UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SPANSION INC., *et al.*[1]	Case No. 09-10690 (KJC)
	Jointly Administered
Debtors.	Related to D.I. Nos. 2032, 2034, 2682, 2683
	Hearing Date: February 11-12, 2010 at 10:00 a.m. (ET)

DEBTORS' MEMORANDUM IN SUPPORT OF CONFIRMATION OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION DATED FEBRUARY 8, 2010 (AS AMENDED)

LATHAM & WATKINS LLP
Michael S. Lurey
Gregory O. Lunt
Kimberly A. Posin
355 South Grand Avenue
Los Angeles, CA 90071-1560
Telephone: (213) 485-1234
Facsimile: (213) 891-8763

DUANE MORRIS, LLP
Michael R. Lastowski
Richard W. Riley
Sommer L. Ross
1100 North Market Street, Suite 1200
Wilmington, DE 19801
Telephone: (302) 657-4900
Facsimile: (302) 657-4901
Counsel for the Debtors and Debtors in Possession

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Spansion Inc., a Delaware corporation (8239); Spansion Technology LLC, a Delaware limited liability company (3982); Spansion LLC, a Delaware limited liability company (0482); Cerium Laboratories LLC, a Delaware limited liability company (0482), and Spansion International, Inc., a Delaware corporation (7542). The mailing address for each Debtor is 915 DeGuigne Dr., Sunnyvale, California 94085.

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I. PRELIMINARY STATEMENT

1. Nearly one year after commencing these complicated Chapter 11 Cases, the Debtors seek confirmation of the *Debtors' Second Amended Joint Plan of Reorganization Dated February 8, 2010 (As Amended)* (as may be amended from time to time, the "**Plan**") [D.I. 2682].[1]

2. As described more fully in the *Second Amended Disclosure Statement for Debtors' Second Amended Joint Plan of Reorganization Dated December 16, 2009* [D.I. 2034] (the "**Disclosure Statement**"), the Debtors' descent into bankruptcy was caused by a number of factors. These factors included persistent oversupply in the Flash memory industry compounded by the global economic recession, which significantly reduced demand for the Debtors' products in the fourth quarter of 2008 and the first quarter of 2009. These two factors were further complicated by the Debtors' inability to obtain the additional external financing necessary to meet operational and financing requirements, which ultimately resulted in the filing of the Chapter 11 Cases.

3. The Debtors faced many challenges in light of the size and complexity of the Debtors' business operations, the magnitude of the Debtors' business assets and facilities, the existence of thousands of creditors, and the substantial changes in the management and personnel of the Debtors in the period prior to commencement of the Chapter 11 Cases. These factors and others contributed to the extensive efforts required of the Debtors' management and professionals to operate the Debtors' business and administer the Chapter 11 Cases.

[1] Capitalized terms used but not otherwise defined herein shall have those meanings ascribed to them in the Plan.

4. Over the past year, the Debtors have engaged in extensive negotiations with the Ad Hoc Consortium and the Creditors' Committee, the more recently formed informal group of certain holders of the 11.25% Senior Notes due 2016 (the "**Senior Noteholders Informal Group**") and Ad Hoc Committee of Convertible Noteholders (the "**Convert Committee**"), and various other key creditors and constituencies to build consensus around the Plan and the distribution of value under the Plan. In light of the unique aspects of these Chapter 11 Cases and the many difficult issues presented, the Plan is a significant achievement. The Plan meets each and every requirement set forth in section 1129 of the Bankruptcy Code, including the requirement that the Plan has been proposed in good faith, the "best interest" of creditors test and the feasibility requirement. Accordingly, the Debtors seek Confirmation of the Plan.

II. BACKGROUND

A. Introduction

5. On March 1, 2009 (the "**Petition Date**"), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On March 4, 2009, the Court entered an Order directing the joint administration of the Chapter 11 Cases under the case of Spansion Inc., Case No. 09-10690 [D.I. 58].

6. On March 12, 2009, the Office of the United States Trustee appointed the Creditors' Committee [D.I. 106].

7. On May 27, 2009, this Court entered the *Order Granting the Motion of Debtors Establishing Bar Dates and Related Procedures for Filing Proofs of Claims and Approving the*

Form, Manner, and Sufficiency of Notice of the Bar Dates [D.I. 554]. The Bar Date was established as September 4, 2009.

8. On June 26, 2009, each of the Debtors filed their schedules and statements of financial affairs [D.I. 718-729], which were subsequently amended, in part, on July 2, 22 and 31, 2009 [D.I. 748-49, 856-861, 920-21, respectively] (collectively, as amended, the "**Schedules**").

B. The Plan

9. Since commencing the Chapter 11 Cases, the Debtors have worked tirelessly to formulate a plan of reorganization to rehabilitate the Debtors' business activities and distribute the value of the Debtors' Estates in an appropriate manner. The Debtors have also sought the support of their creditor constituencies. Towards that end, the Debtors and their counsel, financial advisor, Gordian Group LLC ("**Gordian Group**"), have met and negotiated with representatives of their myriad creditor constituencies – which include, by way of example and without limitation, the Creditors' Committee, the Ad Hoc Consortium, the Senior Noteholders Group, and the Convert Committee among others – to develop a viable plan of reorganization that effectuates a successful and sustainable rehabilitation of the Debtors' business while affording their creditors favorable provisions and appropriate recoveries on account of their Claims.

10. Negotiations over the terms of the Plan commenced in April 2009 and have continued by way of phone calls, correspondence and face-to-face meetings, including the presentation of detailed financial and valuation information, for nearly ten months. During September 2009, the Ad Hoc Consortium and the Creditors' Committee reached agreement on proposed terms of a plan (the "**Committee-Consortium Plan Terms**"). Ultimately, subject to

minor modifications negotiated by the Debtors, the Debtors agreed to propose a plan of reorganization incorporating the Committee-Consortium Plan Terms.

11. On October 2, 2009, the Debtors filed a motion seeking authority to file a plan of reorganization based upon the Committee-Consortium Plan Terms without an accompanying disclosure statement [D.I. 1267]. A draft copy of a plan of reorganization incorporating the Committee-Consortium Plan Terms was attached to the motion as an exhibit.

12. On October 26, 2009, the Debtors filed the *Debtors' Joint Plan of Reorganization Dated October 26, 2009* [D.I. 1477] (the "**Initial Plan**") and accompanying disclosure statement [D.I. 1479] (the "**Initial Disclosure Statement**"). A hearing to consider the Initial Disclosure Statement was scheduled for November 25, 2009.

13. On or about November 11, 2009, the Creditors' Committee notified the Debtors that it could no longer support the Initial Plan because of various concerns. The Creditors' Committee insisted on a number of significant changes to the Initial Plan. After negotiations with the Debtors, the Ad Hoc Consortium agreed to a number of these changes.

14. The Debtors believed that revising the Initial Plan to accommodate the changes would lead to a confirmable plan in the shortest period of time, and accordingly filed the *Debtors' First Amended Joint Plan of Reorganization Dated November 25, 2009* [D.I. 1816], incorporating these terms, and an accompanying disclosure statement (the "**First Amended Disclosure Statement**") [D.I. 1817] on November 26, 2009, and the *Debtors' Second Amended Joint Plan of Reorganization Dated December 9, 2009* [D.I. 1919] and accompanying disclosure statement [D.I. 1921] on December 9, 2009. A hearing on the disclosure statement was held on December 14, 2009. On December 17, 2009, the Debtors filed the *Debtors' Second Amended Joint Plan of Reorganization Dated December 16, 2009* (the "**December 16 Plan**") [D.I. 2032]

and the Disclosure Statement, both of which included changes to reflect the results of the December 14 hearing.[2]

15. On December 18, 2009, the Court entered its *Order (I) Approving Disclosure Statement, (II) Scheduling Confirmation Hearing, (III) Approving Solicitation and Other Procedures, Including Fixing the Voting Record Date and Establishing Deadlines for Voting On the Plan and Objecting to the Plan, and (IV) Approving the Solicitation Package and Forms of Notice* [D.I. 2042] (the "**Disclosure Statement Order**"). Pursuant to the Disclosure Statement Order, among other things, the Court approved the Disclosure Statement and established a number of deadlines, including (i) February 4, 2010, at 4:00 p.m. ET[3] (the "**Voting Deadline**"), as the deadline by which all ballots must be received by the voting agent; and (ii) February 9, 2010, at 12:00 p.m. ET,[4] as the deadline for the Claims and Voting Agent to file with the Court a voting tabulation report (the "**Voting Tabulation Report**"). The Court also scheduled a hearing to consider confirmation of the Plan to commence on February 11, 2010, at 10:00 a.m. ET (the "**Confirmation Hearing**").[5]

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[2] As discussed in more detail below, the Plan contains a limited number of changes from the December 16 Plan. However, the Debtors believe that these changes do not require the resolicitation of any Class of Creditors.

[3] On January 29, 2010, the Court extended the Voting Deadline to February 8, 2010, at 4:00 p.m. ET, in order to provide parties additional time to try to resolve certain potential objections to the Plan [D.I. 2543].

[4] This deadline was subsequently extended by order of the Court to February 10, 2010, at 4:00 p.m. ET [D.I. 2543].

[5] On December 21, 2009, the Senior Noteholders Group filed its *Motion for Entry of an Order Seeking a Standstill of Certain Dates in the Disclosure Statement Order* [D.I. 2065] (the "**Standstill Motion**"), to which the Debtors, the Ad Hoc Consortium and HSBC Bank USA, National Association filed Objections [D.I. 2154, 2157, 2169]. The Standstill Motion sought to postpone certain Plan-related deadlines, including the Voting Deadline and the Confirmation Hearing, by two weeks while awaiting the outcome of the Debtors' financing efforts. On January 7, 2010, the Court continued the hearing on the Standstill Motion to January 29, 2010. At the request of the Senior Noteholders Group, the hearing on the Standstill Motion has now been continued to February 11, 2010 at 10:00 a.m. ET.

