

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

FILED

2009 DEC 22 P 5:04

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
MICROSEMI CORPORATION,)
Defendant.)

Civil Action No. 1:08 CV 1311
U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

Hearing Date: January 9, 2009

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO SEAL EXHIBITS
1, 2, 4, 6, 9, 12, 13, 14, AND 15 TO PLAINTIFF'S EMERGENCY MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff, through its undersigned counsel, respectfully requests that this Court enter an order sealing nine (9) exhibits that Plaintiff has submitted in support of its Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The documents at issue contain competitively sensitive information submitted to Plaintiff by Defendant Microsemi Corporation ("Microsemi"). This relief is sought on an interim basis, pending the entry by the Court of a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. In support of this motion, Plaintiff states as follows:

1. On December 18, 2008, Plaintiff filed with the Court a Complaint alleging that Microsemi's acquisition of Semicoa, Inc. ("Semicoa") violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2. 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. Certain exhibits supporting Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction contain information supplied to the Department of Justice by the Defendant. Certain of this information was provided to the Department in confidence and has been protected from public disclosure during the Department's investigation. In keeping with such confidentiality protections, Plaintiff seeks to initially file certain documents under seal.
3. Specifically, Plaintiff seeks to file under seal Exhibits 1, 2, 4, 6, 9, 12, 13, 14, and 15 submitted in support of its Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. Exhibit 1 is a document titled "Operation Growth Strategy," which discusses the Defendant's marketing strategy for the products at issue, as well as future production plans. Exhibit 2 is a document titled "Strategic Overview," which discusses the Defendant's competitive strategy and contains market analyses for the products at issue. Exhibit 4 is an e-mail containing Microsemi and Semicoa shipment data for the products at issue. Exhibit 6 is a spreadsheet recording all of the Defendant's sales information for the products at issue from the years 1997 to 2008. Exhibit 9 is a Semicoa document discussing the company's readiness to produce the products at issue, including information about its manufacturing processes and capabilities. Exhibit 12 is a Microsemi e-mail that discusses pricing and delivery timing for the products at issue. Exhibit 13 is a Semicoa e-mail discussing the company's readiness to produce one of the products at issue. Exhibit 14 is a Semicoa

document that includes test results for one of the products at issue. Exhibit 15 is a Microsemi e-mail analyzing the backlog of Semicoa orders for the products at issue.

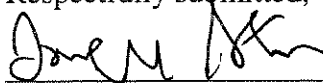
4. Public disclosure of the confidential information contained in the aforementioned exhibits might place the Defendant, as well as any company that may acquire assets divested as a result of this action, at a disadvantage with respect to their existing and potential competitors, who would gain access to sensitive business plans and product development and marketing information.
5. *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.*
4. 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.” *In re Knight Publ’g Co.*, 743 F.2d 231, 235 (4th Cir. 1984). Plaintiff’s motion to seal has been noticed for hearing on January 9, 2009, 21 calendar days from today’s date.
5. The second *Ashcraft* consideration is satisfied because there are no less drastic

alternatives to sealing the aforementioned exhibits. Redacting information from these exhibits is not a viable option because the issue in this case is whether the Defendant's acquisition of the assets of Semicoa resulted in harm to competition in specific product markets. While redacting competitively sensitive information from the exhibits at issue would protect the Defendant and potential acquirers of any divested assets from future competitive disadvantage, it would also deprive the Court of the product, pricing, and strategic business information it needs to evaluate whether the acquisition resulted in competitive harm.

6. 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 the Court enter an order sealing Exhibits 1, 2, 4, 6, 9, 12, 13, 14, and 15 to Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, and that those exhibits remain under seal until a protective order has been entered by the Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of December, 2008, I will mail the foregoing document by U.S. Mail to the following:

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