IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

INTEL CORPORATION'S REPLY BRIEF IN SUPPORT OF ITS MOTION UNDER RULE 17(a), RULE 12(b)(1), 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
633 Battery 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

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

(Signature block continues on next page)

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: August 17, 2011
1024439/29282

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INTRODUCTION

New York General Business Law § 342-b provides that New York may "bring action on behalf of any political subdivision or public authority of the state upon the request of" that non-state public entity. None of the 4,000 legally separate non-state public entities (the "Public Entities") that New York purports to represent ever made such a request. Thus, resolution of this issue hinges on New York's contention that the legislature's express directive that New York may bring a case "upon . . . request" somehow vested New York with the authority to act in the absence a request. New York's arguments flatly contradict the plain language of the statute and flout long-settled principles of statutory construction. Indeed, all three courts to have considered these arguments have easily rejected them, including in a case decided just two weeks ago. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C11-00711SI, slip op. at 7-8 (N.D. Cal. Aug. 9, 2011) ("*TFT-LCD*") (Ex. A hereto); *see also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486, 2007 WL 2517851, at *7 (N.D. Cal. Aug. 31, 2007); *New York v. Cedar Park Concrete Corp.*, 665 F. Supp. 238, 242 (S.D.N.Y. 1987). And because New York has failed to explain why its fourth violation of § 342-b is understandable, excusable, or curable, this Court should dismiss New York's suit on behalf of the Public Entities with prejudice.

ARGUMENT

A. NEW YORK MUST RECEIVE A "REQUEST" UNDER § 342-b FROM EVERY PUBLIC ENTITY IT WISHES TO REPRESENT IN THIS SUIT

In determining the scope of a statue, unambiguous statutory language is conclusive. *See Lloyd v. Grella*, 83 N.Y.2d 537, 546 (1994). Section 342-b is not even slightly ambiguous.[1]

[1] Section 342-b provides: "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

[Footnote continued on next page]

First, the prefatory "[i]n addition to" clause clarifies that § 342-b supplements any "existing statutory authority" to bring actions "on behalf of the state and public authorities." Second, the "upon the request of" clause explains that New York can bring an individual action on behalf of entities that "request[ed]" to be represented.[2] Third, under the class action clause, New York may use a notice and opt-out procedure if it chooses to bring its suit as a class action.

New York argues (Opp. 4-8) that because of the prefatory "[i]n addition to" clause, New York never needs to obtain requests under the "upon the request of" clause. *Id.* This argument cannot be squared with the statutory text. By referencing "existing statutory authority," the prefatory clause recognizes that § 342-b does not override procedures that may be available under other statutes. But this clause does not establish the existence of some unidentified, pre-existing authority that always allows New York to bring suit on behalf of non-state public entities. Reading this clause as if it does would render § 342-b's remaining provisions meaningless. Such an interpretation would thus contradict the maxim that "all parts of a statute are intended to be given effect and that a statutory construction [that] renders one part meaningless should be avoided." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 515

[Footnote continued from previous page]
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." (Emphasis added).

[2] Contrary to New York's intimations, Intel is not arguing that such an "individual action" would foreclose New York from representing multiple entities in the same suit. Opp. 7. Intel is merely using New York's own description, *see* N.Y. Br. as *Amicus Curiae* at 12–13, n.2, *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007) (Ex. B hereto), of the type of suit that New York can bring "upon the request of" any number of public entities that ask to be represented.

(1991); *see also* N.Y. Constr. & Interpretation Law § 98 ("effect and meaning must, if possible, be given to the entire statute and every part and word thereof").

Section 342-b plainly states that New York may bring an action "upon the request of" a political subdivision or public authority. A "request" is "the act of asking for something." Webster's Third New International Dictionary 1929 (3d ed. 1988). Giving the words the legislature used their "ordinary meaning," *Sega v. New York*, 60 N.Y.2d 183, 190-91 (1983), it is clear that New York cannot bring a case on behalf of any public entity without an affirmative act; *i.e.*, a "request." Indeed, had the legislature intended to confer upon New York full discretion to bring lawsuits on behalf of non-state entities, it would have done so in the usual manner: the statute would have expressly so provided and would not have required a request.[3]

New York cites no authority to support its attempt to read the "upon the request of" clause out of the statute. Indeed, the three cases that have addressed that provision have rejected New York's theory. The *Cedar Park* court permitted New York to bring suit only on behalf of the one entity that signed an affidavit affirming "that the organization has requested that the Attorney General pursue its antitrust claims" and dismissed New York's claims on behalf of all of the remaining entities. 665 F. Supp. at 241-42. The court in *In re DRAM* dismissed a suit by New York on behalf of numerous public entities because "these government entities must be specifically identified, and it must affirmatively be demonstrated that they have 'requested' that