16. In anticipation of the Confirmation Hearing, the Debtors have made significant additional progress towards building greater support for the Plan, undertaking transactions and other actions necessary for the confirmation or implementation of the Plan and resolving various objections and disputes relating to the Plan, including, without limitation:

- The Debtors and their management, advisors and counsel engaged in negotiations with certain of their creditor constituencies to obtain their support for the Plan. As a result of these efforts, the Plan is supported by the Ad Hoc Consortium, the Creditors' Committee and the Senior Noteholders Group as well as a number of individual creditors and other interested parties.

- The Debtors successfully consummated the Rights Offering, with unsecured creditors subscribing for more than seventy-five percent (75%) of the total Rights Offering Amount. The Backstop Party, Silver Lake Sumeru, L.P., subscribed for the balance of the stock pursuant to the Backstop Rights Purchase Agreement. Proceeds from the Rights Offering are presently being held in a segregated account of the Debtors pending the Effective Date (assuming the Plan is confirmed).

- The Debtors, the Creditors' Committee, the Senior Noteholders Group and the Convert Committee participated in a mediation with respect to valuation issues on February 5, 2010 and that mediation was continued on February 8, 2010. No overall settlement arose out of the mediation.

- The Debtors will be closing the new senior secured term loan facility (the "**New Spansion Debt**") arranged by Barclays Capital and Morgan Stanley Senior Funding on or about February 9, 2010. The proceeds of the New Spansion Debt will be held in an escrow account pending the Effective Date (assuming the Plan is confirmed). These proceeds, when combined with the proceeds from the Rights Offering being held in the segregated account described above and other cash resources available to the Debtors, are sufficient to provide a full Cash recovery to holders of the Debtors' floating rate notes as contemplated by the Plan (the "**Cash Out Option**").

- The Debtors entered into a settlement with Samsung Electronics Co., Ltd., ("**Samsung**") which was approved by this Court over the objection of certain parties and under which a reserve was established for the prepetition General Unsecured Claims of Samsung. This eliminated a significant impediment to confirmation of the Plan and to Distribution of shares of New Spansion Common Stock to holders of Allowed Claims in Classes 5A, 5B and 5C.

- The Debtors entered into a complex settlement with Spansion Japan Limited ("**Spansion Japan**") with respect to the significant Administrative Expense Claims asserted by Spansion Japan and which provided the Debtors with an assured source of supply of products for the Debtors' post-reorganization operations.

- The Debtors negotiated resolutions to a number of the objections to confirmation of the Plan that have been filed, as more fully discussed below and in the *Debtors' Omnibus Reply to Objections to Confirmation of Debtors' Second Amended Joint Plan of Reorganization Dated February 8, 2010 (As Amended)* **(**"**Debtors' Reply Brief**") filed concurrently herewith.

17. On January 19, 2010, the Debtors filed their Plan Supplement [D.I. 2356], which contains the following:

- Estimate of Administrative and Priority Claims
- Description of Retained Causes of Action
- Backstop Rights Purchase Agreement and Identity of Backstop Party
- Adjusted Plan Equity Value for Conversion Price Calculation
- Indenture and Form of Note for New Convertible Notes
- Indenture and Form of Note for New Senior Notes
- New Spansion Debt Documents
- New Governing Documents
- Proposed Confirmation Order

18. On January 22, 2010, the Debtors filed the First Addendum to the Plan Supplement [D.I. 2410], which contains the following:

- Conditions Precedent Agreement for New Convertible Notes
- Conditions Precedent Agreement for New Senior Notes

19. On January 29, 2010, the Debtors filed the *Contract/Lease Schedule Pursuant To Debtors' Second Amended Plan Of Reorganization* (the "**Contract/Lease Schedule**")

[D.I. 2538], which identifies executory contracts and unexpired leases to be assumed pursuant to the Plan.

20. On February 8, 2010, the Debtors filed an Amendment to the Contract/Lease Schedule [D.I. 2680], which includes additions to and deletions from the Contract/Lease Schedule.

21. On February 8, 2010, the Debtors will also file their Second Addendum to the Plan Supplement (the "**Second Addendum**"), which will contain the following:

- Revised Conditions Precedent Agreement for New Senior Notes
- Revised New Governing Documents
- Proposed Members of Initial Board
- Revised Proposed Confirmation Order
- Identity and Compensation of "Insiders"
- Treatment of Other Secured Claims

22. On January 22, 2010, the Convert Committee filed its *Emergency Motion To Vacate (A) Order Approving Debtors' Disclosure Statement Pursuant To Fed. R. Bank. P. 9024 And Adjourning Confirmation Heating And (B) Directing Appointment Of Trustee Or Examiner Pursuant To 11 U.S.C. §§ 1104(a)(1) And (2) And 1104(c)(2)* [D.I. 2391] (the "**Motion to Vacate**") to which the Ad Hoc Committee of Equity Security Holders (the "**Equity Committee**") filed a Joinder on January 25, 2010 [D.I. 2420]. Pursuant to the Motion to Vacate, the Convert Committee seeks an order of the Court vacating the Disclosure Statement Order and directing the appointment of a chapter 11 trustee or examiner. The Court denied a motion to shorten notice of the Motion to Vacate to be heard on January 29, 2010, and the Motion to Vacate is scheduled to be heard by the Court on February 11, 2010. On February 4, 2010, the Debtors filed an objection to the Motion to Vacate (the "**Vacation Motion Objection**")

[D.I. 2630]. In addition, on February 4, 2010, the Senior Noteholders Group also filed an objection to the Motion to Vacate [D.I. 2631].

23. Objections and other pleadings in response to the Plan have been filed by the following parties (collectively, the "**Objections**"):

- The Convert Committee [D.I. 2479];
- The Equity Committee [D.I. 2476];
- AIG Commercial Equipment Finance, Inc. ("**AIG**") [D.I. 2464];
- GE Japan Corporation ("**GE Japan**") [D.I. 2472];
- International Business Machines Corporation ("**IBM**") [D.I. 2473];
- Joseph E. Rubino ("**Rubino**") [D.I. 2522];
- Longacre Opportunity Fund, LP ("**Longacre**") [D.I. 2482];
- Spansion Japan [D.I. 2546] [6];
- Tessera, Inc. ("**Tessera**") [D.I. 2469][7];
- Texas Comptroller of Public Accounts ("**Texas Comptroller**") [D.I. 2439];
- The John Gorman 401(k) ("**John Gorman**") [D.I. 2474];
- Travis County, Texas ("**Travis County**") [D.I. 2434];
- US Bank, N.A ("**US Bank**") as successor Indenture Trustee for the Senior Notes [D.I. 2468];

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[6] The Debtors are filing a separate reply to the Objections of Spansion Japan, GE Japan and the Spansion Japan Classification Motion, defined below. *See Debtors'(1) Omnibus Reply to (A) Objection of GE Japan Corporation to Confirmation of the Debtors' Second Amended Plan of Reorganization and (B) Objection of Spansion Japan Limited to Confirmation of the Debtors' Second Amended Joint Plan of Reorganization Dated December 16, 2009 and (2) Objection to Motion of Spansion Japan Limited For an Order (I) Determining the Proper Classification of Spansion Japan's Rejection Damages Claim and (II) Requiring the Debtors to Establish a Reserve Under the Plan for Distributions on Account of Spansion Japan's Rejection Damages Claim* (the "**Debtors' Classification Reply**").

[7] The Debtors are filing a separate reply to the Objection of Tessera.

- United States Customs and Border Protection ("**U.S. Customs**") [D.I. 2463];
- The Office of the United States Trustee (the "**U.S. Trustee**") [D.I. 2493];
- Winbond Electronics Corporation ("**Winbond**") [D.I. 2467];
- Bank of America, N.A. ("**Bank of America**") filed a reservation of rights concerning the Plan [D.I. 2466];
- Wilmington Trust Company ("**Wilmington Trust**") filed a Joinder in the Objection of the Convert Committee [D.I. 2561];
- John Gorman filed a Joinder in the Objection of the Equity Committee [D.I. 2560];
- Spansion Japan also filed a *Motion (A) For an Order (I) Determining the Proper Classification of Spansion Japan's Rejection Damage Claim and (II) Requiring the Debtors to Establish a Reserve Under the Plan for Distribution on Account of Spansion Japan's Rejection Damage Claim and (B) For an Order Shortening Time* (the "**Spansion Japan Classification Motion**")[8]; and
- GE Japan filed a Joinder in the Spansion Japan Classification Motion (the "**GE Japan Classification Joinder")**.

24. Of these Objections, the Debtors reached a settlement with Travis County and Travis County has withdrawn its Objection. *See* D.I. 2624. The Debtors believe that they have resolved or will resolve the Objections filed by the Texas Comptroller, U.S. Customs, AIG and Winbond, prior to the Confirmation Hearing.

25. The Debtors have attempted to resolve the Objections without the need for litigation. The Debtors have also worked (and continue to work) diligently to resolve informal objections asserted concerning the Plan. The Debtors have also prepared Replies to the Objections (the "**Replies**"), to be contemporaneously filed herewith, including (a) Debtors' Reply Brief (with respect to all Objections other than those asserted by Spansion Japan, GE

[8] The Debtors are filing a separate reply to the Spansion Japan Classification Motion. *See*, note 7.

Japan, and Tessera), (b) Debtors' Classification Reply (with respect to the Objections of Spansion Japan and GE Japan) and (c) a reply to the Tessera Objection.

26. The Debtors have prepared a status chart that identifies each of the Objections with a short summary of the substance of the Objection and the status of the Debtors' attempt to resolve that Objection (the "**Objections Status Chart**"), a copy of which is attached to the Debtors' Reply Brief as Exhibit "A". The Debtors will continue to negotiate with the Entities who filed (or otherwise raised) as-yet unresolved Objections in an attempt to resolve those Objections before the Confirmation Hearing. To the extent any Objections remain unresolved at the time of the Confirmation Hearing, the Debtors assert in the Replies that none of the Objections prevent Confirmation of the Plan and should be overruled.

