

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

In re	:	CHAPTER 11
	:	
SPANSION, INC., <i>et al.</i> ¹	:	
Debtors	:	Case No. 09-10690 (KJC)
	:	

MEMORANDUM²

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

On November 30, 2009, a hearing was held in connection with the Motion for Appointment of an Official Committee of Equity Security Holders (the “Motion”) brought by the Ad Hoc Committee of Equity Security Holders (the “Ad Hoc Equity Committee”).³ The Motion is opposed by the Debtors (D.I. 821), the Official Committee of Unsecured Creditors (the “Creditors’ Committee”) (D.I. 814), the Ad Hoc Consortium of Floating Rate Noteholders (the “FRNs”) (D.I. 812), HSBC Bank USA, National Association (D.I. 848), and the United States

¹The Debtors being jointly administered in this case pursuant to an Order dated March 4, 2009, are: Spansion, Inc., a Delaware corporation; Spansion Technology, LLC, a Delaware limited liability company; Spansion LLC, a Delaware limited liability company; Cerium Laboratories, LLC, as Delaware limited liability company; and Spansion International, Inc., a Delaware corporation (the “Debtors” or “Spansion”).

²This Memorandum constitutes the findings of fact and conclusions of law, as required by Fed.R.Bankr.P. 7052. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and §157(a). Venue is proper pursuant to 28 U.S.C. § 1409. This contested matter involves a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A)and (O).

³The original Motion for Appointment of an Equity Security Holders Committee (D.I. 602) was filed on June 8, 2009 by Philip Mathers, but dismissed with prejudice by Order dated October 22, 2009 (D.I. 1422). However, joinders to the original motion were filed by The John Gorman 401(K) (D.I. 1044, and, as amended, docket no. 1104), Esopus Creek Value L.P., Schottenfeld Associates, L.P. and Plainfield Asset Management, LLC (D.I. 1250), and Orange Capital LLC (D.I. 1265). The Joinders are the basis for the motion moving forward at this time.

Trustee (D.I. 820).⁴

The Ad Hoc Equity Committee asserts that an official committee is needed to ensure that the equity security holders are adequately represented in this bankruptcy case, particularly with respect to the upcoming plan confirmation process. The Objecting Parties argue that an official committee should not be appointed under Bankruptcy Code §1102, because the equity security holders can adequately represent themselves without causing the estate to incur the cost of an official committee and, further, the Ad Hoc Equity Committee cannot demonstrate a substantial likelihood that equity will receive a meaningful distribution in this case. At the November 30, 2009 hearing, the Ad Hoc Equity Committee and the Objecting Parties presented evidence and argument in support of their positions.⁵

For the reasons set forth herein, the Motion will be denied.

Undisputed Facts.

In the Joint Pretrial Memorandum filed by the parties (D.I. 1781), the parties agreed to the following undisputed facts:

On March 1, 2009 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (collectively, the “Chapter 11 Cases”). The Debtors are operating their businesses and managing their properties as debtors-in-possession

⁴The Debtors, Creditors’ Committee, FRNs, HSBC Bank USA, N.A., and United States Trustee may be jointly referred to herein as the “Objecting Parties.”

⁵The transcript of the November 30, 2009 hearing is cited to herein as “Tr. at ___.” The exhibits that were admitted at the hearing are cited to herein as “Debtors’ Ex. __”, “FRN Ex. __,” or “Ad Hoc Equity Committee Ex. __.” Certain limited portions of the transcript and of some of the exhibits, by agreement of the parties and with the approval of the Court (Order dated December 14, 2009, D.I. 1986) are sealed or redacted.

pursuant to section 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). On March 12, 2009, the Office of the United States Trustee appointed an official committee of unsecured creditors for the Chapter 11 Cases (D.I. 106).

The Debtors filed a disclosure statement (the “Disclosure Statement”) on October 26, 2009. Attached to the Disclosure Statement as Exhibit A was a draft chapter 11 plan of reorganization (the “Chapter 11 Plan”). The Chapter 11 Plan proposes no distribution to existing common equity holders, whose interests will be cancelled.

The Disclosure Statement states that the Gordian Group, the Debtors’ financial advisor, has estimated that the mid-point of the total value for distribution under the plan is approximately \$1.07 billion.⁶

Overview of the Debtors’ Business.

The Debtors are semiconductor device companies which design, develop, manufacture, market and sell Flash memory products and solutions. Spansion’s products are integrated into a broad range of electronic products, including mobile phones, consumer electronics, automotive electronics, networking and telecommunications equipment, servers and computer peripherals.

(Redlined Amended Disclosure Statement at 17).

