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) **PUBLIC VERSION**

INTEL CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION UNDER RULE 17(a), RULE 12(b)(1), RULE 12(b)(6) AND RULE 12(c) FOR DISMISSAL WITH RESPECT TO NEW YORK'S CLAIMS ON BEHALF OF NON-STATE PUBLIC ENTITIES

OF COUNSEL:

Robert A. Van Nest
Paula L. Blizzard
Brook Dooley
KEKER & VAN NEST
710 Sansome Street
San Francisco, CA 94111
Tel: (415) 391-5400

Donn P. Pickett
Frank M. Hinman
BINGHAM MCCUTCHEN LLP
3 Embarcadero Center
San Francisco, CA 94111
Tel: (415) 393-2000

(Signature block continues on next page)

Richard L. Horwitz (#2246)
W. Harding Drane, Jr. (#1023)
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899-0951
Tel.: (302) 984-6000
rhorwitz@potteranderson.com
wdrane@potteranderson.com

Attorneys for Defendant Intel Corporation

Daniel S. Floyd
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Tel.: (213) 229-7000

Joseph Kattan, PC
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Tel.: (202) 955-8500

Dated: May 27, 2011
Public Version Dated: June 3, 2011

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 2

III. LEGAL STANDARD 5

IV. ARGUMENT 6

A. New York Violated Section 342-b By Bringing A Non-Class Action Claim On Behalf of Public Entities That Never Requested That It Bring Such An Action 6

B. New York's Inexcusable Violation Of Section 342-b Means That It Is Not The Real Party In Interest In Its Suit On Behalf Of The Public Entities And Thus Its Complaint On Their Behalf Must Be Dismissed Immediately Under Rule 17(a) 8

C. New York Lacks Standing To Bring This Suit On Behalf Of The Public Entities And Thus Its Complaint On Their Behalf Must Be Dismissed 11

V. CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Amato v. Wilentz,
952 F.2d 742 (3d Cir. 1991) 12, 13

Davis v. Fed. Election Comm'n,
554 U.S. 724 (2008) 12

DeAsencio v. Tyson Foods, Inc.,
342 F.3d 301 (3d Cir. 2003) 8

Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 8

Gardner v. State Farm Fire & Cas. Co.,
544 F.3d 553 (3d Cir. 2008) 10, 11

Gladstone, Realtors v. Vill. of Bellwood,
441 U.S. 91 (1979) 12

Gould Elecs., Inc. v. United States,
220 F.3d 169 (3d Cir. 2000) 5-6

Harold H. Huggins Realty, Inc. v. FNC, Inc.,
634 F.3d 787 (5th Cir. 2011) 6

HB Gen. Corp. v. Manchester Partners, L.P.,
95 F.3d 1185 (3d Cir. 1996) 9

In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,
No. M-02-1486, 2007 WL 2517851 (N.D. Cal. Aug. 31, 2007) .... passim

Kehr Packages, Inc. v. Fidelcor, Inc.,
926 F. 2d 1406 (3d Cir. 1991) 6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 12

New York v. Cedar Park Concrete Corp.
665 F. Supp. 238 (S.D.N.Y. 1987) 1

Powers v. Ohio,
499 U.S. 400 (1991) 12, 13

Table of Authorities
(Continued)

Page(s)

Sperry v. Crompton Corp.,
8 N.Y. 3d 204 (2007) 6, 7

St. Thomas-St. John Hotel & Tourism Ass'n v. Gov't of the U.S. Virgin Islands,
218 F.3d 232 (3d Cir. 2000) 5

State of New York v. Cedar Park Concrete Corp.,
665 F. Supp. 238 (S.D.N.Y.1987) .... passim

Warth v. Seldin,
422 U.S. 490 (1975) 11

Zavolta v. Lord, Abbett & Co. LLC,
Civ. A. No. 2:08-cv-04546, 2010 WL 686546 (D.N.J. Feb. 24, 2010) 6

Statutes

N.Y. Gen. Bus. Law § 340(5) 2, 13

N.Y. Gen. Bus. Law § 340(6) 14

N.Y. Gen. Bus. Law § 342-b .... passim

Other Authorities

54 Am. Jur. 2d Monopolies and Restraints of Trade § 416 9

6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* (3d ed. 2010) 5, 10

Bill Jacket, L. 1975, c. 420, Memo. Hon. Louis J. Lefkowitz, dated June 23, 1975 7

