

Hearing Date: October 28, 2009 at 10:30 a.m. (prevailing Eastern time)
Objection Deadline: October 21, 2009 at 5:00 p.m. (prevailing Eastern time)

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*Attorneys for Dr. Michael Jaffé, as insolvency
administrator over the estate of Qimonda AG*

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

In re

QIMONDA AG,

Debtor in a Foreign Proceeding.

Case No. 09-14766 (RGM)

Chapter 15

NOTICE OF MOTION TO AMEND SUPPLEMENTAL ORDER

PLEASE TAKE NOTICE that on October 8, 2009, Dr. Michael Jaffé, in his capacity as the duly authorized foreign representative (the “*Foreign Representative*”) of Qimonda AG (“*QAG*” or the “*Debtor*”), the debtor in a proceeding currently pending in Germany (the “*Foreign Proceeding*”), by his U.S. counsel, Morrison & Foerster LLP, filed the Motion to Amend the Supplemental Order dated July 22, 2009 (the “*Motion*”).

PLEASE TAKE FURTHER NOTICE that a hearing will be held to consider the Motion (the “Hearing”) on **October 28, 2009 at 10:30 a.m. (prevailing Eastern time)** before the Honorable Robert G. Mayer, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Eastern District of Virginia (Alexandria), 200 South Washington Street, Alexandria, Virginia 22314-5405, Courtroom III.

PLEASE TAKE FURTHER NOTICE THAT responses or objections, if any, to the Motion and the relief requested therein must be made in writing, conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Bankruptcy Court, set forth the basis for the objection and the specific grounds therefor, and be filed with the Bankruptcy Court electronically, with a hard copy delivered directly to Chambers and served upon each of the following: (i) counsel to Dr. Michael Jaffé, as insolvency administrator over the estate of Qimonda AG, Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, New York 10104, Attention: Brett H. Miller, Esq. and Todd M. Goren, Esq., and 2000 Pennsylvania Avenue, N.W., Suite 6000, Washington, DC 20006, Attention: Jeff A. Showalter; (ii) the Office of the United States Trustee for the Eastern District of Virginia, 115 South Union Street, Plaza Level, Suite 210, Alexandria, Virginia 22314, Attention: Dennis J. Early; and (iii) those parties who have requested service of all papers in this Chapter 15 case pursuant to Bankruptcy Rule 2002, so as to be received on or before **5:00 p.m. (prevailing Eastern time) on October 21, 2009.**

PLEASE TAKE FURTHER NOTICE that if you do not timely file and serve a written objection to the relief requested in the Motion, the Bankruptcy Court may deem any opposition waived, treat the Motion as conceded, and enter an order granting the relief requested in the Motion without further notice or hearing.

Dated: October 08, 2009

By:

/s/ Jeff A. Showalter

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**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

In re

QIMONDA AG,

Debtor in a Foreign Proceeding.

Case No. 09-14766 (RGM)

Chapter 15

MOTION TO AMEND SUPPLEMENTAL ORDER

Dr. Michael Jaffé, in his capacity as the duly authorized foreign representative (the “*Foreign Representative*”) of Qimonda AG (“*QAG*” or the “*Debtor*”), the debtor in a proceeding currently pending in Germany (the “*Foreign Proceeding*”), by his U.S. counsel, Morrison & Foerster LLP, respectfully files this motion to amend the supplemental order dated July 22, 2009 (the “*Motion*”). In support of this Motion, the Foreign Representative states as follows:

JURISDICTION AND VENUE

1. The Bankruptcy Court has jurisdiction over this Chapter 15 case and the matters raised in the Motion under 28 U.S.C. §§ 157 and 1334.
2. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(P).
3. Venue is proper in this District under 28 U.S.C. § 1410.

BACKGROUND

4. The Debtor is incorporated under the laws of Germany with its principal executive offices located in Munich, Germany. On April 1, 2009, the Amtsgericht - Insolvenzgericht München (Local Court - Insolvency Court Munich) (the “*Foreign Court*”) entered an order commencing the Foreign Proceeding and appointing the Foreign Representative to administer the reorganization or liquidation of the Debtor under the Foreign Court’s supervision in accordance with the insolvency laws of Germany (“*Foreign Court Order*”). See Pleister Declaration, ¶ 6. Certified copies of the Foreign Court Order (German original and English translation) are attached to the Official Form Petition.

5. The Foreign Representative respectfully directs the Bankruptcy Court to the comprehensive factual background set forth in the Pleister and Seifert Declarations, which contain facts concerning:

- a. the history of QAG in the semiconductor research, development and manufacturing field dating back to 1952;
- b. a general description of QAG’s assets, liabilities, and financial affairs;
- c. the events that precipitated the Foreign Proceeding and the commencement thereof; and
- d. the steps the Foreign Representative has taken to administer the reorganization of QAG in the Foreign Proceeding.

