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

MEMORANDUM OF UNITED STATES IN SUPPORT OF EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Deborah A. Garza
Acting Assistant Attorney General

David L. Meyer
Principal Deputy Assistant Attorney General

J. Robert Kramer II
Director of Operations

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Maribeth Petrizzi
Chief, Litigation II Section

Dorothy B. Fountain
Assistant Chief, Litigation II Section

Kevin C. Quin
Lowell R. Stern
Robert W. Wilder
Janet A. Nash
Stephanie A. Fleming
Christine A. Hill
Helena M. Gardner
Jay D. Owen
Rachel J. Adcox
Brian E. Rafkin
Attorneys

U.S. Department of Justice
Antitrust Division
Litigation II Section
1401 H Street N.W., Suite 3000
Washington, D.C. 20530

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I. NATURE OF THE ACTION AND RELIEF SOUGHT

In this antitrust action, the United States respectfully moves this Court, on an emergency basis, to issue an order to preserve and maintain certain assets of Semicoa Inc., which were acquired by Microsemi Corporation in violation of the antitrust laws. The subject assets are used to produce highly specialized electronic parts, namely certain transistors and diodes, used in critical military space programs vital to the national security of the United States, and also in commercial space programs. The United States seeks this emergency, temporary injunctive relief with the support of the Department of Defense. The Under Secretary of Defense for Acquisition, Technology and Logistics has concluded that the acquisition "reduces competition and is likely to reduce supplier responsiveness and raise component costs." (P. Ex. 25.)

Because the acquisition is already complete, Microsemi controls the subject assets and can dispose of them as it wishes. Following the acquisition, Microsemi took steps to shut down the Semicoa facility and disperse its equipment but suspended its plan as a result of the Department of Justice's investigation. The grant of temporary and preliminary injunctive relief is necessary to prevent further harm to consumers and preserve the Court's ability to order complete and effective relief following a trial on the merits.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337. Section 4 of the Sherman Act, 15 U.S.C. § 4, confers jurisdiction on this Court to prevent and restrain violations of the Sherman Act, and Section 15 of the Clayton Act empowers this Court to "make such temporary restraining order or prohibition as shall be deemed just in the premises" to prevent and restrain violations of the Clayton Act. 15 U.S.C. § 25.

II. SUMMARY OF MICROSEMI'S UNLAWFUL CONDUCT

The Semicoa acquisition is the latest manifestation of Microsemi's strategy to obtain market power by buying up its competitors in the high reliability military semiconductor industry. (P. Ex. 1, MSC-DOJ-002754; P. Ex. 2, MSC-DOJ-000013, 24.) Those firms that it could not purchase it worked to drive out of business in other ways. In those areas of the industry that it succeeded in monopolizing, it raised prices. James Peterson, Chief Executive Officer of Microsemi, summarized the strategy in 2006:

> Military programs? Like I mentioned, we did a lot of acquisitions. We bought every last man standing guy [sic] in the discrete business, except for two small little private companies, and how I manage them is yet another story. You know, essentially it is their product I give away for free, and my sole-source product I charge for. Kind of drives them out of – out of the market . . . [W]e are all over the place . . . It's all predominantly 90 percent or so sole-source Microsemi content, and that is why I raised the prices. I raised the prices because, simply, we could.

(P. Ex. 3, Attach. A at 14:50, Attach. C 11:13–11:25.)[1] A Microsemi strategy document indicates that this plan applied to the high-reliability products at issue in this case: "[a]s history confirms, all major Prime and Sub Contractors believe Microsemi will continue to acquire all high reliability component suppliers and simply raise prices substantially every year." (P. Ex. 1, MSC-DOJ-002749.)

By early 2008, Semicoa—presumably one of the "two small little private companies" that remained in the market as of 2006—was Microsemi's sole remaining competitor for the small signal transistors used in advanced military and aerospace projects. In the two years preceding the acquisition, Semicoa had increased its total shipments by 40 percent. (P. Ex. 4.) In addition,

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[1] *Available at* http://www.tei.net/PresidentsForumPodcast/2006/OrangeCounty/OC06Peterson-podcast.mp3

Semicoa was poised to challenge Microsemi's dominant position in 5811 diodes utilized in the same advanced projects.

Rather than compete with Semicoa, Microsemi purchased substantially all of its assets, thus unlawfully monopolizing the markets for the space-qualified small signal transistors and eliminating Semicoa as a competitive threat in the markets for special space-qualified diodes. One month after the acquisition, Microsemi warned the Department of Defense and the National Aeronautics and Space Administration ("NASA") to expect annual price increases in the "low teens." (P. Ex. 20, Sampson Decl. ¶ 10.)

The United States's motion is supported by customers of the high-reliability semiconductors at issue in this case—including the Department of Defense ("DoD"), the United States Navy, the United States Air Force, and NASA—that procure satellites and other space systems, and Lockheed and Boeing, two of the prime contractors that build such systems. Witnesses from these customers explain that Microsemi's acquisition of the Semicoa assets has already adversely affected competition for JANS small signal transistors and 5811 diodes, which are critical components for a wide array of vital military and space-related systems, ranging from satellites to nuclear missile systems. (*See* P. Ex. 19, Nicholson Decl. ¶ 5; P. Ex. 22, Bartmann Decl. ¶ 6; P. Ex. 20, Sampson Decl. ¶ 5.) As those witnesses explain, this is a case in which harm to competition and to consumers is not merely a likelihood, but is already being felt. For example, Microsemi has already implemented significant price increases on the products sold to at least one major aerospace manufacturer and, moreover, has threatened to retaliate against that same customer for cooperating with the Department of Justice's investigation of the acquisition. (P. Ex. 22, Bartmann Decl. ¶ ¶ 9, 16.)

