

CLIENT MEMORANDUM

Supreme Court Denies Petition for *Certiorari* in *Jaffe v. Samsung*, Bolstering U.S. License Holders' Rights Against Foreign Debtor

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AUTHORS

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On October 6, 2014, the United States Supreme Court issued an order denying a petition for a writ of *certiorari* in *Jaffe v. Samsung*, also known as the *Qimonda* case. In denying the writ, the Supreme Court let stand a decision of the United States Court of Appeals for the Fourth Circuit¹ affirming the decision of the Bankruptcy Court for the Eastern District of Virginia² to grant non-debtor licensees important and valuable rights under section 365(n) of the Bankruptcy Code in an ancillary case pending under chapter 15 of the Bankruptcy Code. Section 365(n) provides a non-debtor licensee with the option, subject to certain limitations, to retain its rights as a licensee if a debtor-licensor rejects an intellectual property license under section 365(a).

Qimonda, a German company that manufactured semiconductor devices, was the subject of an insolvency proceeding in Germany. Qimonda's principal assets were approximately 10,000 patents, of which approximately 4,000 were U.S. patents that had been licensed to third parties. Qimonda's German insolvency administrator had commenced the chapter 15 case to seek recognition by the U.S. bankruptcy court of the pending German insolvency proceeding as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code.

¹ *Jaffe v. Samsung Elec. Co. Ltd. (In re Qimonda AG)*, 737 F.3d 14 (4th Cir. 2013).

² *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

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Simultaneously with a request for U.S. recognition of the German proceeding, the insolvency administrator sought bankruptcy court enforcement of Qimonda's rejection, under German law, of Qimonda's patent licenses. The U.S. bankruptcy court refused to give force and effect to such rejection in the United States because application of German executory contract law, according to the U.S. bankruptcy court, would frustrate the statutory protection afforded to licensees of United States patents by section 365(n) and could undermine the United States' fundamental public policy of promoting technological innovation. The Fourth Circuit affirmed the bankruptcy court's refusal to recognize such rejection for substantially similar reasons. Qimonda's foreign representative appealed to the United States Supreme Court.

In seeking *certiorari*, Qimonda's insolvency administrator argued that the lower court's decision was erroneous in denying comity to German executory contract law.³ Additionally, the petitioner argued that *certiorari* should be granted because the Fourth Circuit's decision abrogated Congress's purpose for enacting chapter 15, which "was to mandate comity to the main bankruptcy proceeding — ensuring uniform application of a single body of insolvency law — subject only to a narrow public policy exception."⁴ The petitioner further argued that the Fourth Circuit's decision threatened the United States' interests in international relations by discouraging reciprocal cooperation by other nations, and that allowing the decision to stand would discourage foreign representatives from invoking chapter 15 in the future.

The Supreme Court's refusal to grant *certiorari* will likely lead to the Fourth Circuit's *Qimonda* decision's more heavily influencing the manner in which U.S. bankruptcy courts and other courts of appeal approach similar requests for extension of comity to foreign insolvency laws. Further, while the Fourth Circuit's ruling may obviously benefit certain creditor constituencies, especially those that are licensees of intellectual property subject to certain foreign laws, the refusal lends further credence to the theory that chapter 15, and its "universalist" underpinnings, is being applied by U.S. bankruptcy courts in a more "territorial" manner. As such, foreign representatives seeking to take full advantage of the benefits afforded by a chapter 15 filing must continue to, and in some cases further, respect that a U.S. bankruptcy court will not act as a "rubber stamp" for orders of foreign courts, even those seated in jurisdictions with well-developed insolvency jurisprudence.

³ The petitioner's question on *certiorari* was "[w]hether the court of appeals erred in construing § 1522(a)'s sufficient protection requirement to permit denial of comity based on an open-ended balancing of competing bankruptcy regimes, without regard to the demanding public policy standard of § 1506." *Petition for a Writ of Certiorari in Jaffe v. Samsung Electronics Co. Ltd.*, No. 13-1324, 2014 WL 1725846 (U.S. Apr. 30, 2014).

⁴ *Id.* at *3.

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If you have any questions concerning the foregoing or would like additional information, please contact Marc Abrams (212-728-8200, mabrams@willkie.com), Shaunna D. Jones (212-728-8521, sjones@willkie.com), Alex W. Cannon (212-728-8899, acannon@willkie.com), or the Willkie attorney with whom you regularly work.

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