27. Despite the various remaining Objections, the Debtors submit that the Plan satisfies all of the confirmation standards under section 1129 of the Bankruptcy Code, is in the best interest on all creditors, and should be confirmed by the Court.

C. Voting Classes

28. The six Classes entitled to vote under the Plan (the "**Voting Classes**") are Classes 1, 3, 5A, 5B, 5C and 5D.

29. On or before February 8, 2010, the extended Voting Deadline, votes were cast to accept or reject the Plan. The Claims and Voting Agent will tally the votes and submit the Voting Tabulation Report. The Claims and Voting Agent will file the Voting Tabulation Report and give notice of the results of voting to accept or reject the Plan (the "**Voting Notice**") as soon as the report is available, and on or before February 10, 2010, at 4:00 p.m. (ET).

30. Class 2 (UBS Credit Facility Claims), Class 4 (Other Secured Claims), Class 4A (Travis County, Texas Tax Claim), Class 6 (Convenience Class Claims) and Class 10 (Other Old

Equity) are Unimpaired within the meaning of section 1124 of the Bankruptcy Code and are presumed to have accepted the Plan. Therefore, such Classes are not entitled to vote to accept or reject the Plan.

31. Class 7 (Non-Compensatory Damages Claims), Class 8 (Interdebtor Claims), Class 9 (Old Spansion Interests), Class 11 (Other Old Equity Rights), Class 12 (Securities Claims), and Class 13 (Non-Debtor Intercompany Claims) (together, the "**Rejecting Classes**") are Impaired within the meaning of section 1124 of the Bankruptcy Code and will receive no Distributions under the Plan. Therefore, such Classes are deemed to have rejected the Plan.

D. Modifications To The Plan Do Not Materially Or Adversely Affect Any Holders Of Claims or Require Resolicitation For The Plan

32. The Debtors have incorporated in the Plan certain modifications to the December 16 Plan and have modified the Confirmation Order to clarify certain provision of the December 16 Plan, to address Objections or concerns filed or asserted by third parties, and to resolve Objections filed by various parties.[9]

33. The modifications to the December 16 Plan (the "**Plan Modifications**") include the following:

- The December 16 Plan provided consent rights to the Ad Hoc Consortium for various matters. Inasmuch as the Debtors have elected the Cash Out Option, the Debtors have eliminated consent rights for the Ad Hoc Consortium on matters which have no impact on the rights of Holders of the FRN Claims, including, for example, Section 3.1(2) on the treatment of the Secured Credit Facility Claims, Section 3.4(2) on the treatment of Other Secured Claims, and Sections 5.1 and 5.3 on assumption of executory contracts.

- In Section 3.3(2)(b), the Debtors elect the Cash Out Option for treatment of the FRN Claims.

[9] *See* paragraph 24 above for the list of Objections which the Debtors believe have been or will be settled prior to the Confirmation Hearing. The Plan has been filed of even date herewith. A revised draft of the Confirmation Order is also being filed of even date herewith, as an exhibit to the Second Addendum.

- In Sections 3.5(2) regarding treatment of Senior Note Claims and 3.17 (Preservation of Subordination Rights), the December 16 Plan has been modified to enforce the subordination of the Exchangeable Debentures Claims to payment in full of the Senior Notes Claims prior to any Distribution to the Holders of Exchangeable Debentures Claims.

- Class 5D was created consisting of the Spansion Japan Rejection Damages Claim. Revised Section 3.8 specifies the treatment of this Claim. If Spansion Japan prevails on the Spansion Japan Classification Motion, then the Spansion Japan Rejection Damages Claim might share Pro Rata in Distributions with Holders of Allowed Claims in Classes 5A, 5B and 5C, on conditions stated in the Plan.

- The Plan provides consent rights in favor of the Senior Noteholders Group and the Creditors' Committee on matters affecting their interests, including Section 6.4 effectuating documents and further transactions, Section 6.6 on the Debtors' authority to waive or release Retained Actions, and Sections 10.1 and 10.2 regarding Conditions to Confirmation and Conditions to the Effective Date.

- The formula for the appointment of the directors for Reorganized Spansion Inc. has been modified. The two directors to be designated by the Ad Hoc Consortium have been removed; and the seven Person board is the result of discussions among the Debtors, the Senior Noteholders Group and the Creditors' Committee.

- Section 9.2 of the Plan has been substantially revised, calling for the appointment of a Claims Agent with responsibility to litigate objections to Disputed Claims in Class 5B and to prosecute Avoidance Actions and 510(c) Actions.

- The releases in Section 11.3 and 11.4 of the Plan have been clarified to confirm that Spansion Japan and its affiliates do not receive the benefits of the releases, and the Senior Noteholders Group and its affiliates have been added to the Debtor Releasees, which receive the benefits of the releases of Section 11.3 and 11.4, and the Exculpation and Limitation of Liability in Section 11.8.

34. Section 1127(a) of the Bankruptcy Code provides a plan proponent with the right to modify the plan "at any time" before confirmation, and section 1127(d) provides that all stakeholders that previously have accepted the plan also should be deemed to have accepted the modified plan. Courts routinely allow plan proponents to make non-material changes to a plan

without requiring the proponent to re-solicit the plan for acceptances.[10] The Debtors submit that the Plan Modifications either (a) do not materially and adversely affect the recoveries of any Creditors or (b) adversely affect only the members of Class 5C, which the Debtors anticipate will vote to reject the Plan without regard to the Plan Modifications. If a class of creditors votes to reject a plan, a modification to the plan adverse to the interests of the affected class does not compel re-solicitation on the plan as modified.[11] If the Voting Tabulation Report confirms that Class 5C has voted to reject the Plan, since the Plan Modifications are adverse only to a Class that either has or is deemed to reject the Plan, the Plan Modifications do not require re-solicitation.

35. The Debtors submit that the Plan can be confirmed without re-solicitation for Plan acceptances, and that all Creditors in Voting Classes that previously voted to accept the Plan should be deemed to accept the Plan as modified. *See* 11 U.S.C. § 1127(d).

III. ARGUMENT

36. In this memorandum, the Debtors present their "case in chief" that the Plan satisfies section 1129 of the Bankruptcy Code.

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[10] *See, e.g., In re New Power Co.*, 438 F.3d 1113, 1117-18 (11th Cir. 2006) ("the bankruptcy court may deem a claim or interest holder's vote for or against a plan as a corresponding vote in relation to a modified plan unless the modification materially and adversely changes the way that claim or interest holder is treated"); *In re Calpine*, No. 05-60200, 2007 WL 4565223, at *6 (Bankr. S.D.N.Y. Dec. 19, 2007) (approving immaterial modification to plan without requiring the debtors to resolicit the plan); *In re Kmart Corp.*, No. 02 B 02474, 2006 WL 952042, at *27 (Bankr. N.D. Ill. Apr. 11, 2006) (if modification does not adversely change the treatment of claims, then resolicitation is not required); *In re Winn-Dixie Stores, Inc.*, 356 B.R. 813, 823 (Bankr. M.D. Fla. 2006) (same).

[11] In *In re American Solar King Corp*, 90 B.R. 808, 824 (Bankr. W.D. Tex 1988), the debtor negotiated a change in the plan to secure a creditor's vote for acceptance. The court found that re-solicitation of the other creditors was unnecessary because "a modification is *material* if it so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance." *See also In re Armstrong World Indus.*, 348 B.R. 136, 148 (Bankr. D. Del. 2006) (voting results including parties deemed to reject applied to modified plan).

A. The Plan Should Be Confirmed

37. To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of section 1129 by a preponderance of the evidence.[12] The Debtors submit that the Plan complies with all relevant sections of the Bankruptcy Code, Bankruptcy Rules, and applicable non-bankruptcy law. In particular, the Plan fully complies with the requirements of sections 1122, 1123 and 1129 of the Bankruptcy Code. This memorandum addresses each requirement individually.

B. The Plan Complies With Applicable Provisions Of The Bankruptcy Code (Section 1129(a)(1))

38. Section 1129(a)(1) of the Bankruptcy Code requires that a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. A principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan of reorganization.[13] Accordingly, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of the Debtors' compliance with sections 1122 and 1123 of the Bankruptcy Code. As explained below, the Plan complies with both sections in all respects.

1. The Plan Properly Classifies Claims And Interests Under Section 1122 Of The Bankruptcy Code

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[12] See *In re Armstrong World Indus.*, 348 B.R. 111, 120-22 (D. Del. 2006); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 616, n.23 (Bankr. D. Del. 2001), appeal dismissed, *In re Genesis Health Ventures, Inc.*, 280 B.R. 339 (D. Del. 2002); see also *In re Bally Total Fitness of Greater New York, Inc.*, No. 07-12395, 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007) ("The Debtors, as proponents of the Plan, have the burden of proving the satisfaction of the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence."). *See* below for a further discussion of the standard of proof applicable to cram down of the Rejecting Classes.

[13] *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648-49 (2d Cir. 1988) (suggesting that Congress intended the phrase "'applicable provisions' in this subsection to mean provisions of Chapter 11 ... such as section 1122 and 1123."); *In re Mirant Corp.*, No. 03-46590 DIAL 11, 2007 WL 1258932, at 7 (Bankr. N.D. Tex. Apr. 27, 2007) (objective of 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification and the contents of a plan of reorganization); S. Rep. No. 989, 95th Cong., 2d Sess., at 126 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess., at 412 (1977).

