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 REPLY 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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Dated: August 17, 2011
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INTRODUCTION

There is no common law or statutory basis for New York's treble damages Donnelly Act claim on behalf of individual consumers. The Donnelly Act permits New York to obtain civil penalties and injunctive relief for certain harms to consumers, and the Executive Law permits New York to recover compensatory damages for harms to individuals arising from repeated violations of the Donnelly Act. But New York seeks to go further, asserting that it may also bring a non-statutory, common-law *parens patriae* Donnelly Act claim for treble damages on behalf of consumers. Compl. ¶ 263. New York agrees that it may invoke its common-law *parens patriae* authority only to vindicate an interest "distinct from [the interest] of a particular party," *People ex rel. Spitzer v. Grasso,* 11 N.Y.3d 64, 69 n.4 (2008), and admits that it is bringing its treble damages claim to recover funds for the benefit of individual consumers. Yet, New York argues that because many consumers will receive the money it seeks to recover, this somehow turns the interest it seeks to vindicate into a quasi-sovereign interest. Unsurprisingly, the overwhelming weight of authority—including a decision rendered since New York filed its response brief, *see In re TFT-LCD (Flat Panel) Antitrust Lit.*, No. C11-00711 SI, slip op. at 8-9 (N.D. Cal. Aug. 9, 2011) ("*TFT-LCD*") (Ex. A hereto)—rejects that argument and confirms that New York has no common-law *parens patriae* authority to bring treble damages suits on behalf of individuals.

ARGUMENT

A. NO STATUTORY AUTHORITY PERMITS NEW YORK TO BRING A DONNELLY ACT TREBLE DAMAGES SUIT ON BEHALF OF INDIVIDUAL CONSUMERS

The Donnelly Act permits New York to bring claims solely for penalties or injunctive relief on behalf of individual consumers. N.Y. Gen. Bus. Law ("GBL") §§ 342, 342-a. *See People v. Gold Medal Farms*, 113 Misc. 2d 574, 578 (N.Y. Sup. Ct. 1982). The Act also allows

New York to seek treble damages for harm to itself and to non-state public entities that request representation. *See* GBL §§ 340(5); 342-b. And, as New York notes, Executive Law § 62(12) authorizes it to seek compensatory damages for certain harms to individuals, including violations of the Donnelly Act. *See* Opp. 10-11; *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386-87 (D.D.C. 2003). In contrast, no statutory authority permits New York to bring treble damages claims on behalf of individuals under the Donnelly Act. *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.").

B. NEW YORK MAY NOT ASSERT ITS COMMON-LAW *PARENS PATRIAE* AUTHORITY TO RECOVER TREBLE DAMAGES ON BEHALF OF INDIVIDUAL CONSUMERS

Since it cannot point to any statutory authority for its treble damages claim on behalf of consumers, New York invokes common-law *parens patriae* authority. But every federal court that has addressed this issue has held that New York has no such common-law authority because recovering damages on behalf of individuals does not constitute a quasi-sovereign interest.

New York argues that *People ex rel. Spitzer* v. *Grasso*, 11 N.Y.3d 64 (2008), states a New-York-specific 3-part test for when New York may invoke its common-law *parens patriae* authority: "'the Attorney General must [1] prove a quasi-sovereign interest [2] distinct from that of a particular party and [3] injury to a substantial segment of the state's population.'" Opp. 3 (quoting *Grasso*, 11 N.Y.3d at 69 n.4, and adding numerals). In *Grasso*, New York brought four common-law *parens patriae* claims, challenging the salary of a former New York Stock Exchange CEO. The Court of Appeals dismissed these claims, holding that New York could not circumvent statutory requirements by invoking *parens patriae* authority. 11 N.Y.3d at 71-72.

In a footnote, the *Grasso* court recited what New York calls a 3-part test for *parens patriae* authority. 11 N.Y.3d at 69 n.4. But, as is clear from that footnote's text, this "test" was

merely a restatement of the federal rule that *Grasso* drew directly from *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), which provides that in order to bring a *parens patriae* claim, the sovereign must assert a "quasi-sovereign interest" that does not vindicate "interests of particular private parties." *Snapp*, 458 U.S. at 607; *see also id.* at 602 ("Quasi-sovereign interests stand apart from [and] . . . are not . . . private interests pursued by the State as a nominal party."). New York thus errs in suggesting that the New York courts follow some unique, non-federal version of the *parens patriae* doctrine. To the contrary, as *Grasso* confirms, New York follows the federal rule expressed in *Snapp*. *Grasso*, 11 N.Y.3d at 69 n.4 (citing *Snapp* as the sole authority for its "test").

