IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY GENERAL ERIC T. SCHNEIDERMAN,	:	C.A. No. 09-827 (LPS)
Plaintiff,	:	**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 12(c) FOR DISMISSAL WITH RESPECT TO NEW YORK'S DONNELLY ACT DAMAGES CLAIM ON BEHALF OF NON-STATE PUBLIC ENTITIES**
v.	:	
INTEL CORPORATION, a Delaware corporation,	:	
Defendant.	:	
		August 3, 2011

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Pursuant to Federal Rules of Civil Procedure 12(b) and (c), Plaintiff State of New York ("New York") files this opposition to Defendant Intel Corporation's May 27, 2011 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 ("Motion to Dismiss") (D.I.164).[1]

I. PRELIMINARY STATEMENT

Intel cloaks its motion in claims of lack of standing pursuant to the Federal Rules of Civil Procedure and even Article III of the United States Constitution, but its substance can be reduced to one single contention: that New York has not properly obtained the authority to represent non-state public entities pursuant to New York General Business Law ("GBL") § 342-b.

That contention turns on Intel's attempt to dictate the communications between the Attorney General and the non-state public entities he represents. Specifically, ignoring the text of the statute and the applicable legislative history, Intel suggests that the three words "upon the request" require an express, affirmative authorization from each entity. Intel's interpretation would turn the law on its head, leading to the absurd result that the Attorney General could never bring an action on behalf of thousands of entities unless each proactively asked to be represented by the Office.

[1] The Attorney General brought this action on behalf of consumers, state entities, and non-state public entities. State entities include entities such as the New York State Department of Health. This motion does not concern those entities. Non-state public entities include entities such as cities, towns, villages, and school districts located in the State of New York.

This cannot be what the legislature intended. The Donnelly Act's legislative history is abundantly clear that the legislature sought to encourage aggressive enforcement of the antitrust laws by, among other things, allowing the Attorney General to assist local entities which lacked sufficient resources and expertise to bring complex antitrust actions and to coordinate investigations and prosecutions of antitrust violations between the Attorney General and non-state public entities. Interpreting GBL §342-b as Intel does would be contrary to this purpose and hinder efforts to effectively enforce the antitrust laws.

II. FACTUAL BACKGROUND

On November 4, 2009, New York filed its complaint in this action. In the complaint, New York sought, *inter alia*, damages on behalf of numerous state and non-state public entities.

Between November 2009 and February 2010, New York sent litigation advisories to all state and non-state public entities represented in this litigation. *See* New York's Response to Intel's Interrogatory No. 18, a copy of which is attached as Exhibit A. The litigation advisories provided background information on the litigation and the products involved, informed entities that they "may wish to seek legal counsel regarding your rights, including your right, under New York State law, to bring suit on behalf of your entity to recover damages suffered," notified entities that to recover damages they may need to produce certain documents, and advised that "entities that believe they may have suffered any damages should take reasonable steps to preserve the originals of their relevant records." *See* Declaration of Daniel S. Floyd, dated May 27, 2011 (D.I.165), Ex. J. ("Floyd Decl.")

In January and February of 2010, New York held two telephone calls concerning the litigation. All entities that had been sent a litigation advisory were invited to attend the calls. On the calls, New York discussed the litigation and answered any questions posed by the entities. *See* New York's Response to Intel's Interrogatory No. 18, at Exhibit A.

On April 9, 2010, New York submitted its Initial Disclosures to Intel pursuant to Federal Rules of Civil Procedure 26. Attached to the initial disclosures was a list of those entities that New York represented in this action. *See* Floyd Decl. ¶ 2 (D.I.165) Thereafter, Intel made various inquiries and discovery requests pertaining to New York's communications with non-state entities and questioned New York's authority to represent those entities in this litigation. *See* Floyd Decl. ¶¶ 3-5, 8-10 (D.I.165).

Thus, in an abundance of caution, on May 25, 2010, New York sent a second notice to non-state public entities. Contrary to Intel's assertions, the notice was neither "misleading" nor "incomplete," but rather, once again informed entities of the litigation and in addition asked them to advise New York if they did not wish the Attorney General to represent them in the litigation.[2] The notice requested those non-state public entities not wishing to be represented by New York to send an email to a specific email address (listed in the notice) by June 25. The notice also stated that "no Public Entity is required to be represented by the Attorney General's Office and that each Public Entity has the right to seek independent legal advice as to whether, and how, it wishes to be represented

[2] As Intel did not question New York's claims on behalf of state entities, the May 25, 2010 notice was only sent to non-state public entities. New York does not view Intel 's Motion to Dismiss as challenging New York's claims on behalf of state entities or arguing that GBL §342-b applies to New York's representation of state entities.

in the Intel Action." *See* Floyd Decl. Ex. K (D.I.165). Shortly thereafter, dozens of non-state entities, including towns, villages, school districts and libraries, sent notification informing New York that they did not want to be represented in the litigation. *See* Floyd Decl. Exs. I, L (D.I.165).

On June 10, 2010, New York held another telephone call with non-state public entities. *See* Floyd Decl. Ex. R (D.I.165). During the call, New York discussed the litigation and answered questions. On that date, New York also filed a corrected version of its Initial Disclosures. This corrected version included additional entities that were unintentionally omitted from earlier disclosures due to a clerical error.

On October 1, 2010, in response to discovery requests by Intel, New York produced to Intel the litigation advisories sent to all entities in this litigation, as well as a list of entities that expressly declined to be represented by New York. *See* Floyd Decl. ¶¶ 11-12 (D.I.165).

In November 2010, the Court granted Intel discovery of 20 entities represented by New York in this litigation. Apart from the discovery from the Metropolitan Transportation Authority, which is due to be completed by September 30, 2011, New York has completed document production for each of the 20 entities, and after conferring and agreeing with Intel on deposition dates, is nearly finished with depositions for all of the entities.