39. The Plan satisfies section 1122's classification requirements, which provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests in such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

40. The requirement of substantial similarity does not mandate that all claims or interests within a particular class be identical.[14] Instead, section 1122 provides a plan proponent with significant flexibility and discretion in classifying claims so long there is some reasonable basis for the classification or if the creditor or interest holder consent to the classification.[15] Courts have identified several grounds justifying separate classification, including where members of a class possess different legal rights[16] and where there are good business reasons for separate classification of claims.[17] The Plan's classification scheme is summarized as follows:

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[14] *In re DRW Prop*. Co. 82, 60 B.R. 505, 511 (Bankr. N.D. Tex. 1986). Section 1122 likewise does not require classifying claims together simply because they may share some attributes. *See, e.g., In re Jersey City Med. Ctr*., 817 F.2d 1055, 1060 (3d Cir. 1987) ("[t]he express language of this statute explicitly forbids a plan from placing dissimilar claims in the same class; it does not, though, address the presence of similar claims in different classes.").

[15] *See John Hancock Mutual Life Ins. Co. v. Route 37 Bus. Park Assocs*., 987 F.2d 154, 158-59 (3d Cir. 1993) (as long as each class represents a voting interest that is "sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed," the classification is proper); *Jersey City*, 817 F.2d at 1060-61 ("Congress intended to afford bankruptcy judges broad discretion [under section 1122] to decide the propriety of plans in light of the facts of each case"); *In re U.S. Truck Co., Inc.*, 800 F.2d 581, 585 (6th Cir. 1986) ("Section 1122(a) specifies that only claims which are 'substantially similar' may be placed in the same class. It does not require that similar claims must be grouped together, but merely that any group created must be homogenous."); *In re Atlanta W. VI*, 91 B.R. 620, 626 (Bankr. N.D. Ga. 1988) ("flexibility [in claims classifications] both promotes the rehabilitative purposes of Chapter 11 reorganization and enables plan proponents to deal with the complex commercial realities which debtor estates often confront.").

[16] *See In re Heritage Org*., L.L.C., 375 B.R. 230, 298 n.86 (Bankr. N.D. Tex. 2007) (finding that if creditors had different legal rights under equitable subordination, then separate classification would be appropriate); *Mirant Corp.*, No. 03-46590-DML-11, 2007 WL 1258932, at *7 (permitting separate classification because holders of claims had different legal interests in the debtor's estate); *In re Kaiser Aluminum Corp.*, No. 02-10429, 2006 WL

Summary of Classification, Status and Voting Rights			
Class	**Claim/Equity Interest**	**Treatment of Claim/Equity Interest**	**Voting Rights**
Class 1	Secured Credit Facility Claims	Impaired	Entitled to Vote
Class 2	UBS Credit Facility Claims	Unimpaired	Deemed to Accept
Class 3	FRN Claims	Impaired	Entitled to Vote
Class 4	Other Secured Claims	Unimpaired	Deemed to Accept
Class 4A	Travis County, Texas Tax Claim	Unimpaired	Deemed to Accept
Class 5A	Senior Notes Claims	Impaired	Entitled to Vote
Class 5B	General Unsecured Claims	Impaired	Entitled to Vote
Class 5C	Exchangeable Debentures Claims	Impaired	Entitled to Vote
Class 5D	Spansion Japan Rejection Damages Claims	Impaired	Entitled to Vote
Class 6	Convenience Class Claims	Unimpaired	Deemed to Accept
Class 7	Non-Compensatory Damages Claims	Impaired	Deemed to Reject
Class 8	Interdebtor Claims	Impaired	Deemed to Reject
Class 9	Old Spansion Interests	Impaired	Deemed to Reject
Class 10	Other Old Equity	Unimpaired	Deemed to Accept
Class 11	Other Old Equity Rights	Impaired	Deemed to Reject
Class 12	Securities Claims	Impaired	Deemed to Reject
Class 13	Non-Debtor Intercompany Claims	Impaired	Deemed to Reject

41. The Plan's classification of Claims and Interests into 17 Classes satisfies the requirements of section 1122 because the Claims or Interests in each Class are substantially similar to the other Claims or Interests in such Class, and all Claims or Interests in each Class differ from the Claims and Interests in each other Class in a legal or factual nature or based on other relevant criteria. In general, the Plan's classification scheme follows the Debtors' capital structure where secured debt is classified separately from unsecured debt. *See* Plan at Section 3. Moreover, the Plan separately classifies the Secured Credit Facility Claims (Class 1), the FRN Claims (Class 3) and the Travis County, Texas Tax Claims (Class 4A) – all of which are Secured Claims which are Impaired – from the UBS Credit Facility Claims (Class 2) and the Other

616243 (Bankr. D. Del. Feb. 6, 2006) (permitting classification scheme after consideration of the diverse characteristics of each class and creditors' legal rights).

[17] *See In re Chateauguay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996) (finding that the debtor must have a "legitimate reason supported by credible proof" to justify separate classification of similar, unsecured claims); *In re Chateauguay Corp.*, 10 F.3d 944, 956-57 (2d Cir. 1993) (finding separate classification appropriate because classification scheme had a rational basis; separate classification based on bankruptcy court-approved settlement); *In re Avia Energy Dev., L.L.C.*, No. 05-39339-bjh-11, 2007 WL 2238039, at *2 (Bankr. N.D. Tex. Aug. 2, 2007) (permitting separate classification based on valid business, factual and legal reasons); *In re Magnatrax Corp.*, No. 09-11402, 2003 WL 22807541 (Bankr. D. Del. Nov. 17, 2003) (permitting separate classification based on valid business, factual, and legislative reasons).

Secured Claims (Class 4) – which are Secured Claims and Unimpaired – where each Class of Secured Claims has liens on different collateral and/or different priorities from, the other Secured Claims.

42. The Plan separately classifies four Classes of prepetition unsecured claims - the Senior Notes (Class 5A), the Exchangeable Debentures (Class 5C), General Unsecured Claims (Class 5B) and Spansion Japan Rejection Damages Claims (Class 5D).[18] While all four of these Classes consist of Unsecured Claims, the Exchangeable Debentures Indenture includes provisions that contractually subordinate the recovery of Holders of Exchangeable Debentures under the Plan to the recovery of Holders of Senior Notes (the so-called "**X-Clause**"). Thus, the Holders of Exchangeable Debentures are not entitled to a Distribution under the Plan until holders of Senior Notes have received a full recovery. Consequently, the contractual rights of Holders of the Senior Notes and Holders of the Exchangeable Debentures differ from the contractual rights of Holders of other Unsecured Claims as well as each other. Furthermore, the Initial Plan classified the Holders of all Unsecured Claims in Classes 5A, 5B and 5C in a single Class, and certain Creditors objected to the placement of Claims with such differing rights being classified in a single Class. The Plan separately classifies these Claims in three different Classes to reflect such differences.

43. The Plan separately classifies the Spansion Japan Rejection Damages Claims in Class 5D for the reasons set forth in the Debtors' Classification Reply.

44. Finally, Holders of Convenience Claims in Class 6 are Unimpaired because such Holders will receive the full amount of their Claims, or will have agreed to reduce their Claims to the maximum amount of $2,000 for any Convenience Claim.

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[18] *See* Debtors' Classification Reply, note 7, *supra*. regarding the objections to the Plan's classification scheme asserted by Spansion Japan and GE Japan.

45. As a result, valid business, factual, and legal reasons exist for classifying separately the Claims and Interests into the seventeen Classes under the Plan. Additionally, the Claims or Interests in each particular Class are substantially similar. Thus, the Plan satisfies section 1122.

2. The Plan Satisfies The Seven Mandatory Plan Requirements Of Sections 1123(A)(1)-(A)(7) Of The Bankruptcy Code

46. The Plan meets the seven mandatory requirements of section 1123(a), which specifically require that a plan:

(1) designate classes of claims and interests;

(2) specify unimpaired classes of claims and interests;

(3) specify treatment of impaired classes of claims and interests;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for implementation of the plan;

(6) provide for the prohibition of nonvoting equity securities and provide an appropriate distribution of voting power among the classes of securities; and

(7) contain only provisions that are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the reorganized company's officers and directors.

47. Sections 2 and 3 of the Plan satisfy the first three requirements of section 1123(a) by: (1) designating Classes of Claims and Interests, as required by section 1123(a)(1); (2) specifying the Classes of Claims and Interests that are Unimpaired under the Plan, as required by section 1123(a)(2); and (3) specifying the treatment of each Class of Claims and Interests that is Impaired, as required by section 1123(a)(3). The Plan satisfies section 1123(a)(4) because the

treatment of each Claim or Interest within a Class is the same as the treatment of each other Claim or Interest within that Class. (Plan at Section 3.)

48. Section 6 of the Plan and various other provisions of the Plan provide adequate means for the Plan's implementation, thus satisfying the fifth requirement of section 1123(a).[19]

49. Section 6 of the Plan provides, among other things, for:

- The continued corporate existence and vesting of assets in Reorganized Debtors.
- Sources of Cash for Distribution
- Authority to take corporate and limited liability company action
- Authority to effectuate documents and further transactions
- Preservation of Retained Actions
- Operations Between Confirmation Date and the Effective Date
- The Rights Offering
- The New Spansion Debt
- The cancellation of FRNs, Senior Notes, and the Exchangeable Debentures

50. The sixth requirement of section 1123(a) (*i.e.*, that a plan prohibit the issuance of nonvoting equity securities) is also met because the New Spansion Common Stock and the new stock of the other Reorganized Debtors will constitute voting securities. The Plan further provides that Reorganized Spansion Inc. will file New Governing Documents which include amended and restated certificates of incorporation of each of Reorganized Spansion Inc. and the

[19] Section 1123(a)(5) of the Bankruptcy Code specifies that adequate means for implementation of a plan may include: (a) retention by the debtor of all or part of its property; (b) the transfer of property of the estate to one or more entities; (c) cancellation or modification of any indenture; (d) curing or waiving any default; (e) amendment of the debtor's charter; and (f) issuance of securities for cash, for property, for existing securities, in exchange for claims or interests or for any other appropriate purpose.

other Reorganized Debtors that each prohibit the issuance of non-voting equity securities to the extent required by section 1123(a)(6). The Plan satisfies the requirements of section 1123(a)(6) of the Bankruptcy Code.

