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DIVISION OF ECONOMIC JUSTICE
EXECUTIVE BUREAU

December 22, 2011

By ECF E-Filing
The Honorable Leonard P. Stark
United States District Judge
J. Caleb Boggs Federal Building
844 N. King Street, Unit 26, Room 6100
Wilmington, DE 19801-3556

Re: *State of New York v. Intel Corporation,* Case No. 09-cv-00827 (LPS)

Dear Judge Stark:

As discussed during our December 15 teleconference, given the combination of the conservative methodology employed by New York's expert to calculate damages and Your Honor's recent decision on statute of limitations, New York is no longer able to proceed before Your Honor with its claim for damages under its state's laws. New York's claims for equitable relief were not dismissed and New York retains damages claims under federal law, but those are much smaller in amount. As ordered, we write to propose a path forward for this case.

Proposal

New York proposes that it dismiss its federal law claims thereby divesting the court of original jurisdiction. Thereafter, the Court should dismiss the state law claims without prejudice. New York may then file in New York state court to seek whatever remedies are available to it there.

Because this proposal would entail the dismissal of certain claims now, it limits the claims against Intel, avoids any additional expenditures of resources and time in this District on this case, and allows New York State, its agencies and citizens their day in court to address their meritorious claims of illegal anti-competitive conduct committed by Intel against New York State, its agencies and political subdivisions, and its citizens.

The Court Should Dismiss the Case for Lack of Original Jurisdiction

Because States are not subject to diversity jurisdiction, the Court cannot retain the case based on diversity. *See* Wright & Miller § 3602 ("It is well settled by decisions of courts at all levels of the federal judiciary . . . that a state . . . is not a citizen for purposes of Section 1332.");

see also Moor v. County of Alameda, 411 U.S. 693 (1973) (same). Without federal question or diversity jurisdiction, the Court no longer has original jurisdiction. And because judicial economy, convenience and fairness do not weigh in favor of the Court retaining the claims under supplemental jurisdiction, Your Honor should dismiss New York's state law claims without prejudice for lack of original jurisdiction.

Whether a court decides to exercise supplemental jurisdiction is within its discretion.[1] But, the Third Circuit has stated "where the claim over which the district court has original jurisdiction is dismissed before trial, the district court ***must*** decline to decide the pendent state claims ***unless*** considerations of judicial economy, convenience and fairness to the parties provide an affirmative justification for doing so." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) (emphasis added); *see also Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir.1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed."); 16 Moore's Federal Practice Civil § 106.66. This concept stems from United States Supreme Court precedent:

> "Certainly, if the federal claims are dismissed before trial ... the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals."

United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966).

This Court recently acknowledged these concepts in *Thomas v. Board of Educ.*, 759 F. Supp. 2d 477, 498, 499 (D. Del. 2010), stating, "[g]enerally, where, as here, all substantive federal claims are resolved prior to trial, the primary justifications for retaining jurisdiction over state law claims are no longer viable. In *Thomas*, this Court retained jurisdiction but noted that the retention of that case under supplemental jurisdiction was "rare," and befitting the "unique" circumstances of that case. We submit that unlike *Thomas*, this is not one of those rare or unique cases.

Judicial Economy Weighs in Favor of Dismissal

First, unlike in *Thomas*, the claims at issue here are not Delaware state law claims – Delaware federal courts have no interest in adjudicating New York state law claims brought by a separate state sovereign that do not involve acts committed in Delaware. *See, e.g., Zeglen v. Miller*, 2008 WL 696940 *11 (M.D. Pa. 2008) (holding that federal courts have no interest in deciding any state law claims); *Duke/Fluor Daniel Caribbean v. Alston Power*, 2004 WL 2095702 (D. Del. 2004) (holding *inter alia* that court resources should be available first for the adjudication of federal claims). Indeed, it is well-settled as a matter of comity that decisions on

[1] The Supreme Court explains the doctrine of discretion by noting that "[supplemental] jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Of course, in this instance, the plaintiff is not advocating for the Court to retain supplemental jurisdiction.

issues involving state law are better left to the state courts. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. at 726 ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."); *Johnson v. Cullen*, 925 F. Supp. 244, 252 (D. Del. 1996) (dismissing state law claim without prejudice for lack of subject matter jurisdiction at summary judgment stage where federal claims were barred).

Second, while we recognize and appreciate the time and energy that the Court has devoted to discovery disputes and the other recent motions in this case, the issues to date have largely been procedural. In *Thomas*, by contrast, the Court retained jurisdiction, in part, because "resources [were] devoted to presiding over mediation and later preparing for and hearing oral argument on – and writing this opinion – resolving the pending motion for summary judgment." 59 F. Supp. 2d at 499. These facts do not exist here. The Court has not had the opportunity to mediate this dispute, and although motions for summary judgment are pending, oral argument has not been set or heard. *See also Untracht v. Fikri*, 454 F. Supp. 2d 289, 327-28 (W.D. Pa. 2006) (declining to retain jurisdiction even after the close of discovery and decisions on multiple motions including summary judgment). Indeed, Intel is currently supplementing one of those summary judgment motions, which will lead to further briefing.