III. ARGUMENT

A. The Attorney General is Authorized to Bring Representative Actions on Behalf of Non-State Public Entities

As the chief law enforcement officer of the State of New York, the Attorney General has the authority to file antitrust actions on behalf of New York individuals and

entities. GBL § 340 *et seq.*; Executive Law §§ 63(1), (12); *People v. Liberty Mut. Ins. Co.,* 52 A.D.3d 378, 861 N.Y.S.2d 294, 295-296 (N.Y. App. Div. 1st Dep't 2008); *Matter of American Dental Coop. v. Attorney General of New York*, 127 A.D.2d 274, 514 N.Y.S.2d 228 (N.Y. App. Div. 1st Dep't 1987); *New York v . Feldman,* 210 F. Supp. 2d 294, 300 (S.D.N.Y. 2002). GBL §342-b of the General Business Law also permits the attorney general to bring claims for damages on behalf of state and non-state public entities, such as municipalities, villages and towns, for violations of state and federal antitrust laws. *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 06-CV-6436-PJH, 2007 WL 2517851 (N.D. Cal.2007)

GBL §342-b was enacted in 1969, and, at the time, read as follows:

> **Recovery of damages by attorney general.** In addition to *existing statutory authority* to bring such actions on behalf of the state and public authorities, the attorney general may also 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 section three hundred forty of this article, or to recover damages provided for by federal law for violations of the federal antitrust laws. The attorney general, on behalf of the state of New York, shall be entitled to retain from any moneys recovered in such actions the costs and expenses of such services. (Emphasis added). L. 1969 ch. 635.

The text of the statute and the legislative history make it clear that at the time of its enactment, the Attorney General had the authority to bring antitrust actions, and indeed had brought such actions, on behalf of state and non-state public authorities. GBL § 342-b ("In addition to existing statutory authority…."); Budget Report on Bill 2881-A (May 22, 1969), ¶ 4(b), reprinted in Bill Jacket for ch. 635 (1969), a copy of which is attached as Exhibit B ("The Attorney General has brought actions on behalf of individual localities in the past.") The legislative history explains that GBL §342-b was enacted to "remove any doubt" concerning the Attorney General's authorization to bring antitrust

damages actions on behalf of non-state public entities. *See* Ex. B ¶4(b) ("There is, however, no specific statutory authority for such service. Enactment of the bill would clarify the Attorney General's authority to bring such actions."). *Id.* ¶ 5(b) ("This legislation may be unnecessary since, as noted in 4(b), the Attorney General has brought actions on behalf of individual localities in the past without challenge."); Memorandum for Governor (April 29, 1969) at 2, reprinted in Bill Jacket for ch. 635 (1969), a copy of which is attached as Exhibit C ("The proposed express authorization to the Attorney General to bring an action on behalf of such political subdivisions and public agencies will remove any doubt as to the authority of the Attorney General to bring such actions").

The legislative history also makes clear that the statute provides the non-state public entities the ability to request representation. Because local governments did not and do not have the "legal resources or expertise" found in the Attorney General's office, the statute ensured that they would have the ability to ask the Attorney General to assist in the prosecution of an antitrust violation. *See* Ex. B ¶ 4(c) ("The legal resources and expertise which the Attorney General's office could draw upon in dealing with this difficult and complex field must be considered superior to the quality of assistance generally available to localities."); *see also* Bersani Memorandum on A.2881, reprinted in Bill Jacket for ch.635 (1969), a copy of which is attached as Exhibit D ("The proposed authorization . . . will afford to [political subdivisions] the opportunity to recover damages which they would not otherwise have because of the lack of adequate funds or personnel to prosecute such complex and expensive litigation.")

B. The Attorney General Is Not Required to Obtain Individual Affirmative Requests Before Litigating on Behalf of Non-State Public Entities

Intel argues that New York may not bring a damages claim on behalf of the more than 4,000 non-state public entities[3] at issue unless each one requests representation; or alternatively, unless the Attorney General brings a class action. Intel focuses on the words "upon the request" in the statute and argues that those words require an express, affirmative authorization by each non-state public entity. Intel has provided no case law in support of its position.

In the first instance, Intel's interpretation of the statute seeks to narrow and limit the Attorney General's authority. New York's authority is not limited, as Intel would have it, to either a class action or an action on behalf of specific, individual entities.[4] Rather, New York may, as it has done here, bring a representative action to recover for individuals, state entities, and non-state public entities. Indeed, the legislature expressly recognized when the statute was passed that it was not disturbing the Attorney General's "existing" authority. This fact is supported by the legislative history, which explained that the statute was passed only to "clarify" and make "express" the Attorney General's authority to bring actions on behalf of non-state public entities. *See* Exhibit. B at ¶4(b);

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[3] In its June 10, 2010 corrected Initial Disclosures, New York identified approximately 4,593 public entities. Subsequently, it provided Intel with a list of 47 entities which expressly opted out of the litigation. *See* Floyd Decl. Ex. I (D.I.165).

[4] Intel references a footnote in New York's brief in *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007), discussing GBL §342-b as applying to both "individual" and class actions as supporting its view that an express, affirmative authorization is required unless brought as a class action. Not only did *Sperry* not address this issue, the reference to "individual" actions merely illustrated the breadth of the authority provided by the original 1969 statute, *i.e.*, covering all antitrust actions brought by New York on behalf of non-state entities, be they on behalf of specific, individual entities, representative actions on behalf of numerous entities, or class actions.

Exhibit D.

Similarly, New York's authority is not limited to requests from entities. While one purpose of the statute was to ensure that entities could request representation, allowing entities to request representation does not forbid the Attorney General from otherwise bringing suit.

Even if the statute could be read to require that non-state public entities must request representation before the Attorney General could act on their behalf, nothing in the text of the statute prescribes the method for doing so. In fact, the legislative history specifically states that "[t]he bill contains no prescribed procedure for a request from a locality. The Attorney General would presumably wish to investigate all requests, even those based on vague suspicions." *See* Ex. B ¶ 5(b). Reading GBL § 340 *et seq*. together with its legislative history, the purpose of the statute is clearly to facilitate representation of those who cannot represent themselves – either due to resources or given the complexity of these matters – whether individuals or non-state public entities.[5] As such, even if consent from each entity were required, given that the statute does not prescribe a particular procedure for the "request," Intel fails to show why providing notice of an action and permitting an opportunity to opt-out is insufficient.

[5] Coordination between the Attorney General and non-state public entities is another theme found in both the statutes and legislative history. GBL§ 340 (5) requires that a "political subdivision or public authority" give the Attorney General notice before filing an action. This enables "political subdivisions and public authorities" to "coordinate prosecutions with the Attorney General's office." Memorandum to Hon. Judah Gribetz (June 27, 1975), reprinted in Bill Jacket for ch.333 (1975), a copy of which is attached as Exhibit F .

C. If the Statute Requires Requests, the Attorney General Has Obtained Them

Even if the Court required the Attorney General to receive a request from each of the 4,000 entities, achieving that result using the mechanism prescribed for class actions is more than adequate.