[3] In an attempt to evade the fact that its interpretation would render § 342-b meaningless, New York suggests that § 342-b was enacted to "provide[] the non-state public entities the ability to request representation." Opp. 6. But this does not support New York's tortured reading because it fails to explain why a statute would be needed to authorize entities to ask the attorney general to perform what New York believes is a wholly discretionary function.

the Attorney General bring suit on their behalf." 2007 WL 2517851, at *7 (emphasis added).[4] And, just two weeks ago, the court in *TFT-LCD* dismissed New York's claim on behalf of public entities because "[t]he State does not allege, nor does it provide evidence in its briefing materials, that any of the subordinate governmental entities it purports to represent have requested such representation." *TFT-LCD*, No. C11-00711, slip op. at 8. Although New York argued in *TFT-LCD*, just it does here, that "it satisfied the representation request requirement by giving state government entities 'due notice' of its plans to sue on their behalf," the court held this procedure does not apply where "the lawsuit is not a class action." *Id.*

New York's only response to *Cedar Park* and *In re DRAM* is to argue that those cases "focused on whether New York expressly identified in its complaint, or at all, which non-state public entities it was representing." Opp. 11. But both courts held that New York must receive requests and identify entities that made requests. *See supra* 3-4.[5] And in *TFT-LCD*, the court held that New York could not represent the public entities, even though it had identified them, because they had not asked the state to represent them. *See* N.Y. Opp. To Def.'s Motion to Dismiss at 17, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:11-cv-711 (N.D. Cal. July 29, 2011) ("New York . . . provided to Defendants a list of all entities which it represents."). (Ex. C hereto).

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[4] In quoting this passage from *In re DRAM*, New York omitted the crucial last half of this sentence through the use of ellipses. *See* Opp. 11 n.8.

[5] New York (Opp. 14) points to *In re Certified Question From the U.S. District Court for the Eastern District of Michigan*, 638 N.W.2d 409 (Mich. 2002), but the statute there did not even mention requests. New York (Opp. 14) also cites *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827, 2011 WL 1363786 (N.D. Cal. Apr. 11, 2011), which similarly addressed statutes that lacked request requirements. Indeed, when the *TFT-LCD* court considered § 342-b, it categorically rejected New York's position, as shown above.

New York's next challenge to the statute's plain meaning is that the words the New York legislature selected were not faithful to its intent. *See* Opp. 5-6. But New York cannot employ legislative history to overcome the plain meaning of § 342-b. Where, as in this case, the language of the statute is clear and unequivocal, there is no need to resort to legislative history. *See Lloyd*, 83 N.Y.2d at 546 ("[T]he court should look no further than unambiguous words and need not delve into legislative history."). In any event, New York's rendition of the legislative history misstates the legislature's intent. Section 342-b's history explains that this provision's goal was to go "one step further" beyond existing authority (Bill Jacket, L. 1969, c. 635, Memo. Hon. Robert R. Douglas (March 24, 1969)), in order to "clarify" the circumstances under which New York may bring actions on behalf of non-state public entities (Bill Jacket, L. 1969, c. 635, Budget Report on Bill 2881-A (May 22, 1969)). The clarification is contained in the words of the statute. Nothing in this legislative history suggests an intent to authorize New York to sue on behalf of non-state public entities that do not ask to be represented, except as a class action pursuant to the procedures that the statute prescribes for such actions.

B. NEW YORK'S OPT-OUT PROCEDURE FAILS TO SATISFY § 342-b

New York claims that it has nonetheless complied with § 342-b because on May 25, 2010—six months after filing this suit—it sent the Public Entities an opt-out notice, informing them it had brought this suit. This notice—which appears to be identical in all relevant respects to the opt-out notice that New York sent in *TFT-LCD*—does not satisfy § 342-b's "request" requirement. *See* N.Y. Opp. To Def.'s Motion to Dismiss at 17, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:11-cv-711 ("New York has given written notice to over 4,000 State and non-State public entities regarding this case, informing them that New York intends to represent them in this litigation and offering them the opportunity to opt out.").