Bill Jacket, L.1969, c. 635, Memo. Hon. Louis J. Lefkowitz, dated April 29, 1969 6

Local Rules of the District of Delaware 23.1 7

Rules

Fed. R. Civ. P. 12(b)(1) 5, 6, 11

Fed. R. Civ. P. 12(b)(6) 6

Fed. R. Civ. P. 12(c) 6, 11

Fed. R. Civ. P. 17(a) 8, 9, 10

Fed. R. Civ. P. 17(a)(1) 5

Table of Authorities
(Continued)

Page(s)

Fed. R. Civ. P. 17(a)(1)(g) 9

Fed. R. Civ. P. 17(a)(3) 10

Fed. R. Civ. P. 23 7

I. INTRODUCTION

New York General Business Law § 342-b permits New York's Attorney General to file a suit representing a "political subdivision or public authority of the state," but only "upon the request of such political subdivision or public authority." *Id.* (emphasis added). For at least the third time, New York has ignored this unambiguous requirement by bringing suit in federal court on behalf of non-State public entities (the "Public Entities") that had not requested to be represented. As in two previous cases filed by New York, *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, No. M 02-1486, 2007 WL 2517851 (N.D. Cal. Aug. 31, 2007), and *New York v. Cedar Park Concrete Corp.*, 665 F. Supp. 238 (S.D.N.Y. 1987), New York's failure to obtain the necessary requests is fatal to its claims on behalf of such Public Entities. The only difference between the present case and the previous cases is that here, many months after filing suit without requests from any Public Entity, New York sent a notice to each Public Entity, asserting that unless the Public Entity specifically objected within one month, New York would assume that the Public Entity had requested New York to represent it in this already-pending lawsuit. But this post-hoc notice plainly failed to satisfy section 342-b's explicit requirement that each Public Entity must "request" to be represented. Accordingly, New York's claims on behalf of the Public Entities should be dismissed.[1]

New York's failure to obtain the necessary requests from Public Entities is not merely academic. Given New York's non-compliance with its own state law, and its inadequate and improper attempt to redefine what it means to "request" that a lawsuit be brought, Intel faces

---

[1] New York could have sought to bring this case as a class action pursuant to section 342-b and Rule 23 of the Federal Rules of Civil Procedure, but instead chose to proceed based on the counterfactual assumption that it had been requested by each Public Entity to bring claims on behalf of that entity. *See infra* n.5.

purported damages claims on behalf of thousands of Public Entities that, if later dissatisfied with the judgment, could assert they were not properly represented in this lawsuit and attempt to file another round of litigation. *See* N.Y. Gen. Bus. Law § 340(5) (authorizing public entities to bring Donnelly Act claims). The unfair prejudice to Intel is substantial. As this Court observed in a recent order in this case, ambiguity regarding the parties properly represented by New York could prevent "Intel from relying on any judgment in this case for res judicata purposes, compounding the prejudice to Intel." Mem. Order Denying New York's Motion For Leave to Amend Complaint, May 12, 2011, at 8.

Because New York has no authority to represent the Public Entities, it is not the real party in interest under Federal Rule of Civil Procedure 17 and lacks both constitutional and prudential standing. Thus, New York's Donnelly Act claim on behalf of the Public Entities should be dismissed. And because New York's error was wholly inexcusable, this dismissal should be immediate and with prejudice to New York refiling such a claim in the future.

II. FACTUAL BACKGROUND

New York has sued Intel "on behalf of . . . non-State public entities," and asserts, without specific supporting allegations, that it is "the duly constituted officer authorized to represent" these Public Entities. Compl. ¶ 14. The Public Entities include unspecified New York political subdivisions, local entities, and public authorities. *See id.* ¶ 10. New York's allegation on behalf of the Public Entities is set forth in Claim Two, a Donnelly Act claim for treble damages "based on the injury suffered . . . indirectly by . . . [these] departments and local entities." *Id.* ¶ 262.