GBL §342-b was amended in 1975 to "clarify the manner in which the Attorney General ***may be requested*** to bring class actions on behalf of subordinate governmental entities within the state." Memorandum Re: Senate Assembly (June 16, 1975), reprinted in Bill Jacket for ch. 420 (1975) (emphasis added), a copy of which is attached as Exhibit E. Specifically, the following sentence was added to the statute:

> 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. (Emphasis added). L. 1975 ch. 420.

The amendment confirmed "the right of the Attorney General to maintain antitrust class actions on behalf of these entities without first having to solicit the express approval of every potential class member before filing a lawsuit." *See* Exhibit E.

Intel's interpretation would have the Attorney General write to all 4,000 entities and request that they return a formal letter in turn "requesting" representation. Mandating such an onerous and inefficient procedure for filing representative antitrust actions on behalf of thousands of entities where the same statute permits a simple opt-out mechanism for class actions would make the statute internally inconsistent. *See Matter of Charter Dev. Co. v. City of Buffalo*, 6 N.Y.3d 578, 581 (2006) (noting that "all parts of an act are to be read and construed together to determine the legislative intent") (quoting Statutes § 97, 1 McKinney's Cons. Laws of N.Y. at 211 (1971)).

Thus, if any consent procedure is required, it should be nothing more than what is prescribed for class actions in the statute. Indeed, for purposes of notification, a representative action brought on behalf of 4,000 entities is more akin to a class action than to an individual action. Intel itself argues that New York's representative action is "analogous" and "indistinguishable" from class actions in certain respects.[6] In this instance, that makes sense. Because class actions often involve hundreds or thousands of class members, efficient procedures for obtaining consent from members are necessary.

Here, while comporting with the procedures typically required for class actions, the non-state public entities represented by New York in this action were provided substantial notice, information and an opportunity to opt-out of this litigation. New York sent a litigation advisory to each non-state public entity that it claims to represent in this matter. The advisory, among other things, provided background on the litigation and the products involved, notified entities that they may wish to seek the advice of legal counsel, and advised them to preserve documents. *See* Floyd Decl. Ex. J (D.I.165). Then in May 2010, New York sent additional notices once again informing the non-state public entities of the litigation and asking them to advise New York if they did not want New York to represent them in the litigation. Overall, New York held three telephonic calls wherein it discussed the litigation and answered questions. All entities that were sent the advisories were invited to participate in the call and ask questions.

Dozens of non-state entities did in fact opt out. These efforts to inform non-state entities of the litigation and provide them with an opportunity to opt out satisfies GBL

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[6] *See* Intel's Motion for Partial Summary Judgment on Statute of Limitation Grounds at 8 (D.I.167).

§342-b, as well as traditional notions of due process and fairness – as demonstrated by the dozens of entities that in fact opted out. As such, pursuant to the plain text of the statute, the non-state public entities should be "deemed to have requested" representation. GBL § 342-b.

The only support Intel cites for its contention that GBL §342-b mandates an express, affirmative request from each non-state entity is an excerpt from a general treatise[7] and two inapposite cases. While New York disputes that *State of New York v. Cedar Park Concrete Corp*., 665 F. Supp. 238 (S.D.N.Y.1987) and *In re DRAM* accurately interpret New York law, these decisions are inapplicable and do not support Intel's argument. Both cases focused on whether New York expressly identified in its complaint, or at all, which non-state public entities it was representing. Neither case attempts to determine what is a "request" by a non-state public entity.[8] In both cases the courts granted leave to amend to identify the entities represented by the State.

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[7] Intel cites as support *American Jurisprudence*, which states: "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." 54 Am. Jur. Monopolies § 416. This statement, however, assumes that the statute mandates an "express authorization." GBL§ 342-b contains no such requirement. Moreover, to support this excerpt, *American Jurisprudence* cites only one case, which interpreted an Illinois statute that does not contain the same language as GBL § 342-b.

[8] I*n re DRAM*, 2007 WL 2517851, at *7 ("[W]hile 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* …"); *Cedar Park*, 665 F. Supp. at 242 ("The other State subdivisions on whose behalf the State of New York sues, however, are not named in the complaints. . . In view of the need early in the litigation to identify State-affiliated purchasers, we believe the complaints should be dismissed insofar as they purport to state treble damages claims on behalf of *unidentified* state subdivisions.") (emphasis added).

Here, New York has already provided Intel a detailed listing of the entities that it represents.[9] In April 2010, Intel was informed of each and every entity that New York claimed to represent in this action. In October 2010, New York provided Intel with a list of entities that expressly opted out of the litigation. And in November 2010, the Court granted Intel discovery of 20 of the entities that New York represents in this litigation. Intel has failed to identify any cognizable prejudice that it has suffered based on the timing of New York's identification of each entity it represents.

D. Intel's Position Frustrates the Intent and Purpose of the Statute And Would Lead to Absurd Results

Intel's interpretation of the statute seeks to limit the Attorney General's ability to bring actions to protect New York State entities. If Intel were to prevail on its statutory interpretation of GBL §342-b of the Donnelly Act, New York could not bring a proactive, representative antitrust action for damages on behalf of thousands of entities – it could only be reactive to a request from each and every entity, or bring a class action. Alternatively, *if* New York could bring such a proactive, representative action, it could only do so if it first obtained an affirmative statement of "request" from each of the thousands of entities. Either interpretation of the statute would severely limit New York's ability to bring representative actions. That cannot be what the legislature intended.

The legislative history clearly states that the statute was intended to permit New York to bring legal actions, in addition to its existing authority, on behalf of numerous

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[9] To the extent that Intel maintains that New York was required to identify each and every entity it represents in its Complaint, it has provided no basis (and shown no prejudice) for such an assertion. *See e.g., In re TFL-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 1363786 (N.D. Cal. 2011) (Missouri Attorney General was not required to list all entities on whose behalf it was representing at the pleading stage).

public entities that may not have the resources or expertise to file their own action. *See* Ex. D. The legislative history also specifically mentions relief that should be available to localities that purchase off of State contracts. *See* Ex. B ¶5(d) ("It should be pointed out that some protection in this area would seem to be afforded localities by the existing provisions of law that permit local subdivisions to purchase under the terms of State negotiated contracts any goods and services for which the State has a contract."). Thus, attempting to limit the Attorney General, especially in this circumstance involving purchases from state contracts, is contrary to what was intended by the legislature.

