IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, Plaintiff, v. INTEL CORPORATION, a Delaware Corporation, Defendant.	C. A. No. 09-827 (LPS)

INTEL CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION UNDER RULE 12(c) FOR DISMISSAL WITH RESPECT TO NEW YORK'S DONNELLY ACT DAMAGES CLAIM ON BEHALF OF CONSUMERS

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I. INTRODUCTION

In Claim 2 of its complaint, New York seeks to recover treble damages under the Donnelly Act, N.Y. Gen. Bus. Law § 340, on four separate grounds: (i) for harms allegedly suffered by the State itself as a purchaser of computers containing Intel microprocessors; (ii) as assignee of the claims previously owned by the Original Equipment Manufacturers ("OEMs") that purchased Intel microprocessors; (iii) on behalf of New York non-state local entities that purchased computers containing Intel microprocessors; and (iv) on behalf of New York consumers who purchased computers containing Intel microprocessors. Compl. ¶¶ 261–63. This motion addresses only the last of those grounds for relief set forth in Claim 2: New York's treble damages claim under the Donnelly Act on behalf of individual New York consumers.[1]

New York lacks authority to bring this treble damages claim on behalf of consumers. First, the Donnelly Act does not authorize New York to bring damages claims on behalf of consumers; instead, it specifically limits the State to requests for penalties and injunctive relief when suing on behalf of its citizens. Second, New York cannot rely upon a *parens patriae* theory, because a sovereign has no *parens patriae* right to recover damages on behalf of particular individuals for harm done to those individuals. For these reasons, this Court should dismiss New York's Donnelly Act treble damages claim on behalf of consumers.

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[1] This ground for relief is set forth in paragraph 263 of New York's complaint (and is reiterated in the request for treble damages on behalf of these consumers set forth in the prayer for relief). Intel's concurrently filed Motion Under Rule 17(a), Rule 12(b)(1), and Rule 12(c) For Dismissal With Respect To Claims On Behalf Of Non-State Public Entities separately seeks dismissal of New York's treble damages claim on behalf of non-state local entities under Claim 2 (the third ground for relief listed above).

II. FACTUAL BACKGROUND

Intel and Advanced Micro Devices ("AMD") sell microprocessors to OEMs, who then build computers of which microprocessors are one component. Compl. ¶¶ 2, 18, 20. New York alleges that Intel gave discounts and other rebates to OEMs so that they would buy Intel, and not AMD, microprocessors. These discounts allegedly weakened AMD, and consequently enabled Intel to charge higher prices for its microprocessors (while at the same time still, somehow, offering price discounts with which AMD could not compete). *Id.* ¶¶ 3, 6, 40, 43, 74, 111, 146, 147, 205, 222, 235. According to New York, Intel's discounts caused OEMs to pay higher prices for microprocessors, which they passed on to computer purchasers, who were "compelled . . . to pay prices above competitive levels." *Id.* ¶ 252.

New York purports to represent New York consumers who have allegedly purchased computers containing microprocessors. *Id.* ¶ 14. In Claim 2 of its complaint, New York seeks to recover treble damages on behalf of these consumers under the Donnelly Act, for harm purportedly suffered by those consumers as a result of Intel's actions. *See id.* ¶¶ 260, 263.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "There is no material difference in the applicable legal standards" between a motion to dismiss under Rule 12(c) and a motion to dismiss under Rule 12(b)(6). *See Spruill v. Gillis*, 372 F.3d 218, 223 n.2 (3d Cir. 2004). Thus, to survive a motion to dismiss under Federal Rule of Civil Procedure 12(c), the "factual allegations" in a complaint "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

