IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

INTEL CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS

OF COUNSEL:

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

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

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

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Intel asks this Court to grant summary judgment in its favor on New York's claims that fall outside the applicable limitations period. *See* Fed. R. Civ. P. 56(c). Resolution of the statute-of-limitations issue at this stage of the case is particularly desirable because it will have a significant impact on case management, discovery, expert reports, and trial planning. New York's attempt to seek relief for time-barred claims (which encompass more than half of the entire time period allegedly at issue) will unnecessarily complicate future proceedings in this case if not rejected now.

INTRODUCTION

New York alleges that Intel has monopolized a market for x86 microprocessors in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and, as a result, overcharged its customers, computer Original Equipment Manufacturers ("OEMs"). *See* Compl. ¶¶ 256–257. New York also makes claims based on the same factual allegations under New York's antitrust statute (the Donnelly Act), N.Y. Gen. Bus Law § 340(5), and under New York's Executive Law § 63(12), a statute allowing New York's Attorney General to seek relief with respect to certain "repeated fraudulent or illegal acts." *See* Compl. ¶¶ 260–264, 267–268, 271.

New York's claims fall into two categories: direct and indirect. The direct claims allege that Intel overcharged OEMs for microprocessors, and that the OEMs assigned to New York any antitrust claims that they might have under assignment clauses in New York's computer purchase contracts. *See* Compl. ¶ 251. New York makes these direct claims under both the Sherman Act and the Donnelly Act. *See* Compl. ¶¶ 258, 261.

New York's indirect claims allege that computer purchasers were indirectly overcharged because OEMs passed on microprocessor overcharges to consumers in the computer market. New York purports to bring these indirect claims both on behalf of itself, its local governments, and its agencies (as computer purchasers themselves) (the "Indirect Proprietary Claims"), and on

behalf of New York consumers who purchased computers (the "Indirect Representative Claims"). *See* Compl. ¶ 263. Because indirect claims are not cognizable under the Sherman Act, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the indirect claims are based entirely on state law. *See* Compl. ¶¶ 262–263, 268, 272.[1]

The Complaint was filed on November 3, 2009, but alleges anticompetitive conduct dating back to 2001, and [redacted] *See* Compl. ¶¶ 257, 260, 266, 270; Declaration of Daniel S. Floyd, Ex. A, Nos. 14 & 15. The applicable limitations periods are three years for the Donnelly Act and Executive Law claims and four years for the Sherman Act claims. Accordingly, most of the alleged injuries fall outside the applicable limitations periods, and Intel is entitled to summary judgment on all claims for alleged overcharges arising before November 3, 2006 (for the state-law claims) or November 3, 2005 (for the Sherman Act claims).

ARGUMENT

I. THE DELAWARE BORROWING STATUTE LIMITS ALL STATE LAW CLAIMS TO THREE YEARS.

Federal courts sitting in diversity, or exercising supplemental jurisdiction, apply the forum state's choice-of-law rules when deciding state law claims. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Chin v. Chrysler LLC*, 538 F.3d 272, 278 (3d Cir. 2008); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 857 (D.C. Cir. 2006); *In re Cendant*

[1] As Intel explains in its concurrently-filed Motion Under Rule 17(a), Rule 12(b)(1), and Rule 12(c) For Dismissal With Respect To Claims On Behalf Of Non-State Public Entities, New York has an inherent conflict of interest in seeking direct damages for itself while at the same time seeking indirect damages on behalf of other parties, because a double recovery is prohibited and thus any award would have to be apportioned between New York itself and the parties it seeks to represent. *See* N.Y. Gen. Bus. Law § 340(6). New York is not entitled to represent the non-State public entities in these circumstances.

Corp. Sec. Litig., 139 F. Supp. 2d 585, 602 (D.N.J. 2001). In this Court, the Delaware Borrowing Statute, 10 *Del. C.* § 8121, governs the limitations period applied to foreign state law claims. *See, e.g.*, *In re W.R. Grace & Co.*, 418 B.R. 511, 517 (D. Del. 2009).