Further, in 1975, Section 340 of the Donnelly Act was also amended to, among other things, require non-state entities that sought to commence an action for violation of the Donnelly Act to provide the Attorney General with at least ten days notice. *See* GBL § 340(5) (L.1975 ch.333). According to a memorandum from the Counsel to the Governor, the purpose of this amendment was to allow the Attorney General to better coordinate antitrust actions with non-state entities. *See* Ex. F.

Instead of limiting the Attorney General, the notice requirements of GBL§ 340 read together with GBL§ 342-b evince an intent to encourage the Attorney General's involvement in antitrust enforcement involving non-state public entities. Here, New York has filed on behalf of over 4,000 entities – the vast majority being non-state public entities. It would frustrate the purpose of the statute, and discourage aggressive state antitrust enforcement, to find that New York is not allowed to bring proactive representative actions.

E. New York's Interpretation of GBL §342-b of the Donnelly Act Is Consistent With Interpretation of Similar State Statutes

A review of other state statutes authorizing State Attorneys Generals' actions on behalf of non-state public entities demonstrates that New York's Donnelly Act is not alone in not expressly mandating a particular procedure by a State Attorney General to file a representative action on behalf of numerous non-state public entities. For example, a Michigan statute broadly authorizes the Michigan Attorney General to file actions "in which the state shall be interested" and "in which the people of this state may be a party or interested."[10] Michigan's highest state court has interpreted that language as not requiring express consent of represented entities.[11] And a recent case interpreted the relevant Missouri statute,[12] which provides that "[t]he attorney general may represent, besides the state and any of its political subdivisions or public agencies, all other political subdivisions, school districts and municipalities within the state . . ." as not requiring Missouri to demonstrate that it obtained express authorization from non-state entities (at least at the pleading stage).[13]

F. New York Has Independent Standing to Represent Non-State Entities for Damages.

Contrary's to Intel's assertion, even if the Court finds that New York has not complied with GBL §342-b, and thereby lacks authority to represent those entities under the Donnelly Act, New York has separate, independent authority to recover damages

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[10] Michigan Compiled Laws §14.28.
[11] *In re Certified Question From the U.S. District Court for the Eastern District of Michigan*, 638 N.W.2d 409 (Mich. 2002).
[12] Mo. Rev. Stat. §416.061.3.
[13] *In re TFL-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 1363786 (N.D. Cal. 2011) (Missouri Attorney General not required to list all entities on whose behalf representing at the pleading stage).

suffered by non-state public entities under New York Executive Law.[14]

New York's Executive Law provides an independent basis of authority pursuant to which New York may bring antitrust actions to recover damages or restitution for non-state public entities. Section 63(1) of the Executive Law provides that the Attorney General may "[p]rosecute and defend all actions and proceedings in which the State is interested." N.Y. Exec. Law § 63(1). Section 63-c(1) of the Executive Law provides that "an action . . . may be maintained by the state . . . before any court or tribunal of the United States" to recover for injury caused to "a city, county, town, village or other division, subdivision, department or portion of the state" where money was "without right obtained" by the defendants. "[T]he phrase 'without right obtained' as used in the statute means no more than actionable by the State or a municipality pursuant to any viable action or proceeding at law or in equity." *New York v. Grecco,* 800 N.Y.S.2d 214, 221 (N.Y. App. Div. 2005). Section 63(12) of the Executive Law further authorizes the Attorney General to sue "in the name of the people of the State of New York" when a defendant has engaged in persistent illegal acts in the transaction of business. N.Y. Exec. Law § 63(12). And Section 63(12) expressly permits the Attorney General to seek restitution and damages. Indeed, New York has used Executive Law §63(12) to pursue damages and restitution in antitrust actions. *New York v . Feldman,* 210 F. Supp. 2d 294, 300 (S.D.N.Y. 2002).

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[14] New York's ability to seek injunctive relief on behalf of non-state entities is beyond dispute. Intel's motion only challenges New York's ability to assert claims for damages on behalf of non-state entities.

G. If the Court Finds New York Lacks Standing, Leave to Amend Should Be Freely Granted

Intel's challenges to New York's right to claim damages on behalf of non-state public entities are without merit. New York initiated the suit on behalf of both state and non-state public entities as "a party authorized by statute," and is thereby a "real party in interest." Fed. R. Civ. P. 17(a)(1)(G). "Whether a plaintiff is the real party in interest is to be determined by reference to the applicable substantive state law." *Kenrich Corp. v. Miller*, 256 F.Supp.15, 17 (E.D.Pa. 1966), *aff'd*, 377 F.2d 312 (3d Cir.1967). Because New York is authorized to represent non-state public entities' claims under various statutes, *e.g.* GBL §342-b, Executive Law §§63(1), 63-c(1), and 63(12), there is no question that New York is the "real party in interest." As such, contrary to Intel's assertions, New York need not seek "ratification, joinder, or substitution" pursuant to Rule 17 (a)(3), as New York is the real party in interest and has already properly identified those non-state entities on whose behalf New York is bringing this action.

Intel's only contention that New York is not the real party in interest is predicated on its erroneous belief that New York is not authorized to assert claims for damages on behalf of non-state public entities under GBL §342-b. *See* Intel's Mt. to Dismiss at 12 (D.I. 164).[15] However, as already explained, this is based on three false premises. First, as demonstrated, GBL §342-b does not mandate that non-state entities may only request representation by an express, affirmative authorization. Second, even if it did, the actions taken by New York, *e.g.*, sending informative advisories and notices,

[15] Intel references *In re DRAM* and *Cedar Park* in support of its argument that New York is not the "real party in interest." Intel's Mt. to Dismiss at 9-10 (D.I.164). Intel's quotations to those cases fail to mention that those courts would allow New York's claims to proceed if the entities it represented were identified. Under those circumstances, Intel does not appear to contest that the Attorney General would be the real party in interest.

having calls to provide information and answer questions, and providing an easy method to opt out, easily demonstrate that entities requested representation. Third, independent and apart from GBL §342-b, New York has authority to assert claims on behalf of non-state public entities, *e.g.*, Executive Law §§ 63(1), 63-c(1), and 63(12). For similar reasons, Intel's contention that New York lacks Article III standing to assert these claims should be rejected.[16] As for prudential standing, the relationship between New York and non-state public entities, as well as the purpose of GBL §342-b to permit New York to assist local entities which lacked the "legal resources or expertise," weigh in favor of – not against – standing.

