SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY; COMMERCIAL DIVISION

GLOBALFOUNDRIES U.S. INC.,

PLAINTIFF,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

DEFENDANT.

Index No.

COMPLAINT

Plaintiff GLOBALFOUNDRIES U.S. Inc. ("**GF**" or "**Plaintiff**"), by and through its attorneys, WEIL, GOTSHAL & MANGES LLP, complains and alleges against Defendant International Business Machines Corporation ("**IBM**" or "**Defendant**") as follows:

PRELIMINARY STATEMENT

1. This action arises out of what seems to be a misguided and ill-conceived effort by IBM's law department to try to extract an outlandish payment from GF that IBM knows it is not entitled to. IBM's timing is not only highly suspect as it comes on the heels of recently reported news of a potential initial public offering ("**IPO**") by GF that would value it at approximately $30 billion, but also incredibly inconsiderate of current events, namely a global chip shortage fueled by a pandemic that has impacted important domestic industries, including the automotive sector.

2. IBM's actions come at a time when domestic semiconductor supply concerns have become paramount for America, and at a time when two great companies, both based in New York, should be collaborating and not threatening, as IBM is doing now, baseless legal claims. It is especially disappointing given GF's and IBM's long-standing partnership, and IBM's own storied history in advancing American technology leadership. After exchanging limited correspondence

with GF terminating the Parties' technology cooperation relationship in 2018, IBM went silent for two-and-a-half years. Now, years later, and without any prior notice, IBM threatens to sue GF unless it caves to IBM's outlandish demands. IBM has refused to explain why it is raising these claims now while it stood idly by for years and said nothing. As discussed below, however, IBM's claims have no merit under the plain language of the Parties' Agreements. GF honors its agreements and faithfully did so here, going far beyond what was required. GF seeks a declaratory judgment in order to put an end to IBM's assertion of its baseless claims.

3. The action arises from GF's acquisition of IBM's challenged chip manufacturing business, which IBM classified as a "non-core franchise" at the time of its divestment. As part of the transaction, IBM provided GF with $1.5 billion to invest in the Business. GF, in turn, invested far more than this amount. The Parties worked together to develop new and cutting-edge technology, including mutually agreeing to forgo a 10nm version of the 10HP Technology in pursuit of 7nm technology.

4. However, despite the billions of dollars that GF invested in the Business and the 7nm technology, given the technical complexity and enormous financial cost, GF was unable to complete the 7nm technology according to the Parties' desired timeline. Given the delay, the availability of 7nm technology from other suppliers, and the billions of dollars in additional investment that would have been required to bring the 7nm technology into production, GF opted not to place itself in serious financial stress through the continued pursuit of a failing strategy and accordingly ceased developing 7nm technology.

5. GF informed IBM of this decision in August 2018 and IBM quickly found a new, and less expensive, 7nm technology supplier in Samsung. Indeed, the arrangement worked out better for IBM as Samsung, upon information and belief, was able to supply the technology more

quickly than GF would have been able to and at significantly less cost to IBM. IBM actually benefitted from GF's decision to cease working on 7nm technology.

6. IBM then went silent for nearly two-and-a-half years. GF heard nothing from IBM regarding the 7nm technology or any of the Parties' agreements. That is, until a mere three weeks after public reports emerged regarding GF's potential IPO.

7. In addition to the much sought-after differentiated technologies that GF now offers post its "pivot" away from 7nm, the chip shortage and other geopolitical factors have made GF essential to the U.S. economy and national security, and the threat of tarnishing GF's reputation at such an important time may unfortunately also have been part of IBM's analysis.