IV. ARGUMENT

A. THE DONNELLY ACT DOES NOT AUTHORIZE A TREBLE DAMAGES SUIT BY NEW YORK ON BEHALF OF CONSUMERS

As a threshold matter, the Donnelly Act does not authorize New York to bring a damages claim for harm done to private parties. The Donnelly Act permits the State to bring only claims for penalties or injunctive relief on behalf of "the people." N.Y. Gen. Bus. Law §§ 342, 342-a. *See People v. Gold Medal Farms*, 113 Misc. 2d 574, 578 (N.Y. Sup. Ct. 1982); *People v. Feldman*, 210 F. Supp. 2d 294, 303 n.4 (S.D.N.Y. 2002) ("The [Donnelly] Act does not authorize [New York] to recover damages on behalf of the people."). Notably, the Donnelly Act specifically permits New York to seek damages for harms that "the state" itself has sustained (and also permits non-state public entities and consumers to seek damages for harms they sustained themselves). *See* N.Y. Gen. Bus. Law § 340(5). The Donnelly Act further allows New York to bring suit for damages on behalf of harms suffered by non-state public entities, but only "upon the request[s]" of such entities. *Id.* § 342-b.[2] The Donnelly Act includes no similar provision authorizing New York to sue for damages on behalf of consumers.

Indeed, in a case remarkably similar to this one, *In re Dynamic Random Access Memory Antitrust Litig.* (*In re DRAM*), 2007 WL 2517851 (N.D. Cal. Aug. 31, 2007), the court rejected an essentially identical attempt by New York to seek treble damages on behalf of consumers under the Donnelly Act. In that case, as here, New York filed a Donnelly Act treble damages claim on behalf of consumers, alleging that manufacturers of a particular computer component (there, DRAM memory chips) artificially raised the prices of their products and that consumers

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[2] Such requests are lacking in the present case, necessitating dismissal of New York's claims on behalf of these entities. *See* Intel's Motion Under Rule 17(a), Rule 12(b)(1), and Rule 12(c) For Dismissal With Respect To Claims On Behalf Of Non-State Public Entities.

therefore overpaid when they purchased computers containing those components. The *In re DRAM* court held that "the [Donnelly] Act itself does not authorize the [New York] Attorney General to pursue damages claims on behalf of natural persons," because the express statutory authorization for the State to obtain penalties and injunctive relief on behalf of consumers necessarily means that "the legislature's failure to include similar language in the provision authorizing damages suits was deliberate." *Id.* at *8; *compare* 15 U.S.C. §15c(a) (explicitly permitting state attorneys general to bring actions for damages on behalf of their citizens for violations of the Clayton Act). New York thus cannot state a claim for damages on behalf of consumers under the Donnelly Act.

B. NEW YORK'S CLAIM FOR TREBLE DAMAGES ON BEHALF OF CONSUMERS CANNOT BE MAINTAINED UNDER COMMON-LAW *PARENS PATRIAE* AUTHORITY

Nor can New York plausibly rely on a common-law *parens patriae* theory in an effort to justify its claim for monetary relief on behalf of consumers. *See* New York's Reply In Support of Its Motion For Leave to Amend Its Complaint, D.I. 92, at 6.[3] As the Supreme Court explained almost thirty years ago, a *parens patriae* claim can only be brought on behalf of the State as a whole to protect a "quasi-sovereign interest," and cannot be asserted to vindicate the "interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). New York's highest court has adopted *Snapp*'s "quasi-sovereign interest" standard as articulating New York's common-law *parens patriae* authority. *See People* v. *Grasso,* 11 N.Y.3d 64, 72 n.4 (2008).

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3 New York does not invoke the *parens patriae* theory in its Donnelly Act claim. *See* Compl. ¶ 263; *cf. Broselow v. Fisher*, 319 F.3d 605, 608 (3d Cir. 2003) (relying on the fact that Pennsylvania "expressly invoked [a 'parens patriae theory'] as the basis for its complaint" as supporting the conclusion that Pennsylvania had asserted such a theory).