New York alleges that Intel's allegedly anticompetitive conduct caused the Public Entities to "pay prices above competitive levels" for computers. *Id.* ¶ 252; *see also id.* ¶ 253.[2]

At various points between November 30, 2009 and February 16, 2010, New York sent the Public Entities a document titled an "Advisory." Declaration of Daniel S. Floyd, dated May 27, 2011 ("Floyd Decl."), ¶ 15, Ex. P. This Advisory noted that New York filed this action on November 4, 2009, but did not mention the Public Entities' rights to request (or not request) the State to sue on their behalf. Floyd Decl. ¶ 12a, Ex. J. On May 25, 2010, more than six months after filing suit, New York then sent the Public Entities a purported request for authorization to represent them, asking them to notify New York only if they did "NOT wish to be represented by" New York. Floyd Decl. ¶ 12b, Ex. K. This notice stated that if any Public Entity did not seek to opt out within one month, New York would "assume that [the] Public Entity is requesting to be represented by the Attorney General in the Intel Action." *Id.* (emphases added). This notice was incomplete and misleading; among other things, it did not describe the basis for New York's allegations or explain the res judicata effect of any judgment in this case, and it did not disclose New York's inherent conflict of interest in seeking to recover direct damages in its own right (as assignee of the OEMs) while also seeking to recover (on behalf of the Public Entities)

---

2 Even though New York's Sherman Act claim—Claim One—mentions the Public Entities, that claim seeks only to recover "direct damages" suffered by computer Original Equipment Manufacturers ("OEMs"). Compl. ¶ 258. Because the Complaint alleges that the OEMs assigned claims exclusively to New York itself, the Public Entities are not alleged to have suffered any direct damages under Claim One. *See id.* ¶ 245 ("all purchases of x86 CPU-containing products made pursuant to the Centralized Contracts (whether made by New York State itself or by non-State governmental entities) give rise to direct claims for damages owned by the State (assuming that the OEMs themselves had such direct claims)"). Rather, New York alleges that it stands in the OEMs' shoes and has the right to recover under this direct claim.

indirect damages allegedly attributable to the same OEM purchases. *See infra* pp. 13–14 & n.6. Several Public Entities contacted New York to opt out, but the vast majority were simply silent. *See* Floyd Decl. ¶ 12c, Ex. L (sample opt-out emails).[3]

Intel repeatedly sought information from New York about the basis for the State's allegation that it had proper authority to represent the Public Entities, and also about the identities of the specific Public Entities allegedly represented by New York. On April 9, 2010, in its initial disclosures, New York listed roughly 3,000 governmental or quasi-governmental entities on whose behalf it purported to be asserting claims. *See* Floyd Decl. ¶ 2. On May 7, 2010, Intel sent a letter asking New York to specify which of these entities were part of the State and thus represented by New York's Attorney General, and which were not. Floyd Decl. ¶ 3, Ex. A. New York responded on May 24, 2010, asserting that it represented non-state public entities "pursuant to statutory authority," including section 342-b. Floyd Decl. ¶ 4, Ex. B, at 1. On May 28, 2010, Intel then asked New York to confirm whether each of the named Public Entities "has requested that it be represented by" New York in this action in accordance with section 342-b. Floyd Decl. ¶ 5, Ex. C, at 2. Without addressing the question whether it had actually received any requests, New York informed Intel that it was "in the process of communicating with each non-State public entity in order to confirm that it requests the Attorney General to represent it in this action." Floyd Decl. ¶ 6, Ex. D, at 2.

Intel also sought formal discovery of documents from New York regarding its claimed authority to represent the Public Entities. *See* Floyd Decl. ¶ 9, Ex. G, at 6. Intel received

---

3 New York also sent the Public Entities a notice regarding a conference call to take place on June 10, 2010, Floyd Decl. ¶ 12d, Ex. M, but has provided no details about what occurred on the call, Floyd Decl. ¶¶ 17–18.

responsive documents in October 2010, including New York's May 25 notice to the Public Entities. *See* Floyd Decl. ¶ 12. On November 2, 2010, Intel—now apprised of the contents of New York's May 25 notice— [REDACTED] Floyd Decl. ¶ 16, Ex. Q, at 21–22 (Intel's Responses to Plaintiff's First Set of Interrogatories). In February 2011, Intel received confirmation that New York had completed its document production regarding its claimed authority to represent the Public Entities. Floyd Decl. ¶¶ 17–18, Ex. R.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 17(a)(1) provides that "[a]n action must be prosecuted in the name of the real party in interest." The defendant may raise a real-party in interest violation "by a preliminary motion." 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1554 (3d ed. 2010). A defendant may also move to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1) because "[t]he issue of standing is jurisdictional." *St. Thomas-St. John Hotel & Tourism Ass'n v. Gov't of the U.S. Virgin Islands*, 218 F.3d 232, 240 (3d Cir. 2000). Under Rule 12(b)(1), the Court may "consider evidence outside the pleadings," *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir.