6. On July 22, 2009, the Bankruptcy Court entered an order granting the petition of the Foreign Representative to recognize the Foreign Proceeding as a “foreign main proceeding” (Docket No. 56) and a supplemental order (the “*Supplemental Order*”) (Docket No. 57). Paragraph 4 of the Supplemental Order provides “Pursuant to 11 U.S.C. §1521(a) and in addition to those sections made applicable pursuant to §1520, the following sections of title 11 of 3 the United States Code are also applicable in this proceeding: §§305-307, 342, 345, 349, 350, 364-366, 503, 504, 546, 551, 558.”

7. On September 9, 2009, the Debtor received a letter from Elpida Memory, Inc. (“*Elpida*”), the relevant parts of which are attached to this Motion as Exhibit A, and on September 14, 2009, the Debtor received a letter from Samsung Electronics Co., Ltd. (“*Samsung*”), the relevant parts of which are attached to this Motion as Exhibit B. Elpida and Samsung are foreign companies that are counterparties to certain license agreements with the Debtor (the “*Agreements*”), and each are purporting to exercise rights pursuant to Section 365(n) of the Bankruptcy Code (“*Section 365(n)*”).

RELIEF REQUESTED

8. For the reasons stated below, the Foreign Representative requests that the Bankruptcy Court either amend the Supplemental Order to (a) remove the reference to Section 365 from paragraph 4¹ or (b) to include the following proviso at the end of paragraph 4: “; provided, however, Section 365(n) applies only if the Foreign Representative rejects an executory contract pursuant to Section 365 (rather than simply exercising the rights granted to the Foreign Representative pursuant to the German Insolvency Code).”

¹ The Foreign Representative proposes to amend paragraph 4 so that it reads as follows: “Pursuant to 11 U.S.C. §1521(a) and in addition to those sections made applicable pursuant to §1520, the following sections of title 11 of 3 the United States Code are also applicable in this proceeding: §§305-307, 342, 345, 349, 350, 364, 366, 503, 504, 546, 551, 558.”

ARGUMENT

9. The changes requested to the Supplemental Order by the Foreign Administrator are consistent with principals of comity and the core purposes of Chapter 15. Specifically, the enforcement of Section 365(n) rights when the Debtor has not sought the protections of Section 365 of the Bankruptcy Code would be inconsistent with the afforded to intellectual license counter-parties under the German Insolvency and would be detrimental to the estate's other creditors.

10. As this Court has noted, the basic idea of Chapter 15 is to provide recognition of the primary (foreign) proceeding, and for courts in the United States to lend assistance to such primary case. One of the key means by which courts in the United States effectuate this assistance is through the granting of comity to the foreign proceeding. Specifically, under Section 1509(b)(3), courts in the United States (including the Bankruptcy Courts) are required to grant comity to the foreign representative upon recognition of the foreign proceeding. See 11 U.S.C. § 1509(b)(3). “While comity finds only three specific references in chapter 15, its influence in chapter 15 is pervasive.” Samuel L. Bufford, United States International Insolvency Law 2008-2009, 33 (Oxford University Press 2009).

11. The primary purpose of Chapter 15 is to provide for the efficient administration of cross-border insolvencies. See 11 U.S.C. § 1501(a)(3) (objective of Chapter 15 is to provide for the “efficient administration of cross-border insolvencies . . .”); 11 U.S.C. § 1501(a)(1) (noting that one of the objectives of Chapter 15 is to provide for cooperation between courts in the U.S. and courts (or other competent authorities) in foreign countries involving in cross-border insolvencies); Bufford, supra, at 27 (“A principal purpose of a chapter 15 case is to provide a structure to assist a foreign representative with respect to a foreign insolvency case.”)

12. In the Foreign Proceeding, the Debtor has exercised its right of non-performance under German Insolvency law, which excuses it from performance under the Agreements. In

doing so, the Debtor has not asked, nor does it have any intention to ask, the Bankruptcy Court to reject the Agreements pursuant to section 365 of the Bankruptcy Code.

13. The Bankruptcy Court should recognize the Debtor's declaration of non-performance with respect to the Agreements under the German Insolvency Code, as to do otherwise would be contrary to the core purposes of Chapter 15. Relief under Chapter 15 "is designed to protect the interests of the debtor and its creditors in an orderly administration of the bankruptcy estate and to promote fairness for both local and foreign creditors." See Collier on Scope and Application of Chapter 15 of the Code (December 5, 2007). Thus, the Bankruptcy Court should not equate the Debtor's declaration of non-performance under German law with the concept of rejection under U.S. law because to do so would not provide for the efficient administration of the insolvencies as it would create inconsistencies in the treatment of the counterparties to intellectual property agreements with the Debtor.