Unless this Court acts immediately to restrain Microsemi, the company may take further steps to make it more difficult – or perhaps even impossible – for competition to be fully restored, by destroying, transferring, or otherwise damaging the Semicoa assets; firing or transferring to Microsemi facilities employees with critical skills; or otherwise allowing the key DSCC qualifications that Semicoa had obtained or was in the process of obtaining to lapse. Such actions are an explicit objective of Microsemi's business strategy. As CEO James Peterson boasted, "anybody that had any manufacturing equipment to buy, I either bought it, I put it in storage, or I flat out destroyed it." (P. Ex. 3, Attach. A at 5:00, Attach. C 4:16–4:18.)

III. FACTUAL BACKGROUND

A. The Defendant

Microsemi is a Delaware corporation with its principal place of business in Irvine, California. (P. Ex. 5 at 1, 4.) Microsemi's sales were approximately $514 million in fiscal year 2008. (P. Ex. 5 at 6.) Microsemi's products include a range of electronic components, including high reliability semiconductors, which include the transistors and diodes at issue. (P. Ex. 5 at 4-5.) Microsemi ships these products to customers throughout the United States. (P. Ex. 6.)

Semicoa was a California corporation which, prior to the acquisition, had its principal place of business in Costa Mesa, California.[2] (P. Ex. 7 at 1; P. Ex. 9, MSC-DOJ-002554.) Semicoa's sales were approximately $14.7 million in 2007. (P. Ex. 10, MSC-001-000053.) Prior to the acquisition, Semicoa manufactured a range of high reliability devices for the military, aerospace, and satellite markets which included the transistors at issue, and its assets included

[2] Semicoa sold Microsemi the right to the Semicoa trade name, and the Semicoa assets not purchased by Microsemi presently operate under the name Array Optronics, Inc.

equipment needed to manufacture the diodes at issue. (P. Ex. 11, MSC-001-000039; P. Ex. 8, MSC-001-000184; P. Ex. 22, Bartmann Decl. ¶ 12.) From its sole manufacturing facility in Costa Mesa, California, (P. Ex. 7 ¶ 4.19 & Schedule 4.19), Semicoa shipped the products at issue to customers throughout the United States (P. Ex. 8, MSC-001-000277–80).

B. The Transaction

On July 14, 2008, Microsemi acquired substantially all of the assets of Semicoa, including the right to lease and an option to purchase its Costa Mesa facility for about $25 million.[3] (P. Ex. 5 at 1, 4; P. Ex. 7 ¶¶ 1, 1.15, 3.4, 8.8.) Microsemi immediately announced plans to release most Semicoa employees, transfer production of Semicoa's products to Microsemi facilities, and move critical equipment to Microsemi's facility in Ireland. (P. Ex. 5 at 53; P. Ex. 11, MSC-001-000040, 43.) Microsemi has already transferred much production to Microsemi facilities and reduced employment at the Semicoa facility from approximately 100 employees to only 40. (P. Ex. 11, MSC-001-000043.) Microsemi stated shortly after the transaction that it intends to "vacate" the Costa Mesa facility. (P. Ex. 5 at 78.)

C. The High Reliability Military Semiconductor Industry

1. DoD's Qualification System for Military-Grade Semiconductors

Military satellites, missiles and other demanding military systems require highly reliable electronic parts in order to perform their critical missions. The Defense Supply Center Columbus ("DSCC"), a component of the DoD, maintains a list of parts that have been proven to be both

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[3] The transaction was not required to be reported under 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 about the transaction until after it had been consummated.

extremely reliable and of guaranteed performance. (P. Ex. 17, Kolonchuk Decl. ¶ 2; P. Ex. 16, Hess Decl. ¶ 2.) Manufacturers seeking placement on this "qualified manufacturers list" ("QML") must pass a rigorous audit by DSCC, which extensively evaluates—and, if satisfied, certifies for the production of specified categories of products—the manufacturer's facility, production, assembly and test processes, equipment, documentation, and personnel. (P. Ex. 17, Kolonchuk Decl. ¶ 6.)

Within the QML, DSCC grants several different grades of process certifications and part qualifications, known as JAN (for "Joint Army-Navy") categories. (P. Ex. 17, Kolonchuk Decl. ¶ 3; P. Ex. 16, Hess Decl. ¶ 4.) These grades represent different degrees of reliability, with JAN being the lowest grade on the QML, followed by JANTX and JANTXV.[4] The highest reliability grade is JANS (for Joint Army-Navy Space), which designates parts qualified for space and other highly demanding applications. (P. Ex. 16, Hess Decl. ¶¶ 4-5.)

The space environment is harsh, exposing components to extremes of temperature, pressure, radiation, and vibration during launch. (P. Ex. 19, Nicholson Decl. ¶ 5; P. Ex. 22, Bartmann Decl. ¶ 6; P. Ex. 18, Emily Decl. ¶ 5; P. Ex. 20, Sampson Decl. ¶ 5; P. Ex. 21, Davis Decl. ¶ 4.) It is impossible to retrieve or repair a failed satellite component. (P. Ex. 16, Hess Decl. ¶ 5; P. Ex. 20, Sampson Decl. ¶ 5.) These components must be extraordinarily reliable

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[4] The distinction between the JANTXV, JANTX, and JAN grades is not as stark as between JANTXV and the highest grade, JANS, which refers to products qualified for use in space. Therefore, the term JANTXV is used in this memorandum and in the Complaint to refer to grades JANTXV and below; that is, to refer to all grades except JANS.

The Complaint alleges that the Microsemi has eliminated or reduced competition in all QML grades, but this Motion focuses on JANS products, for which the harm from the transaction is the most obvious and immediate. The preliminary relief requested with regard to JANS parts will also address the acquisition's harm to competition for JANTXV products.

because failure of an individual transistor or diode could jeopardize an entire mission. (P. Ex. 20, Sampson Decl. ¶ 4.) A JANS qualification represents the highest assurance of performance and reliability.

Obtaining QML listing is a lengthy and uncertain process. For a manufacturer without any products on the QML, the certification and qualification process may take up to 24 months, depending on the level at which a company wishes to qualify. Very few manufacturers seeking to be placed on the QML for the first time are able to achieve qualification in less than one year. A manufacturer with existing QML parts (and possessing a certified facility) must still complete numerous additional tests before qualifying a new product. This process could take three to twelve months, depending on the type of part and the level at which the company wishes to qualify. This period does not include the significant time and effort the manufacturer must spend on research and development and engineering evaluation. (P. Ex. 17, Kolonchuk Decl. ¶ 8.)