8. IBM watched GF's success and the news of the IPO, then seeking a quick payday in the hopes that GF would not defend itself, IBM sent a legal dispute letter from a top tier, expensive white-shoe New York law firm to GF, demanding that it pay an outlandish $2.5 billion in unspecified damages for alleged breaches that, until April 2021, had never been asserted, and without any real explanation as to the basis of its claims. IBM sensed an opportunity to interfere with the rumored GF IPO transaction by sending the letter with an amount outrageously high enough that, by IBM's calculations, would certainly need to be disclosed in GF's prospectus unless, as IBM hoped, the matter could be resolved quickly via a settlement payment made by GF. IBM also has a reputation of making licensing requests, at or near, quarter end to meet Wall Street analyst earning expectations and this aggressive move is consistent with that playbook. IBM's subsequent threat of litigation, in the midst of the Parties' dispute resolution process, was in clear violation of the Parties' agreed-to 60-day dispute mechanism. GF's written request to continue discussions, in line with the agreed-to dispute mechanism, yielded no response from IBM.

9. Other than threatening to sue GF unless it capitulated to its demands, IBM has yet to provide any substantive explanation as to its claims. Left with no choice, GF brings this action to make clear that GF has fulfilled its contractual obligations to IBM and that IBM has no claim for damages, let alone the $2.5 billion payment that it seeks.

10. As such, GF requests an order from this Court: (i) declaring that GF did not breach Section 3.2(b) of the MTA and that any allegation by IBM of such a breach is time-barred, (ii) declaring that the 7nm technology was a "[redacted]" as indicated in the 10HP Technology definition of the TCA and, therefore GF's efforts on the 10nm and 7nm technology satisfied its TCA obligations, (iii) in the alternative, declaring that IBM and GF amended the TCA to remove GF's obligation to attempt to develop a 10nm version of 10HP Technology, and therefore GF did not breach the TCA, (iv) declaring that GF did not breach Section 4(a) or Section 5(d) of the ACA, and (v) any other relief that the Court deems just and proper.

THE PARTIES

11. Plaintiff, GF, is a Delaware corporation with its principal place of business at 400 Stone Break Road Extension, Malta, New York 12020.

12. Defendant, IBM, is a New York corporation with its principal place of business at 1 New Orchard Road, Armonk, New York 10504.

JURISDICTION AND VENUE

13. This Court has personal jurisdiction over IBM pursuant to Civil Practice Law and Rules ("**CPLR**") § 301 because IBM's principal place of business is in New York and IBM regularly transacts business in New York.

14. This Court has jurisdiction under CPLR § 3001 because an actual, present and justiciable controversy exists between the Parties.

15. The agreements at issue (the "**Agreements**") are all governed by New York law and all dictate that, if there is no federal jurisdiction, disputes "arising out of or in connection with" the Agreements shall be brought exclusively before a state court sitting in the County of New York. *See* MTA § 12.3; ACA § 13.2; TCA § 11.3.

16. The Parties waived their rights to a jury trial for disputes arising out of the Agreements. *See* MTA § 12.4; ACA § 13.3; TCA § 11.3.

17. Venue is proper in this Court pursuant to CPLR § 501 because, under the Agreements, the Parties fixed this Court as the place of trial and the Agreements were made before this action was commenced.

FACTUAL ALLEGATIONS

I. GF Acquires IBM's Semiconductor Business

18. GF is the global leader in feature-rich semiconductor manufacturing, with manufacturing facilities that use and develop some of the world's most advanced semiconductor devices available today.

19. GF has three U.S.-based manufacturing facilities, two of which are located in New York and employ thousands of New Yorkers.

20. Prior to 2014, IBM and GF collaborated on semiconductor chip research and development.

21. IBM has a great history in semiconductors, but as manufacturing became more technically challenging and less profitable, IBM started to invest less and less in microelectronics, shifting focus to software, cloud computing and services.

22. In 2014, IBM made the strategic decision to exit the semiconductor manufacturing business. It had tried to sell the East Fishkill, NY ("**EFK**") and Essex Junction/Burlington, VT ("**BTV**") manufacturing facilities ("**fabs**") to many different companies, but was unsuccessful, as the fabs were loss-making, subscale, not well maintained and with a number of other operational and environmental issues that any future owner would need to mitigate.