The Borrowing Statute sets the limitations period of foreign state causes of action brought in Delaware courts to "whichever is shorter" as between the foreign state's limitations period or the limitations period for the analogous claim under Delaware law. 10 *Del. C.* § 8121; *see Plumb v. Cottle*, 492 F. Supp. 1330, 1336 (D. Del. 1980); *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 58 (Del. 1957). The statute of limitations for antitrust claims under the Delaware Antitrust Act, *see* 6 *Del. C.* §§ 2101–2114, is three years. *See* 6 *Del. C.* § 2111. The default limitations period for any "action based on a statute" not otherwise specified is also three years. 10 *Del. C.* § 8106. The Donnelly Act and the Delaware Antitrust Act are both antitrust laws, and are substantially similar to each other. Both are construed in conformance with federal antitrust law. *See RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F. Supp. 2d 218, 233-34 (E.D.N.Y. 2009), *aff'd*, 391 F. App'x 59 (2d Cir. 2010); 6 *Del. C.* § 2113. Moreover, it does not appear that any Delaware state or federal court applying the Delaware Borrowing Statute has ever declined to apply it (or the Delaware statute of limitations it points to) because of differences between the substantive law of Delaware and the foreign state. *See, e.g.*, *Burrell v. Astrazeneca LP*, Nos. 07C-01-412, 07C-04-110, 07C-04-267, 2010 WL 3706584, at *2-7 (Del. Super. Sept. 20, 2010) (not analyzing the substantive personal injury law of Delaware, Utah, New York, or California); *Cerullo v. Harper Collins Publishers, Inc.*, No. 01C-03-21-CHT, 2002 WL 243387, at *4 (Del. Super. Feb. 19, 2002) (not analyzing the substantive defamation law of Delaware or New York); *Youell v. Maddox*, 692 F. Supp. 343, 355 (D. Del. 1988) (not analyzing the substantive contract law of Delaware, Pennsylvania, or the District of Columbia). Thus, any differences between the

Donnelly Act and the Delaware Antitrust Act are irrelevant for purposes of the Borrowing Statute. Accordingly, the indirect claims brought under the Donnelly Act are subject to a three-year limitations period.

The Borrowing Statute also imposes a three-year limitations period on New York's claims under Executive Law § 63(12), which permits New York's Attorney General to seek relief with respect to certain "repeated fraudulent or illegal acts." The Executive Law claims here are founded upon alleged violations of the Sherman and Donnelly Acts. Compl. ¶¶ 267, 271. In substance, therefore, they are properly viewed as antitrust claims for purposes of identifying the most relevant Delaware limitations period, and are subject to Delaware's three-year antitrust limitations period. In any event, Delaware's limitations period for any "action based on a statute" is also three years. 10 *Del. C.* § 8106. Thus, all state law claims are subject to a three-year limitations period under the Borrowing Statute.

II. INTEL IS ENTITLED TO SUMMARY JUDGMENT ON ALL SHERMAN ACT DIRECT DAMAGES CLAIMS BASED ON OEM MICROPROCESSOR PURCHASES BEFORE NOVEMBER 3, 2005, AND ON ALL DIRECT STATE LAW DAMAGES AND PENALTIES CLAIMS BASED ON OEM MICROPROCESSOR PURCHASES BEFORE NOVEMBER 3, 2006.

New York's direct claims—which New York allegedly holds as assignee of claims the OEMs would have against Intel—arise under the Sherman Act and the Donnelly Act. The assignee of a cause of action takes it subject to any defenses that could have been raised against the assignor. *See, e.g.*, *Cirone v. Tower Ins. Co. of N.Y.*, 908 N.Y.S.2d 178, 179-80 (N.Y. App. Div. 1st Dep't 2010); *Am. Lumber Corp. v. Nat'l R.R. Passenger Corp.*, 886 F.2d 50, 55 (3d Cir. 1989). The limitations period for Sherman Act claims is four years. *See* 15 U.S.C. § 15b.