A manufacturer will spend significant additional time, effort, and capital to qualify a JANS part, even if it is already qualified to produce the same part at a JANTXV level. Many companies may produce parts at the JANTXV level for months, and possibly years, before attempting to qualify JANS parts. (P. Ex. 17, Kolonchuk Decl. ¶ 10.)

2. Small Signal Transistors and Ultrafast Recovery Rectifier Diodes

Small signal transistors act as switches of electrical current and/or amplifiers of electrical signals. (P. Ex. 21, Davis Decl ¶ 5.) Prior to the acquisition, Microsemi and Semicoa were the only two manufacturers of JANS small signal transistors.[5] (P. Ex. 22, Bartmann Decl. ¶ 9; P. Ex.

[5] Products listed on the QML are organized into "slash sheets," which denote groups of components with similar characteristics. Microsemi and Semicoa were the only manufacturers on the QML slash sheets for small signal transistors. For convenience, this Motion uses the term

19, Nicholson Decl. ¶ 9; P. Ex. 20, Sampson Decl. ¶ 11; P. Ex. 17, Kolonchuk Decl. ¶ 11; P. Ex. 18, Emily Decl. ¶ 10, P. Ex. 21, Davis Decl. ¶ 9.)

Semicoa was also poised to begin competing with Microsemi for JANS 5811 diodes, the most common part in a class called ultrafast recovery rectifier diodes. (P. Ex. 22, Bartmann Decl. ¶ 12.) This class of diodes operate at low power levels and convert alternating current to direct current.[6] (P. Ex. 21, Davis Decl ¶ 6.)

These JANS small signal transistors and JANS ultrafast recovery rectifier diodes are small but critical components of many important space and military programs vital to national security, including the Navy's MUOS communication satellite and Trident II D-5 strategic nuclear missile. (P. Ex. 19, Nicholson Decl. ¶¶ 4, 6; P. Ex. 18, Emily Decl. ¶¶ 4, 6, 9.) There are no practical substitutes because other electronic components do not perform the necessary functions, and less-reliable small signal transistors and 5811 diodes do not meet the needs of these customers for high reliability components. When these products are unavailable, NASA programs, defense programs essential to the security of the United States, and many civilian applications are at risk of being delayed and impaired. (P. Ex. 19, Nicholson Decl. ¶ 3, 9; P. Ex. 22, Bartmann Decl. ¶ 10, 11; P. Ex. 18, Emily Decl. ¶ 12; P. Ex. 20, Sampson Decl. ¶ 12; P. Ex. 21, Davis Decl. ¶ 8.)

"small signal transistors" to describe the products on these slash sheets.

[6] Both small signal transistors and ultrafast recovery rectifier diodes are manufactured in three stages, consisting of production of specialized silicon wafers ("fabrication"), cutting of the wafers into individual "dies" and subsequent packaging with the appropriate container and connectors ("assembly"), and other testing to assure reliability including long-duration electrical testing of the finished products ("burn in"). (P. Ex. 5 at 7.)

IV. ARGUMENT

A. Standard for Preliminary Relief

Where, as here, the United States seeks to enforce a statute that authorizes injunctive relief, it need not prove irreparable injury to obtain preliminary injunctive relief.[7] The United States need show only that the balance of hardships weighs in favor of relief and that it has "raised questions going to the merits so serious, substantial, difficult and doubtful" as to warrant issuance of the preliminary injunction. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 195-96 (4th Cir. 1977); *see Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 417 (4th Cir. 1999).[8] In this case, the hardships clearly favor the granting of preliminary relief because Microsemi is already exercising market power and could easily take actions that would preclude the Court from granting effective relief following trial. Furthermore, the evidence of a violation is so compelling that it satisfies the preliminary injunction standard applicable to private plaintiffs, let alone the reduced standard applicable here.[9]

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[7] The United States "is not bound to conform with the requirements of private litigation when it seeks the aid of courts to give effect to the policy of Congress as manifested in a statute." *Shafer v. United States*, 229 F.2d 124, 128 (4th Cir. 1956); *Nat'l Labor Rel. Bd. v. Aerovox Corp. of Myrtle Beach, South Carolina*, 389 F.2d 475, 477 (4th Cir. 1967) (citing *Shafer*, 229 F.2d at 128) (holding that "the government is not required to show irreparable injury when it seeks an injunction to give effect to an act of Congress"); *see also Fed. Trade Comm'n v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 59 (D. Md. 1981).

[8] Courts in other jurisdictions have held similarly that if the United States shows a reasonable probability of success on the merits, irreparable harm to the public should be presumed. *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1429 (W.D. Mich. 1989); *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992).

[9] A private plaintiff seeking preliminary injunctive relief must ordinarily show "'(1) the likelihood of irreparable harm to the plaintiffs if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the

B. The United States Will Show That Microsemi Violated Section 7 of the Clayton Act

Section 7 of the Clayton Act prohibits any acquisition "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 allows a district court to afford relief after an acquisition has been consummated. *See United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957) (stating that the Clayton Act's "aim was primarily to arrest apprehended consequences of inter corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition"); *see Fed. Trade Comm'n v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131, 1146-47 (N.D. Ill. 1988), *aff'd, Fed. Trade Comm'n v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989). To determine whether an acquisition may substantially lessen competition or tend to create a monopoly, the reviewing court must identify "the product market or 'line of commerce' and the geographical market or 'section of the country'" as well as the transaction's probable effect on competition in those product and geographic markets. *Fed. Trade Comm'n v. Food Town Stores*, 539 F.2d 1339, 1344 (4th Cir. 1976); *see United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 618-23 (1974).