23. IBM also wanted to keep manufacturing supply on-shore, and with a trusted foundry business, it was important to have an American company take over in order to ensure CFIUS approval of the transaction. In fact, IBM made it clear on multiple occasions to key government stakeholders that if they failed to approve the transfer of the failing assets to GF, it would have no choice but to shutter the loss making fabs.

24. At the time of the sale, IBM's Business was failing, losing approximately $500 million annually.

25. GF was the only U.S. entity willing to acquire the Business, invest and maintain it in operation. At the time, GF was fully committed to leading edge supply and advanced technology development at its upstate New York facility.

26. However, understanding the substantial costs inherent in the Business, GF required that IBM pay GF $1.5 billion in cash plus other assets to assume the Business and to continue producing chips for IBM. The $1.5 billion was intended to help cover GF's costs of absorbing IBM's money-losing fabs and assist with integrating the fabs into GF's core business.

27. Given the substantial expenses to be incurred in operating the Business, the $1.5 billion payment was intended to ensure that GF would be cash flow neutral for three years post-acquisition. The Parties understood that after three years GF would have cancelled or transitioned a significant portion of IBM and other customers' supply needs out from EFK to other GF fabs,

and potentially closed or transferred that subscale facility. Of the two facilities, EFK's cost burden was by far the heaviest, making it the loss leader. As discussed below, however, even the $1.5 billion paid by IBM was far from sufficient to cover all of the new technology development costs.

28. Beginning in October 2014, GF and IBM entered into a series of agreements through which GF purchased IBM's chip manufacturing business (the "**Business**").

29. These agreements included, among others, the October 18, 2014 Master Transaction Agreement ("**MTA**"), attached hereto as **Exhibit 1**, the July 1, 2015 Albany Cooperation Agreement ("**ACA**"), attached hereto as **Exhibit 2**, and the March 24, 2016 Amended and Restated Technology Cooperation Agreement ("**TCA**"), attached hereto as **Exhibit 3**.

30. As part of the transaction, GF would become IBM's exclusive provider for 14 nanometer ("**nm**") and 10nm semiconductors for the next 10 years.

31. Among other matters, the Parties' Agreements dealt with GF's further development of the Business and chip technology, as well as the Parties' research collaboration at the College of Nanoscale Science and Engineering of the University at Albany in Albany, New York (the "**Albany Research Fab**").

32. The first agreement, the MTA, was signed on October 18, 2014, and the transaction closed on July 1, 2015 (the "**Closing Date"**).

II. GF's Substantial Investment in the Business

33. Under the MTA, IBM agreed to pay GF a total of $1.5 billion, over the course of several years, in exchange for GF taking over the Business. *See* MTA § 3.2(a). As noted in the MTA, [redacted]." *Id.*

34. Section 3.2(b) of the MTA states that GF "[redacted]."

35. Section 10.1(c) of the MTA indicates that [redacted]." *Id.* § 10.1(c).

36. GF completed development of a 14nm High Performance ("14HP") technology for IBM and then started making 14HP wafers exclusively for IBM. At the time of close, IBM's own development was woefully behind schedule, and GF worked tirelessly in partnership with IBM to help it catch up, through use of a complex flow, where GF's new world class Malta fab assisted the EFK team, performing a complex hybrid two-fab flow, to deliver flawlessly for IBM.

37. The IBM team was very pleased with the 14HP support, even awarding GF incentive payments for meeting key milestones.

38. GF also started making long overdue investments in both EFK and BTV.

39. Since the acquisition, GF has invested far more in the Business than the $1.5 billion contributed by IBM, and continuously supplied IBM with chips utilizing 14HP Technology through the end of IBM's requirements for such chips.

40. Indeed, GF has spent billions of dollars operating the Business, including operating the fabrication facilities, SG&A expenses, research and development investments, and capital expenditures. These expenses include capacity additions for 14nm and 10nm development and

manufacturing as well as over $1.5 billion in expenses related to the development of 7nm technology.