Should the Court determine that New York must obtain express, affirmative requests from the non-public entities and so orders, the Court should not dismiss the claims brought by New York on behalf of the non-state public entities pursuant to Rule 17, without first allowing New York time to obtain ratification of the entities. Fed. R. Civ. P. 17(a)(3) ("The court may not dismiss an action…until…a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."). Rather, the Court should permit New York to obtain whatever proof of ratification the Court believes necessary and to amend the complaint. Indeed, even the two courts that found that New York failed to comply with GBL §342-b by not identifying each non-state public entity that it represented, dismissed the action with leave to amend. *See In re DRAM*, 2007 WL 2517851, *7; *Cedar Park*, 665 F.Supp. at

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[16] Intel's sole allegation that New York lacks Article III standing is that New York has not suffered "injury in fact." *See* Intel's Mt. to Dismiss at 12 (D.I. 164). This argument fails for the same reason as its arguments under Rule 17: New York is the "real party in interest" by virtue of its statutory authority and thereby may seek recovery for injuries-in-fact of non-state entities.

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Amendment of the complaint is proper here because Intel will not be prejudiced. *See Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000) (absent delay, prejudice or bad faith, amendment should be freely granted). Rather, Intel has been on notice since the outset of the case that New York was representing the non-state public entities. In fact, Intel was informed of the identity of the non-state public entities represented by New York, as well as the ones that opted out, early in the litigation. There will also be no delay in the case because Intel has already taken discovery from a number of non-state public entities, which it selected, as the Court is well aware.

The Third Circuit has stated that the primary purposes of Rule 17 are to ensure that a judgment will have *res judicata* effect and to protect the interests of absent parties. *Icon Group, Inc. v. Mahogany Run Development Corp.*, 829 F.2d 473, 478 (3d Cir. 1987). Because both those purposes have been met here, and Intel faces no prejudice or possible delay, the court should give New York leave to amend its complaint. Fed. R. Civ. P. 15(a) (2) ("The court should freely give leave when justice so requires.")

Intel's arguments against allowing New York to ratify under Rule 17(a)(3) are without merit. First, Intel incorrectly argues that Rule 17(a)(3) applies only "when determination of the right party to sue is difficult or when an understandable mistake has been made." Intel's Mt. to Dismiss at 10 (D.I.164). That language does not appear in the rule, but rather in the Advisory Notes, which explain that the provision "is added simply in the interests of justice" to prevent forfeiture of cases, protect defendants' rights and preserve *res judicata*. Fed. R. Civ. P. 17 advisory committee's note to the 1966 Amendment. Second, *Gardner v. State Farm Fire & Cas. Co.*, 544 F.3d 553 (3d Cir.

2008), on which Intel relies, presents a typical situation in which the plaintiff attempted to "circumvent the statute of limitations" by filing suit without having a cause of action and before receiving an assignment from the real party in interest in order to toll the statute of limitations. *Id.* at 563. In this case, by contrast, New York is, and always has been, the real party in interest with statutory authority to bring this action on behalf of state entities and non-state entities alike.

In a last-ditch attempt to obtain a favorable ruling from the Court, Intel accuses New York of impropriety. Specifically, Intel asserts that New York's failure to obtain express, affirmative authorization from non-state public entities was "inexcusable" and justifies dismissal with prejudice. However, Intel can point to no improper conduct by New York. Intel claims that *In re DRAM* and *Cedar Park* – which never addressed the issue raised in this brief – should have "put New York on notice" that it had to obtain express, affirmative authorization from non-state entities. But in those *two* cases, New York did not identify the non-state entities that it represented. Here, in contrast, not only has New York identified each and every entity that it represents, but it also identified those entities that expressly declined to be represented by New York. There is no substance to Intel's argument that these cases required any more from New York.

Intel also suggests improper conduct by conjuring up a "conflict of interest" that it asserts would somehow "impair" New York's "ability to fairly represent" non-state public entities. Intel's suggestion that GBL §340(6), which permits a defendant "to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others," somehow creates a conflict of interest is baseless. Pursuant to GBL §340(6), Intel will have an opportunity at trial to prove that illegal overcharges paid by

direct purchasers – here, the OEMs – have been passed on to indirect purchasers. And *if* Intel succeeds, GBL §340(6) requires that "the court shall take all steps necessary to avoid duplicate liability." Whatever litigation decisions are made at trial, there is no basis for Intel's claim that New York cannot fulfill its statutory obligations to both State and non-State public entities in this action.

CONCLUSION

For the reasons set forth above, Defendant Intel Corporation's May 27, 2011 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 (D.I. 164), should be denied in all respects.

Dated: August 3, 2011
New York, New York

Respectfully submitted,
ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: /s/ Richard L. Schwartz

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY GENERAL ANDREW M. CUOMO, Plaintiff, v. INTEL CORPORATION, a Delaware Corporation, Defendant.	C.A. No. 09-827 (LPS) **PLAINTIFF STATE OF NEW YORK'S RESPONSES AND OBJECTIONS TO INTEL CORPORATION'S FOURTH SET OF INTERROGATORIES (Nos. 14-18)**

Pursuant to Fed. R. Civ. P. 26 and 33, and Local Rule 26.1 for the United States District Court for the District of Delaware, Plaintiff State of New York ("New York") hereby responds and objects to Defendant Intel Corporation's Fourth Set of Interrogatories to Plaintiff State of New York, dated November 11, 2010 ("Interrogatories"). New York reserves the right to supplement its Responses to the Interrogatories as more information becomes available.

GENERAL OBJECTIONS

1. New York objects to the Interrogatories and to the incorporated definitions and instructions that are contained in Intel Corporation's Second Set of Requests for the Production of Documents (Nos. 42-55), dated July 13, 2010 ("the Requests for Documents"), to the extent that they impose requirements greater than or in addition to those set forth in the Federal Rules of Civil Procedure or applicable law.

2. New York incorporates herein its General Objections and Specific Objections to the Definitions and Instructions contained in New York's Response to Defendant Intel

Corporation's First Set of Requests for the Production of Documents, dated June 10, 2010 ("Response to the Requests for Documents"), its Responses and Objection to Intel Corporation's First Set of Interrogatories, dated June 14, 2010, its Responses and Objections to Intel Corporation's Second Set of Interrogatories, dated June 28, 2010, and its Responses and Objections to Intel Corporation's Third Set of Interrogatories, dated August 16, 2010.