Sherman Act limitation periods may be tolled by actions brought by the federal government, including Federal Trade Commission proceedings. *See* 15 U.S.C. § 16(i); *N.J. Wood*

Finishing Co. v. Minn. Mining & Mfg. Co., 332 F.2d 346, 354 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965). But Sherman Act claims are generally not tolled by private litigation. *See* 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320, at 324 (3d ed. 2007) (citing *Shimazaki Commc'ns, Inc. v. AT&T*, 647 F. Supp. 10 (S.D.N.Y. 1986)). The only exception is that the filing of a private class action tolls Sherman Act limitations periods—for class members only, and only with respect to future individual actions—until class certification is denied or the class member opts out. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); 2 Areeda & Hovenkamp ¶ 320, at 324. The filing of a class action does not toll the limitations period with respect to a successive class action (except where the earlier class certification is denied "solely on the basis of the lead plaintiffs' deficiencies as class representatives"). *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004).

Although the Complaint does not mention them, three proceedings are potentially relevant to the issue of tolling. None of them operates to toll the limitations period for the direct claims. The first was a 2005 competitor suit by Advanced Micro Devices ("AMD"), which was neither brought by the federal government nor brought as a class action, and so can have no tolling effect. The second proceeding is the set of consolidated consumer class actions, also filed against Intel in 2005, that involve the indirect claims of computer consumers, not the direct claims of OEMs. Expressly excluded from the putative class are "purchasers of stand-alone microprocessors"—i.e., OEMs. *In re Intel Corp. Microprocessor Antitrust Litig.*, MDL No. 05-1717 (D. Del. Feb. 1, 2010), D.I. 2295, at 7. Thus, the OEMs are not parties in the consumer class action, and their claims (allegedly assigned to New York) could not have been tolled by *American Pipe* or *Crown, Cork & Seal*, which toll the limitations period for class members only.

A third action, brought by the FTC, was filed in December 2009. Because it was commenced after the filing of New York's complaint in this case, it cannot toll the limitations period here.[2]

Accordingly, Intel is entitled to summary judgment on all Sherman Act direct claims based on OEM microprocessor purchases occurring before November 3, 2005. Intel is also entitled to summary judgment on all Donnelly Act direct claims, including claims for civil penalties, based on OEM microprocessor purchases occurring before November 3, 2006.

III. INTEL IS ENTITLED TO SUMMARY JUDGMENT FOR INDIRECT CLAIMS BASED ON COMPUTER PURCHASES BEFORE NOVEMBER 3, 2006.

Because all of the indirect claims (Proprietary and Representative) are state-law claims, they are subject to a three-year limitations period under the Delaware Borrowing Statute, and the limitations period presumptively began on November 3, 2006.

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[2] Some courts have tolled the Sherman Act limitations period on a fraudulent concealment theory. *See* 2 Areeda & Hovenkamp ¶ 320e. The Complaint does not allege fraudulent concealment or any of its any elements, however. Nor would any such allegation be plausible. The theory of the direct claims is that Intel coerced OEMs through discounts, rebates, and threats to award contested sales to Intel, which allegedly elevated the prices that Intel charged its customers. The Complaint alleges that these discounts and rebates were provided, and the threats were communicated, directly to the OEMs. *See, e.g.*, Compl. ¶¶ 74, 87, 149, 202. Thus, Intel's allegedly illegal conduct and any resulting injuries were plainly known to the injured OEMs—the original holders of the direct claims—immediately. The lack of fraudulent concealment, evidenced by New York's failure even to allege concealment, dooms any attempt to toll the limitations period. *See* 2 Areeda & Hovenkamp ¶ 320, at 319; *Stolow v. Greg Manning Auctions, Inc.*, 258 F. Supp. 2d 236, 253 (S.D.N.Y. 2003), *aff'd*, 80 F. App'x 722 (2d Cir. 2003). OEMs were put on further notice of any antitrust injuries by June 2005, when AMD filed its suit, several months before the federal limitations period in this case commenced on November 3, 2005, and a year-and-a-half before the Delaware limitations period commenced with respect to the state-law claims. Where a party is put on notice of its claims by public documents, the limitations period will commence to run. *See* 2 Areeda & Hovenkamp ¶ 320, at 319 & n.159. The allegedly unlawful activity was not concealed from the OEMs, so there can be no tolling under a fraudulent concealment theory.