51. Finally, the Plan also fulfills section 1123(a)(7), which requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan." 11 U.S.C. § 1123(a)(7). In accordance with Section 7.2 of the Plan and the Second Addendum, the Initial Board will consist of the seven (7) persons set forth the Second Addendum, provided that, if (i) any of the Persons set forth on the Second Addendum, other than any Person selected by the Backstop Party pursuant to the terms of the Backstop Rights Purchase Agreement is unable or unwilling to serve on the Initial Board for any reason, the Debtors, the Senior Noteholders Group and the Creditors' Committee shall jointly designate a replacement and (ii) if any of the Persons set forth on the Second Addendum that were designated by the Backstop Party to serve on the Initial Board pursuant to the terms of the Backstop Rights Purchase Agreement is unable or unwilling to serve on the Initial Board for any reason, the Backstop Party shall designate a replacement.

52. The Initial Board shall choose the members of the Boards of Directors of each of the other Reorganized Debtors on the Effective Date or as soon as practicable thereafter.

53. The Debtors' current management will continue as the management of Reorganized Spansion Inc., subject to review by the Initial Board.

54. The manner of selecting the officers and directors of Reorganized Spansion Inc. and the other Reorganized Debtors is consistent with Delaware law, the Bankruptcy Code, and the interests of the Debtors' Creditors, equity security holders, and public policy. The relevant

corporate governance documents for the Reorganized Debtors also are set forth in the Plan Supplement as amended. Therefore, the Plan satisfies the requirements of section 1123(a)(7).

3. The Discretionary Contents Of The Plan Are Appropriate

55. Section 1123(b) of the Bankruptcy Code contains various discretionary provisions that may be included in a plan of reorganization. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. A plan also may include the settlement or adjustment of any claim or interest held by the debtor or the debtor's estate or provide for the debtor's retention and enforcement of any such claim or interest. 11 U.S.C. § 1123(b)(3)(A), (B). Likewise, a plan may modify the rights of secured creditors or unsecured creditors, or leave unaffected the rights of creditors in any class of claims. Finally, a plan may contain "any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(5), (6).

56. Here, the Plan contains various provisions in accordance with the Debtors' discretionary authority under section 1123(b). For example, Section 2 and 3 of the Plan leave certain Classes of Claims Unimpaired and impair the remaining Classes of Claims and Interests. The Plan also provides for the rejection of all the Debtors' executory contracts and unexpired leases that are not assumed. (Plan at Section 5.5.) In addition, the Plan contains procedures for the Allowance and Disallowance of Claims and sets forth a process to govern the Distributions to the Debtors' Creditors with Allowed Claims. (Plan at Section 4.)

57. Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the] Bankruptcy Code." In that regard, Section 7 of the Plan provides that, among other things, the Court shall retain jurisdiction over all matters arising out of, or related to, the Chapter 11 Cases and the Plan. This provision is

appropriate because the Court otherwise has jurisdiction over all of these matters during the pendency of the Chapter 11 Cases, and case law establishes that a bankruptcy court may retain jurisdiction over the debtor or the property of the estate following confirmation.[20]

58. Significantly, the Plan also provides that the Debtors are to be "substantively consolidated" for purposes of Plan confirmation and consummation and all Distributions in satisfaction of Creditor Claims. Pursuant to Section 2.2 of the Plan, in settlement and compromise of existing and potential disputes regarding Interdebtor Claims and related matters, pursuant to sections 1123(b)(3) and (6) of the Bankruptcy Code and Bankruptcy Rule 9019, the Plan treats the Debtors as compromising a single Estate solely for purposes of voting on the Plan, Confirmation of the Plan and Distributions in respect of Claims and Interests under the Plan. Such treatment shall not affect any Debtor's status as a separate legal entity, change the organizational structure of the Debtors' business enterprise, constitute a change of control of any Debtor for any purpose, cause a merger or consolidation of any legal Entities, nor cause the transfer of any Assets of any of the Debtors or their Estates, and all Debtors shall continue to exist as separate legal Entities. The above treatment serves only as a mechanism to effect a fair distribution of value to the Debtors' constituencies. Any Avoidance Action held by any of the Debtors against any Entity other than another Debtor or a Non-Debtor Affiliate is preserved and remains unaffected by the provisions of this Section. Accordingly, the Debtors are to be "substantively consolidated" for purposes of Plan confirmation and consummation and all Distributions in satisfaction of creditor Claims. The Debtor entities themselves however will survive Plan consummation and emerge as the Reorganized Debtors.

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[20] *See In re Jewekor Inc*., 150 B.R. 580, 582 (Bankr. M.D. Pa. 1992) ("There is no doubt that the bankruptcy court's jurisdiction continues post confirmation to 'protect its confirmation decree, to prevent interference with the execution of the plan and to aid otherwise in its operation.'") (citations omitted).

59. The Plan also contains releases given by the Debtors (Plan at Section 11.3) as well as Creditors who vote to accept the Plan or fail to vote with respect to the Plan and do not opt-out of the third-party releases (Plan at Section 11.4). As more fully discussed below, these releases are essential components of the Plan.

4. The Releases Provided In The Plan Are Proper And Appropriate

60. The Plan includes release, exculpation, and injunction provisions (Plan at Sections 11.3, 11.4 and 11.8). These discretionary provisions are proper because, among other things, they are the product of arm's-length negotiations, and are critical to obtaining the support of the various constituencies for the Plan. The Debtors further believe that the Plan will be supported overwhelmingly by Creditors, and such support will provide further justification for such provisions. Such release, exculpation, and injunction provisions are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and these Chapter 11 Cases. Neither the release, the exculpation, nor injunction provisions are inconsistent with the Bankruptcy Code and, thus, the requirements of section 1123(b) of the Bankruptcy Code are satisfied.

5. The Debtors Have Complied With The Applicable Provisions Of The Bankruptcy Code (Section 1129(a)(2))

61. The Debtors have satisfied section 1129(a)(2) of the Bankruptcy Code, which requires that the proponent of a plan of reorganization comply with the applicable provisions of the Bankruptcy Code. The cases and legislative history discussing section 1129(a)(2) indicate that this section principally requires compliance with the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code.[21] The Debtors satisfied section 1129(a)(2) by

[21] *See In re Worldcom, Inc.*, No. 02-13533, 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) (stating that section 1129(a)(2) requires plan proponents to comply with applicable provisions of the Bankruptcy Code, including "disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code");

distributing their Disclosure Statement and soliciting acceptances of the Plan through their Claims and Voting Agent, as authorized by the Disclosure Statement Order.

62. Section 1125 prohibits the solicitation of acceptances or rejections of a plan of reorganization unless, prior to or contemporaneously with solicitation, the plan proponent transmits the plan or a summary of the plan and a written disclosure statement that was approved by the court as containing "adequate information." 11 U.S.C. § 1125(b). The purpose of section 1125 is to ensure that parties in interest are fully informed regarding the condition of the debtor so that they may make an informed decision whether to approve or reject the plan. *See In re All Robins Co., Inc.*, No. 98-1080, 1998 WL 637401, at *3 (4th Cir. Aug. 31, 1998) ("The disclosure statement must contain 'adequate information,' i.e. sufficient information to permit a reasonable, typical creditor to make an informed judgment about the merits of the proposed plan."); *In re Clamp All Corp.*, 233 B.R. 198, 208 (Bankr. D. Mass. 1999). Here, the Debtors have satisfied section 1125. The Court approved the Disclosure Statement as containing adequate information. In the Disclosure Statement Order, the Court also approved the procedures for soliciting acceptances and rejections to the Plan (defined in the Disclosure Statement Order as the "**Solicitation Procedures**"), including the materials to be transmitted to Holders of Allowed Claims in Voting Classes (defined in the Disclosure Statement Order as the "**Solicitation Package**"). The Solicitation Procedures also set forth, among other things: (a) the method of distribution of the Solicitation Package; (b) procedures for the temporary allowance of Claims for voting purposes; (c) the method of distribution of notices to non-voting creditors and other interested parties; (d) the qualifications for creditors entitled to vote on the Plan; (e) a hierarchy

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In re Lapworth, No. 97-34529DWS, 1998 WL 767456, at *3 (Bankr. E.D. Pa. Nov. 2, 1998) ("The legislative history of § 1129(a)(2) specifically identifies compliance with the disclosure requirements of § 1125 as a requirement of § 1129(a)(2)."); S. Rep. No. 989, 95th Cong., 2d Sess., at 126 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess., at 412 (1977).

to establish the amount of the claim associated with each creditor's vote; and (f) procedures for tabulating the ballots and master ballots submitted to the Claims and Voting Agent.

63. On December 23, 2009, the Debtors caused the Solicitation Package to be mailed to Holders of the Claims in the Voting Classes, Class 1, 3, 5A, 5B, 5C and 5D, whose Claims were Allowed or deemed to be Allowed for voting purposes. The Debtors also made the Plan, Disclosure Statement, Disclosure Statement Order and certain related materials available to Creditors, other interested parties and the public generally by posting it on the website http://chapter11.epiqsystems.com/Spansion. Hence, the Debtors solicited and tabulated votes on the Plan in accordance with the Solicitation Procedures approved by the Court. The Debtors also timely mailed notice, in the form approved by the Court in the Disclosure Statement Order, to non-voting Creditors and other parties entitled to receive such notice as described in the Solicitation Procedures. Accordingly, the Solicitation Package was transmitted in connection with the solicitation of votes to accept or to reject the Plan in compliance with section 1125 and the Disclosure Statement Order.

