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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSEMI CORPORATION, Defendant.	CASE NO.: 8:09-cv-00275-AG-AN **COMPETITIVE IMPACT STATEMENT** Hon. Andrew J. Guilford

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On July 14, 2008, defendant Microsemi Corporation ("Microsemi") acquired most of the assets of Semicoa. After investigating the competitive impact of that acquisition, the

United States filed a civil antitrust Complaint on December 18, 2008, seeking an order compelling Microsemi to divest the Semicoa assets and other relief to restore competition. The Complaint alleges that the acquisition significantly lessened competition in the development, manufacture and sale of certain high reliability small signal transistors and ultrafast recovery rectifier diodes used in aerospace and military applications, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2. As a result of the acquisition, prices for these products did or would have increased, delivery times would have lengthened, and terms of service would have become less favorable. Pursuant to an Order to Preserve and Maintain Assets, which was entered on December 24, 2008 and modified on August 6, 2009, Microsemi may not, without written consent of the United States, dispose of the acquired assets prior to resolution of this proceeding.

Concurrent with the filing of this Competitive Impact Statement, the United States and Microsemi have filed a Stipulation Regarding Proposed Final Judgment and a proposed Final Judgment. These filings are designed to restore competition through a divestiture of the acquired assets. The proposed Final Judgment, which is explained more fully below, requires Microsemi to divest the Semicoa assets, thus restoring the competition that was lost as a result of the acquisition.

The United States and Microsemi have stipulated that the proposed Final Judgment may be entered after compliance with the

APPA. Entry of the Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Microsemi and the Semicoa Acquisition

Microsemi is a Delaware corporation with its principal place of business in Irvine, California. Microsemi's sales were approximately $514 million in fiscal year 2008. Microsemi's products include a range of electronic components, including high reliability small signal transistors and ultrafast recovery rectifier diodes.

Semicoa was a California corporation that operated from a manufacturing facility in Costa Mesa, California. Semicoa's sales were approximately $14.7 million in 2007. Semicoa manufactured a range of high reliability electronic devices for the military, aerospace, and satellite markets, including high reliability small signal transistors and ultrafast recovery rectifier diodes.

On July 14, 2008, Microsemi acquired substantially all of the assets of Semicoa. The transaction was not subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which requires companies to notify and provide information to the Department of Justice and the Federal Trade Commission before

consummating certain acquisitions. As a result, the Department of Justice did not learn of the transaction until after it had been consummated.

B. The Competitive Impact of the Acquisition on the Markets for QML Small Signal Transistors and QML Ultrafast Recovery Rectifier Diodes

Transistors and diodes are semiconductor devices used to control the flow of electric current. In their simplest forms, transistors can be viewed as switches and diodes can be viewed as one-way valves. Both products begin as silicon wafers produced in a furnace, typically referred to as a foundry. They are then cut into small sections known as dies. These dies are packaged in various ways into transistors and diodes.

Small signal transistors are a class of transistors commonly used in communications and other signal processing applications. Small signal transistors operate at low power levels and typically are used to amplify electrical signals in a wide range of products, including critical military and civilian applications ranging from satellites to nuclear missile systems.

Rectifier diodes are a class of diodes also commonly used in communications and other signal processing applications. Rectifier diodes operate at low power levels and are used to convert alternating current to direct current in a wide range of products, including critical military and civilian applications ranging from satellites to nuclear missile systems. Ultrafast recovery rectifier diodes are distinguished from other rectifier diodes by their extremely high alternating speeds, which

minimize power loss and waste heat generation. Their ability to perform efficiently and without generating excess heat is especially important in applications such as satellites and missiles, where power availability is strictly limited and heat dissipation is challenging.

Highly reliable performance under demanding conditions is absolutely essential in military and space systems, where failure of a single component could result in failure of the mission. To ensure reliability and proper performance, production of these components for use in United States military and space applications is supervised by the Defense Supply Center Columbus ("DSCC"), a component of the Department of Defense. DSCC maintains a list of qualified components and their suppliers generally known as the Qualified Manufacturers List, or QML. Manufacturers seeking placement on the QML must pass rigorous audits of their facilities, production processes, assembly and test procedures, equipment, documentation, and personnel.

Prior to the acquisition, Microsemi and Semicoa were the only QML-listed manufacturers of small signal transistors. In addition, Semicoa and Microsemi were both poised to obtain QML listing for ultrafast recovery rectifier diodes, which at the time were in critically short supply.[1] While a firm with

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[1] Products listed on the QML are organized into "slash sheets," which generally denote groups of components produced by similar processes and having somewhat similar characteristics. Small signal transistors are denoted on slash sheets 182, 251,

production facilities in Mexico did produce some QML Ultrafast Recovery Rectifier Diodes, concerns related to classified data, sensitive end uses, and the inability of the United States government to prioritize product deliveries beyond the nation's borders make many customers reluctant to purchase such products from non-domestic sources.

