FILED

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

2009 JUL 28 A 9:14

UNITED STATES OF AMERICA, Plaintiff, v. MICROSEMI CORPORATION, Defendant.	) Civil Action No. 1:08 CV 1311) **Hearing Date: February 13, 2009**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO FILE UNDER SEAL ITS MEMORANDUM IN OPPOSITION OF DEFENDANT MICROSEMI'S MOTION TO STRIKE, OR, IN THE ALTERNATIVE, TO SEAL, PART OF THE MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff, through its undersigned counsel, respectfully requests that this Court allow to be filed under seal Plaintiff's Memorandum in Opposition of Defendant Microsemi's Motion to Strike, or, in the Alternative to Seal, Part of the Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. Plaintiff asks that the memorandum and supporting exhibit be sealed pending the Court's decision on the underlying motion to strike or seal, as the documents contain the information that is the subject of that motion. In support of this motion, Plaintiff states as follows:

1. On December 22, 2008, Plaintiff filed an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, a memorandum in support of that motion, and supporting declarations, documents, and other materials.

2. On January 16, 2009, Defendant filed a Motion to Strike, or, in the Alternative, to

Seal, Part of the Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. In the materials appended to that motion, Defendant claimed that the paragraph on pages 27 and 28 of Plaintiff's Memorandum in Support of its Motion for a Temporary Restraining Order (referred to herein as "the Paragraph") should be either stricken or sealed because it improperly disclosed confidential settlement communications and contained information that hurt Defendant's competitive standing.

3. On January 30, 2009, Plaintiff filed a Memorandum in Opposition of Defendant's Motion to Strike, or, in the Alternative, to Seal, Part of the Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. In order for Plaintiff to fully explain its reasons for opposing Defendant's motion, it was necessary to refer to the information in the Paragraph.

4. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000), sets out the legal standard that this Court must apply when determining whether it is appropriate to order the sealing of documents. It states that before entering an order to seal, a district court must "(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives." *Id.*

5. The first *Ashcraft* consideration, *i.e.*, public notice of the motion to seal, is satisfied by docketing the motion "reasonably in advance of deciding the issue."

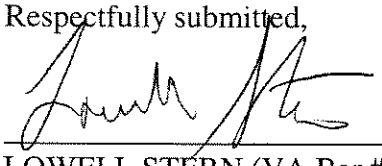
See In re Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984) (cited by *Ashcraft*, 218 F.3d at 302). Plaintiff's motion to seal has been noticed for hearing on February 13, 2009, two weeks from the filing of this motion.

6. The second *Ashcraft* consideration is satisfied because there are no less drastic alternatives to sealing the aforementioned memorandum. Redacting references to the information contained in the Paragraph is not a viable option because it would deprive the Court of the information it needs in order to evaluate whether the Paragraph should be stricken or sealed.

7. The third *Ashcraft* consideration - that the Court "provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives" - is satisfied by the findings of fact in the proposed Order accompanying this Motion.

WHEREFORE, the Plaintiff respectfully requests that this Court allow to be filed under seal Plaintiff's Memorandum in Opposition of Defendant Microsemi's Motion to Strike, or, in the Alternative to Seal, Part of the Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, pending the Court's decision on the underlying motion to strike or seal.

Respectfully submitted,



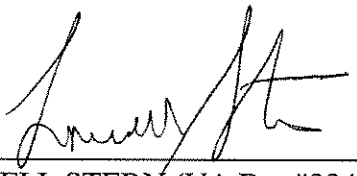
LOWELL STERN (VA Bar #33460)
Counsel for the United States
Trial Attorney
Antitrust Division, Litigation II Section
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530
(202) 514-3676
(202) 307-6283 (fax)
Lowell.Stern@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of January, 2009, I will hand deliver the foregoing document to the following:

Brian A. O'Dea
Michael Antalics
Benjamin G. Bradshaw
William T. Buffaloe

O'Melveny & Meyers LLP
1625 Eye Street, N.W.
Washington, DC 20006



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