14. Moreover, even if Section 365 could be deemed to apply to the Agreements in the Chapter 15 context, Section 365(n) is not being invoked in this instance. Section 365(n) grants the licensee of intellectual property certain rights not enjoyed by other contracting parties. However, Section 365(n) only applies "[i]f the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property." Thus, Section 365(n) should not apply to the Agreements because the Debtor is not seeking to "reject" the Agreements pursuant to Section 365.

15. In addition, Section 365(n) should not grant counterparties any additional rights simply because the Foreign Representative has been excused from performance under Section 103 of the German Insolvency Code. The rights available to licensees under Section 365(n) of the Bankruptcy Code are not available under German law and should not be applied in a Foreign Proceeding where the Debtor did not take any action seeking the benefits of section 365 of the Bankruptcy Code. See Bufford, supra, at 273 ("Because of the complexity of this provision, the

court should adopt and apply to the chapter 15 case only those parts of § 365 that are relevant to the case.”). Further, foreign counterparties to executory contracts should not be able to claim the benefit of a U.S. law to the detriment of the foreign estate’s other creditors. Accordingly, Section 365(n) should not apply to the Agreements.

16. While the Foreign Representative believes that Section 365(n) is not applicable for the reasons set forth above, by way of clarification and for the avoidance of doubt, the Foreign Representative hereby requests that the Bankruptcy Court either amend the Supplemental Order, by (a) removing Section 365 from the description in paragraph 4 of the applicable code sections, or (b) specifying that Section 365(n) only applies with respect to intellectual property licenses that the Foreign Representative rejects pursuant to Section 365 (rather than simply exercising the rights granted to the Foreign Representative pursuant to the German Insolvency Code). If the Bankruptcy Court does not amend the Supplemental Order to clarify paragraph 4, the Foreign Representative will be forced to waste valuable estate resources responding to contract counterparties that assert that Section 365(n) applies to their contracts. Further, the failure to clarify paragraph 4 could hamper the Foreign Representative’s ability to negotiate resolutions with such contract counterparties, all of which would ultimately harm the other creditors of the Debtor’s estate.

NOTICE

17. The Foreign Representative will serve copies of this Motion on all parties that received notice of the Supplemental Order, as well as the counterparties to the Agreements and the United States Trustee.

18. The Foreign Representative respectfully submits that such notice procedures provide proper and sufficient notice of the relief requested herein, and that such notice procedures are consistent with all applicable rules of procedure.

CONCLUSION

WHEREFORE, the Foreign Representative respectfully requests that the Bankruptcy Court: (a) amend the Supplemental Order as requested herein; and (b) grant any other relief that is proper.

Dated: October 08, 2009

By:

/s/ Jeff A. Showalter

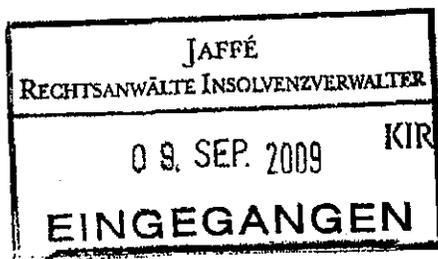
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EXHIBIT A



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Herrn Dr. Michael Jaffé
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Franz-Joseph-Str. 8
80801 München

September 9, 2009

**Re: Insolvency proceedings over the estate of Qimonda AG, Local Court of Munich -
Insolvency Court, File 1542 IN 209/09**

Dear colleague Dr. Jaffé,

We hereby notify you that we represent Elpida Memory, Inc. ("Elpida") in the insolvency proceedings of Qimonda AG ("Qimonda"). Please find enclosed the respective power of attorney.

The JDA and the PCLA

Elpida is licensed under the Patent Cross License Agreement ("PCLA") and the Joint Development Agreement ("JDA"), both dated June 1, 2008, between Qimonda and Elpida (collectively "the Agreements"). Licenses under the JDA have become perpetual and irrevocable due to the termination of the JDA (see the attached termination letter from Elpida dated September 8, 2009).¹ Licenses under the PCLA may not be terminated by either party and instead only terminate upon the expiration of the last-to-expire Licensed Patent thereunder.

¹ The timing of Elpida's termination of the JDA is not relevant to the analysis of Elpida's rights thereunder.