New York's suit for treble damages on behalf of consumers in connection with individual computer purchases is the prototypical example of a claim brought to vindicate private interests and therefore cannot be maintained under New York's common-law *parens patriae* authority. Indeed, federal courts have repeatedly rejected similar attempts by New York to invoke the *parens patriae* doctrine to obtain damages on behalf of individual citizens. Most closely analogous is *In re DRAM*, which squarely held that New York lacks common-law *parens patriae* authority to seek treble damages on behalf of consumers under the Donnelly Act. 2007 WL 2517851, at *8. The court explained that "there is no broadly recognized common law parens patriae right to pursue monetary damages claims, and cases discussing the common law parens patriae right have generally been limited to cases seeking injunctive or other equitable relief." *Id.* Accordingly, the court concluded that a Donnelly Act treble damages claim on behalf of New York consumers "cannot be premised on the Attorney General's general common law powers." *Id.* at 9.

Similarly, in *New York ex rel. Abrams v. Seneci*, 817 F.2d 1015 (2d Cir. 1987), the Second Circuit rejected an attempt by New York to seek treble damages on behalf of individuals under a *parens patriae* theory. Citing Supreme Court precedent, the court explained that "[a] State that sues as *parens patriae* must seek to redress an injury to an interest that is separate from the interests of particular individuals," and "cannot merely litigate as a volunteer the personal claims of its competent citizens." *Id.* at 1017. Accordingly, the court concluded that "[w]here the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests. Thus, the state as *parens patriae* lacks standing to prosecute such a suit." *Id. Accord*,

e.g., *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1061 (E.D. Pa. 1969).

New York cannot avoid the force of these precedents by claiming that its damages claim on behalf of individuals is aimed at vindicating the State's quasi-sovereign interest "in protecting the integrity of the marketplace." *Grasso*, 11 N.Y.3d at 72 n.4. In the context of a *parens patriae* suit brought pursuant to the Clayton Act, the Supreme Court held that States had no *parens patriae* authority to bring antitrust damages suits even for harm done to their "general economy." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 259–66 (1972). At the same time, the Court explained that the States did have authority to bring claims for injunctive relief, pointing to the "striking contrast between the potential impact of suits for injunctive relief and suits for damages" in terms of "the potential liability" and the "duplicative recover[y]" that defendants face from sovereigns' *parens patriae* damages claims. *Id.* at 260–64. The Court emphasized that "[a]t the very least, if . . . injury [to a state's general economy] is to be compensable under the antitrust laws [in *parens patriae* suits], we should insist upon a clear expression of a congressional purpose to make it so." *Id.* at 264.

Similarly, in *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied,* 412 U.S. 908 (1973), the Ninth Circuit held that States have no common-law authority to bring damages suits to recover for harms suffered by individual consumers, explaining that "[p]arens patriae has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals." *Id.* at 775. The Ninth Circuit added that "since a parens patriae suit for the benefit of consumers would not necessarily preclude a class action on behalf of the same individuals, defendants could well be faced with two massive actions based on identical claims." *Id.* at 777 n. 11. The court thus left it to "legislation and rule making" to determine

whether, and to what extent, States should be permitted to assert *parens patriae* damages claims. *Id.* at 777.[4]

The Second Circuit reached the same conclusion in *Seneci*, squarely rejecting New York's claim that the assertion of a quasi-sovereign interest could justify the State's attempt to obtain damages on behalf of individuals under a *parens patriae* theory. Even though New York "allege[d] that the defendants' conduct has caused substantial injury to the integrity of the state's marketplace and the economic well-being of all its citizens," it could not obtain monetary relief for individual harms under a *parens patriae* theory: "Since . . . the monetary relief sought by the complaint is not designed to compensate the state for those damages [to its quasi-sovereign interest], the asserted presence of those damages cannot serve as the foundation for the state's authority to act here as the representative of its citizens." 817 F.2d at 1017–18; *see also New York ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 198 (1st App. Dep't 2008) (describing *Seneci* as "particularly instructive" on the scope of New York's *parens patriae* doctrine).