41. Accordingly, GF has complied with Section 3.2(b) of the MTA by utilizing at least $1.5 billion "[redacted]."

42. IBM has no valid claim for restitution of its unconditional $1.5 billion payment to GF.

III. The Parties' Agreement to Forego a 10nm Version of 10HP Technology

43. On March 24, 2016, the Parties entered into the TCA, under which GF and IBM agreed that GF would try to develop 14HP Technology and 10HP Technology. *See* TCA at 1-2.

44. The TCA defines 10HP Technology as "[redacted] (emphasis added). *Id.* at 2.

45. Specifically, the TCA indicated that GF would "[redacted]." *Id.* at § 2.1 (emphasis added).

46. The TCA includes a 10HP Operational Plan, which sets forth certain development criteria and milestones. *See id.* at Annex E.

47. The TCA also set forth the maximum additional resources that GF would be required to expend on the 10HP Technology to the extent GF was delayed in achieving the 10HP milestones. *See id.* at Annex F.

48. GF developed the 14HP Technology in accordance with the TCA and used the technology to supply 14HP semiconductor wafers to IBM under the Parties' related foundry supply agreement.

49. TCA Section 2.3 states that GF "[redacted]." *Id.* § 2.3 (emphasis added).

50. Under the TCA, the Parties agreed that "[redacted]." *Id.* at § 3.4.3.

51. The Parties also explicitly agreed that "[redacted]." *Id.* at § 3.10.

52. Initially, the Parties contemplated under the TCA that the Business, under GF, would develop and manufacture a 10nm technology.

53. However, rather than turn to 10nm technology as its next node after the 14nm technology, GF accelerated its technology development to support IBM and its other lead customer at the time, AMD, who like IBM had an exclusive long term take-or-pay supply agreement with GF, at the 7nm node.

54. In 2016, GF and IBM agreed that it would be mutually beneficial to attempt to pursue 7nm technology in lieu of the 10nm technology. The 10nm node was seen by the industry as a "half-step," and most leading edge customers readily agreed to skip that node and to focus on 7nm development. To this date, 7nm remains a much more prevalent technology than 10nm.

55. Like AMD and other GF customers, IBM never raised any objection to GF attempting to develop the 7nm technology in lieu of 10nm technology.

56. The 7nm technology was a [redacted]" as indicated in the 10HP Technology definition.

57. If the Court concludes that 7nm technology is not included in the 10HP Technology definition, then in the alternative, IBM also, by its course of conduct over the years that GF spent developing the 7nm technology, accepted the development of 7nm technology in lieu of 10nm technology under the TCA.

58. Over the course of 2016-2018, IBM collaborated with GF on the 7nm technology, including on developing and testing the technology. The Parties regularly discussed the status and development of 7nm technology, including a 7nm Operational Plan with development milestones.

59. Both IBM and GF operated on a day-to-day basis as if the obligations under the TCA pertaining to 10nm technology had been replaced with similar obligations pertaining to 7nm technology.

60. Accordingly, the Parties, through their agreement and through their course of conduct, amended the TCA such that GF was no longer obligated to attempt to achieve the 10HP Operational Plan with 10nm technology pursuant to TCA Section 2.1.

61. Therefore, GF's failure to develop a 10nm version of the 10HP Technology is not a breach of the TCA.

IV. GF Ceases Work on 7nm Technology and IBM Partners with Samsung

62. Despite GF's investment of over $1.5 billion to develop the 7nm technology and despite placing hundreds of engineers on the 7nm project, by August 2018 GF knew that it would not be able to achieve a 7nm prototype in a timely manner.

63. Development of the 7nm technology was far more challenging and expensive than had been anticipated, which caused delays in reaching the project's targeted milestones. To note, other industry participants (including those with scale far exceeding GF) also faced execution challenges at this technology node given the enormous technical complexity required.

64. In an effort to reduce further delays, GF exceeded the maximum additional resources that GF would have been required to contribute to remedy such delays under the TCA. *See* TCA at Annex F. These investments included additional silicon wafer starts, additional headcount, and additional cycles of learning on the project.