New York's argument under its mistaken reading of *Grasso* can be summarized as follows: any time New York brings an antitrust damages claim on behalf of a large segment of the population, it satisfies all three parts of the *Grasso* test. Opp. 2-6. Yet, contrary to New York's repeated intimations, *Grasso* did not hold that common-law *parens patriae* authority ever permits New York to seek damages on behalf of consumers. Instead, *Grasso* rejected New York's attempt to bring the common law claims asserted in that case. *Grasso*, 11 N.Y.3d at 72.

New York's argument that it may always bring a treble damages claim on behalf of a large number of people is implausible and against the overwhelming weight of authority. New York's filings in this case demonstrate that its treble damages claim (as distinct from its claims for injunctive relief and civil penalties) is meant only to vindicate the "interests of particular private parties." *Snapp*, 458 U.S. at 607. Indeed, in its Opposition to Intel's Motion For Partial Summary Judgment On Statute of Limitations Grounds, New York asserts that its suit on behalf of consumers is an "alternative to numerous individual actions" and that there will be "no duplication with respect to recovery" because of the "the single satisfaction rule." *Id.* at 14.

There is only one way to read this concession: New York's treble damages claim is meant merely to secure damages on behalf of private parties and thus does not protect some "quasi-sovereign interest." *Grasso,* 11 N.Y.3d at 69 n.4.

Nor can New York dispute that federal courts (including in cases brought by New York) have uniformly held that attorneys general do not assert a quasi-sovereign interest when they seek to recover damages on behalf of individuals. As the Second Circuit explained in *New York ex rel. Abrams v. Seneci,* 817 F.2d 1015 (2d Cir. 1987), "[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." 817 F.2d at 1017-18; *accord People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 198 (N.Y. App. Div. 2008).[1] The Ninth Circuit in *California v. Frito-Lay, Inc.,* 474 F.2d 774 (9th Cir. 1973), reached the same conclusion, 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. Numerous other courts are in accord, including every federal court that has addressed New York's *parens patriae* authority. *See, e.g., In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M02-1486 PJH, 2007 WL 2517851, at *8 (N.D. Cal. Aug. 31, 2007) ("[T]here 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."); *TFT-LCD*, No. C11-00711, slip op. at 8-9 (adopting *In re DRAM*'s conclusion and reasoning).

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1 New York attempts to distinguish *Seneci* by noting that New York, in that case, was only seeking to recover damages for 79 individuals. Opp. 8. But nothing in the Second Circuit's analysis turned on the number of people on whose behalf New York was suing.

New York's attempts to minimize this authority are ineffective. First, New York claims that these federal cases do not reflect New York law. Opp. 11-12. But New York fails to offer a single citation for the proposition that the New York courts have defined a quasi-sovereign interest in a manner any different from the definition applied in federal courts. To the contrary, New York courts expressly rely on and follow federal law on this issue. *See Grasso*, 11 N.Y.3d at 69 n.4 (relying upon the Supreme Court's decision in *Snapp* as articulating the authoritative rule for common-law *parens patriae* authority); *Grasso*, 54 A.D.3d at 198 (describing the Second Circuit's *Seneci* decision as "particularly instructive" on the scope of New York's common law *parens patriae* authority).

Second, New York points to Congress's adoption of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which permits state attorneys general to bring *parens patriae* suits for treble damages under the Sherman Act. Opp. 12-13. However, this statutory enactment does nothing to undermine the well-settled principle that the common law provides attorneys general no authority to recover damages for harms done to private parties. Indeed, the New York legislature's choice not to amend the Donnelly Act to allow *parens patriae* suits for treble damages supports Intel's argument. Through the Hart-Scott-Rodino Act, Congress decided to supplement the authority of attorneys general by allowing an additional category of claims, subject to careful judicial oversight. *See* 15 U.S.C. § 15c(b) and (c). The New York legislature made a somewhat similar choice through Executive Law § 62(12), permitting New York to recover compensatory damages for certain harms done to consumers, including those arising from violations of the Donnelly Act. But the New York legislature chose not to displace the common law by permitting its attorney general to recover treble damages in suits on behalf of consumers.

In the face of the overwhelming authority precluding *parens patriae* suits to recover damages on behalf of private parties, New York relies on three intermediate and trial court decisions—*People ex rel. Cuomo v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378 (N.Y. App. Div. 2008), *People ex rel. Spitzer v. Coventry First LLC*, 2007 N.Y. Slip Op. 33089(U), 2007 WL 2905486 (N.Y. Sup. Ct. Sept. 25, 2007), and *People ex rel. Cuomo v. Merkin*, 26 Misc. 3d 1237(A), 2010 WL 936208 (N.Y. Sup. Ct. Feb. 8, 2010). *See* Opp. 6-8. But each case is readily distinguishable and, in any event, cannot overcome the weight of authority against New York's position.