The failure to respond to an opt-out notification is not a "request" under § 342-b's "upon the request of" clause. A "request" is "the act of asking for something." Webster's Third New International Dictionary 1929. An entity that passively receives an opt-out email notice six months after a lawsuit has been filed on its behalf, and does nothing in response, has not engaged in any "act," let alone the "act of asking" for representation. And if there were any possible doubt, § 342-b's class action clause would dispel it. That clause states that "[i]n any class action . . . any governmental entity that does not affirmatively exclude itself from the action, upon due notice thereof, shall be deemed to have requested" to be part of the class. (Emphasis added). The phrase "deemed to have requested" is an unambiguous recognition that the failure to opt-out of a suit is not a "request" unless it is "deemed" to be one by special legislative authorization.

Indeed, *TFT-LCD* rejected New York's use of just such an opt-out notice, explaining that "the State cannot succeed in substituting 'due notice' directed at the government entities for a request for representation from those entities because the lawsuit is not [a] class action." *TFT-LCD*, No. C11-00711, slip op. at 8. Similarly, *Cedar Park* and *In re DRAM* rejected New York's reliance upon § 342-b's class action clause. *In re DRAM*, 2007 WL 2517851, at *3; *Cedar Park*, 665 F. Supp. at 242. New York cites no case authorizing a rewrite of § 342-b's plain language.

In enacting § 342-b, the legislature offered New York two paths for bringing antitrust cases on behalf of non-state public entities: (1) New York can bring an individual action on behalf of entities that request representation (either on the entities' own initiative or in response to New York's solicitation of such requests); or (2) New York—if it feels that asking for affirmative requests would be too burdensome—can comply with class action requirements, including use of § 342-b's opt-out procedure. There is nothing "internally inconsistent" or "absurd," Opp. 9, 12, about honoring the New York legislature's choice. *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."). Here, New York chose not to include the requisite class allegations in its complaint and has made no effort to comply with the requirements of Federal Rule of Civil Procedure 23 (and the time for seeking certification of any such class would, of course, be long past). Therefore, New York cannot claim the benefits of § 342-b's class opt-out procedure.[6]

C. THE EXECUTIVE LAW DOES NOT INDEPENDENTLY AUTHORIZE NEW YORK'S SUIT

New York invokes Executive Law §§ 63(1), 63-c(1), and 63(12) as alternative authorization for its claim on behalf of the Public Entities. Opp. 14-15. To begin with, New York's Donnelly-Act-based Executive Law claim seeks relief only on behalf of "natural persons," not the Public Entities. Compl. ¶ 272. New York's argument is therefore a non-sequitur. In any event, these provisions provide no basis for a suit on behalf of the Public Entities for the reasons explained in *In re DRAM*, 2007 WL 2517851.

Section 63(1) of the Executive Law merely provides that New York may prosecute "all actions and proceedings in which the state is interested." It "nowhere mentions suit on behalf of government entities, let alone authorizes representative actions on behalf of the government entities." *In re DRAM*, 2007 WL 2517851, at *6.

Section 63-c(1)—the "Tweed Law"—authorizes suit on behalf of public entities to recover public property that has been unlawfully "obtained, received, converted, or disposed of." It "is limited to violations of the section itself, which allows the Attorney General to bring a

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[6] Even if New York had tried to allege and pursue a valid class action (which it plainly did not, *see* Opening Mem. 7 n.5), its May 25 notice would not have satisfied § 342-b's "due notice" requirement. New York's "notice," among other deficiencies, failed to describe the basis for New York's allegations and did not explain the res judicata effect of any judgment. And New York's reference to "three telephonic calls" that it allegedly held with some unnamed Public Entities (Opp. 10) is plainly insufficient, as class notice cannot be given orally.

claim wherever state or local government entities have had public funds or property unlawfully converted or appropriated." *In re DRAM*, 2007 WL 2517851, at *6; *see, e.g.*, *State v. Seventh Regiment Fund*, 822 N.Y.S.2d 383 (N.Y. Sup. Ct. 2006) (suit to recover unlawfully sold military artifacts). New York has not alleged that Intel unlawfully converted government property and has not invoked its authority under § 63-c(1). Nor does New York's citation to *New York v. Grecco*, 800 N.Y.S.2d 214 (N.Y. App. Div. 2005), support its position. Opp. 15. In *Grecco*, New York brought suit under § 63-c(1) to recover overpayments resulting from a particular municipal land purchase. The passage New York quotes merely rejected the argument that New York "may invoke the Tweed Law only when a municipality otherwise refuses to act upon a viable basis for recovery, or upon allegations that every relevant municipal official was involved in the targeted wrongful conduct." *Id.* at 221. *Grecco* did not hold that New York may bring an action on behalf of non-state public entities for violations of the Donnelly Act without complying with § 342-b's "request" requirement and without even asserting a § 63-c claim.