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plaintiff will succeed on the merits, and (4) the public interest.'" *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)). If the plaintiff makes a strong showing of irreparable harm if the injunction is denied, the court then balances the harms to plaintiff and defendant. *Id.* If the balance of hardships favors the plaintiff, then it will "'be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation'" for the court to issue a preliminary injunction; the plaintiff need not show a likelihood of success on the merits. *Blackwelder,* 550 F.2d at 195-96.

1. The United States Is Likely to Establish that JANS Small Signal Transistors and JANS 5811 Diodes Are Relevant Product Markets

"The outer boundaries of a product market are determined by the reasonable interchangeability of use (by consumers) or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *see du Pont*, 351 U.S. at 395 ("[C]ommodities reasonably interchangeable by consumers for the same purposes" constitute a product market for antitrust purposes); *see Murrow Furn. Galleries, Inc. v. Thomasville Furn. Ind., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989). The market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953). Thus, the pivotal question in product market definition is whether an increase in price for one product would cause enough buyers to turn to other products so as to make the price increase unprofitable. *du Pont*, 351 U.S. at 400; *Murrow Furn. Galleries*, 889 F.2d at 528.

This same analytical approach is incorporated in the 1992 U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines ¶ 1.11 (1997 rev.) (hereinafter "Merger Guidelines").[10] The Merger Guidelines take the smallest group of competing products and ask whether a "hypothetical monopolist over that group of products would profitably impose at least a 'small but significant and nontransitory' [price] increase." Merger Guidelines ¶ 1.11. Under the Merger Guidelines, a "small but significant and nontransitory" price increase in most instances is an "increase of five percent lasting for the foreseeable future." *Id.* ¶ 1.11.

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[10] Courts have turned to the Merger Guidelines as persuasive authority in analyzing merger cases. *See generally Fed. Trade Comm'n. v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

a. JANS small signal transistors are a relevant product market.

Small signal transistors typically are used in switching and signal processing, amplifying electrical signals. (P. Ex. 18, Emily Decl. ¶ 4.) While there are many types of transistors, it would be difficult, time-consuming, expensive, and sometimes impossible to design around the use of small signal transistors. (P. Ex. 18, Emily Decl. ¶ 6; P. Ex. 21, Davis Decl. ¶ 5.) A small but significant and nontransitory increase in the price of small signal transistors would not cause customers to substitute other types of transistors for small signal transistors.

During the design phase of a project, customers and the project's prime contractor determine the required grades for the electronic components used in those projects. (P. Ex. 22, Bartmann Decl. ¶ 4; P. Ex. 23, Hougen Decl. ¶ 4.) It is at this point that the decision is made whether to use JANS small signal transistors. (P. Ex. 22, Bartmann Decl. ¶ 4; P. Ex. 20, Sampson Decl. ¶¶ 4-6.) The key factors in this determination are the requirements of the program, including the degree of reliability required of the parts and the risk level acceptable to the project as a whole. (P. Ex. 22, Bartmann Decl. ¶ 4; P. Ex. 20, Sampson Decl. ¶¶ 5-6.)

Where customers have specified JANS parts, parts of lesser reliability (e.g., JANTXV or commercial grade parts) would not be substituted in response to an increase in prices. JANTXV parts would not be substituted for JANS parts because they do not have the extra reliability and life expectancy of JANS parts, which result from the much more demanding and extensive testing, documentation, process control and burn-in required of JANS parts. (P. Ex. 20, Sampson Decl. ¶¶ 3, 6-7; P. Ex. 19, Nicholson Decl. ¶ 6; P. Ex. 16, Hess Decl. ¶ 5; P. Ex. 18, Emily Decl. ¶ 8.) Each manufacturing lot of JANS parts is individually tested, ensuring that product quality remains consistent over time. (P. Ex. 16, Hess Decl. ¶ 5.) If no JANS components are available,

customers needing JANS-level of reliability can make use of JANTXV components by putting each individual component through a battery of extensive tests (called "upscreening"), which might reduce the risk of failure posed by the use of such parts. However, upscreening is not a viable alternative when JANS components are available because the additional testing required is both time consuming, delaying the project requiring the part, and is not capable of removing all of the additional risks associated with using non-JANS parts. (P. Ex. 20, Sampson Decl. ¶¶ 7-8.) In addition, the additional cost associated with upscreening would as a practical matter make using JANTXV components far *more expensive* than simply buying JANS parts when they are available at competitive prices. (P. Ex. 20, Sampson Decl. ¶ 8; P. Ex. 19, Nicholson Decl. ¶ 7; P. Ex. 22, Bartmann Decl. ¶ 8.) Customers and end users therefore do not consider the cost or availability of JANTXV parts when designing systems requiring JANS parts when a JANS part is available. (P. Ex. 19, Nicholson Decl. ¶¶ 7-8; P. Ex. 22, Bartmann Decl. ¶ 8.)

Commercial grade small signal transistors are significantly less reliable than their JANTXV counterparts, and upscreening them for reliability also costs far more than JANS parts. (P. Ex. 20, Sampson Decl. ¶ 8.) Thus, a small but significant and nontransitory increase in the price of JANS small signal transistors will not cause customers to substitute lower grade components for JANS small signal transistors. JANS small signal transistors therefore constitute a relevant product market under Section 7 of the Clayton Act.

b. JANS 5811 diodes are a relevant product market.

5811 diodes are one of the more common members of the class of ultrafast recovery rectifier diodes. Rectifier diodes are used to convert alternating current to direct current; ultrafast recovery indicates rectifier diodes with very high switching speeds, which minimizes heat

generation and energy loss. (P. Ex. 21, Davis Decl. ¶ 6.) While there are many types of diodes, it would be difficult, time-consuming, expensive, and sometimes impossible to design around the use of JANS 5811 diodes. (P. Ex. 21, Davis Decl. ¶ 6; *cf.* P. Ex. 19, Nicholson Decl. ¶ 4.) A small but significant and nontransitory increase in their price would not cause customers to substitute other types of diodes for JANS 5811 diodes.