3. New York objects to the Interrogatories to the extent that they seek information or the production of documents that are protected by attorney-client or attorney work-product privileges, the informant's privilege, the common-interest doctrine, law enforcement privilege, public interest privilege, or that are otherwise protected from disclosure under applicable privileges, laws or rules. The inadvertent disclosure of information or production of documents protected by such privileges and protections shall not constitute a waiver of the applicable privilege and/or protection either as to the documents inadvertently produced or as to any other documents or information. All originals and any copies of any privileged or potentially privileged documents that are inadvertently produced must be returned to New York immediately.

4. New York objects to the Interrogatories to the extent that they call for the production of confidential and highly confidential documents.

5. New York objects to the Interrogatories to the extent that they call for production of information or documents that Intel has obtained from third parties and already has in its possession. It would be unreasonably cumulative, duplicative, and a drain on resources for New York to produce such information and additional copies of those documents to Intel.

SPECIFIC OBJECTIONS TO THE DEFINITIONS AND INSTRUCTIONS

1. New York objects to Intel's definitions of "New York" and "New York Governmental Entity" (incorporated in the Interrogatories from Intel's Second Set of Requests for Documents) as overbroad, to the extent that the purported definitions include entities beyond those defined by New York as "State Entities" and "Non-State Entities" in its Initial Disclosures and related correspondence. New York specifically objects to the inclusion of non-State "affiliates," "agents," or "anyone acting on [the] behalf" of New York within the definition of "New York."

2. New York objects to the specified Time Period, on the ground that it extends beyond the relevant time period in this action and is therefore burdensome and not reasonably calculated to lead to the discovery of admissible evidence. New York will provide information and responsive documents for the period approximately from January 1, 2000 up to and including December 31, 2009.

Preparation of the Responses

The following individuals supplied information for or participated or assisted in the preparation of the following Responses: Richard L. Schwartz, Saami Zain, OAG (counsel for Plaintiff New York).

RESPONSES AND SPECIFIC OBJECTIONS TO INTERROGATORIES

Interrogatory No. 14:

For the relevant time period set forth in your Complaint, are you claiming damages were incurred in connection with every Intel microprocessor purchase made by every vendor where an antitrust overcharge claim was assigned to NYS as a result of the purchase of an Intel-based computer pursuant to any Centralized Contract? If the answer is yes, please set forth the factual basis for your answer. If the answer is no, please identify those transactions for which you are not claiming damages, and the factual basis for your answer.

Response to Interrogatory No. 14:

New York objects to Interrogatory No. 14 as premature to the extent that it covers matters that are more properly a matter of expert opinion, to be determined through expert discovery which has not yet occurred. To the extent that Intel's question is based on the assumption that New York is required to show damages on an individualized basis with respect to each individual microprocessor purchased by New York's vendors or its Public Entities, New York objects on the basis that the assumption has no basis in applicable law, and is plainly impracticable. New York also objects to Interrogatory No.14 to the extent that it prematurely calls for a specification of the "factual basis" for an estimate of damages which has not yet been provided.

Subject to the General Objections and the specific foregoing objections, New York responds to Interrogatory No. 14 as follows: New York claims both direct and indirect damages caused by Intel's anticompetitive conduct. New York claims direct damages to the extent that such direct damages claims, arising from overcharges imposed by Intel on OEMs' purchases of x86 microprocessors, have been assigned to it by its vendors (OEMs) pursuant

to the terms of the Assignment Clause contained in the Centralized Contracts, and to the extent that purchases were made pursuant to those Centralized Contracts.

New York also claims indirect damages arising from all purchases of computer products containing x86 microprocessors made by those New York Public Entities identified on Exhibit C to New York's initial disclosures (as amended on June 10, 2010).

New York does claim that damages were incurred on all x86 microprocessors and computer products containing such microprocessors, which were purchased as set forth above during the relevant period by its vendors, the OEMs, its Public Entities, and New York consumers-at-large (including natural persons and small and medium-sized businesses, as well as Public Entity consumers) in the sense that Intel's exclusionary acts resulted in a market-wide overcharge which affected all such purchases. The aggregate amount of damages arising from such purchases remains to be estimated.

Interrogatory No. 15:

For the relevant time period set forth in your Complaint, are you claiming damages were incurred in connection with every Intel-based computer purchase made by every purchaser? If the answer is yes, please set forth the factual basis for your answer. If the answer is no, please identify those transactions for which you are not claiming damages, and the factual basis for your answer.

Response to Interrogatory No. 15:

See Response to Interrogatory No .14.

Interrogatory No. 16:

Identify by contract number, as assigned by NYS or any NYS agency, each Centralized Contract that you contend gives rise to a claim of damages in this lawsuit.

Response to Interrogatory No. 16:

Subject to the General Objections and the specific foregoing objections, New York refers Intel to the Centralized Contract documents and to the document prepared by OGS entitled "Contracts for Intel x86 Litigation," numbered NYAG-DOCPROD-0000001, and produced to Intel on July 7, 2010, which lists each Centralized Contract which gives rise to damages claims on behalf of purchases made pursuant to such contracts.

Interrogatory No. 17:

Describe with particularity all factual bases for your allegation in Paragraph 2 of your Complaint that AMD's x86 microprocessors "were in many ways more desirable" than Intel's competitive x86 microprocessor offerings.

Response to Interrogatory No. 17:

New York objects to Interrogatory No. 17 to the extent that it prematurely seeks a complete itemization of all factual bases for the assertion in Paragraph 2 of New York's Complaint that beginning in 2001, AMD "had begun developing x86 chips that not only competed with Intel's offerings, but were in many ways more desirable." New York's analysis is ongoing, and it reserves its right to supplement and amend its response.

Subject to the General Objections and the specific foregoing objections, New York responds as follows: In Paragraph 2, New York was referring primarily to AMD's server products, the Athlon MP processor (launched June 2001) and the Opteron, a 64-bit processor (launched April 2003). For factual support for the proposition that these products, and particularly the Opteron product, were recognized as more desirable to customers for certain applications, New York refers Intel to the following paragraphs of the complaint, and the documents referenced therein: ¶¶34-35, 131, 135-36, 140-41, and the following deposition testimony: Deposition of Thomas M. Kilroy, at 66:1-71:2, 154:9 – 158:17 (February 24, 2009); Deposition of Abhi Y. Talwalker, at 57:25 – 61:8, 61:9-62:17, and 68:25 – 72:23 (March 18, 2009).

Interrogatory No. 18:

For each entity identified in the corrected Exhibit C to your Initial Disclosures Pursuant to Fed. R. Civ. P.26(a)(l)(A), sent to Intel on June 10,2010, identify the following: (a) the earliest date on which the entity received a Litigation Hold Notice related to the allegations in the Complaint; (b) whether and when you requested or conducted a search for

potentially relevant documents within the possession, custody or control of the entity; and (c) if you did request or conduct a search for potentially relevant documents, a description of the locations and sources searched.