Section 63(12) permits suit only "in the name of the people of the state of New York," which is not an authorization to bring suit on behalf of non-state public entities. *See In re DRAM*, 2007 WL 251785154, at *9. This is no doubt why, in the present case, New York asserted a § 63(12) claim only on behalf of "natural persons," and specifically excluded the Public Entities from that cause of action. Compl. ¶ 272.

Finally, if the Executive Law permitted New York to bring a suit on behalf of any non-state public entity for any violation of law, New York would never need to follow § 342-b's "request" procedures (or, for that matter, its class action procedures). This would render § 342-b meaningless, in violation of New York rules of statutory interpretation. *See Rocovich*, 78 N.Y.2d at 515; *see also* N.Y. Constr. & Interpretation Law § 98.

D. BECAUSE NEW YORK'S FAILURE TO OBTAIN REQUESTS IS INEXCUSABLE, THIS COURT SHOULD DISMISS ITS SUIT ON BEHALF OF THE PUBLIC ENTITIES WITH PREJUDICE

New York's failure to abide by § 342-b means that it has no authority to represent the Public Entities, is not the real-party-in-interest, and lacks both constitutional and prudential standing. Opening Mem. 8-14. Under Third Circuit law, when a party brings a suit in which it is not the real-party-in-interest, that party is permitted to amend its complaint only in two circumstances: "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); Advisory Committee Notes on the 1966 Amendments to Fed. R. Civ. P. 17 (same). Neither exception applies. New York's failure to follow § 342-b is inexcusable in light of the plain language of that provision. Particularly after New York had been put on notice that its interpretation of section 342-b was meritless by *In re DRAM* and *Cedar Park*, New York can have no possible justification for its failure to receive the required requests before bringing the present suit. Opening Mem. 9-11.

New York responds that this Court should ignore its recidivism because New York did not circumvent the statute of limitations and because Intel will not be prejudiced by allowing belated requests. Opp. 18-19. First, nothing in the Third Circuit's decision in *Gardner* implied that a litigant could violate the real-party-in-interest requirement with impunity as long as it did not do so in order to evade the statute of limitations. *See Gardner*, 544 F.3d at 563. Second, as this Court noted in denying another attempt by New York to expand the parties it represents, New York's lack of authority to bind the parties it purports to represent could prevent "Intel from relying on any judgment in this case for res judicata purposes, compounding the prejudice to Intel." Mem. Order Denying N.Y.'s Motion For Leave to Amend Complaint, May 12, 2011, at 8. And although New York argues that it has provided Intel with a list of the Entities it purports

to represent, Opp. 12, that argument merely assumes what is in dispute—that New York has authority to represent those Entities.

Third, the plain text of the statute does not permit New York an opportunity to cure at this late hour. Section 342-b states that New York may "bring action" "upon the request of" non-state public entities. The word "upon" requires a proper sequence for, or at least proximity in time between, New York's "bring[ing]" of the action and the "request." The statute does not permit New York to purportedly "bring action" on behalf of (likely unknowing) entities, and seek validation of its unauthorized action long after the fact.

Finally, giving New York an opportunity to seek the requests now would unfairly delay the resolution of this case. New York filed this suit in November 2009, but it never bothered to obtain requests from any of the Entities before filing suit or in the twenty months since. Now, just months before the start of a possible trial, and with multiple case-dispositive motions pending or soon-to-be filed, New York asks this Court for permission to comply—at long last—with the law. In contrast, Intel took diligent steps to determine the accuracy of New York's assertion of authority to represent the Entities, including sending numerous letters and discovery requests on this subject, before obtaining permission from this Court to file this motion. *See* Intel Mem. 3-5. And New York does not bother to explain what procedures could be used to obtain requests, at this late hour, without delaying this case, especially in light of the fact that the universe of Entities allegedly harmed by Intel's conduct would be materially different and would thus require potentially significant changes to the expert reports.

CONCLUSION

For the foregoing reasons, this Court should grant Intel's motion to dismiss New York's claims on behalf of the Public Entities with prejudice to New York filing such a claim again.

OF COUNSEL:

Robert A. Van Nest
Paula L. Blizzard
Brook Dooley
KEKER & VAN NEST
633 Battery 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: August 17, 2011
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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

Attorneys for Defendant Intel Corporation