As discussed in the Complaint, customers benefitted from robust competition between the two firms. In the two years before the acquisition, Semicoa expanded its capacity, improved delivery times, and priced aggressively to take business from Microsemi. As a result, it increased its shipments by more than 40 percent between 2005 and 2007. Without the constraining effect of Semicoa, Microsemi has the power to raise prices and lengthen delivery times on QML Small Signal Transistors and QML Ultrafast Recovery Rectifier Diodes.[2]

253, 255, 270, 290, 291, 301, 317, 336, 349, 354, 366, 374, 376, 382, 391, 392, 394, 395, 423, 455, 512, 534, 535, 544, 545, 558, 559, 560, and 561. Ultrafast recovery rectifier diodes are denoted on slash sheets 477 and 590. This Competitive Impact Statement will hereinafter refer to the products on these slash sheets as "QML Small Signal Transistors" and "QML Ultrafast Recovery Rectifier Diodes."

[2] The Complaint describes the various reliability grades of QML products. In particular, it distinguishes products qualified for use in space ("JANS") from lower reliability grades (collectively referred to in the Complaint as "JANTXV"). The terms of the proposed Final Judgment, however, do not vary among the different QML reliability grades. Therefore, this Competitive Impact Statement uses the terms "QML Small Signal Transistors" and "QML Ultrafast Recovery Rectifier Diodes" to include products of all QML reliability grades.

There are no practical substitutes for QML Small Signal Transistors or QML Ultrafast Recovery Rectifier Diodes. While commercial grade analogues of these components exist, such components are produced to much wider tolerances than QML components, and lack the extensive production control, testing and documentation—and thus the reliability and guaranteed performance—of QML components. While extensive testing of commercial grade components might somewhat reduce the risk of failure posed by the use of such components, such testing would be costly and time consuming, and some risk would still remain. Military and aerospace customers therefore do not regard commercial grade components as viable substitutes for QML components.

Entry of new firms into the production of QML Small Signal Transistors or QML Ultrafast Recovery Rectifier Diodes is highly unlikely to alleviate the harm to competition resulting from Microsemi's acquisition of Semicoa. Obtaining QML listing is a lengthy and uncertain process. Even at the lowest QML reliability grades, entry resulting in sufficient market impact likely would take more than two years. Moreover, entry on a scale sufficient to match the competitive impact of Semicoa prior to the acquisition would require significant investment, particularly in equipment dedicated to automated production, and is unlikely to occur given the small size of the potential markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the markets for QML Small Signal Transistors and QML Ultrafast Recovery Rectifier Diodes by reestablishing Semicoa as an independent and economically viable competitor. The assets to be divested include essentially all of the assets[3] acquired by Microsemi in the July 14, 2008 transaction. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the provision of QML Small Signal Transistors and QML Ultrafast Recovery Rectifier Diodes.

The proposed Final Judgment requires Microsemi, within thirty (30) days after the filing of the proposed Final Judgment, or five (5) calendar days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the Semicoa assets as a viable ongoing business. The United States may, in its discretion, extend this period by an additional period of up to thirty (30) days. The assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by the purchaser as a viable, ongoing business that can compete

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[3] Inventory and/or work-in-progress that Microsemi sold in the ordinary course of business after the July 14, 2008 acquisition of the Semicoa assets are excluded from the divestiture. The Acquirer will acquire all of the assets necessary to restore competition in the relevant markets.

effectively in the relevant markets. Microsemi must use its best efforts to accomplish the divestiture as expeditiously as possible and shall cooperate with prospective purchasers.

In the event that Microsemi does not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the Final Judgment provides that Microsemi will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

In addition to the divestiture provisions, the proposed Final Judgment, in Section XI, provides that Microsemi will provide the United States at least thirty (30) days advance notice of any acquisition of the assets of, or any interest in, any entity engaged in the development, production or sale of QML

Small Signal Transistors or QML Ultrafast Recovery Rectifier Diodes. The notification shall be provided in the same format as, and per the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions need be provided only for QML Small Signal Transistors and QML Ultrafast Recovery Rectifier Diodes.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Microsemi have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the

United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
Liberty Square Building
450 5th Street, N.W., Suite 8700
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the

Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Microsemi. The United States could have continued the litigation and sought divestiture of the Semicoa assets. The United States is satisfied, however, that the divestiture of the assets in the manner prescribed in the proposed Final Judgment will restore competition in the markets for QML Small Signal Transistors and QML Ultrafast Recovery Rectifier Diodes. The proposed Final Judgment would achieve all of the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United*

States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[4]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role

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[4] The 2004 amendments substituted "shall" for "may" in directing relevant factors for the court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

> in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[5] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland*

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[5] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Co., 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L.Ed.2d 472 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56

F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains

sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[6]

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: August 20, 2009 Respectfully submitted,

By: _____/s/_____
Lowell R. Stern
Attorney for Plaintiff

[6] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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