Because customers need the highest possible level of quality and reliability, a small but significant increase in the price of JANS 5811 diodes would not cause these customers to switch to JANTXV 5811 diodes. (*Cf.* P. Ex. 19, Nicholson Decl. ¶¶ 4, 6-7.) Similarly, although commercial grade analogues exist, a small but significant increase in the price of JANS 5811 diodes would not cause customers to switch to them because they are less reliable and pose more risk than JANS parts.

c. Microsemi can offer competitive terms to any customer able to substitute lower grade products for JANS products.

Microsemi may assert that some customers could substitute lower quality components in response to a small but significant price increase on JANS small signal transistors and JANS 5811 diodes. The United States does not believe that the evidence will support this claim. Indeed, to date, the United States has not identified any customer of JANS small signal transistors or 5811 diodes that is willing to substitute lower quality products in the face of price increases of a magnitude of ten percent or even much larger. To the contrary, as shown above, customers that rely on these parts for critical military and space systems say that lower-grade products are not a cost-effective alternative to JANS parts, and substitution occurs only when JANS part are unavailable.

However, even if it were the case that a few Microsemi customers could choose to replace JANS products with lower-grade products in response to a price increase, Microsemi could identify such customers to avoid losing sales while still targeting for price increases the numerous customers without practical, cost-effective alternatives to JANS parts. The ability of sellers to charge different prices to distinct groups of customers (*i.e.*, "price discriminate") with distinct needs is part and parcel of standard market definition analysis. As described generally in the Merger Guidelines:

> [i]f a hypothetical monopolist can identify and price differently to those buyers ('targeted buyers') who would not defeat a targeted price increase by substituting to other products in response to a 'small but significant and nontransitory' price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers.

Merger Guidelines § 1.12; *see also* 5C P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 534d (3rd ed. 2007) (noting that "a seller who can segregate a substantial group of buyers and charge them monopoly prices for a significant period has market power over the group of buyers who pay these prices"); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1278 (8th Cir. 1981) (finding that "there is a group of customers for whom artificial turf is the only realistic choice").

Microsemi would be able to identify those customers without affecting the high prices it is able to charge the vast majority of its JANS customers. Microsemi is well aware of the identity of its customers for JANS products, (P. Ex. 6) and is often aware of the individual projects for which those customers are seeking JANS components (P. Ex. 12). It has even considered developing individualized sales strategies tailored to each customer. (P. Ex. 1, MSC-DOJ-002754.) With this degree of customer knowledge, Microsemi can identify any

customer with the ability to substitute lower grade components for JANS components, if they exist, and offer more favorable terms to those customers to avoid losing sales. It thus can profitably increase prices on JANS parts to all other customers that have no practical alternatives to JANS parts.

2. The Relevant Geographic Markets for JANS Small Signal Transistors and JANS 5811 Diodes Is The United States

A relevant geographic market is an "area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Philadelphia Nat'l Bank*, 374 U.S. at 359 (internal quotation marks omitted). The Merger Guidelines identify the relevant geographic market as

> a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere.

Merger Guidelines ¶ 1.21.

There is a group of U.S. based customers that require such parts—the Department of Defense, the United States Navy, the United States Airforce, NASA, and the firms that supply them. Microsemi can identify these customers and increase prices to them. Thus, under Section 7 of the Clayton Act, the relevant geographic market for JANS small signal transistors and 5811 diodes is the United States.

3. The Acquisition Unlawfully Lessened Competition

a. The acquisition is presumptively illegal with respect to JANS small signal transistors.

An acquisition challenged under Section 7 of the Clayton Act is *presumed* to have lessened competition substantially if the Government can show that the combined entity has a

significant market share and that the acquisition has significantly increased concentration in the relevant market. *See Philadelphia Nat'l Bank*, 374 U.S. at 363 (holding that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects"). Under *Philadelphia National Bank*, a post-merger market share of 30 percent or higher raises a presumption of illegality. *Id.* at 364. Here, Semicoa was a significant competitor prior to the acquisition, and, as a result of acquiring substantially all of the assets of Semicoa, Microsemi obtained a 100 percent share of the market for JANS small signal transistors. (*See* P. Ex. 22, Bartmann Decl. ¶ 9; P. Ex. 19, Nicholson Decl. ¶ 9; P. Ex. 23, Hougen Decl. ¶ 4; P. Ex. 20, Sampson Decl. ¶ 11; P. Ex. 17, Kolonchuk Decl. ¶ 10; P. Ex. 18, Emily Decl. ¶ 10; P. Ex. 21, Davis Decl. ¶ 8.) Microsemi's acquisition of the Semicoa assets eliminated all competition between the two companies for these products, resulting in a monopoly.

b. The acquisition substantially lessened competition for JANS 5811 diodes.

An acquisition that prevents imminent entry by a firm into a relevant market violates Section 7 of the Clayton Act. *See, e.g., Yamaha Motor Co., Ltd. v. Fed. Trade Comm'n,* 657 F.2d 971, 977 (8th Cir. 1981); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1229 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974), *reh'g denied*, 419 U.S. 886 (1974); *cf. Fed. Trade Comm'n v. Atlantic Richfield Co.*, 549 F.2d 289, 293-94 (4th Cir. 1977) (collecting

cases).[11] This "actual potential competition" theory of harm is described in the Department's Merger Guidelines as follows:

> By eliminating the possibility of entry ... [a] merger could result in a lost opportunity for improvement in market performance resulting from the addition of a significant competitor. The more procompetitive alternatives include both new entry and entry through a "toehold" acquisition of a present small competitor.

Dep't of Justice Non-Horizontal Merger Guidelines, § 4.112 (1984).

Conditions in the market for JANS 5811 diodes amply satisfy the legal standards for showing a violation of Section 7 arising from the elimination of a firm that likely would have competed in the relevant market in the near future. The actual potential competition theory requires a showing of: (1) an oligopolistic relevant market; (2) that the potential entrant is likely, and has the ability and feasible plans, to enter the relevant market other than by the acquisition; and (3) the substantial likelihood that the new entry would result in deconcentration of the market or other significant procompetitive effects. *See, e.g., Marine Bancorp.*, 418 U.S. at 630-33; *Yamaha Motor*, 657 F.2d at 977. Objective evidence that shows "the basic economic facts of the [potential entrant's] overall size, resources, capability, and motivation with respect to entry" is preferable to subjective evidence in showing the ability and feasibility of potential entry and its likely effect on competition; however, subjective evidence of intent to enter is still relevant. *Phillips Petroleum*, 367 F. Supp. at 1236-39; *see also Mercantile Texas Corp. v. Bd. of Governors,* 638 F.2d 1255, 1269-70 (5th Cir. 1981).