A. The indirect claims were not tolled by the AMD suit or the FTC proceeding.

The 2005 AMD suit and the 2009 FTC proceeding did not toll the limitations period for either the Indirect Proprietary Claims or the Indirect Representative Claims for the same reasons discussed in Part II above.

B. The indirect claims were not tolled by the consumer class action.

As noted above, *American Pipe*, *Crown, Cork & Seal*, and *Yang v. Odom* recognize a narrow exception to the usual rule against the tolling of Sherman Act claims. The consumer class actions filed against Intel do not satisfy that exception and hence did not toll either the Indirect Proprietary Claims or the Indirect Representative Claims in this case.

The 2005 consumer class actions did not toll the Indirect Proprietary Claims because New York, its agencies, and local governments were not class members. The putative class expressly excludes federal, state, and local government entities. *See In re Intel Corp. Microprocessor Antitrust Litig.*, MDL No. 05-1717 (D. Del. Feb. 1, 2010), D.I. 2295, at 7. *American Pipe* and *Crown, Cork & Seal* allow for tolling only of class members' claims.

Nor did the 2005 consumer class action toll the Indirect Representative Claims. First, there is no Delaware authority supporting the notion that representative claims brought by a state's Attorney General on behalf of state residents should be tolled by the earlier filing of a putative class action that included those same residents as class members. This Court should not create such a rule when it has not been adopted by Delaware. *See In re Fosamax Prods. Liab. Litig.*, 694 F. Supp. 2d 253, 258 (S.D.N.Y. 2010) ("[F]ederal courts generally have been disinclined to import [new] tolling [rules] into the law of a state that has not ruled on the issue.")

Second, *American Pipe, Crown, Cork & Seal*, and *Yang* support tolling only for follow-on individual actions, not for successive representative actions.[3] The Individual Representative Claims are brought as a representative action that is, for tolling purposes, essentially the equivalent of a successive class action, with New York's Attorney General in the role of lead plaintiff. As the Third Circuit's decision in *Yang* teaches, a consumer class action does not toll a subsequent claim on behalf of the same consumers except where class certification was denied in the first action based on the inadequacy of the representative plaintiffs. *See Yang*, 392 F.3d at 111. That principle bars tolling here as well.

Courts have recognized that Attorney General representative suits (such as *parens patriae* suits) on behalf of numerous real parties in interest are analogous to class actions or "mass actions" in certain respects. For example, in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, the Fifth Circuit held that a state Attorney General *parens patriae* suit is a mass action for the purposes of removal to federal court under the Class Action Fairness Act ("CAFA"). *See* 536 F.3d 418, 429 (5th Cir. 2008) ("We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest."). Similarly, the Eastern District of Pennsylvania approved the CAFA removal of an Attorney General representative suit

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[3] *Yang* recognizes a narrow exception to the rule against tolling for successive class actions when class certification was denied solely because of problems with the lead plaintiffs. *See Yang*, 392 F.3d at 111. In Intel's case, the special master appointed in the consumer class action recommended that class certification be denied because of several class-wide issues, not merely problems with the lead plaintiffs. For example, the special master found that some OEMs passed Intel's discounts and rebates on to consumers, meaning that many class members were benefited, rather than harmed, by Intel's practices, thus defeating a finding of predominance under Rule 23(b)(3). *See In re Intel Corp. Microprocessor Antitrust Litig.*, MDL No. 05-1717 (D. Del. July 28, 2010), D.I. 2471, at 69. The Court recently heard oral argument on plaintiffs' objections to the special master's report. *See id.* at D.I. 2504. There has been no suggestion that the court should decline to certify the class solely because of problems with the lead plaintiffs. *See id.*

in *West Virginia ex rel. McGraw v. Comcast Corp.* *See* 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010) (finding that "Comcast's premium subscribers are the real parties interest"). The Eastern District of Pennsylvania has also recognized that Attorney General representative actions serve the same function as consumer class actions representing the same class members. *See Pennsylvania v. Budget Fuel Co.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988).