65. Despite intense efforts, GF was falling behind its competitors in 7nm, Samsung and TSMC, two Asian semiconductor giants. TSMC alone at the time had more than 6 times GF's revenue, and Samsung benefits from significant captive chip demand as well as synergies from its vast memory manufacturing operations. Each competitor was making investments of over $10 billion annually to win the leading edge race. The odds were heavily stacked against GF and the industry was aware of this challenge. GF needed more access to capital. GF's shareholder had invested billions of dollars of additional capital in GF post the IBM transaction, the majority of which went into ramping its Malta fab to serve AMD, IBM and others, eventually totaling more than $20 billion in shareholder investment. In early 2018, to continue the pursuit of the project, GF unsuccessfully sought to raise bank financing from third party lenders and also unsuccessfully sought support from the U.S. Government on grounds of national security concerns. The Asian players, with greater access to capital, were also using their market positions to not only outspend, but also to bundle technologies to attract customers to their fabs. It simply was not a level playing field. GF subsequently submitted complaints against the dominant foundry player TSMC to

regulatory authorities across the world, including the DOJ, FTC and NYAG, seeking regulatory and compensatory relief.

66. At the same time, semiconductor chips were becoming pervasive in every part of human existence thanks to an explosion in demand catalyzed by the smartphone in 2008 which, a decade later, led to practically everything and everyone being connected, the 5G and data revolution and the internet of things. The vast majority of the market, approximately 70%, did not need "bleeding edge" single-digit nanometer chips, like the 7nm technology. For example, watches, speakers, automobiles, and healthcare devices all need to be connected, but also need to be lower power and more cost efficient. GF's customers saw these trends as well and informed GF that they strongly preferred GF to focus on more relevant, differentiated technology for their needs rather than the riskier, more costly, compute centric and less pervasive single-digit nanometer chips.

67. IBM, which was kept up-to-date on the 7nm technology development through weekly meetings, technical status interlock meetings and other check-ins, was well aware of the delay to the 7nm technology and the significant expenses incurred by GF. Indeed, a portion of the development team were also IBM secondees.

68. In the summer of 2018, GF determined that in order to finish development and commercialize the 7nm technology, GF would need to spend at least an additional $2.3 billion in research and development and capital expenditures, and billions more to scale its Malta facility to make it cost competitive with the Asian giants.

69. Spending this additional money would have resulted in significant losses for GF and risked the future of GF.

70. With this backdrop, GF made the difficult, but prudent, decision to cut its losses. Having spent billions of dollars and devoted far greater resources to the development effort than required in its agreement with IBM, GF decided to halt its 7nm and smaller technology roadmap to focus on the pervasive market instead. GF also took this decision knowing that both AMD and IBM had more reliable and timely sources of this technology from either TSMC or Samsung.

71. Accordingly, in August 2018, GF informed IBM that it would not be proceeding with further development of the 7nm technology. *See* August 16, 2018 Letter from GF's David Bennett to IBM's Ron Leviner, attached hereto as **Exhibit 4**.

72. Knowing the inherent technical challenges associated with 7nm development, IBM had a "back-up" plan to enable a shift in supply to a new supplier should GF be unable to provide the supply. Following GF's August 2018 communication, IBM acted on its back-up plan, quickly partnering with Samsung in the fall of 2018 for Samsung to produce IBM's 7nm processors.

73. The transition to Samsung was easy and natural for IBM given that Samsung was a long-time technology development partner with IBM and there was significant similarity between Samsung's technology and GF's technology, since they both came from a similar development origin. This technology alignment was the basis of a secure and executable back-up plan.

74. At the time of GF's acquisition of the Business, in order to compensate GF for the overall deal and to partially offset GF's technology development costs, IBM agreed that it would purchase wafers from GF at pre-agreed prices which were set at 3-4 times the market price for these wafers. Accordingly, had GF manufactured 10nm or 7nm wafers, IBM would have been committed to paying those higher rates for those wafers.