2000), and the plaintiff bears the burden of persuasion, *see Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F. 2d 1406, 1409 (3d Cir. 1991).[4]

IV. ARGUMENT

A. New York Violated Section 342-b By Bringing A Non-Class Action Claim On Behalf of Public Entities That Never Requested That It Bring Such An Action

New York General Business Law § 342-b provides the New York Attorney General may

> bring action on behalf of any political subdivision or public authority of the state upon the request of such political subdivision or public authority to recover damages for violations of [the Donnelly Act or federal antitrust law]. In any class action the attorney general may bring on behalf of these or other subordinate governmental entities, any governmental entity that does not affirmatively exclude itself from the action, upon due notice thereof, shall be deemed to have requested to be treated as a member of the class represented in that action.

(emphases added).

As originally enacted in 1969, section 342-b did not contain the second sentence, which refers to class actions. At that time, section 342-b was meant to remove any "doubt as to the authority of the [New York Attorney General] to bring such actions" on behalf of public entities. Bill Jacket, L. 1969, c. 635, Memo. Hon. Louis J. Lefkowitz, dated April 29, 1969. According to New York, the original sentence defined New York's authority "regardless of whether the case was brought as an individual action or as a class action." N.Y. Br. as *Amicus Curiae* at 12–13, n.2, *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007) (emphasis added). The 1975 amendment, which added the second sentence, was intended to "clarify the manner in which the Attorney

---

4 If this Court evaluates Intel's standing objection as prudential standing, the Court should also make a decision under Rule 12(c) out of an abundance of caution. *Compare Zavolta v. Lord, Abbett & Co. LLC*, Civ. A. No. 2:08-cv-04546, 2010 WL 686546, at *2 (D.N.J. Feb. 24, 2010) (Rule 12(b)(1) may "be asserted to contest whether the allegations within a plaintiffs [sic] complaint establish prudential and constitutional standing"); *with Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) ("[u]nlike a dismissal for lack of constitutional standing, which should be granted under Rule 12(b)(1), a dismissal for lack of prudential or statutory standing is properly granted under Rule 12(b)(6)").

General may be requested to bring class actions on behalf of subordinate governmental entities within the state" by bringing "the authority expressly granted to the Attorney General under state law into conformity with those powers he has traditionally been permitted to exercise under the provisions of the Federal Rules of Civil Procedure." Bill Jacket, L. 1975, c. 420, Memo. Hon. Louis J. Lefkowitz, dated June 23, 1975.

Section 342-b thus contemplates two ways that New York can bring a claim as a representative of public entities: First, under the first sentence, New York can bring what the State itself has described as an "individual action" on the entities' behalf, *see* N.Y. Br. in *Sperry* at 12–13, n.2, but only "upon the request of" the entities. Second, under the second sentence, New York can bring a class action on behalf of public entities, and each entity "shall be deemed to have requested" to be included in this class unless the entity "affirmatively excludes itself from the action."

Here, New York does not purport to bring a class action.[5] Instead, it has attempted to follow the approach of bringing an individual action on behalf of the Public Entities, but has violated the statutory requirement that it obtain a <u>request</u> from each of the Public Entities prior to filing the action. Its complaint did not mention such a request or explain the basis for its claimed

---

[5] The complaint is silent as to any class-action allegations. *See* Local Rules of the District of Delaware 23.1 ("In any case sought to be maintained as a class action, the complaint or other pleading asserting a class action shall include, next to its caption, the legend 'Class Action.'"). Indeed, the two cases to consider whether New York has satisfied section 342-b dismissed any notion that New York can maintain a class action *sub silentio*. *See In re DRAM*, 2007 WL 2517851, at *3 ("Normally, a plaintiff state might assert such a representative claim by bringing a class action on behalf of the other government entities. *See* Fed. R. Civ. P. 23. Plaintiff has not alleged a class action."); *Cedar Park*, 665 F. Supp. at 242 ("Plaintiff also recognizes that under the Donnelly Act, a class action may be brought by the State on behalf of its subdivisions . . . . The present actions, however, are not styled as class actions."). In addition, none of New York's communications with the Public Entities comes close to satisfying the requirements of class notice. *See infra* pp. 13–14 & n.6.

right to bring the action, and did not even identify the Public Entities on whose behalf New York was bringing suit. The only two courts that have considered the issue have held that a failure to allege such a request in the complaint or to identify the Public Entities purportedly represented is sufficient to establish that New York has violated section 342-b. *See infra* pp. 9–11 (discussing *In re DRAM*, 2007 WL 2517851, and *Cedar Park*, 665 F. Supp. at 241).