Microsemi's purchase of the Semicoa assets eliminated an actual potential entrant in the market for JANS 5811 diodes. This part has been in critically short supply since Microsemi

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[11] The Supreme Court has reserved judgment on the actual potential competition doctrine. *See Marine Bancorp.*, 418 U.S. at 625-26, 639.

failed in an attempt to transfer its JANS 5811 diode production operations between facilities. (P. Ex. 22, Bartmann Decl. ¶ 10.) Semicoa was well along the path toward entering this market when it was acquired in July 2008. Indeed, it had already started testing of its diode in July 2008 and had scheduled a DSCC audit of its facility for August 2008. (P. Ex. 9; P. Ex. 13; P. Ex. 14, MSC-DOJ-000114, 120; *see also* P. Ex. 22, Bartmann Decl. ¶ 12; P. Ex. 17, Kolonchuk Decl. ¶14.) Semicoa thus had the ability and feasible plans to enter the JANS 5811 diode market.

Microsemi recently regained its DSCC qualification, and is the sole current supplier of JANS 5811 diodes. Semicoa's impending entry was likely to have significant procompetitive effects. Semicoa already had obtained over $3 million in orders from customers. (P. Ex. 15.) A third firm, with manufacturing facilities located in Mexico, is attempting to enter this business. (P. Ex. 17, Kolonchuk Decl. ¶ 15.) However, one major satellite manufacturer found Semicoa to be the best possible alternative to Microsemi in part because of concerns raised by customers regarding purchasing parts from a foreign company, including the firm with facilities in Mexico. (P. Ex. 22, Bartmann Decl. ¶¶ 11-12.) As a result, entry by this firm, even if it occurs in the future, likely would have less impact on competition than entry by Semicoa. In any case, the number of likely participants in the market for JANS 5811 diodes has declined from three to two, Microsemi will have less incentive to bid aggressively, and customers will not benefit from Semicoa's competing bids.

4. Microsemi Cannot Rebut the Presumption of Illegality

Once the United States has established a presumptive violation of the Clayton Act, the defendant may introduce evidence to attempt to rebut that presumption. However, the Supreme Court has directed that the presumption will not easily be overcome. *See Philadelphia Nat'l*

Bank, 374 U.S. at 363 (defendants must provide evidence that the merger is not likely to have anticompetitive effects). Defendants can rebut this presumption of illegality only by showing that other market characteristics would preclude the merger from substantially lessening competition. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 497-98 (1974). In such a case, the defendants must "show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975).

a. Entry will not counteract the anticompetitive effects of the transaction.

The presumption that the proposed transaction will result in anticompetitive effects may be overcome if entry to the market would be easy, *i.e.* "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern." Merger Guidelines ¶ 3.0; *see Chicago Bridge and Iron Co. N.V. v. Fed. Trade Comm'n*, 534 F.3d 410, 429-30 (5th Cir. 2008) (analyzing legal standard regarding barriers to entry). Entry barriers include legal license requirements; government regulations, entrenched buyer preferences for established brands; and higher capital costs. *See, e.g., Reazin v. Blue Cross & Blue Shield of Kansas, Inc.,* 899 F.2d 951, 968 (10th Cir. 1990) (quoting Areeda & Turner, *Antitrust Law* ¶ 409 (1978)); *Citizens & S. Nat'l Bank*, 422 U.S. at 91, 118 n.30 (1975). The Merger Guidelines employ a three-step method to determine whether entry is likely to counteract a competitive effect of concern. "The first step assesses whether entry can achieve significant market impact within a timely period." Merger Guidelines ¶ 3.0. If entry will not be timely, there is no need to go beyond the first step and analyze whether entry is likely and sufficient. *Id.* The need for high reliability, and the government qualification process that ensures high reliability, is a

significant barrier preventing timely entry into markets for any JANS product, including both small signal transistors and 5811 diodes. As previously discussed, to obtain JANS qualification, a manufacturer must first obtain JANTXV qualification. The process of obtaining JANS qualification begins with a rigorous DSCC audit of the manufacturer's production, assembly and testing facilities. (P. Ex. 17, Kolonchuk Decl. ¶ 6.) If the manufacturer obtains DSCC certification for the facilities, it then must produce a sample lot of the product (or similar group of products) for which it seeks qualification. (P. Ex. 17, Kolonchuk Decl. ¶ 7.) Only if satisfied with the results of this testing will DSCC grant QML status to the manufacturer for that specific component. *Id.* This initial process, from arranging for initial audits to obtaining QML status, typically requires anywhere from three to twelve months for a manufacturer that makes existing QML parts to up to two years for a manufacturer without any products on the QML.[12] (P. Ex. 17, Kolonchuk Decl. ¶¶ 8-9.)

Qualifying to produce JANS parts takes additional time, effort, and money above that which is required to obtain qualification for lower-level QML parts. Many companies produce parts at lower JAN levels for months or years before attempting JANS certification and qualification process. (P. Ex. 17, Kolonchuk Decl. ¶¶ 8-9.) Thus, even for existing QML-qualified suppliers, expansion into JANS products likely would take well over another year.[13]

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[12] These time projections assume a semiconductor manufacturer that is already producing transistors or diodes of a type similar to that for which qualification is sought. A firm without such facilities would first need to obtain access to a plant, and purchase, hire or contract out for the necessary equipment and skilled personnel.