Response to Interrogatory No. 18:

New York objects to Interrogatory No. 18 to the extent it seeks information protected by attorney-client or attorney work-product privileges. New York also objects to Interrogatory No. 18 on the grounds that it is unreasonably burdensome for New York to provide the detail requested in parts (a) through (c) of Interrogatory No. 18 for each of the over 4,000 entities identified on Exhibit C to New York's Initial Disclosures (as amended on June 10, 2010).

Subject to the General Objections and the specific foregoing objections, New York responds to Interrogatory No. 18 as follows:

(a) New York sent initial litigation advisories to all represented entities on either November 30, 2009 or December 22, 2009, with the exception of those entities for which contact information had to be obtained. Litigation advisories were sent to this latter group of entities on either February 12, 2010 or February 16, 2010. In response to a request from Intel, by email dated October 20, 2010, New York identified each entity listed on NYAG-INITDISCL-0000120 to NYAG-INITDISCL-0000156 which was sent a litigation advisory on either February 12, 2010 or February 16, 2010.

Copies of the advisory were produced to Intel on October 1, 2010. *See, e.g.,* NYAG-DOCPROD-000003294 to NYAG-DOCPROD-000003296. In addition to sending the advisory, New York held two informational calls on January 27, 2010, and February 2, 2010, to advise the represented entities of their obligation to take reasonable steps to preserve potentially relevant documents, and to answer questions relating to the litigation and the advisory.

(b-c). Apart from certain state agencies (OGS, OSC, and OFT), which New York and Intel are addressing separately, and the entities identified in Dan Floyd's Dec. 6, 2010 letter (as

to which searches have not yet been conducted), New York has not requested that any represented entity conduct a search for potentially relevant documents, or itself conducted any such search.

Dated: December 14, 2010
New York, New York

Respectfully Submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
MARIA VULLO
Executive Deputy Attorney General for
Economic Justice
MICHAEL BERLIN
Deputy Attorney General for
Economic Justice

By: /s/ Richard L. Schwartz
RICHARD L. SCHWARTZ
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EXHIBIT B

30-DAY BILL

B-201 (7/63) BUDGET REPORT ON BILLS Session Year: 19 69

SENATE Introduced by: ASSEMBLY

Pr: Mr. Bersani Pr:

Int: Int: 2881-A

Law: General Business Sections: 342-b (new)

Division of the Budget recommendation on the above bill:

Approve: X Veto: No Objection: No Recommendation:

1-2. Subject and Purpose; and Summary of provisions: To permit the Attorney General office to bring action on behalf of individual political subdivisions and public authorities of the State, who so request, for recovery of damages arising from violations of antitrust laws. The Attorney General may withhold an amount equal to the cost of providing such services from any moneys recovered.

3. Legislative history: Assembly bill #2881 was passed during the 1969 legislative session, recalled from the Governor, amended and repassed. The amendment added the sentence authorizing the Attorney General to withhold from moneys recovered the cost of bringing such actions.

4. Statements in support:

(a) The Attorney General's memorandum in support of the bill before amendment stated in part that the bill would afford political subdivisions "... the opportunity to recover damages which they would not otherwise have because of the lack of adequate funds or personnel to prosecute..."

(b) The Attorney General has brought actions on behalf of individual localities in the past. There is, however, no specific statutor authority for such service. Enactment of this bill would clarify the Attorney General's authority to bring such actions.

(c) The legal resources and expertise which the Attorney General's office could draw upon in dealing with this difficult and complex field must be considered superior to the quality of assistance generally available to localities. This should result in more successful prosecuti of antitrust cases. In addition, the stigma connected with even the threat of an investigation by the Attorney General could be a significant deterrent to firms who deal with political subdivisions and public authorities.

5. Possible objections:

(a) It should be noted that the language relating to the Attorney General's power to retain funds to meet the cost of his services from damages recovered is permissive rather than mandatory. The State would bear the full cost should the Attorney General decide not to charge the political subdivision serviced.

Date: Examiner:

Disposition: Chapter No: Veto No.

5. Possible objections (Cont'd.):

(b) The bill contains no prescribed procedure for a request from a locality. The Attorney General would presumably wish to investigate all requests, even those based on vague suspicions. Those deemed inappropriate for prosecution would still represent a cost to the State, without recovery of such costs from the locality.

(c) This legislation may be unnecessary since, as noted in 4(b), the Attorney General has brought actions on behalf of individual localities in the past without challenge.

(d) It should be pointed out that some protection in this area would seem to be afforded localities by the existing provisions of law that permit local subdivisions to purchase under the terms of State negotiated contracts any goods and services for which the State has a contract.

6. Other State agencies interested: We understand that the Office for Local Government recommended against this bill before it was recalled from the Governor. This bill is part of the Department of Law's legislative program.

7. Known position of others: None are known; however, it is recommended that opinions on the bill be solicited from the Conference of Mayors, the Association of Towns and other local organizations.

8. Budget implications: It may be assumed that enactment of this bill would result in an increased workload for the Attorney General.

The amount of such an increase cannot be estimated at this time but could necessitate some expansion of the present staff. No provisions have been made for such an eventuality in the 1969-70 Budget.

9. Recommendation: The Division of the Budget believes the services authorized by the Attorney General for political subdivisions and public authorities of the State are desirable, and therefore recommends approval of this bill.

K. L. Dunbar

Date: May 22, 1969 Examiner: Michael J. Duffley

MJD:mec

Disposition:

EXHIBIT C

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

MEMORANDUM FOR THE GOVERNOR

Re: Assembly 2881-A

This bill, effective immediately, expressly authorizes the Attorney General to bring an action on behalf of political subdivisions and public authorities in the State to recover damages for violations of the antitrust laws.

The bill is part of the Attorney General's legislative program.

The bill provides that in addition to existing statutory authority to bring antitrust damage actions on behalf of the State and public authorities, the Attorney General may also 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 violation of the Donnelly Act (Gen. Bus. Law, §340) or the federal antitrust laws.

In recent years the Attorney General has commenced actions in the Federal courts under the Clayton Act (15 U.S.C.A. §15) on behalf of the State and the Thruway Authority to recover treble damages incurred as a result of alleged violations of the Sherman Act (15 U.S.C.A. § 1) in the procurement of various products and services. Public Authorities Law, § 362, authorizes the Thruway Authority to request such legal services; statutes relating to other public authorities do not so expressly provide.

