

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Terrell McSweeney

_____)
In t he Matter of)
) Docket No. C -4560
NXP Semiconductors N.V.,)

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement (“Consent Agreement”) containing consent orders, an admission by Respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as set forth in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it is reasonable to believe that Respondent has violated the said Acts, and that a complaint should be filed stating its charges in that respect, and having thereupon issued its Complaint and its Order to Cease and Desist and to Restore Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule § 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following additional findings and enters the following Decision and Order (“Order”):

1. Respondent NXP Semiconductors N.V. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Netherlands, with its corporate office and principal place of business located at High Tech Campus 60, Eindhoven 5656 AG, the Netherlands.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

- A. “NXP” means NXP Semiconductors N.V., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by NXP Semiconductors N.V. (including Freescale, after the Acquisition) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Acquirer” means (i) JAC or (ii) any other Person that acquires the RF Power Assets pursuant to this Order.
- D. “Acquisition” means the proposed acquisition described in the Agreement and Plan of Merger by and among NXP Semiconductors N.V., Nimblei Nsbles33* [(33* [3(ble)-2(s).oT-0.006 Tw

- G. “Confidential Information” means any and all of the following information:
1. all information that is a trade secret under applicable trade secret or other law;
 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;
 3. all information concerning the relevant business (which includes historical and

- K. “Divestiture Agreement” means (i) the JAC Acquisition Agreement or (ii) any other agreement between Respondent (or a Divestiture Trustee) and Acquirer that receives the prior approval of the Commission to divest the RF Power Assets, including all related ancillary agreements (transitional services agreement, intellectual property transfer and license agreement, and manufacturing services agreement), schedules, exhibits, and attachments thereto.
- L. “Divestiture Date” means the date on which Respondent (or the Divestiture Trustee) closes on the transaction to divest the RF Power Assets to Acquirer.
- M. “Divestiture

S. "Person" means any individual, partnership, corporation, business trust, limited liability

6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and

1. The Retained Intellectual Property sufficient for JAC or other Acquirer to operate the RF Power Business in substantially the same manner as NXP prior to the Ac

- BB. “Retained Intellectual Property” means any owned or licensed (as licensor or licensee) Intellectual Property (not included in the Retained Assets) relating to both the operation of the RF Power Business and any other business owned by NXP prior to the Acquisition, unless such Intellectual Property is predominantly used by the RF Power Business.
- CC. “SiPS Building” means the building located at Philips Avenue, LISP 1, Barrio Diezmo Cabuyao City, Laguna, Philippines.
- DD. “Support Services” means administrative and technical services and training, including but not limited to, services and training relating to (i) audits, (ii) environmental health and safety, (iii) exporting, (iv) finance and accounting, (v) human resources, (vi) information technology, (vii) intellectual property, (viii) legal services, (ix) maintenance and repair of facilities, (x) manufacturing, (xi) pensions, (xii) purchasing, (xiii) quality control, (xiv) R&D support, (xv) real estate, (xvi) regulatory compliance, (xvii) sales and marketing, (xviii) supply chain management, (xix) technology transfer, and (xx) warehousing.
- EE. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, and other items of tangible personal property (other than inventories) of every kind owned or leased, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.
- FF. “Volcano Chip RFE001” means NXP’s Volcano chip RFE001 designed in Qubic technology as available today, without any further future amendment or updates.

II.

IT IS FURTHER ORDERED that:

- A. No later than ten (10) days after the Acquisition Date, Respondent shall divest the RF Power Assets and grant the RF Power License, absolutely and in good faith, to JAC pursuant to the JAC Acquisition Agreement.
- B. If Respondent has divested the RF Power Assets to JAC prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that:
1. JAC is not acceptable as the acquirer of the RF Power Assets, then Respondent shall immediately rescind the JAC Acquisition Agreement, and shall divest the RF Power Assets and grant the RF Power License no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture or grant of license to JAC was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised JAC Divestiture Agreement) to the manner of divestiture of the RF Power Assets or grant of the RF Power License as the Commission may determine are necessary to satisfy the requirements of this Order.
- C. Notwithstanding any other provision of this Order, Respondent may (i) enter into an agreement with JAC or other Acquirer for a License-Back (subject to the prior approval of the Commission) or (ii) lease the SiPS Building to JAC or other Acquirer for a period not to exceed two (2) years prior to divesting the building absolutely to JAC or other Acquirer.

Provided further that Respondent shall not (i) terminate its obligation to provide any Transitional Assistance because of a material breach by Acquirer of any agreement to

- G. Notwithstanding any provision of this Order, Respondent shall permit Acquirer to use the name “NXP Semiconductors” or “NXP,” or any abbreviation thereof, or any name, logo, or lettering which is similar, in the operation of the RF Power Business for a period of up to nine (9) months from the Divestiture Date.
- H. Respondent shall cooperate with and assist Acquirer to evaluate and retain any and all RF Power Employees necessary to operate the RF Power Business in substantially the same manner as NXP prior to the divestiture, including but not limited to:
1. Not later than twenty (20) days before the Divestiture Date, Respondent shall (i) identify all RF Power Employees, (ii) allow Acquirer to inspect the personnel files and other documentation of all RF Power Employees, to the extent permissible under applicable laws, and (iii) allow Acquirer an opportunity to interview any RF Power Employee;
 2. Respondent shall (i) not offer any incentive to any RF Power Employee to decline employment with Acquirer, (ii) remove any contractual impediments that may deter any RF Power Employee from accepting employment with Acquirer, including but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondent that would affect the ability of such employee to be employed by Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any RF Power Employee by Acquirer;
 3. Respondent shall (i) vest all current and accrued pension benefits as of the date of transition of employment with Acquirer for any RF Power Employee who accepts an offer of employment from Acquirer and (ii) provide each RF Power Employee with reasonable financial incentive as necessary to accept offers of employment with Acquirer; and
 4. For a period of two (2) years after the RF Power Assets are divested, Respondent shall not solicit the employment of any RF Power Employee who becomes employed by Acquirer at the time the RF Power Assets are divested; **provided, however,** that a violation of this provision will not occur if: (i) the individual’s employment has been terminated by Acquirer, (ii) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (iii) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

enterprise, except for such Tangible Personal Property or other appropriate arrangements which can readily be obtained from sources other than Respondent.

- J. The purpose of the divestiture of the RF Power Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondent and to remedy the lessening of compet

IV.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement, the Commission may appoint Advolis S.A. to serve as Monitor. The Monitor may be the same person as the Monitor appointed pursuant to the Order to Maintain Assets.
- B. Respondent shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
 - 1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order and (ii) act in a fiduciary capacity for the benefit of the Commission;
 - 2. Respondent shall (i) insure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;
 - 3. The Monitor (i) shall serve at the expense of Respondent, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
 - 4. Respondent shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and

5. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after the Acquisition Date for a period of one (1) year, (ii) every ninety (90) days thereafter until Respondent has completed all obligations required by Paragraph II. of this Order (including a final report when Respondent has completed all such obligations), and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order.
- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate ten (10) business days after the Monitor has completed his final report pursuant to Paragraph IV.C.(ii) of this Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld:
 1. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondent of the identity of any substitute Monitor, then Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 2. Respondent shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph IV.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

V.

IT IS FURTHER ORDERED that:

- A. If Respondent has not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the RF Power Assets and perform Respondent's other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Divestiture Assets.
2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by R

accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph V.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph V.E.5. of this Order.
 7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph V.

than JAC); and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondent completed such divestiture and the date the divestiture was accomplished.

VIII.