[13] Microsemi's own experience in transferring its JANS 5811 diode production between two well-established facilities demonstrates some of the difficulties associated with development of JANS products. Microsemi failed in its effort to transfer production, and required three years to develop JANS 5811 diodes at a third facility. (P. Ex. 17, Kolonchuk Decl., ¶ 13.) A two and

For entry to be timely, "entrants quickly must achieve a significant impact on price in the relevant market." Merger Guidelines ¶ 3.2. In addition, "[t]he Agency will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to *significant market impact*." *Id.* (emphasis added). Even producers who obtain JANS qualification are likely to have little immediate market impact on the market unless they have an established record of quality, consistency, and reliability in other JANS products. Because of great risks involved in spaceflight, customers move cautiously before switching to any new supplier. (P. Ex. 20, Sampson Decl. ¶ 9.) Therefore, no entrant is likely to have a significant market impact in the near future.

b. Microsemi's claimed efficiencies cannot justify a merger to monopoly.

Although Microsemi may claim as a defense that the acquisition of its only competitor would result in efficiencies, such efficiencies do not justify approval of this merger to monopoly. The Merger Guidelines allow for consideration of verifiable, merger-specific efficiencies that are generated in the relevant product market if the "efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." Merger Guidelines ¶ 4. The Merger Guidelines, however, caution that "[e]fficiencies almost never justify a merger to monopoly or near-monopoly." *Id.* In evaluating a proposed merger that would combine the second- and third-largest makers of baby food in a market in which the top three manufacturers accounted for over 95 percent of sales, the Court of Appeals for the District of Columbia stated that "the high market concentration levels present in this case require, in

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one-half year effort to develop another source at yet another Microsemi facility ended in failure.

rebuttal, proof of extraordinary efficiencies . . . ." *Fed. Trade Comm'n v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001).

Courts that have allowed an efficiency defense have required defendants to satisfy a rigorous burden of proof. A defendant must prove that claimed efficiencies are merger specific, *i.e.*, can be achieved "only through the merger and in no other manner." *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1289 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990), *cert. denied*, 498 U.S. 920 (1990); *see also Fed. Trade Comm'n v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998) (holding that "efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger"). Defendant must prove that claimed efficiencies would result in "significant economies and that these economies ultimately would benefit competition and, hence, consumers." *Fed. Trade Comm'n v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *see also Rockford Mem'l*, 717 F. Supp. at 1289 (requiring defendants to establish "by clear and convincing evidence that the efficiencies provided by the merger produce a significant economic benefit to consumers, even in light of the possible anti-competitive effects of the merger"). Defendants claiming efficiencies must explain with specificity how efficiencies "would be created and maintained." *Univ. Health*, 938 F.2d at 1223; *see also Heinz*, 246 F.3d at 721 (finding that "mere speculation and promises about post-merger behavior" are not sufficient to sustain an efficiencies defense to a merger leading to high market concentration levels). Microsemi's acquisition of the Semicoa assets does not present the exceptional case where a merger to monopoly might be justified by substantial and credible claims of merger-specific efficiencies. Microsemi has produced no credible evidence that would meet this high standard.

Microsemi may contend that, by acquiring Semicoa and thereby appropriating for itself 100 percent of the sales in these markets, it is able to spread its own fixed costs over greater volume, thereby lowering its total costs per unit. Such a contention, however, would not provide a viable efficiency defense in an antitrust merger case. Competition – not acquisitions creating monopolies – is the means by which firms may increase their sales volumes and thereby lower their unit costs. Nothing prevented Microsemi from achieving the same result without acquiring Semicoa – by competing with Semicoa for the sales of its customers using lower prices, superior service or other efforts. Allowing firms to justify mergers based on such an argument would sanction the elimination of competition in most industries where suppliers have some fixed costs, and write the Clayton Act out of the statute books.

C. The United States Is Likely to Show that Microsemi Unlawfully Monopolized the Market for JANS Small Signal Transistors

Section 2 of the Sherman Act proscribes monopolization of "any part of the trade or commerce among the several states." 15 U.S.C. § 2. To establish a claim under Section 2, the United States must show two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991). Here, Microsemi possesses and willfully acquired monopoly power in a market with high entry barriers by eliminating its only rival in the production of JANS small signal transistors.

1. Microsemi Possesses Monopoly Power

Monopoly power is "the power to control market prices or exclude competition." *du*

Pont, 351 U.S. at 391; *see Dickson v. Microsoft Corp.*, 309 F.3d 193, 199 n.1 (4th Cir. 2002). Monopoly power can be proven directly by showing the exercise of monopoly power (*e.g.*, the charging of prices above the competitive level), or indirectly by showing that defendant has a dominant market share of a market protected by barriers to entry. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001); *Re/Max Int'l v. Realty One*, 173 F.3d 995, 1018 (6th Cir. 1999). The principles of market definition applicable to cases arising under Section 2 of the Sherman Act are the same as those applicable to cases arising under Section 7 of the Clayton Act. *See Grinnell*, 384 U.S. at 573 ("We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."). As demonstrated above, JANS small signal transistors are a relevant market.

The evidence demonstrated beyond question that Microsemi has a dominant share of the market, having gained control of 100 percent of the market for JANS small signal transistors through its purchase of substantially all of the assets of Semicoa, its sole competitor. Moreover, that monopoly is protected by entry barriers, including the DSCC qualification process described above. Microsemi's CEO James Peterson has boasted that the firm's sole-source position in high reliability product was protected by high entry barriers, and that the time to enter is "three to five years and gaining." (P. Ex. 3, Attach. A, 4:42, Attach. C 3:12–3:19.)

2. Microsemi Willfully Acquired Monopoly Power

The second element of claim under Section 2 of the Sherman Act is the willful acquisition of monopoly power, as distinguished from monopoly power attained through growth or development as a consequence of a superior product, business acumen, or historic accident. *Grinnell*, 384 U.S. at 570-71.