75. Indeed, upon information and belief, Samsung's pricing per wafer is in the range of $10,000-$15,000, which is a fraction of what IBM would have had to pay GF had GF ultimately manufactured the wafers.

76. In addition, in using Samsung as its 7nm foundry supplier, IBM avoided the burden of being the yield improvement driver, and the significant associated cost. Samsung itself (for its own processors) and Qualcomm both used Samsung's 7nm technology and drove that technology's yield improvement – IBM benefited from Samsung's and Qualcomm's investments and will avoid a far higher number of wafer purchases (at higher prices) than it would have had to make with GF. And IBM's costs would have been further compounded by the need to take those wafers through very expensive post-fab processes (assembly, test and module builds). Upon information and belief, IBM may enjoy 5-10 times lower finished goods costs with Samsung as a 7nm supplier compared to GF.

77. While there may have been a modest cost to IBM to switch to Samsung, that cost is (and will continue to be) more than offset by the hundreds of millions of dollars that IBM, upon information and belief, will have saved in comparison to what IBM would have had to spend under the GF arrangement.

78. Moreover, IBM's switch to Samsung in 2018 de-risked their supply since Samsung was twelve to eighteen months ahead of GF in 7nm development and ultimately ended up delivering much faster and at better yields than GF would have.

79. In August 2020, IBM and Samsung announced that Samsung will manufacture IBM's latest 7nm processor chip for data centers. At around the same time, IBM sought to significantly reduce its 14nm purchase commitments from GF, as IBM transitioned to its new supplier on 7nm, a clear indicator of Samsung's successful ramp of IBM's products in a timely

fashion. The general availability date for IBM's new 7nm chips based on Samsung's technology is expected to be in the third quarter of 2021, approximately one year from its August 2020 announcement. That date is earlier than the date that IBM would have been able to achieve for general availability had IBM remained tied to GF's 7nm technology development.

80. Accordingly, upon information and belief, IBM's agreement with Samsung results in a substantial cost savings to IBM over what IBM would have been obligated to pay GF had GF completed development of the 7nm technology and supplied IBM with 7nm wafers.

81. Following the decision to stop 7nm technology development, GF sold its 7nm-and-beyond-focused application-specific integrated circuit ("**ASIC**") business to an American company, Marvell Technology Inc., which sale preserved the jobs of the individuals associated with that business.

82. GF also entered into a transaction with ON Semiconductor (a trusted U.S. Government supplier) which will keep EFK open potentially for decades, as that fab is a perfect long-term fit for a leading product company such as ON Semiconductor ("**ON Semi**"). This transition will also preserve American jobs for decades. The sale and transfer to ON Semi was celebrated by EFK employees who for more than a decade under IBM's ownership and even subsequent to GF's acquisition had an uncertain future as the EFK fab proved to be subscale and not-competitive for GF. Further as another trusted supplier to the US government, this important asset is being transferred to a very safe secure partner in ON Semi.

83. GF is also expanding in Burlington and in Malta, New York, where GF continues to employ thousands of former IBM employees together with other talented GF employees, who are now supplying the Department of Defense.

V. GF and IBM Engage in Good Faith Negotiations Regarding a Successor Agreement to the ACA but are Unable to Reach Agreement

84. On July 1, 2015, the Parties entered into the ACA, which, in part, governed the Parties' research collaboration at the Albany Research Fab.

85. Under the ACA, the Parties agreed to negotiate in good faith to potentially continue the collaboration at the Albany Research Fab through a Successor Agreement between the Parties and The Research Foundation of the State University of New York (the "**Foundation**"). *See* ACA § 4(a).

86. The ACA expressly stated that the Parties would, prior to entering into a Successor Agreement, agree on a field of research (the "**AL Research Field**"), business plan and technology roadmap. *See* ACA § 5(b).

87. If a Successor Agreement was executed, then IBM and GF would share equally all capital expenditures and operating expenses relating to joint programs conducted at the Albany Research Fab within the AL Research Field. *See* ACA § 5(d).