⁶The Debtors filed a First Amended Disclosure Statement for Debtor’s First Amended Joint Plan of Reorganization Dated November 25, 2009, which increased the Gordian Group’s estimate of the mid-point of the total value for distribution from approximately \$1.07 billion to \$1.09 billion. *See* Notice of Filing of Redline Of First Amended Disclosure Statement For Debtors’ First Amended Joint Plan of Reorganization Dated November 25, 2009, p. 119. (D.I. 1819) (the “Redlined Amended Disclosure Statement”).

Flash memory is a “non-volatile” memory solution, meaning that it retains its contents even after power is shut off, allowing memory contents be retrieved at a later time. (*Id.* at 18). There are two main types of Flash memory: NOR and NAND.⁷ (*Id.* at 20). Spansion designs, develops, manufactures, markets and sells NOR Flash memory products and solutions, and together with Numonyx, accounts for 63% of the NOR Flash memory market. (Houlihan Lokey Expert Report for Spansion, Inc., dated November 20, 2009 (the “H&L Report”), FRN Ex. 156, at 29).

Spansion is headquartered in Sunnyvale, California, with research and development, manufacturing and assembly operations in the United States, Middle East, Europe and Asia. In fiscal year 2008, the net sales of wireless applications (such as mobile phones), and embedded

⁷The Debtors’ Amended Disclosure Statement describes the two types of semiconductor memory as follows:

The terms NOR and NAND refer to the architecture of the connections between the memory cells of the device which produce the different characteristics of the two memory types. . . . NAND offers a number of desirable attributes: it is relatively inexpensive, a small device can hold a great amount of information, and its performance characteristics are particularly well suited to data storage such as music, pictures, video, etc. The market for NAND Flash memory has grown rapidly in recent years owing to the growing popularity of devices that consumers can use to access their personal media in a portable, batter-powered format.

. . . .
NOR Flash memory has different characteristics than NAND Flash memory. . . . Though NOR Flash memory is more expensive than NAND for comparable densities, it is also available in much lower densities with lower prices than NAND and for this reason alone is preferred in many applications that do not require the greater storage capacity of NAND. At higher densities similar to NAND, the high reliability and ease of use of NOR, in addition to its ability to support a more efficient and cost effective memory sub-system in certain applications, make it a favored solution. These characteristics continue to drive NOR Flash memory use in embedded applications. For example modern automobiles are dependent on NOR Flash memory for engine control, transmission control, ABS systems, anti roll systems and a multitude of other operations in the vehicle. The majority of cell phones continue to use NOR Flash memory. The telecommunication, networking, consumer electronics, and industrial control industries rely on NOR Flash memory.

Debtors’ Amended Disclosure Statement at 20.

applications (gaming, set top boxes, DVD players, automotive) each represented approximately 50% of the Debtors' total net sales. (H&L Report at 15).

The Debtors' Business Transition.

The Debtors are currently restructuring their business to focus their energies on the embedded market, while winding down their participation in the less profitable wireless market. The Debtors have started implementing the following operational initiatives: reducing the overall workforce by 40% and management structure by 45%; divesting non-key assets, such as closing and/or selling facilities in Thailand and Malaysia; closing its research and development (R&D) fabrication facility in Sunnyvale, CA; and consolidating manufacturing capacity in its fabrication facility in Austin, TX. (H&L Report, at 17).

Legal Standard.

A bankruptcy court may appoint an additional committee in a bankruptcy case pursuant to Bankruptcy Code §1102(a)(2), which provides:

On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States Trustee shall appoint any such committee.

11 U.S.C. §1102(a)(2). The Ad Hoc Equity Committee, as the moving party, has the burden of proving that an additional committee is needed for adequate representation. *Victor v. Edison Bros. Stores (In re Edison Bros. Stores, Inc.)*, 1996 WL 534853, *4 (D.Del. September 17, 1996). The Code does not define "adequate representation," and the Court has discretion to appoint an additional committee based upon the facts of the case. *Edison Bros.*, 1996 WL 534853, *3. See also *In re Dana Corp.*, 344 B.R. 35, 38 (Bankr.S.D.N.Y. 2006) ("Bankruptcy

courts have discretion to examine the circumstances on a case-by-case basis to determine if additional committees are warranted.”)

In determining whether to appoint an additional committee, the factors a court will consider may include the number of shareholders, the complexity of the case, and whether the cost of an additional committee significantly outweighs the concern for adequate representation. *In re Williams Commc'n Group, Inc.*, 281 B.R. 216, 220 (Bankr.S.D.N.Y. 2002). In particular, the moving party must show that:

(i) there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule, and (ii) they are unable to represent their interests in the bankruptcy case without an official committee.

Exide Tech. v. State of Wisconsin Inv. Bd., 1996 WL 534853, *1 (D.Del. Dec. 23, 2002) citing *Williams*, 281 B.R. at 223. See also *In re Pilgrim's Pride Corp.*, 407 B.R. 211, 216 (Bankr.N.D.Tex. 2009) (Courts will also consider the following factors in determining whether to appoint an equity committee under §1102(a)(2): “(i) whether Debtors are likely to prove solvent; (ii) whether equity is adequately represented by stakeholders already at the table; (iii) the complexity of the Debtors’ cases; and (iv) the likely cost to Debtors’ estates of an equity committee.”)