As Intel explained in its opening brief, *Liberty Mutual* did not analyze the question of whether New York could recover treble damages on behalf of private parties under its common-law *parens patriae* authority. Rather, as the briefing that New York points to makes clear, *Liberty Mutual*'s single relevant sentence merely rejected the argument that the Donnelly Act's comprehensive scheme preempts New York's common-law *parens patriae* authority. *Compare* Reply Br. of Defendants-Appellants at 19, *People ex rel. Cuomo v. Liberty Mut. Ins. Co.*, No. 2008-03972, 2008 WL 5934819 (N.Y. App. Div. Apr. 25, 2008) ("In *People ex. rel. Spitzer v. Grasso*, 42 A.D.3d 126 (N.Y. App. Div. 2007), this Court held that when the Legislature grants express authority to Respondent to assert specific claims but not others, he is precluded from asserting those other claims under his common law parens patriae authority."), *with Liberty Mutual*, 52 A.D.3d at 379 ("Contrary to defendants' contention, this Court's decision in *People v Grasso* . . . does not support a holding that the Attorney General is not empowered to assert the Donnelly Act claims under the facts herein."). Intel has not made such a *Grasso* preemption argument here. Instead, Intel argues that New York lacks any common-law *parens patriae*

authority to bring a treble damages claim on behalf of private parties, without regard to the remedies provided by any statutory scheme.[2]

Indeed, since New York filed its response brief, the district court in *TFT-LCD* explicitly rejected New York's reliance on *Liberty Mutual*, in a case where New York also asserted *parens patriae* authority to seek treble damages under the Donnelly Act. *TFT-LCD*, No. C11-00711, slip op. at 8-9. *TFT-LCD* explained that *Liberty Mutual*'s treatment of the issue is "exceedingly brief" and "does not discuss what relief would be available in such an action." *Id.* at 9. The decision in *TFT-LCD* thus confirms the unanimous rejection by federal courts of the argument advanced by New York here.[3]

Nor do the unpublished trial court decisions in *Coventry First* and *Merkin* alter the analysis. As a threshold matter, state trial court decisions are not probative of the meaning of state law. *See Canal Ins. Co. v. Underwriters at Lloyd's London*, 435 F.3d 431, 436 (3d Cir. 2006). Second, the only Donnelly Act issue addressed in *Coventry First* was whether the out-of-state conduct alleged was sufficiently related to New York State to implicate the Donnelly Act. 2007 N.Y. Slip Op. 33089(U), at *2. Indeed, New York admits that the passing dictum on which it relies was expressed in the course of discussing "an unrelated issue." Opp. 8. And in *Merkin*, "[t]he AG's focus [was] on obtaining injunctive relief," 26 Misc. 3d 1237(A), at *9, whereas in

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2 New York wrongly alleges that Intel cited the same *Grasso* case relied upon by the defendant in *Liberty Mutual*. Opp. 8-9. The *Grasso* opinion that Intel cited in its opening brief was issued in 2008, 54 A.D.3d 180—not the 2007 decision cited by New York and the *Grasso* defendant, 42 A.D.3d 126—and Intel cited the 2008 decision only to show that the Second Circuit's *Seneci* opinion is "particularly instructive" of New York law. Opening Mem. 7.

3 *TFT-LCD* also refutes New York's claim that the federal courts that previously decided that New York lacks common-law *parens patriae* authority to bring treble damages claims would have changed their minds if only they had access to *Liberty Mutual*'s one sentence of "reasoning." Opp. 10.

the present case New York seeks to recover a large treble damages award. In any event, the sparse reasoning of this unpublished trial court decision cannot possibly be more persuasive than the myriad of well-reasoned authorities that Intel has cited and the unanimous view of the federal courts that have considered this precise question.

Finally, there is no merit to New York's argument that it should be permitted to bring its common-law *parens patriae* treble damages claim because New York consumers will otherwise be unable to obtain "complete relief"—including treble damages, an injunction, and civil penalties. Opp. 4-5. The inability of New York consumers to prevail in a class action provides no basis for disregarding the long-established requirement that *parens patriae* suits are limited to the vindication of quasi-sovereign interests, and do not permit the recovery of damages on behalf of individuals. Moreover, New York consumers could and did bring their own suit for treble damages and injunctive relief, and at the appropriate time they can seek appellate review of Judge Farnan's order dismissing their Donnelly Act class damages claims. *See In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 408, 415 (D. Del. 2007). And New York's argument that only it can obtain civil penalties actually cuts against its position, because New York is precluded from obtaining both civil penalties and treble damages in the same case. *See* GBL §§ 341, 342-a; *TFT-LCD*, No. C11-00711, slip op. at 10-11 (citing *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007)). For all these reasons, New York has failed to identify any valid basis for disregarding its lack of *parens patriae* standing to assert a Donnelly Act treble damages claim on behalf of private parties.

CONCLUSION

Because the overwhelming weight of authority establishes that New York cannot bring a common-law *parens patriae* treble damages claim under the Donnelly Act to recover for harms to private parties, this Court should grant Intel's motion to dismiss.

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Dated: August 17, 2011
1024434/29282

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