In many instances it has come to the attention of the Attorney General that political subdivisions and public authorities, including, among others, counties, cities, towns and school districts, may have incurred damages for alleged antitrust law violations. The proposed express authorization to the Attorney General to bring an action on behalf of such political subdivisions and public agencies will remove any doubt as to the authority of the Attorney General to bring such actions on their behalf and thus afford to them the opportunity to sue to recover damages which they would not otherwise do because of the lack of adequate funds or personnel to prosecute such complex and expensive litigation. Such authority will promote uniformity in the interpretation and enforcement of the antitrust laws.

I find no legal objection to this bill and recommend its approval.

Dated: APR 29 1969

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

EXHIBIT D

MEMORANDUM

Leonard F. Bersani
Assemblyman
118th A. D.

A 2881

AN ACT to amend the general business law, in relation to authorizing the attorney general to bring action on behalf of political subdivisions and public authorities of the state to recover damages for violations of antitrust laws.

This bill, recommended by the attorney general, expressly authorized the attorney general to bring an action upon request and on behalf of any political subdivision or public authority of the state, pursuant to the provisions of New York State or Federal laws, to recover damages for violations of the federal or state antitrust laws. Such authorization would be in addition to existing statutory authority to bring such actions on behalf of the state and any public authorities.

In recent years, the attorney general has commenced actions in the federal courts under the Clayton Act (15 U.S.C.A. § 15) on behalf of the state and the Thruway Authority to recover treble damages incurred as a result of alleged violations of the Sherman Act (15 U.S.C.A. § 1) in the procurement of various products and services. Public Authorities Law, § 362, authorized the Thruway Authority to request such legal services; statutes relating to other public authorities do not so expressly provide.

In many instances, it has come to the attention of the attorney general that political subdivisions and public authorities, including, among others, counties, cities, towns and school districts, may have incurred damages for alleged antitrust law violations. The proposed authorication to the attorney general to bring an action on behalf of such political subdivisions and public agencies will afford to them the opportunity to recover damages which they would not otherwise have because of the lack of adequate funds or personnel to prosecute such complex and expensive litigation. Such authority will promote uniformity in the interpretation and enforcement of the antitrust laws.

This bill is part of the legislative program of the attorney general.

EXHIBIT E

JUN 16 1975

2476/2476

MEMORANDUM

Re: Senate

Assembly

AN ACT to amend the general business law, in relation to the recovery of damages by the attorney general, to provide for notice in class actions brought on behalf of subordinate governmental entities

This bill, recommended by the Attorney General, would amend the General Business Law by adding a new sentence to § 342-b thereof that would clarify the manner in which the Attorney General may be requested to bring class actions on behalf of subordinate governmental entities within the state. The bill would take effect immediately.

The new sentence provides that in any class action brought by the Attorney General on behalf of subordinate governmental entities for violations of state or federal antitrust laws, 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 class member in that action.

Essentially, this bill confirms the right of the Attorney General to maintain antitrust class actions on behalf of these entities without first having to solicit the express approval of every potential class member before filing a lawsuit. All that is required is that due notice of the action be given to potential governmental class members and that each entity have an opportunity to decide for itself whether or not it wishes to participate in the lawsuit. Any entity not wishing to participate may exclude itself from the action. Those entities who wish to participate need do nothing in order to avail themselves of the Attorney General's services.

This will bring 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.

In addition to whatever authority the Attorney General may possess under federal law, the bill is intended to confirm his authority to maintain governmental class actions in the state or federal courts as a matter of state law. It is further intended to defeat any possible claims that: (1) by maintaining a class action without the express prior approval of every class member, he may have failed to comply with the requirements of § 342-b as presently drafted; or that (2) by soliciting the express prior approval of class members, he may have failed to comply with the federal prohibitions against solicitation in class actions.

This bill is part of the legislative program of the Attorney General.

EXHIBIT F

C.S

MEMORANDUM

STATE OF NEW YORK — DEPARTMENT OF STATE

JUN

DATE: June 27, 1975

TO: Hon. Judah Gribetz — OFFICE: Counsel to the Governor

FROM: Mario M. Cuomo — OFFICE: Secretary of State

SUBJECT: A. 3546 (Mr. Harenberg)
Recommendation: No Objection

We have your request for our comments on the above bill.

This bill, introduced at the request of the State Department of Law, amends the Donnelly Act (N.Y. General Business Law Article 22 (McKinney 1968, McKinney Supp. 1974-1975)) to increase the damages and penalties therein to be similar to such provisions under federal anti-monopoly laws. The bill also requires a notice of intention to commence an action to be given to the Attorney General at least ten days prior to the commencement of such action where the aggrieved party is a political subdivision or a public authority.

This bill will make it possible for political subdivisions and others to utilize the provisions of the Donnelly Act in cases where they now must sue under the federal statutes because of the low penalties imposed under the New York law.

We are informed by the Attorney General's office that the reason for requiring political subdivisions and public authorities to file a notice of intention to commence an action under section 340 is so that they will be able to coordinate prosecutions with the Attorney General's office. While the Attorney General was authorized to bring actions under the Donnelly Act on behalf of political subdivisions by L. 1969, c. 635 (N.Y.), if a political subdivision brings its own action it may be unaware of investigations and legal actions contemplated by the Attorney General. The notice required by this bill will give an opportunity for the Attorney General to consult with a political subdivision on such actions prior to their commencement. The decision to proceed independent of the Attorney General's office, however, is retained by the political subdivision.

Failure to file such notice should not jeopardize the legal action, since the requirement to file the notice is not intended to affect any substantive right. In the case of Columbia Gas v. New York State Electric and Gas Corp., 1971, 28 N.Y.2d 117, 320 N.Y.S.2d 57, itwas held that failure of a plaintiff to allege in his complaint that notice of commencement of an action under the Donnelly Act had been given the Attorney General (as is presently required, but without the 10-day time limit provided by this bill) does not render the complaint defective. The Court of Appeals held that the notice requirement was informational and not a condition precedent to the plaintiff's cause of action.

The immediate effective date of this bill does not present any problem.

Since this bill will facilitate prosecutions under the state anti-monopoly laws and will allow the coordination of legal actions, we have no objection to its approval.

We defer to the Attorney General's office on the appropriateness of the criminal penalty provided.

ACB:mm
cc: Leonard Schwartz
John Dugan