Even if this Court goes beyond the face of the complaint and considers New York's communications with the Public Entities, the fact remains that no Public Entity requested that New York bring this suit on its behalf—even assuming retroactive compliance could satisfy New York's obligations, which it cannot. *See Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (standing "must exist at the commencement of litigation"). New York's "Advisory" makes no mention of any request, while New York's May 25 letter takes the approach adopted in section 342-b's second (class action) sentence by requiring every Public Entity to affirmatively opt out or else be deemed to have requested to be represented. Allowing such an approach would impermissibly collapse section 342-b's distinction between individual actions, which require an explicit request by the Public Entity, and class actions, which can be brought on an opt-out basis. *Cf. DeAsencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003) ("[M]andating an opt-in class or an opt-out class is a crucial policy decision."). Indeed, section 342-b's text makes clear that the "shall be deemed to have requested" method is valid only for class actions. Were it otherwise, section 342-b's second sentence would not say "in any class action," but rather would say "in any action."

B. New York's Inexcusable Violation Of Section 342-b Means That It Is Not The Real Party In Interest In Its Suit On Behalf Of The Public Entities And Thus Its Complaint On Their Behalf Must Be Dismissed Immediately Under Rule 17(a)

Federal Rule of Civil Procedure 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest," but provides that "a party authorized by statute" may sue

in its own name. Fed. R. Civ. P. 17(a)(1)(g). Whether a state attorney general is "authorized by statute" to sue on behalf of the public entities within the state's borders turns on whether such a representative suit is authorized under state law. *See HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1196–97 (3d Cir. 1996); *see also* 54 Am. Jur. 2d Monopolies & Restraints of Trade § 416 ("Where a state law requires, however, that the state attorney general obtain the express authorization of political subdivisions in order to bring an action on their behalf, but the attorney general fails to obtain such authorization, the political subdivisions are properly dropped from an antitrust action."). Because no Public Entity requested that New York sue on its behalf, as section 342-b requires, and New York is not the real party in interest in its suit on behalf of the Public Entities, those claims must be dismissed.

That New York is not the real party in interest is confirmed by the only two courts to have considered this precise issue. In *Cedar Park Concrete*, 665 F. Supp. at 241, New York brought a Donnelly Act claim and a federal antitrust claim on behalf of various unnamed public entities, as well as one named public entity that requested representation. The court held that New York violated section 342-b by bringing claims on behalf of public entities, except for one that affirmatively requested to be represented. The court concluded that because New York violated section 342-b and Rule 17(a), its claims must be "dismissed insofar as they purport to state treble damages claims on behalf of unidentified state subdivisions." *Id.* at 241–42.

The court in *In re DRAM,* 2007 WL 2517851, reached the same conclusion. There, New York also sued on behalf of unnamed public entities, alleging violations of the Donnelly Act and federal antitrust law. The court explained that, contrary to section 342-b's requirements, New York made "no allegation in the present complaint stating either that the government entities at issue have requested that the present action be instituted on their behalf, or that even identify the

entities at issue." *Id.* at *5. The court concluded that "while the Donnelly Act does provide express statutory authority for the State Attorney General to sue on behalf of 'any political subdivision or public authority of the state,' the Donnelly Act contemplates that these government entities must be specifically identified, and it must affirmatively be demonstrated that they have requested that the Attorney General bring suit on their behalf." *Id.* at *7 (emphasis added). Given New York's failure to allege any such request, the court "conclude[d] that plaintiff has provided no legal authority expressly authorizing plaintiff's representative claim under the Sherman Act on behalf of the unnamed government entities alleged in plaintiff's complaint" and dismissed New York's complaint. *Id.*

Just as in *Cedar Park* and *In re DRAM*, New York's failure to allege here that any Public Entity requested its representation and to identify in its complaint any Public Entity that it purports to represent is fatal to its attempt to represent the Public Entities. This Court should thus dismiss New York's claim on behalf of these Public Entities under Rule 17(a).