Like the Attorneys General in *Caldwell* and *McGraw*, New York seeks treble damages "on . . . behalf" of New York consumers. Compl. at 82 (Prayer for Relief ¶ C). And like the Attorney General in *Budget Fuel*, the New York Attorney General seeks "coextensive representation" of consumers who are already represented in the class action. 122 F.R.D. at 186. New York's attempt to represent the millions of consumers in the state—who are the "real parties in interest" for the Indirect Representative Claims—is, for tolling purposes, indistinguishable from a successive class action. Accordingly, the three-year limitations period is not tolled under *Yang*.

Third, tolling in this case would not comport with *American Pipe*'s and *Crown, Cork & Seal*'s rationale for permitting tolling where class members are relying on the pending class action to protect their rights. No such reliance could exist here. As the Supreme Court explained, once a consumer class action is filed, the purpose of Rule 23 would be defeated if class members needed to move to intervene, file an individual suit, or file a parallel class action to prevent their own claims from expiring. Class members are expected to rely upon the class action so that they do not clog the courts with inefficient duplicative suits. The Supreme Court explained in *Crown, Cork & Seal*:

> The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would

> not be lost in the event that class certification was denied. Much the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification.

462 U.S. at 350.

No such efficiency or reliance considerations support tolling the Indirect Representative Claims in this case. New York filed this case over two years after this Court dismissed the Donnelly Act claims in the consumer class action.[4] Given the delay, New York was plainly not relying on the class action to protect the rights of New York consumers. Tolling the Indirect Representative Claims based on the class action filed in 2005 would also undermine the efficiency rationale, because such a ruling would create a substantial overlap between the classes and would give plaintiffs two bites at the apple. The more efficient outcome would be to deny tolling, which would create no overlap with the consumer class action and no inefficiencies.

Finally, the Supreme Court has recognized that one purpose of the antitrust limitations period is to encourage prompt suits in the public interest. *See Rotella v. Wood*, 528 U.S. 549, 558 (2000); 2 Areeda & Hovenkamp ¶ 320a, at 282–83. It would be "strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit [private enforcement] might realize." *Rotella*, 528 U.S. at 558. In this case, New York had constructive notice (and very likely actual notice) of the potential Indirect Representative Claims by 2005, when AMD filed suit. Even after the filing in 2005 of several class actions that included New York residents as class members, New York waited until 2009 to file suit. Allowing the Indirect Representative Claims period to stretch back to July 2002 (three

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[4] Donnelly Act claims were added to the consumer class action on July 13, 2005. *See Simon v. Intel Corp.*, No. 1:05-cv-490 (D. Del. July 13, 2005), D.E. No. 1. Those claims were dismissed from the class action on July 12, 2007. *See In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 415 (D. Del. July 12, 2007), D.I. 532 & 533.

years before the filing of the class action) would run counter to the policy of prompt enforcement of the antitrust laws. It would also encourage state Attorneys General to delay filing representative claims until just after certification is denied to extend the claims period far into the future—in this case, more than doubling the claims period from three years to seven years. Such deliberate delay is plainly against the goal of prompt enforcement of the antitrust laws, and the Court should not endorse it.

CONCLUSION

Accordingly, this Court should grant Intel summary judgment on (a) direct Sherman Act damages claims for microprocessor purchases occurring before November 3, 2005; (b) direct Donnelly Act and Executive Law damages and penalties claims for microprocessor purchases occurring before November 3, 2006; and (c) all indirect damages and penalties claims based on computer purchases occurring before November 3, 2006.

OF COUNSEL:

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

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

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

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

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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
rhorwitz@potteranderson.com
wdrane@potteranderson.com

Attorneys for Defendant Intel Corporation