The court’s appointment of an additional committee is considered “extraordinary relief” and should be “the rare exception.” *Dana Corp.*, 344 B.R. at 38, *Exide Tech.*, 1996 WL 534853 at *1.

Discussion.

- (A) Whether there is a substantial likelihood that equity security holders will receive a distribution in this case under a strict application of the “absolute priority rule?”

Section 1102 of the Bankruptcy Code provides for the appointment of creditors’ and equity security holders’ committees to supervise the debtor in possession and to protect their constituents’ interests. H.R. Rep. No. 95-595, at 401 (Sept. 8, 1977). The committees’ powers and duties include participation in the formulation of a plan. *Id.*, 11 U.S.C. 1103(c)(3).

However, if equity holders have no reasonable prospect of receiving a meaningful distribution, an equity committee could serve no legitimate role in negotiating a plan. *See Williams*, 281 B.R. at 220 (If equity holders have no economic interest left to protect, neither the debtors nor the creditors should have to bear the expense of negotiating what would be, in essence, a “gift” for the equity holders.) Therefore, in weighing the cost of appointing an official committee of equity security holders against the potential benefit of such a committee, a court should consider whether there is a substantial likelihood that the equity security holders will receive a distribution.

The Objecting Parties argue that the Debtors’ insolvency, and application of the absolute priority rule of Bankruptcy Code §1129(b)(2)(B), preclude the equity security holders from receiving any distribution on account of their interests in the chapter 11 plan. Under the balance sheet test, a corporation is insolvent if the fair market value of its assets is less than its liabilities. *See* 11 U.S.C. §101(32). The Debtors argue that their insolvency has been shown throughout this case. First, the Schedules of Assets and Liabilities (D.I. 719, 721, 723-25, 727 and 729)(the “Schedules”), listed approximately \$1 billion in assets and approximately \$1.6 billion in

liabilities.⁸ More recently, the Amended Disclosure Statement For the Debtors' First Amended Joint Plan of Reorganization Dated November 25, 2009 (the "Amended Disclosure Statement")(D.I. 1817)⁹ includes an analysis of the Debtors' reorganized value prepared for the Debtors by the Gordian Group, which concludes that "the Enterprise Value of the Reorganized Debtors ranges from \$625 to \$900 million, with a midpoint of \$762.5 million as of an assumed Effective Date of January 1, 2010." (Amended Disclosure Statement at 113).¹⁰ The Gordian Group analysis also estimates a mid-point Distributable Value for the Debtors of approximately \$1.09 billion.¹¹ (*Id.*). In its analyses, the Ad Hoc Equity Committee estimated the Debtors' total claims to be in a range of \$1.6 to \$2.2 billion, although the Debtors argued that the amount will

⁸The Debtors noted that the Schedules listed the net book value of the Debtors' assets as listed in their books and records. Further, the amount of liabilities is adjusted to include liabilities owed by more than one Debtor only once. See Memorandum of Law in Further Support of the Debtors' Objection, D.I. 1798, at 7.

⁹On October 26, 2009, the Debtors filed a Joint Plan of Reorganization (D.I. 1477) and a Disclosure Statement for the Debtors' Joint Plan of Reorganization (D.I. 1479). On November 25, 2009, the Debtors filed the First Amended Joint Plan of Reorganization (D.I. 1816) and the Amended Disclosure Statement.

I take judicial notice that the Debtors have since filed yet another joint plan (filed on December 9, 2009) and disclosure statement (filed on December 10, 2009) (D.I. 1919 and 1921, respectively), which are not a part of this record. A hearing to consider approval of the amended disclosure statement was held and concluded on December 14, 2009, at which hearing the Ad Hoc Equity Committee was represented by counsel and participated in support of its objection to the proposed disclosure statement. An order approving the most recent amended disclosure statement was entered on December 18, 2009. (D.I. 2042).

¹⁰See Redlined Amended Disclosure Statement at 119.

¹¹The Gordian Group prepared a valuation analysis "for the purpose of determining value available for Distribution to Holders of Allowed Claims and Allowed Interests [as those terms are defined in the Amended Plan] pursuant to the compromises embodied in the Plan and to analyze the relative recoveries to such Holders thereunder." (Redlined Disclosure Statement at 118). The term "Distributable Value" is defined in the Amended Disclosure Statement to mean the value available for Distribution to Holders of Allowed Claims and Allowed Interests, which is derived from the "Enterprise Value," which is an estimated value of the Reorganized Debtors' operations on a going-concern basis. *Id.*