In addition, because New York's violation of section 342-b and Rule 17(a) was inexcusable, this Court should dismiss New York's complaint on behalf of the Public Entities immediately and with prejudice to New York's refiling such claims in the future. Normally, "[t]he court may not dismiss an action [under Rule 17] . . . until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. 17(a)(3). But this rule applies only "when determination of the right party to sue is difficult or when an understandable mistake has been made." *Gardner v. State Farm Fire & Cas. Co.*, 544 F.3d 553, 563 (3d Cir. 2008) (internal quotation omitted); *accord* Wright, Miller § 1555 (same). Neither condition is met here.

First, New York's "mistake" is decidedly not "understandable." The recent decision in *In re DRAM* and the earlier decision in *Cedar Park* both put New York on notice that it had to obtain requests from the Public Entities in order to represent them. If that were not enough, Intel informed New York that it lacked authority to represent Public Entities absent requests, and New York required Intel to go through a lengthy letter-writing and discovery process to confirm the truth that no such requests were ever submitted before New York filed suit (or even after). *See supra* pp. 3–5; Floyd Decl. ¶ 5, Ex. C, at 2; *id.* ¶ 16, Ex. Q, at 21-22.

Second, determination of the proper Public Entities was not "difficult," because New York was well aware that it had planned to bring the present claims on behalf of these Public Entities. New York instead chose not to obtain requests from those Public Entities as required by section 342-b before filing its complaint. Indeed, New York filed this complaint eighteen months ago, but still has not obtained any request from any Public Entity, and has attempted to follow a post-hoc opt-out procedure that violates New York law and was misleading to the Public Entities.

In light of New York's repeated and inexcusable violations of section 342-b and Rule 17, the Court should dismiss New York's suit on behalf of the Public Entities immediately and with prejudice to New York's later refiling such claims. *See Gardner*, 544 F.3d at 563.

C. New York Lacks Standing To Bring This Suit On Behalf Of The Public Entities And Thus Its Complaint On Their Behalf Must Be Dismissed

A plaintiff's standing to sue "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). For much the same reasons that New York is not the real party in interest, New York lacks constitutional and prudential standing to assert its claim on behalf of the Public Entities. The Court should thus dismiss the complaint under Rule 12(b)(1) or Rule 12(c). *See In re*

DRAM, 2007 WL 2517851, at *4 (holding that New York cannot "demonstrate that applicable New York law grants it standing to sue on behalf of other governmental entities").

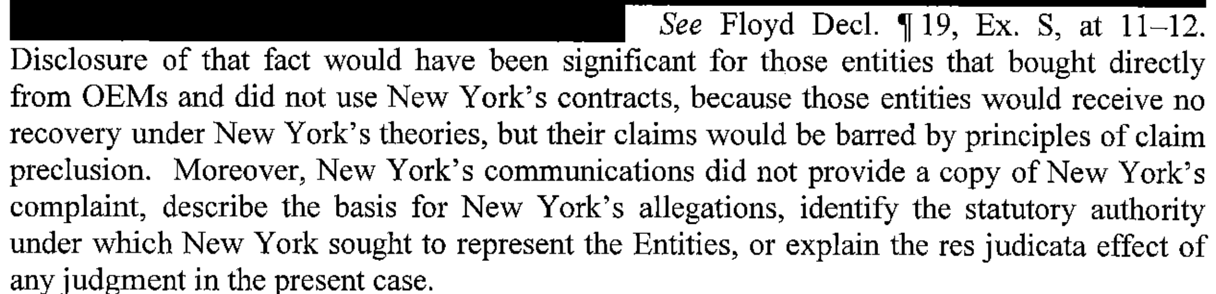
First, New York lacks constitutional standing to assert its claim on behalf of the Public Entities. Under Article III of the Constitution, for a Court to have jurisdiction over a claim, the plaintiff must demonstrate (1) injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury-in-fact requirement means the plaintiff must show that the alleged violation harmed a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation omitted). The plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979). Insofar as New York is seeking relief on behalf of the Public Entities, it has not suffered a personal injury-in-fact because those Public Entities have neither assigned their claims to New York nor requested that it sue on their behalf under section 342-b. Thus, even if New York has standing to bring a claim for injuries that the State itself has allegedly suffered, it has no standing to bring this suit on the Public Entities' behalf. This is because "[s]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (internal quotation omitted).