88. Good faith discussions between IBM and GF regarding a Successor Agreement were initiated in October 2016 and continued over the course of 2017 and 2018.

89. Despite the Parties' good faith efforts to negotiate an agreed-upon AL Research Field, business plan and technology roadmap, the Parties were unable to come to a meeting of the minds regarding the scope of the proposed continued collaboration.

90. Therefore, in October 2018, GF informed IBM, pursuant to the ACA, that there was a significant possibility that the Parties would be unable to enter into a Successor Agreement with the Foundation prior to January 1, 2019. *See* October 11, 2018 Letter from GF's David Bennett to IBM's Ron Leviner, attached hereto as **Exhibit 5**.

91. The Parties did not enter into a Successor Agreement for the Albany Research Fab.

92. As the Parties did not enter into a Successor Agreement, there was no joint program at the Albany Research Fab within the AL Research Field and GF therefore has no obligation to share in any capital expenditures or operating expenses at the Albany Research Fab.

VI. IBM's Initial Response and Two-and-a-Half Years of Silence

93. On December 16, 2018, IBM sent a letter to GF indicating that IBM was terminating the 10HP Operational Plan under the TCA and also winding-down the ACA. *See* December 16, 2018 Letter from IBM's Bruce Hawks to GF's David Bennett, attached hereto as **Exhibit 6**.

94. GF responded to IBM's letter by reminding IBM of its obligations under the termination provisions of the TCA and ACA and asserting that, since termination required a prior notice of breach and expiration of a cure period, and IBM had not sent any prior notice of breach, termination was premature. *See* December 18, 2018 Letter from GF's David Bennett to IBM's Bruce Hawks, attached hereto as **Exhibit 7**.

95. IBM never responded to GF's December 18, 2018 Letter.

96. IBM never provided a notice of breach to GF regarding any of the MTA, ACA, or TCA.

97. IBM never provided GF with the opportunity to cure any alleged breaches of the MTA, ACA or TCA.

98. Instead, after remaining silent for nearly two-and-a-half years, mere weeks after news organizations reported that GF may undertake an IPO, IBM first alleged that GF breached the MTA, ACA and TCA on April 28, 2021. *See* April 28, 2021 Letter from IBM's counsel to GF's counsel, attached hereto as **Exhibit 8**.

99. IBM now asserts that GF owes IBM $2.5 billion in unspecified damages for alleged breaches of the MTA, ACA, and TCA.

100. The Parties initiated the Dispute Resolution process outlined in Sections 12.2(a) and 12.2(b) of the MTA, however, IBM has been unwilling to engage in a discussion of the merits of the allegations.

101. GF requested confirmation that IBM would continue the Dispute Resolution process, however, IBM provided no response.

102. Therefore, because IBM has disengaged from the Dispute Resolution process and there is an actual case and controversy, GF brings this action for declaratory judgment.

FIRST CAUSE OF ACTION
(Declaratory Judgment Regarding the MTA)

103. GF repeats and realleges each and every allegation contained in paragraphs 1 through 102 of the Complaint as if stated herein.

104. GF spent billions of dollars operating the Business, including operating the fabrication facilities, SG&A expenses, research and development investments, and capital expenditures.

105. These expenses include capacity additions for 14nm and 10nm development and manufacturing as well as over $1.5 billion in expenses alone related to the development of 7nm technology.

106. IBM has asserted that GF intentionally breached MTA Section 3.2(b), even though GF has invested more in the Business than the $1.5 billion outlined in that Section.

107. IBM did not provide GF with notice of the alleged breach of MTA Section 3.2(b) prior to the five-year anniversary of the Closing Date.

108. By reason of the foregoing, an actual case and controversy exists and GF seeks a declaration from the Court that (a) GF did not breach Section 3.2(b) of the MTA and (b) that any

claim of breach of Section 3.2(b) by IBM is time-barred because no notice of such alleged breach was provided to GF before the five-year anniversary of the Closing Date.