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The licenses granted to Elpida under each of the JDA and the PCLA were not affected by either the opening of the insolvency proceedings or the exercise of the alleged right to elect non-performance (pursuant to your letters dated May 27, 2009 and June 3, 2009) for at least the following independent reasons:

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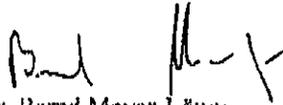
5. U.S. Chapter 15 Proceeding and Section 365(n) of the U.S. Bankruptcy Code. In addition and notwithstanding the foregoing, to the extent that your non-performance election and termination of the Agreements are argued to be effective, Elpida hereby provides you with written notice of its election to retain its rights under the JDA and the PCLA (and all agreements supplementary to the JDA and the PCLA) pursuant to 11 U.S.C. 365(n) (i.e., Section 365(n) of the U.S. Bankruptcy Code). On June 15, 2009, you submitted a petition in the United States Bankruptcy Court for the Eastern District of Virginia ("U.S. Chapter 15 Proceeding") in your capacity as the foreign representative of Qimonda AG, seeking recognition of a foreign main proceeding and other relief under Chapter 15 of the U.S. Bankruptcy Code. The U.S. Bankruptcy Court granted your petition on July 22, 2009.

In a Supplemental Order dated July 22, 2009, the U.S. Bankruptcy Court ruled that certain provisions of the U.S. Bankruptcy Code are applicable to the U.S. Chapter 15 Proceeding, including, *inter alia*, 11 U.S.C. § 365. You have elected non-performance of—and have purported to terminate—the Agreements, and Qimonda is the licensor of intellectual property to Elpida under both the JDA and the PCLA. Because you have initiated the U.S. Chapter 15 Proceeding as the foreign representative of Qimonda—and because the U.S. Bankruptcy Court has ordered that Section 365 of the U.S. Bankruptcy Code applies to the U.S. Chapter 15 Proceeding—Elpida is entitled to, and hereby does, elect to retain its rights under the JDA and the PCLA, and all agreements supplementary thereto, pursuant to 11 U.S.C. § 365(n)(1)(B). Elpida further requests that you comply with the requirements of 11 U.S.C. § 365(n)(3), and to the extent that your non-performance election and termination of the Agreements are not effective, comply with the requirements of 11 U.S.C. § 365(n)(4).

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Sincerely yours,

A handwritten signature in black ink, appearing to read 'Bernd Meyer-Löwy', written in a cursive style.

Dr. Bernd Meyer-Löwy
Rechtsanwalt/Fachanwalt für Insolvenzrecht

cc:

Local Court of Munich - Insolvency Court
Amtsgericht München - Insolvenzgericht
Infanteriestr. 5
80325 Munich
Germany

EXHIBIT B

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Privileged / Confidential

Herrn
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in his function as insolvency administrator
over the estate of Qimonda AG
Franz-Joseph-Str. 8
80801 München

14 September 2009

**Re: Insolvency proceedings over the estate of Qimonda AG, Local Court of Munich -
Insolvency Court, File 1542 IN 209/09**

Dear colleague Dr. Jaffé,

We hereby notify that we represent Samsung Electronics Co., Ltd. ("Samsung") in the insolvency proceedings of Qimonda AG ("Qimonda"). Please find enclosed the power of attorney.

Samsung holds licenses under the Cross Patent License Agreement ("CPLA") dated March 18, 1995, originally concluded between Siemens Aktiengesellschaft ("Siemens") and Samsung. According to a letter by Siemens dated April 29, 1999, the CPLA has been extended to Infineon Technologies AG, such that it became a separate party to the agreement and pursuant to Article 7.5 of the CPLA agreed to be bound by the conditions of the CPLA in particular in respect of the licenses granted. By a letter dated October 4, 2006 Infineon Technologies AG ("Infineon") provided written notice pursuant to Article 7.5 of the CPLA that Infineon assigned the licenses granted under the CPLA, with respect to the activities of the Infineon Memory Products Business, to Qimonda, and Qimonda, by itself and on behalf of its subsidiaries, agreed to comply fully with the contractual obligations and duties and to

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grant to Samsung and its subsidiaries licenses and rights of the same scope and duration as provided by Infineon under the CPLA.

Pursuant to your letter dated August 24, 2009 you have chosen non-performance according to § 103 of the German Insolvency Code ("InsO") and, as a mere matter of precaution, you have additionally declared to terminate the CPLA.

In addition and notwithstanding the abovementioned Samsung hereby provides you with written notice of its election to retain its rights under the CPLA pursuant to 11 U.S.C. 365(n). In the U.S. Chapter 15 Proceeding which you initiated as the foreign representative of Qimonda the U.S. Bankruptcy Court has ordered that Section 365 of the U.S. Bankruptcy is applicable. Therefore, Samsung is entitled to, and hereby does, elect to retain its rights under the CPLA pursuant to 11 U.S.C. § 365(n)(1)(B) and further requests that pursuant to 11 U.S.C. § 365(n)(3), you do not interfere with the rights of Samsung under the CPLA.

Sincerely yours,



Florian Bruder
Rechtsanwalt

cc:

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Enc.