The prudential standing doctrine's limitation on third-party standing also bars New York's claims: "The longstanding basic rule of third party standing is that 'in the ordinary course, a litigant must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Amato v. Wilentz*, 952 F.2d 742, 748 (3d Cir. 1991) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). This rule admits of exceptions

only in narrow circumstances. Factors a court should consider in determining whether to permit third-party standing are: (1) "the relationship between the plaintiff and the third party whose rights are asserted"; (2) "the ability of the third party to advance its own rights"; and (3) "the impact on third party interests." *Id.* at 749–50.

Here, inasmuch as New York is asserting its claim on behalf of the Public Entities, it is not "'assert[ing] [its] own legal rights and interests,'" but instead is "'rest[ing] a claim to relief on the legal rights or interests'" of the Public Entities themselves—in violation of the bar against third-party standing. *See Amato*, 952 F.2d at 748 (quoting *Powers*, 499 U.S. at 410). And no exception applies here. The Public Entities are fully capable of asserting their own Donnelly Act claims against Intel, *see id.* § 340(5), and an adjudication in this case, where the Public Entities have not asked to be represented, may preclude them from bringing their own claims, which would adversely impact third-party rights.[6]

But even more fundamentally, New York suffers from a conflict of interest that impairs its ability to fairly represent the Public Entities' rights, because New York's economic interests in this suit are directly adverse to the Entities' interests. Under New York law, in a case "where both direct and indirect purchaser are involved," a defendant is "entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others

6  *See* Floyd Decl. ¶ 19, Ex. S, at 11–12. Disclosure of that fact would have been significant for those entities that bought directly from OEMs and did not use New York's contracts, because those entities would receive no recovery under New York's theories, but their claims would be barred by principles of claim preclusion. Moreover, New York's communications did not provide a copy of New York's complaint, describe the basis for New York's allegations, identify the statutory authority under which New York sought to represent the Entities, or explain the res judicata effect of any judgment in the present case.

who are themselves entitled to recover so as to avoid duplication of recovery of damages." *See* N.Y. Gen. Bus. Law § 340(6). In this case, New York purports to assert claims in at least two roles: (1) as alleged assignee of the OEMs' claims, New York asserts that it is entitled to recover *in its own right* for alleged overcharges to the OEMs; and (2) as purported representative of the Public Entities, New York seeks to recover those same alleged overcharges *on behalf of* the Entities. Because the Donnelly Act permits New York to recover only one of these amounts with regard to any CPU or product containing that CPU, New York has an economic incentive—directly adverse to the Public Entities' interests—to allocate as much of the recovery as possible to the direct claims it allegedly owns. In light of this clear conflict of interest, it is unsurprising that none of New York's communications informed the Public Entities of the conflicting nature of these claims—and even in the absence of such disclosures, no Public Entities stepped forward to request that New York sue on their behalf. Dismissal is therefore required.

V. CONCLUSION

New York seeks to impermissibly expand its list of clients without proper authority and in violation of law. Intel faces purported damages claims on behalf of thousands of Public Entities that, if later unsatisfied with the judgment, could claim they were not properly represented in this lawsuit and attempt to file another round of litigation. If New York wanted to represent these Entities, it should have complied with its own state law.

For the foregoing reasons, this Court should grant Intel's motion to dismiss New York's claims on behalf of the Public Entities.

Respectfully submitted,

POTTER ANDERSON & CORROON LLP

By: /s/ W. Harding Drane, Jr.
Richard L. Horwitz (#2246)
W. Harding Drane, Jr. (#1023)
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899-0951
Tel.: (302) 984-6000
rhorwitz@potteranderson.com
wdrane@potteranderson.com

Attorneys for Defendant Intel Corporation

OF COUNSEL:

Robert A. Van Nest
Paula L. Blizzard
Brook Dooley
KEKER & VAN NEST
710 Sansome Street
San Francisco, CA 94111
Tel: (415) 391-5400

Donn P. Pickett
Frank M. Hinman
BINGHAM MCCUTCHEN LLP
3 Embarcadero Center
San Francisco, CA 94111
Tel: (415) 393-2000

Daniel S. Floyd
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Tel.: (213) 229-7000

Joseph Kattan, PC
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Tel.: (202) 955-8500

Dated: May 27, 2011
Public Version Dated: June 3, 2011

1015317/29282