SECOND CAUSE OF ACTION
(Declaratory Judgment Regarding the TCA)

109. GF repeats and realleges each and every allegation contained in paragraphs 1 through 108 of the Complaint as if stated herein.

110. The TCA defines 10HP Technology as "[redacted] (emphasis added). TCA at 2.

111. The 7nm technology was a "[redacted]" as indicated in the 10HP Technology definition.

112. The TCA also set forth the maximum additional resources that GF would be required to expend on the 10HP Technology to the extent GF was delayed in achieving the 10HP milestones. *See id.* at Annex F.

113. GF invested over $1.5 billion to develop the 7nm technology and exceeded the maximum additional resources that GF would have been required to contribute to remedy any delays under the TCA. *See* TCA at Annex F. These investments included additional silicon wafer starts, additional headcount, and additional cycles of learning on the project.

114. By reason of the foregoing, an actual case and controversy exists and GF seeks a declaration from the Court that the 7nm technology is "[redacted]" as indicated in the 10HP Technology definition, and, therefore GF's efforts on the 7nm technology satisfied its TCA obligations.

THIRD CAUSE OF ACTION

(In the Alternative to the Second Cause of Action, Declaratory Judgment Regarding the TCA)

115. GF repeats and realleges each and every allegation contained in paragraphs 1 through 114 of the Complaint as if stated herein.

116. Through the Parties' agreement and course of conduct over several years, the Parties amended the TCA to remove GF's obligation to attempt to develop and provide a 10 nm version of 10HP Technology.

117. Despite the amendment of the TCA to remove the 10nm HP Technology obligation, IBM alleges that GF breached the TCA by failing to develop the 10HP Technology.

118. By reason of the foregoing, an actual case and controversy exists and GF seeks a declaration from the Court that GF did not breach the TCA because GF was not obligated to attempt to develop a 10nm version of the 10HP Technology.

FOURTH CAUSE OF ACTION

(Declaratory Judgment Regarding the ACA)

119. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 118 of the Complaint as if stated herein.

120. GF and IBM engaged in good faith negotiations to reach an agreement on a potential Successor Agreement to the ACA.

121. However, the Parties were unable to agree on the requisite terms and, as a result, no Successor Agreement was entered.

122. GF's obligation to equally share in capital expenditures and operating expenses at the Albany Research Fab was contingent on the Parties reaching a Successor Agreement.

123. As no Successor Agreement was entered into, GF has no obligation to share in the capital expenditures or the operating expenses at the Albany Research Fab.

124. Nevertheless, IBM has maintained that GF did not negotiate the Successor Agreement in good faith and that GF is obligated to pay an equal share of the capital expenditures and operating expenses at the Albany Research Fab.

125. By reason of the foregoing, an actual case and controversy exists and GF seeks a declaration from the Court that (a) GF did not breach Section 4(a) of the ACA because it negotiated a potential Successor Agreement with IBM in good faith, and (b) because no Successor Agreement was entered into, GF has no obligation to share in the capital expenditures or the operating expenses at the Albany Research Fab and therefore GF did not breach Section 5(d) of the ACA.

WHEREFORE, GF respectfully requests that the Court enter judgment:

a) Declaring that GF did not breach Section 3.2(b) of the MTA and that any claim by IBM of such breach is time-barred;

b) Declaring that the 7nm technology is a "[redacted]" as indicated in the 10HP Technology definition, and, therefore GF's efforts on the 7nm technology satisfied its TCA obligations;

c) Declaring that GF did not breach the TCA by failing to develop a 10nm version of the 10HP Technology;

d) Declaring that GF did not breach Section 4(a) or Section 5(d) of the ACA; and

e) Awarding GF such other and further relief as this Court deems just and proper together with the costs and disbursements of this action.

Dated: New York, New York
June 7, 2021

WEIL, GOTSHAL & MANGES LLP

By: */s/ David J. Lender*
David J. Lender

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