

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	Civil Action No. 1:08 CV 1311
)	
v.)	
)	
MICROSEMI CORPORATION,)	Hearing Date: February 20, 2009
Defendant.)	
)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS MOTION FOR
LEAVE TO FILE A SURREBUTTAL**

Plaintiff United States, through its undersigned counsel, respectfully requests that this Court grant Plaintiff leave to file a surrebuttal in connection with Defendant Microsemi’s Motion to Dismiss for Improper Venue, Motion to Dismiss for Lack of Personal Jurisdiction, or, in the Alternative, Motion to Transfer Venue. This relief is sought pursuant to Local Civil Rule 7(F)(1).

On January 21, 2009, Defendant filed its Motion to Dismiss for Improper Venue, Motion to Dismiss for Lack of Personal Jurisdiction, or, in the Alternative, Motion to Transfer Venue. On February 4, 2009, Plaintiff filed an opposition to that motion, and on February 9, 2009, Defendant filed a rebuttal memorandum. In its rebuttal memorandum, Defendant argues for the first time that its contacts with the forum do not satisfy constitutional due process requirements. (See Def.’s Reb. Mem. pp. 2-9.) Plaintiff seeks a fair opportunity to respond to this argument. See *Vasquez v. The Paul Revere Life Ins. Co.*, 289 F. Supp. 2d 727, 728 (E.D. Va. 2001) (noting that the defendant filed a surrebuttal because the plaintiff’s rebuttal raised arguments that the

defendant had not had the opportunity to address). Plaintiff requests that the Court accept the attached surrebuttal (Exhibit A).

Accordingly, the Plaintiff respectfully requests that the Court enter an order granting Plaintiff leave to file a surrebuttal to Defendant Microsemi's Motion to Dismiss for Improper Venue, Motion to Dismiss for Lack of Personal Jurisdiction, or, in the Alternative, Motion to Transfer Venue.

Dated: February 12, 2009

Respectfully submitted,

/s/

LOWELL STERN (VA Bar #33460)
Counsel for the United States
Trial Attorney
Antitrust Division, Litigation II Section
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530
(202) 514-3676
(202) 307-6283 (fax)
Lowell.Stern@usdoj.gov

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF VIRGINIA
 ALEXANDRIA DIVISION

)	
UNITED STATES OF AMERICA,)	
Plaintiff,)	Civil Action No. 1:08 CV 1311
)	
v.)	
)	
MICROSEMI CORPORATION,)	
Defendant.)	
)	

**SURREBUTTAL MEMORANDUM OF UNITED STATES
 IN OPPOSITION TO DEFENDANT MICROSEMI’S MOTION
 TO DISMISS FOR IMPROPER VENUE, MOTION TO DISMISS FOR LACK
 OF PERSONAL JURISDICTION, OR, IN THE ALTERNATIVE,
MOTION TO TRANSFER VENUE**

In its Rebuttal Memorandum, Microsemi for the first time argues that its contacts with Virginia do not satisfy constitutional due process standards. This Court should disregard that argument because it was made late and misstates the applicable constitutional due process requirements.

First, as a procedural matter, this Court should not consider this argument because Microsemi failed to raise it in its opening Memorandum. *See Bland v. Virginia State Univ.*, No. 3:06CV513-HEH, 2007 WL 446122, at *4 n.2 (E.D. Va. Feb. 7, 2007) (refusing to consider argument raised for the first time in a reply brief). Second, constitutional due process is clearly established here. In a case arising under a federal statute that provides for nationwide service of process, the constitutional due process inquiry is governed by the “national contacts” test under the Fifth Amendment. *Board of Trustees, Sheet Metal Workers’ Nat’l Pension Fund v. McD Metals, Inc.*, 964 F. Supp. 1040, 1043 (E.D. Va. 1997) (Ellis, J., collecting cases); *see Kingsepp v. Wesleyan Univ.*, 763 F. Supp. 22, 24-25 (S.D.N.Y. 1991) (finding that in an antitrust case,

“when a defendant resides in the United States and is subject to nationwide service of process under a federal statute, the defendant is subject to personal jurisdiction in federal court without regard to state long arm statutes and due process requirements are satisfied by the defendant’s contacts with the United States”). This test requires only that “a defendant have sufficient aggregate contacts with the United States as a whole.” *McD Metals*, 964 F. Supp. at 1044. Because the Clayton Act allows for nationwide service of process, (*see* 15 U.S.C. § 22) and Microsemi clearly has sufficient aggregate contacts with the United States as a whole, constitutional due process is satisfied.¹

Microsemi’s argument that its contacts with Virginia do not satisfy constitutional due process principles was made late and is incorrect. Accordingly, this Court should disregard that argument.

Dated: February 12, 2009

Respectfully submitted,

/s/

LOWELL STERN (VA Bar #33460)
Counsel for the United States
Antitrust Division, Litigation II Section
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530
(202) 514-3676
(202) 307-6283 (fax)
Lowell.Stern@usdoj.gov

¹ By contrast, all of the cases cited by Microsemi for the proposition that its contacts do not meet constitutional due process requirements involve either diversity jurisdiction or federal statutes that do not contain a provision for nationwide service of process.