6. The Plan Has Been Proposed In Good Faith And Not By Any Means Forbidden By Law (Section 1129(a)(3))[22]

a. Confirmation of a plan should only be denied under section 1129(a)(3) if the plan is infeasible or unable to effectuate the debtor's legitimate and honest reorganization

64. 11 U.S.C. § 1129(a)(3) provides, in relevant, part,

> (a) The court shall confirm a plan only if all of the following requirements are met: . . .(3) The plan has been proposed in good faith and not by any means forbidden by law.

[22] As noted in paragraph 22, *supra*, the Convert Committee has filed its Motion to Vacate; that motion is set for hearing concurrently with the Confirmation Hearing. The Debtors vigorously dispute the allegations in the Motion to Vacate.

65. The Bankruptcy Code does not define "good faith" as that term is used in section 1129(a)(3). "[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code" in light of the particular facts and circumstances of the case. *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 247 (3d Cir. 2004); *In re Armstrong World Indus.,* 348 B.R. 136, 164 (Bankr. D. Del. 2006); *In re PWS Holding Corp*., 228 F.3d 224, 242 (3d Cir. 2000) (quoting *In re Madison Hotel Associates*, 749 F.2d 410, 424-25 (7th Cir. 1984)); *In re Burns & Roe Enters.,* 2009 U.S. Dist. LEXIS 13574 at *78 (D.N.J. Feb. 20, 2009). This inquiry typically focuses on whether a plan has been proposed with a legitimate purpose and with a basis for expecting that reorganization consistent with the Bankruptcy Code's objectives can be effectuated. [23]

66. "[D]enial of confirmation for failure to satisfy section 1129(a)(3) should be reserved for only the most extreme of cases." 7-1129 Collier on Bankruptcy P 1129.02; *see also In re Sound Radio, Inc.,* 93 B.R. 849 at 853 ("To find a lack of 'good faith' courts have examined whether the debtor intended to abuse the judicial process and the purposes of the reorganization provisions. A finding of a lack of good faith is especially appropriate when no realistic possibility of an effective reorganization exists and it is evident that the debtor seeks to delay or frustrate the legitimate efforts of secured creditors to enforce their rights"). Good faith

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[23] *See, e.g., In re Zenith Electronics Corp*., 241 B.R. 92, 107-08 (Bankr. D. Del. 1999) (quoting *In re Sound Radio, Inc.,* 93 B.R. 849, 853 (Bankr. D.N.J. 1988))) (finding good faith where the plan was "proposed with the legitimate purpose of restructuring [the debtor's] finances to permit [the debtor] to reorganize successfully…exactly what chapter 11 of the Bankruptcy Code was designed to accomplish"); *In re Burns & Roe Enters.*, 2009 U.S. Dist. LEXIS 13574 (holding that plan had been proposed with the legitimate purpose of reorganizing the debtors' affairs and maximizing the returns available to creditors and holders of equity interests and therefore satisfied 1129(a)(3), even if it relieved debtors of contractual obligations to objecting insurance company); *In re Surfango, Inc.*, 2009 WL 5184221 at *8-9 (Bankr. D.N.J. Dec. 18, 2009) (In determining good faith, "[t]wo relevant inquiries deserve focus: (1) whether the plan serves a valid bankruptcy purpose, e.g., by preserving a going concern or maximizing value, and (2) whether the plan is proposed to obtain a tactical litigation advantage"); *see also NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 528 (1984) (recognizing that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources").

is not lacking simply because a plan "may not be one which the creditors would themselves design and indeed may not be confirmable." *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 803 (5th Cir. 1997) (bankruptcy court's finding of good faith upheld against allegations that debtor did not effectively market the property so as to produce a bidder who would compete against lender at confirmation hearing); *In re Montgomery Court Apartments, Ltd.*, 141 B.R. 324, 329 (Bankr. S.D. Ohio 1992) ("The Court fails to see how Greyhound's unhappiness with the Plan's terms can give rise to a finding of bad faith on the part of the Debtor under 11 U.S.C. § 1129(a)(3). Chapter 11 plans routinely alter the contractual rights of parties"); *In re Zenith Electronics Corp*., 241 B.R. at 107 (fundamental fairness not offended by one group receiving better treatment than another under plan).

67. Fundamentally, the good faith standard does not demand that a debtor offer more to its creditors than the Bankruptcy Code requires. *See In re G-1 Holdings Inc.*, 2009 WL 3785953 at *34 (D.N.J. Nov. 12, 2009). "In enacting the Bankruptcy Code, Congress made a determination that an eligible debtor should have the opportunity to avail itself of a number of Code provisions which adversely alter creditors' contractual and nonbankruptcy rights….The fact that a debtor proposes a plan in which it avails itself of an applicable Code provision does not constitute evidence of bad faith." *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1075 (9th Cir. 2002) (quoting *In re PPI Enter., Inc.*, 228 B.R. 339, 344, 347 (Bankr. D. Del. 1998).

b. <u>The Plan provides for a viable and efficient reorganization</u>

68. As proposed by the Debtors, the Plan's purpose and contents are honest, legitimate and viable. The Plan's paramount objectives are the reorganization of the Debtors' valuable existing business, the restructuring of the Debtors' liabilities and the preservation of the

value of the Debtors' Estates while allowing Creditors to realize a fair and reasonable recovery. Furthermore, the Plan satisfies these objectives in the most efficient and timely manner of reorganization presently imaginable, and is in no way an attempt to abuse judicial process or delay or frustrate the legitimate efforts of creditors to enforce their rights. *See In re Sound Radio, Inc.*, 93 B.R. at 853.

69. As detailed in the Plan and Disclosure Statement, the Plan will resolve certain disputes and provide the Reorganized Debtors with a capital structure allowing them to satisfy their obligations with sufficient liquidity and capital resources and otherwise conduct their business. Furthermore, the significant restructuring benefits envisioned by the Plan will be effectuated without abuse of the judicial process and with the Creditors' interests in mind – evidenced, for example, by the Debtors' sedulous negotiations and efforts to address and resolve the major obstacles to Confirmation hitherto voiced, as well as through the New Spansion Debt and the Rights Offering, which financings provide an appropriate recovery to the FRNs while protecting the allocation of new equity to Holders of Unsecured Claims. Notwithstanding the Objections of Creditor constituencies seeking to avoid legal infirmities in their rights or to cajole a more favorable Distribution, the Plan is eminently confirmable and is consistent with the objectives and purposes of the Bankruptcy Code. *In re Federal-Mogul Global Inc.*, 2007 Bankr. LEXIS 3940 at *69-71 (Bankr. D. Del. Nov. 8, 2007).

c. The Debtors proposed the Plan and negotiated with their creditor constituencies diligently, honestly and in good faith

70. Furthermore, the Plan is the product of extensive arm's-length negotiations which belie (and reveal as unfounded) the allegations of bad faith, collusion or manipulation of the process. Throughout the Chapter 11 Cases, the Debtors made detailed presentations and negotiated extensively with the Creditors' Committee and the Ad Hoc Consortium and more

recently with the organizing of the Senior Noteholders Group and the Convert Committee, with those Entities and other creditor constituencies (including the objecting parties). The Debtors voluntarily disclosed detailed and confidential business information, kept the Creditor groups apprised of developments with the Debtors and the Chapter 11 Cases, and responded to all requests for information by the Creditor constituencies.

71. Negotiations over the terms of a plan of reorganization commenced in April 2009, within sixty days of the commencement of these Chapter 11 Cases, and have continued by way of conference calls, written presentations, correspondence and face-to-face meetings for nearly ten months now. Throughout this period, the Debtors negotiated diligently with their Creditor constituencies and have been forthcoming with information and disclosures. The Debtors, Gordian Group and the Debtors' other advisors have had numerous meetings with the Creditors' Committee and its professional advisors.[24] The Debtors filed their voluminous schedules of assets and liabilities, statements of financial affairs and monthly operating reports with this Court. They have also filed a number of reports with the Securities and Exchanges Commission. They have diligently responded to a significant number of discovery requests, including those from the Convert Committee and the Equity Committee. As such, the Plan satisfies the requirements of 1129(a)(3).

7. The Plan Provides For Bankruptcy Court Approval Of Certain Administrative Payments (Section 1129(a)(4))

72. Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by either the plan proponent, the debtor or a person issuing securities or

[24] The Indenture Trustees for both the Senior Notes and the Exchangeable Debentures have been, and continue to be, active members of the Creditors' Committee.

acquiring property under the plan, be subject to approval of the bankruptcy court as reasonable. Specifically, section 1129(a)(4) provides that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4).

73. This section of the Bankruptcy Code requires that all post-petition fees promised or received in the Chapter 11 Cases remain subject to the Court's review. *See In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992). Courts have construed this provision to require that all payments of professional fees using funds from estate assets be subject to review and approval by the Court as to their reasonableness. *See In re Chapel Gate Apartments, Ltd*., 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation.").

74. Here, all payments made or to be made by the Debtors for services rendered and expenses incurred in connection with the Chapter 11 Cases prior to Confirmation, including, without limitation, all Professional Claims, will be paid only after allowance of such Claims by the Court to the extent not already approved and paid in accordance with orders of the Court. (Plan at Section 4.2.) In addition, the Fee Auditor will continue to perform its services and the Court will retain jurisdiction after the Effective Date to grant or deny applications for allowance of Professional Compensation or reimbursement of expenses authorized pursuant to Orders of the Court, the Bankruptcy Code, or the Plan. Thus, the Plan complies fully with the requirements of section 1129(a)(4).

