor's assets."). And, the requested modifications would further the purpose of protecting the creditors of Elpida. See Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1168 (2d Cir. 1979) (stating that "[t]he purpose of the [stay] is the protection of the debtor, but when the debtor is in the position of assailant rather than victim, the potential for abuse of that purpose is manifest" and overturning the injunction of a creditor's counterclaim against a debtor in an antitrust action commenced by the debtor).

35. To the extent the Recognition Order supplants section 1522 of the Code, protection of the interests of creditors constitutes good cause for modification, and thus the requested relief is also warranted under the provisions of the Recognition Order. See Arnold v. Dep't of Trans., 477 F.3d 105, 108-13 (3d Cir. 2007) (upholding district court's modification of confidentiality order, finding "good cause" where the district court properly balanced the appropriate interests and carefully considered the public interest in allowing the disclosure of names of certain employees); Twitchell v. Hutton, No. 10-01939, 2012 WL 2360546, at *3-4 (D. Colo. June 20, 2012) (modifying an order, finding plaintiff established "good cause" where the plaintiff diligently sought leave to modify the prior scheduling order); Sommers v. Roqumore (In re Roqumore), No. 06-36406, Adv. No. 06-03691, 2010 WL 148189, at *4 (Bankr. S.D. Tex. Jan 8, 2010) (granting in part a request for modification of an order, finding "good cause" where the party seeking modification of a case management order acted diligently in seeking depositions of newly identified witnesses).

D. The Requested Modifications Will Not Cause Undue Prejudice to Elpida

36. The modifications requested herein will provide protection to creditors without unduly prejudicing Elpida. The requested reporting requirements are minimal and this information should be readily available to Elpida. Moreover, the Sponsorship Agreement permits the Trustees to disclose "Confidential Information to the extent necessary if it is required to disclose such Confidential Information by Law or stock exchange rules, or a court or other such competent authority." (Redacted Transl., Art. 26(3) (emphasis added).) The Bondholders are also willing to enter into an appropriate confidentiality agreement to protect any sensitive information disclosed. With respect to the asset transfer conditions, these requested modifications are the minimum required to prevent the Elpida U.S. Assets from being removed

from this Court's jurisdiction without first giving creditors notice and an opportunity to be heard. The Bondholders are only requesting 30 days' notice, which period can be shortened if Elpida has a legitimate need to dispose of assets on a more accelerated timetable.

II.

CLARIFICATION REGARDING THE AUTOMATIC STAY

37. The Bondholders anticipate that Elpida may raise objections that this Court lacks the power to order disclosure or export concepts of U.S. bankruptcy into the Japan Proceeding. To the extent that the Court has concerns regarding its authority under chapter 15, it is clear that this Court has the power to require transparency and creditor protections in a plenary chapter 11 proceeding.

38. The Bondholders do not believe that the filing of a plenary case against Elpida under section 303 of the Bankruptcy Code is prevented by the automatic stay imposed by the Recognition Order. Indeed, in enacting chapter 15, Congress explicitly recognized that the commencement of a plenary chapter 11 case by or against a foreign debtor with U.S. assets may be appropriate even where an order recognizing a foreign proceeding has been entered. Section 1528 of the Bankruptcy Code provides:

> After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527, to other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title, and 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

11 U.S.C. § 1528. Thus, not only are post-recognition chapter 11 cases contemplated by the Bankruptcy Code, but such cases are limited to assets located within the United States and will not interfere with the existing foreign main proceeding.

39. Moreover, those few courts that have considered the issue have determined that the automatic stay imposed under chapter 15 is not and "was never intended to be an automatic bar to additional proceedings being brought in the United States that might, to some extent, conflict with or overlap the foreign proceeding." RHTC Liquidating Co. v. Union Pac. R.R. Co. (In re RHTC Liquidating Co.), 424 B.R. 714, 729 (Bankr. W.D. Pa. 2010). As one court explained:

> All relief that automatically goes into effect after main recognition can be modified or vacated. Under chapter 15 the court is required to ascertain that the interests of U.S. creditors are "sufficiently protected" before it grants any discretionary relief, particularly if it entrusts the distribution of assets to the foreign representative, and the court is also empowered to effectuate other procedures for the protection of U.S. creditors, such as the appointment of an examiner. . . . Moreover, although multiple proceedings should be the exception, U.S. creditors are not precluded from filing an involuntary plenary proceeding against the debtor in the United States if there is an adequate showing of a need for additional protection.

In re Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 82 (Bankr. S.D.N.Y. 2011) (citing In re RHTC Liquidating Co., 424 B.R. 714).

40. Accordingly, the prior entry of the Recognition Order should not bar any attempt by the Bondholders to commence a plenary chapter 11 case against Elpida in this Court under section 303 of the Bankruptcy Code. Nonetheless, out of an abundance of caution, the Bondholders request that the Court enter an order clarifying that the Recognition Order does not preclude the Bondholders from initiating an involuntary bankruptcy case against Elpida.

RESERVATION OF RIGHTS

41. Undisclosed information may ultimately show that the Proposed Sale is fair and in the best interests of Elpida's creditors, but the only information available to the Bondholders indicates that this is far from the case. To the extent that the facts underlying the Proposed Sale confirm that the Proposed Sale will be detrimental to the rights of Elpida's creditors, the Bondholders reserve the right to seek additional relief in respect of the Recognition Order, including pursuant to section 1517(d) of the Bankruptcy Code to the extent that the facts show that the grounds for granting the Recognition Order, such as the representations Elpida made to the Court, were fully or partially lacking or have ceased to exist.

NOTICE

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

WHEREFORE, the Bondholders respectfully request pursuant to sections 105(a) and 1522(a) and (c) of the Bankruptcy Code, and pursuant to the terms of the Recognition Order, that the Recognition Order be modified as set forth herein. Additionally, the Bondholders request that the Court clarify that the automatic stay imposed under the Recognition Order does not prevent the Bondholders from commencing an involuntary bankruptcy case against Elpida as another potential avenue for protecting their interests with respect to the Elpida U.S. Assets and that the Court grant such other and further relief as it deems just and proper.

Dated: August 10, 2012
Wilmington, Delaware

CERTAIN MEMBERS OF THE STEERING COMMITTEE OF THE AD HOC GROUP OF ELPIDA BONDHOLDERS

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