Microsemi gained monopoly power by acquiring its sole competitor for JANS small signal transistors. It did not develop a better product, display superior business acumen, or fall into a natural position of dominance. By July 2008, Microsemi was facing competition from only one competitor, a competitor that was constraining prices to the point that Microsemi later described them as being "below market." (P. Ex. 15.) Microsemi decided to remove this constraint by acquiring its sole competitor in violation of Section 2 of the Sherman Act. *Fraser v. Major League Soccer, L.L.C.* 284 F.3d 47, 61 (1st Cir. 2002) (merger to monopoly states Section 2 claim); *see also Standard Oil Co. v. United States*, 221 U.S. 1, 61-62, 75 (1911) (holding that in the absence of countervailing circumstances, the acquisition of competitors resulting in dominance over an industry gives rise to a prima facie presumption of intent to obtain monopoly power "not as a result of normal methods of industrial development" but in restraint of trade in violation of Section 2 of the Sherman Act); *cf. Grinnell*, 384 U.S. at 576.

D. Issuance of a Temporary Restraining Order and Preliminary Injunction is Necessary to Ensure Effective Relief

Although Microsemi has already completed its acquisition of Semicoa's assets, a temporary restraining order and preliminary injunction nevertheless is essential to protect the assets of Semicoa and preserve the ability of this court to restore competition for JANS small signal transistors and 5811 diodes. Microsemi has not yet completed its planned shutdown of the Semicoa plant, and former-Semicoa employees remain at that facility engaged in the production of some of the components that Semicoa manufactured prior to the acquisition. Destruction of the Semicoa equipment, or its sale, other than to a firm that would use those assets to compete effectively against Microsemi, would permanently prevent this Court from exercising its authority to restore competition. In addition, shutdown of the equipment could prevent or delay a

restart of operations by a new owner and threaten the continued existence of the DSCC qualifications that Semicoa held. (P. Ex. 17, Kolonchuk Decl. ¶¶ 18–20.)

This is an urgent matter, since Microsemi has already taken steps to carry out its plan to shutter the Semicoa facility by firing the great majority of the employees and transferring some of the plant's production to Microsemi's own facilities. Thus, while the plant is still in place and in use, this asset and the related production capabilities are in serious jeopardy.

Without an order of this Court, there is no legal impediment to Microsemi finally and completely disposing of the assets of Semicoa whenever it wishes, and in whatever way it chooses, including by destroying the equipment. Indeed, Microsemi's chief executive officer has explained that removing assets from the market has been part and parcel of Microsemi's business strategy. (P. Ex. 3, Attach. A at 5:00, Attach. C 4:16–4:18.)

As a result of the Antitrust Division's investigation into the unlawful acquisition, Microsemi sent a letter stating it would not damage or dispose of the Semicoa assets. This unilateral statement lacks the enforceability of an order by this Court, can be withdrawn at any time, and does not even purport to forbid all of the steps that Microsemi might take to further extinguish the competitive capabilities of the Semicoa assets.

The need for an enforceable order of this Court is underscored by the United States' experience with other "commitments" made by Microsemi in connection with the Antitrust Division's investigation in this matter. On November 5, 2008, representatives of Microsemi, together with counsel, stated that rather than provide information sought by the Antitrust Division under compulsory process during the course of its investigation, Microsemi would divest itself of the Semicoa assets. (P. Ex. 24, Fountain Decl. ¶¶ 4-5.) That assurance led the

Antitrust Division to refrain from seeking to compel production of this information, and it instead worked to implement the divestiture promised by Microsemi. In a subsequent conversation with counsel more than a week later, Microsemi revoked its pledge to divest the Semicoa assets. (P. Ex. 24, Fountain Decl. ¶ 6.) Microsemi instead proposed, in effect, that the Antitrust Division reopen its investigation, and it pledged again not to dispose of the Semicoa assets while a new investigation is underway. *Id.* Microsemi still has not complied with the compulsory process issued by the Antitrust Division. (P. Ex. 24, Fountain Decl. ¶ 3.) This behavior provides no sound basis for confidence that Microsemi will not dispose of or otherwise damage the assets of Semicoa pending the outcome of this matter, regardless of its purported pledge not to do so.

Even if the balance of hardships test applicable to private litigants were applied in this case, the balance tips sharply in the favor of the United States. Microsemi has, as a result of the Antitrust Division's investigation, halted its plan to shut down Semicoa and sent a letter to the Antitrust Division stating it would not further impair the assets. At this point, the burden of preserving and maintaining the assets under Court order prior to resolution on the merits must be deemed to be minimal. The harm to the public and consumers absent an order far outweigh the burden on Microsemi. Ensuring that the Semicoa assets can be used effectively by a new owner is critical to an effective remedy. A new owner's ability to use the assets to restore competition would be hindered or delayed if the assets are not maintained in continuous operation. (P. Ex. 17, Kolonchuk Decl. ¶¶ 18–20.) Successful semiconductor manufacturing is in some ways as much an art as a science, and even very subtle changes can disrupt efficient operations, which manufacturers describe as "losing the recipe." Shutdown of the Semicoa plant would virtually

guarantee such disruption, even if the equipment is ultimately reactivated by the same personnel. It is vital that Microsemi be subject to an order of this Court ensuring that the assets will not be compromised. Accordingly, the United States seeks the entry of an order restraining Microsemi from impairing, disposing of, transferring, or idling the Semicoa assets, or from dismissing Semicoa employees except for cause. This order also should require Microsemi to provide the United States advance notice of any employee dismissal, to maintain the Semicoa assets by, for example, adhering to normal repair and maintenance schedules, and to take any step necessary to ensure that the Semicoa assets retain all DSCC certifications.

V. CONCLUSION

For all the foregoing reasons, the United States respectfully requests that this Court issue an order directing Microsemi to preserve and maintain the Semicoa assets pending a trial on the merits.

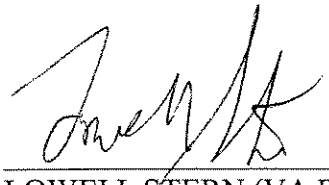
Respectfully submitted,

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 22nd day of December, 2008, I will hand deliver the foregoing document to the following :

Michael E. Antalics
O'Melveny & Myers LLP
1625 Eye St. N.W.
Washington, D.C. 20006-4001



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