8. Information Has Been Disclosed About Post-Emergence Directors And Officers And Their Appointment Is Consistent With Public Policy (Section 1129(a)(5))

75. The Debtors have complied with all the elements of section 1129(a)(5) of the Bankruptcy Code (in addition to their compliance with the related provisions of section 1123(a)(7), as discussed above). In particular, section 1129(a)(5)(A) requires that, prior to confirmation, the proponent of a plan disclose the identify and affiliations of the proposed officers and directors of the reorganized debtors and that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy. 11 U. S. C. § 1129(a)(5)(A). In addition, section 1129(a)(5)(B) requires a plan proponent to disclose the identity of any "insider" (as defined by 11 U.S.C. § 101(31)) to be employed or retained by the reorganized debtor and the "nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B); see *In re NH Holdings, Inc.*, 288 B.R. 356, 363 (Bankr. D. Del. 2002); *Drexel*, 138 B.R. at 760 (section 1129(a)(5)(13) "requires a plan to disclose the identity of any 'insider' to be employed or retained by the reorganized debtor."). The Plan satisfies the first part of section 1129(a)(5)'s requirements because the identities and affiliations of any Person designated to serve as an officer or director of the Reorganized Debtors will have been disclosed prior to or at the Confirmation Hearing. The selection of the seven initial members of the board of directors of Reorganized Debtors comports with the relevant Plan provisions.

76. The appointment of the proposed directors of the Initial Board of Reorganized Spansion Inc. also complies with section 1129(a)(5)(A)(ii) because the appointment of the proposed directors is in the best interests of creditors and equity security holders and conforms with public policy. 11 U.S.C. § 1129(a)(5)(A)(ii). This section asks a court to ensure that the post-confirmation governance of the reorganized debtor is in "good hands," which courts have

concluded to mean experience in the reorganized debtor's business and industry[25] and experience in financial and management matters.[26] The proposed directors and officers of the Reorganized Debtors easily satisfy this standard. Section 1129(a)(5)(B) is also satisfied by the contents of the Second Addendum.

9. The Plan Does Not Require Governmental Regulatory Approval (Section 1129(a)(6))

77. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation has approved any rate change provided for in the debtor's plan. Section 1129(a)(6) is inapplicable to these Chapter 11 Cases because the Debtors' rates are not subject to approval of any governmental regulatory commission.

10. The Plan Is In The Best Interest Of Creditors And Interest Holders (Section 1129(a)(7))[27]

78. Section 1129(a)(7) of the Bankruptcy Code—the "best interest test"—requires that, with respect to each class, each holder of a claim or an equity interest in such class either:

> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtors liquidated under chapter 7 of [the Bankruptcy Code] on such date.

11 U.S.C. § 1129(a)(7)(A)(i)-(ii).

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[25] *See Drexel*, 138 B.R. at 760; *In re Rusty Jones, Inc.*, 110 B.R. 362, 372 (Bankr. N.D. Ill. 1990); *In re Toy & Sports Warehouse. Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

[26] *See In re Stratford Assocs. Ltd. P'ship*, 145 B.R. 689, 696 (Bankr. D. Kan. 1992); *In re Sherwood Square Assocs.*, 107 B.R. 872, 878 (Bankr. D. Md. 1989).

[27] The Debtors are submitting a separate memorandum of law in response to Spansion Japan's Objection on this issue.

79. The best interest test applies to individual dissenting holders of claims and interests rather than classes and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's plan of reorganization. As section 1129(a)(7) makes clear, the best interest test applies only to non-accepting holders of impaired claims or interests. The Plan contemplates Distributions to six Impaired Classes – Classes 1, 3, 5A, 5B, 5C and 5D. The Plan also contemplates no Distributions to Holders of Claims in Classes 7, 8, 12 and 13 or to Holders of Interests in Classes 9 and 11. Accordingly, to satisfy the best interests test, the Debtors must demonstrate that each Creditor holding Claims or Interests in these Classes will receive at least as much under the Plan as that Creditor would receive in a chapter 7 liquidation. *See In re Lason, Inc*., 300 B.R. 227, 232 (Bankr. D. Del. 2003) ("Section 1129(a)(7)(A) requires a determination whether 'a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization.'"). Here, the Plan satisfies the best interest tests as demonstrated by comparing the Plan's projected recoveries with the Debtors' liquidation analysis contained in the Disclosure Statement, Exhibit "D".

80. The Debtors have retained John P. Brincko and Brincko Associates, Inc. ("**Brincko**") to perform a detailed analysis of the likely Creditor recoveries in a hypothetical chapter 7 liquidation scenario of the Debtors' Estates. Class 1 (Secured Credit Facility Claims), Class 3 (FRN Claims), Class 5A (Senior Notes Claims), Class 5B (General Unsecured Claims), Class 5C (Exchangeable Debentures Claims) and Class 5D (Spansion Japan Rejection Damages Claims) are impaired and receiving Distributions. Brincko prepared a detailed Liquidation Analysis, which is set forth as Exhibit "D" to the Disclosure Statement. Brincko has also

prepared an expert report (the "Brincko Liquidation Report") to set forth his findings. The Brincko Liquidation Report will be presented at the Confirmation Hearing. As set forth in the Brincko Liquidation Report, Holders of Allowed Claims and Interests in each Impaired Class will receive a Distribution under the Plan that is in all cases no less, and in many cases significantly more, than they would in a liquidation in a hypothetical Chapter 7 case. The Debtors understand that none of the objecting parties disputes the findings in the Brincko Liquidation Report or objects to its inclusion in the record of the Confirmation Hearing.

81. The Brincko Liquidation Report is substantially consistent with the Liquidation Analysis in the Disclosure Statement, except that Brincko used December 27, 2009 as the date for the liquidation analysis as compared to September 27, 2009, the date used for the Disclosure Statement. In the Liquidation Analysis in the Disclosure Statement, the highest estimated recovery rate for impaired unsecured creditors in a Chapter 7 liquidation on an entity-by-entity basis was .02%, which is less than the 31-45% recovery the same impaired unsecured creditors would receive under the Plan assuming substantive consolidation. In the Brincko Liquidation Report, the highest estimated recovery rate for impaired unsecured creditors in a Chapter 7 liquidation on an entity-by-entity basis is 0%. The six Impaired Voting Classes, Classes 1, 3, 5A, 5B, 5C and 5D, and the six Impaired Non-Voting Classes 7, 8, 9, 11, 12 and 13, as well as holders of Claims in all of the other Classes, will receive no less under the Plan (and, in the case of the Voting Classes, substantially more) than under a Chapter 7 liquidation of the Debtors.

82. The Debtors believe that, if the Chapter 11 Cases were converted to cases under chapter 7 of the Bankruptcy Code, the value of distributions from the chapter 7 cases would be less than the value of Distributions under the Plan for a number of reasons. First, proceeds received in a chapter 7 liquidation are likely to be significantly discounted due to the distressed

nature of the sale of the Debtors' assets and the lack of potential purchasers' ability to secure financing in today's tight credit markets. In addition, the Debtors would incur the additional costs and expenses of a chapter 7 trustee and other professional fees relating to the chapter 7 wind-down. Moreover, distributions in chapter 7 cases may not occur for a longer period of time than Distributions under the Plan, thereby reducing the present value of such distributions. In this regard, it is possible that distributions of the proceeds of a liquidation could be delayed for a significant period while the chapter 7 trustee and its advisors become knowledgeable about, among other things, the Chapter 11 Cases and the Claims against the Debtors.

83. The Plan provides a better distribution to Impaired Classes in either a high or low value liquidation scenario. The estimate of the Debtors' value under the Plan exceeds the estimate of values set forth in the liquidation analysis; therefore, the Plan satisfies the best interest test.

11. Acceptance Of Impaired Classes (Section 1129(a)(8))

84. Section 1129(a)(8) of the Bankruptcy Code, when read together with section 1129(b)(1) of the Bankruptcy Code, requires that each class of claims or interests must either accept a plan or be unimpaired thereunder, or the debtor must request that the so-called "cramdown" provisions of section 1129(b) are satisfied with respect to such class of claims or interests, and the cramdown shall be satisfied as to any class with respect to which section 1129(a)(8) is not satisfied. Pursuant to section 1126(c) of the Bankruptcy Code, a class of impaired claims accepts a plan if the holders who vote to accept the plan constitute at least two-thirds in dollar amount and more than one-half in number of the claims in that class that actually vote to accept or reject the plan. A class that is not impaired under a plan, and each holder of a claim or interest in such class, is conclusively presumed to have accepted the plan. Conversely, a class is conclusively deemed to have rejected a plan if the plan provides that the claims or

interests of such class do not receive or retain any property under the plan on account of such claims or interests.

85. The Debtors expect that the Plan will be accepted by at least several of the Voting Classes, Classes 1, 3, 5A, 5B, 5C and 5D. The Debtors expect however that the Plan will not be accepted by all of the Voting Classes. In any case, the Debtors will demonstrate that the Plan satisfies the cramdown with respect to the Classes which will not receive any Distribution of property under the Plan, the six Impaired Non-Voting Classes 7, 8, 9, 11, 12 and 13. Because those Classes are conclusively deemed to reject the Plan and would receive no Distribution, the cramdown must be met as to those Classes. Pursuant to Section 2.9 of the Plan, the Debtors have requested that the Bankruptcy Court confirm the Plan under the cramdown powers of section 1129(b) of the Bankruptcy Code.

12. The Plan Complies With Statutorily Mandated Treatment Of Administrative And Priority Tax Claims (Section 1129(a)(9))

86. Section 1129(a)(9) of the Bankruptcy Code requires a chapter 11 plan to provide that all persons holding claims entitled to priority under section 507(a) of the Bankruptcy Code will be fully compensated for their claims in cash unless the holder of a particular claim agrees to a different treatment with respect to such claim. As required by section 1129(a)(9), Section 4.2 of the Plan provides for full payment of all Allowed Administrative Claims on or as soon as reasonably practicable after the Effective Date. Further, Section 4.2.2 of the Plan provides for full payment of Allowed Priority Tax Claims as soon as reasonably practicable after the

Effective Date or over a five-year period using installment payments as permitted by section 1129(a)(9)(C).[28] Therefore, the Plan complies with section 1129(a)(9).