In the present case, New York is suing to recover treble damages on behalf of certain New York consumers, in order to recover overcharges those consumers allegedly paid while purchasing computers containing microprocessors. It is clear that this ground for relief seeks to vindicate particular private interests, because the same individuals on whose behalf New York is seeking to recover have already attempted to vindicate the same private interests in a private-party class action previously filed in this Court. *See In re Intel Corp. Microprocessor Antitrust*

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4 Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress specifically provided the authority that the Ninth Circuit found lacking in *Frito-Lay*. *See* 15 U.S.C. §15c(a). The New York Legislature, in contrast, has not enacted any equivalent to the Hart-Scott-Rodino Act and permits New York to bring suit on behalf of individuals only for penalties or injunctive relief. *See* N.Y. Gen. Bus. Law § 342-a.

Litig., 496 F. Supp. 2d 404, 415 (D. Del. 2007). As the Supreme Court has explained, "[p]arens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries." *Hawaii*, 405 U.S. at 266. This principle applies with conclusive force where, as here, the sovereign has no statutory or common-law authority to bring its *parens patriae* damages suit, particularly as New York is seeking to circumvent the Rule 23 procedures that bind class members to any judgment, prevent duplicative recovery, give notice to the parties represented, and require that the suit involve the kind of claims that are appropriate for mass adjudication. *Id.* This Court should thus dismiss New York's Donnelly Act treble damages claim on behalf of consumers.

In its reply brief in support of its now-rejected motion for leave to amend its complaint, New York cited *People ex rel. Cuomo v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378 (N.Y. App. Div. 2008), and *People ex rel. Spitzer v. Coventry First LLC*, 2007 WL 2905486 (N.Y. Sup. Ct. Sept. 25, 2007), as alleged support for its damages claims on behalf of consumers. *See* D.I. 92, at 7. Both cases are inapposite. *Liberty Mutual* did not analyze the question whether New York could recover damages on behalf of private parties under its common law *parens patriae* authority, which is the only issue presented by this motion. The unpublished trial court decision in *Coventry First* is not probative in discerning New York law (*see, e.g.*, *Canal Ins. Co. v. Underwriters at Lloyd's London*, 435 F.3d 431, 436 (3d Cir. 2006)), and in any event it too addressed a different question. The issue before the court there was whether the out-of-state conduct alleged was sufficiently related to New York State to enable the proper exercise of

parens patriae authority, not whether New York has common law *parens patriae* authority to bring treble damages claims on behalf of private parties. 2007 WL 2905486 at *2.[5]

V. CONCLUSION

As the Supreme Court established in *Snapp*, and as New York's highest court reiterated in *Grasso*, a sovereign cannot bring a common-law *parens patriae* claim in order to vindicate private interests. Applying this principle, the Second Circuit in *Seneci*, the Ninth Circuit in *Frito Lay*, and the District Court in *In re DRAM* all held that a State may not invoke its common-law *parens patriae* authority to recover money damages for harms allegedly inflicted upon private parties. For these reasons, and because the Donnelly Act itself does not authorize New York's claim for damages, this Court should grant Intel's to dismiss New York's Donnelly Act damages claim on behalf of Consumers.

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5 In its reply brief in support of its motion to amend, New York also relied on the non-binding state trial court decision in *People ex rel. Cuomo v. Merkin*, 907 N.Y.S.2d 439, 2010 WL 936208 (N.Y. Sup. Ct. Feb. 8, 2010). *See* D.I. 92, at 7. This reliance was misplaced, because in *Merkin* "[t]he AG's focus [was] on obtaining injunctive relief," *id.* at *9, whereas in the present case New York seeks to recover vast sums of money on behalf of New York consumers. In any event, to the extent that the trial court decision in *Merkin* purported to hold that a State can recover damages for injuries to private interests under *parens patriae* authority so long as the State also seeks injunctive relief in the same suit, that holding conflicts with the New York appellate courts' endorsement (in *Grasso*) of the principles enunciated by the Supreme Court in *Snapp* and the Second Circuit in *Seneci*.

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CERTIFICATE OF SERVICE

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