Third, unlike in *Thomas* or in other supplemental jurisdiction cases, the Court has made no determination that the federal claims are without merit and should be dismissed. Here, the State is proposing their dismissal, which in itself saves resources. This result actually creates numerous efficiencies that would otherwise require the investment of substantial additional judicial resources and time. As referenced above, Intel's summary judgment motions are pending, including the one currently being supplemented (which the Court could not even consider until further briefing is complete). Also, pending are Intel's Daubert motion, and seven motions in limine. Without a dismissal, there could be significant motion practice in anticipation of an appeal. The appeal itself would require the use of the Third Circuit's time and resources. In addition, New York has claims for injunctive relief that have not yet even reached the briefing stage, and would require a separate bench trial. Finally, there is the matter of the trial to the jury. A trial of the federal claims would require presentation of the same liability evidence as a trial of both the state and federal claims together; thus, the most efficient result for all parties involved is to try the case only once in one forum. Proceeding with New York's federal claims would require trial of those claims in February, or once an appeal on the state law claims was decided (together with the state law claims if New York prevailed), or potentially twice (once in February and a second time if New York prevailed after appeal). New York's proposal economizes on these expenditures of the Court's resources. Considered as a whole, the efficiencies do not weigh in favor of retaining jurisdiction.

Fairness Weighs in Favor of Dismissal

A fair result allows New York its day in court. Cases are routinely brought in a second court when dismissed in the first court on procedural grounds such as those at issue here.[2]

[2] Dismissal on statute of limitations grounds does not bar refiling, particularly in a State with strong contacts with the case. *See Semtek Int. Inc. v. Lockheed*, 531 U.S. 497, 504 (2001) ("The traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that

Indeed, most states have statutes known as "savings" statutes that allow this very outcome. *See, e.g.*, N.Y. C.P.L.R. §205; Del. Code Ann. tit 10, § 8118. Cases often cite to an opinion by Justice Cardozo in *Gaines v. City of New York*, 215 N.Y. 533, 109 N.E. 594, 596 (1915), describing the rationale behind these statutes:

> These savings statutes are "designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts."

(*cited by Leavy v. Saunders*, 319 A.2d 44 (Del. Super. Ct. 1974)). Justice Cardozo's statement reflects the long-standing public policy that cases should be tried on their merits even if they have to be filed elsewhere.

This is especially applicable here where a State has brought an enforcement action in its sovereign and quasi-sovereign capacities to address what it believes is Intel's egregious and illegal conduct. This belief is not just held by New York. In 2010, the Federal Trade Commission reached a settlement with Intel enjoining it from specific conduct; the European Commission adopted a decision finding that Intel abused its dominant position in the x86 market and imposed a penalty of 1.06 billion Euros;[3] and Intel voluntarily settled with AMD for $1.25 billion and additional injunctive relief. Each one of these outcomes was based on essentially the same conduct at issue here; but, none resulted in any compensation to New York victims. As the chief legal officer for New York State, we brought these claims under New York law to deter unlawful conduct and redress harm to the State, its agencies and political subdivisions, and New York citizens that was caused by Intel's business practices. We are prepared to demonstrate at a trial that the New York claims have merit, and thus should be afforded the opportunity to try them to a jury.

Dismissal Causes No Inconvenience to the Parties; Intel Will Not Be Prejudiced

Undoubtedly, Intel will argue that New York's proposal requires them "to start over," and as such it is inconvenient. However, those arguments are without merit. To be sure, once in state court, Intel would be obliged to try the case that was brought. But that is true in any event; Intel would have to try this case even if it remained in federal court. Indeed, Intel cannot seriously contend that it is inconvenienced (or unfairly treated) by having to answer New York's

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dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods."); *Reinke v. Boden,* 45 F.3d 166, 170-72 (7th Cir. 1995) (permitting an action dismissed on statute of limitations grounds in Minnesota to be brought under Illinois law because "the Minnesota courts' conclusion that the cause of action is barred by its statute of limitations is . . . nothing more than a determination that the action is time-barred in Minnesota"); *Equity Corp. v. Groves,* 30 Del. Ch. 68, 53 A.2d 505, 507 (1947) (applying "general rule" that "the statute of limitations merely affects the complainant's remedy *in the State in which the suit is brought,* and not the right of the matter involved in the action"). Thus, the Court's statute of limitations decision will not preclude a separate action by New York.

[3] Intel has filed what is known as an application for annulment, which is pending.

allegations of its illegal conduct. Moreover, the parties would not "start over" – discovery is complete and trial preparation is under way. None of that work need be redone. *Iseley v. Beard*, 2009 WL 1675731 *11 (M.D. Pa. 2009) (declining to assert supplemental jurisdiction and dismissing state law claims ruling that any discovery already completed can "be used in the state courts").

Whether this case is tried in state court or federal court should make little difference to Intel – neither Intel's counsel or clients reside in Delaware, none of the witnesses reside in Delaware (in fact, the live witnesses are either experts, in Intel's control or agreed to appear voluntarily) and this case will largely be presented through depositions and documents, which can be presented just as easily in a New York state court. Moreover, Intel waited until May 2011 – nearly 18 months after the Complaint was filed – to raise issues of law, such as statute of limitations, that are better suited to an earlier motion. Had Intel made its motion earlier, these issues would have been decided long ago. Intel should not be heard to complain now. Considering all the circumstances, there will be no prejudice to Intel.

* * *

In the end, New York is not seeking anything beyond what it requested in its complaint – a chance for the case to be tried under its statutes using its statute of limitations for wrongful conduct committed in its State. Intel has not been prejudiced in that it has been fully aware of New York's case and will not be inconvenienced. New York should be given this opportunity.

We have consulted with Intel, which has declined to consent to this proposal. We look forward to discussing our proposal, and current settlement prospects, with Your Honor.

Respectfully Submitted,

Karla G. Sanchez

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Office