13. At Least One Impaired Class Of Claims Has Accepted The Plan, Excluding The Acceptances Of Insiders (Section 1129(a)(10))

87. Section 1129(a)(10) of the Bankruptcy Code is an alternative requirement to section 1129(a)(8)'s requirement that each class of claims or interests must either accept the plan or be unimpaired under the plan. Section 1129(a)(10) provides that to the extent there is an impaired class of claims, at least one impaired class of claims must accept the Plan, excluding acceptance by any insider. The Debtors believe that, when the Claims and Voting Agent delivers its Voting Tabulation Report, several of the six Voting Classes of Claims will have voted to accept the Plan. Accordingly, the Debtors believe that the Plan will satisfy the requirements of section 1129(a)(10).

14. The Plan Is Feasible (Section 1129(a)(11))[29]

88. Section 1129(a)(11) of the Bankruptcy Code requires that the bankruptcy court find that a plan is feasible as a condition precedent to confirmation. Specifically, the bankruptcy court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11).

89. A debtor must prove a chapter 11 plan's feasibility by the preponderance of evidence. *See In re Briscoe Enters.*, 994 F.2d 1160, 1165 (5th Cir. 1993) (rejecting "clear and

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[28] With respect to the Objections by Tessera that the Plan cannot be confirmed because the Plan fails to provide for payment in full of Allowed Administrative Expense Claims on the Plan Effective Date, see the separate reply filed by the Debtors of even date herewith.

[29] *See* the separate memorandum of law which addresses Tessera's Objection on this issue.

convincing" as the applicable standard); *CoreStates Bank N.A. v. United Chem. Tech., Inc*., 202 B.R. 33, 45 (ED. Pa. 1996). To demonstrate that a plan is feasible, however, it is not necessary that success be guaranteed. *See In re U.S. Truck*, 47 B.R. 932, 944 (E.D. Mich. 1985). Rather, a bankruptcy court must determine whether a plan is workable and has a reasonable likelihood of success. *Mercury Capital Corp. v. Milford Conn. Assocs., L.P*., 354 B.R. 1, 9 (D. Conn. 2006) (A "'relatively low threshold of proof' will satisfy the feasibility requirement.") (quoting *In re Brotby*, 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003)). The key element of feasibility is whether there exists a reasonable likelihood that the provisions of the plan can be performed and that the debtor will be commercially viable after the plan's effective date. *In re Texaco Inc*., 84 B.R. 893, 910 (Banta. S.D.N.Y. 1988) ("What is required is that there be a reasonable assurance of commercial viability") As demonstrated below, the Plan is feasible within the meaning of section 1129(a)(11).

90. In evaluating a plan's feasibility, courts have considered the following factors as probative:

- the adequacy of the capital structure;
- the earning power of the reorganized debtor;
- economic and market conditions;
- the ability of management and the likelihood that the same management will continue; and
- any other related matter that determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

91. The Debtors have thoroughly analyzed their ability to meet their Plan obligations post-Confirmation and to continue as a going concern without further financial reorganization. As a result of this analysis, the Debtors submit that the Plan meets the feasibility requirement set

forth in section 1129(a)(11). The Debtors contend that Plan Confirmation is not likely to be followed by the need for further financial reorganization or liquidation.

92. Under the Plan, the Debtors have certain payment obligations on or as soon as practicable after the Effective Date, including working capital needs for the operation of the Debtors' business. These Chapter 11-related payment obligations include the Cash Distribution to the Holders of the FRN Claims pursuant to the Cash Out Option under the Plan, payments to Holders of Allowed Administrative Expense, Priority and Convenience Claims and certain Secured Claims, and, in the months following the Effective Date, including payment of Professional Compensation. In order to make these payments and to fund their ongoing working capital needs, the Debtors' emergence from Chapter 11 is predicated on funding from: (a) Cash on hand as of the Effective Date; (b) the New Spansion Debt; (c) the proceeds of the Rights Offering; and (d) the Exit Financing Facility.

93. For all the reasons set forth above, the Debtors submit that the Plan satisfies section 1129(a)(11)'s feasibility requirement. The Debtors have established by a preponderance of the evidence that Confirmation of the Plan is not likely to be followed by the liquidation or need for further reorganization of any or all of the Reorganized Debtors. As a result, the Plan satisfies the requirements of section 1129(a)(11).

15. The Plan Provides For The Payment Of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12))

94. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930.161. Section 4.2.1(b) of the Plan provides that all such fees will be paid prior to the closing of the Chapter 11 Cases when due or as soon thereafter as practicable. The Plan, therefore, complies with section 1129(a)(12).

16. The Plan Does Not Modify Retiree Benefits (Section 1129(a)(13))

95. Section 1129(a)(13) of the Bankruptcy Code requires that all retiree benefits continue to be paid post-Confirmation at any levels established in accordance with Bankruptcy Code section 1114 of the Bankruptcy Code. Section 6.7. of the Plan provides that, following the Effective Date, the payment of all retiree benefits as defined in section 1114 of the Bankruptcy Code shall continue. The Plan satisfies section 1129(a)(13) of the Bankruptcy Code.

17. The Plan Satisfies The "Cram Down" Requirements (Section 1129(b))

96. Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a) are met, then — notwithstanding the existence of a class of impaired claims or interest that has not accepted the plan, so that the plan does not comply with section 1129(a)(8) — the plan may be confirmed so long as it does not discriminate unfairly and is fair and equitable with respect to each class of claims and interests that is impaired and has not accepted the plan. 11 U.S.C. § 1129b(1). Thus, to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" against, and is "fair and equitable" with respect to, the non-accepting impaired classes. S*ee John Hancock Mutual Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 n.5 (3d Cir. 1993). As discussed below, the Debtors satisfy the "cram down" requirements in section 1129(b) of the Bankruptcy Code to confirm the Plan.

a. <u>The Plan is fair and equitable with respect to the Impaired Classes that vote to reject the Plan</u>

97. Section 1129(b)(2) provide that a plan is fair and equitable with respect to a particular class of unsecured claims or impaired interests if it provides that the holder of any claim or interest in a class junior to the claims or interests of that particular class will not receive or retain under the plan on account of such junior claim or interest in property. *See* 11 U.S.C.

§ 1129(b)(2)(B)(ii) and (C)(ii). This central tenet of bankruptcy law—the "absolute priority rule"—requires that, if the holders of claims or interests in a particular class that votes to reject a plan receive less than full value for their claims or interests, no holder of claims or interests in a junior class may receive or retain any property under the plan.[30] Another condition under the absolute priority rule is that senior classes cannot receive more than a 100% recovery for their claims. *See Exide,* 303 B.R. at 61; *Genesis,* 266 B.R. at 612.

98. The Plan satisfies the absolute priority rule with respect to all of the Impaired Non-Voting Classes, Classes 7, 8, 9, 11, 12 and 13, in that no Class of Claims or Interests junior to any such Class receives or retains any property under the Plan and no Class of Claims senior to it receives or retains property with a value greater than 100% of such Class's Claims. Further, to the extent any of Classes 5A, 5B, 5C or 5D votes to reject the Plan, the Debtors contend that the absolute priority rule is satisfied with respect to such Class. Accordingly, the Plan satisfies the requirements of sections 1129(b)(2)(B) with respect to Classes of Claims and 1129(b)(2)(C)(ii) for the Classes of Interests that either voted to reject or were deemed to reject the Plan and, therefore, is fair and equitable with respect to those Classes.

b. The Plan does not unfairly discriminate with respect to the Impaired Classes that have rejected the Plan

99. The Plan does not discriminate unfairly with respect to the Impaired Classes that have rejected the Plan or are deemed to reject the Plan. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists. *See In re 203 N. LaSalle St. Ltd.*

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[30] *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (the absolute priority rule, "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan.") (citations omitted); *Bank of Am.*, 526 U.S. at 441-42 ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

P'ship., 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), rev'd on other grounds, *Bank of America*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established."). Rather, courts typically examine the facts and circumstances of each particular case to determine whether unfair discrimination exists. *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis."); *see also In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances"). At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without sufficient justifications for doing so. *See In re Ambanc*, 115 F.3d at 655; *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

100. A threshold inquiry to assessing whether a proposed plan of reorganization unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment.

101. The only Entities to assert unfair discrimination are Spansion Japan and GE Japan, the Holders of Class 13 Claims under the December 16 Plan. Because Spansion Japan Rejection Damages Claims are now Class 5D Claims under the Plan, this issue should be resolved.

102. Nor does the Plan's treatment of Interests discriminate unfairly. Holders of Interests in Classes 9, 11 and 12 contain all Interests in the Debtors and Claims held by Interest

Holders on account of their equity securities, and all such Holders receive the same treatment under the Plan, *i.e.*, nothing. Therefore, the Plan does not unfairly discriminate with respect to the Impaired Classes, and the cram down test of section 1129(b) is satisfied.

IV. CONCLUSION

For the foregoing reasons, the Debtors respectfully request that the Plan be confirmed.

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Wilmington, Delaware

Respectfully submitted,

/s/ Michael R. Lastowski

Michael R. Lastowski (No. 3892)
Richard W. Riley (No. 4052)
Sommer L. Ross (No. 4598)
DUANE MORRIS, LLP
1100 North Market Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 657-4900
Facsimile: (302) 657-4901
E-mail: mlastowski@duanemorris.com
rwriley@duanemorris.com
slross@duanemorris.com

and

Michael S. Lurey (Admitted *Pro Hac Vice*)
Gregory O. Lunt (Admitted *Pro Hac Vice*)
Kimberly A. Posin (Admitted *Pro Hac Vice*)
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, California 90071-1560
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
E-mail: Michael.Lurey@lw.com;
Gregory.Lunt@lw.com
Kim.Posin@lw.com

ATTORNEYS FOR DEBTORS AND DEBTORS-IN-POSSESSION