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 SUMMARY JUDGMENT DUE TO LACK OF ANTICOMPETITIVE EXCLUSION, ANTITRUST INJURY, AND MEASURABLE DAMAGES

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Intel is entitled to summary judgment on all of New York's claims because New York cannot meet its burden of demonstrating anticompetitive exclusion or antitrust injury. To prevail under either the Donnelly Act, N.Y. Gen. Bus. Law § 340, or the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, New York must show that it has suffered antitrust injury, *i.e.*, "injury of the type the antitrust laws were intended to prevent," which "flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In other words, the injuries that New York alleges must be "attributable to an anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (citation omitted). This means that New York must both establish the anticompetitive conduct that it alleges and show that the injury for which it seeks recovery is "attributable to" that which makes the alleged conduct unlawful. As a matter of law, New York cannot satisfy either of these requirements.

New York's complaint alleges that Intel illegally "maintain[ed] its monopoly power" in the market for x86 microprocessors. Compl. ¶ 1.[1] New York claims that Intel accomplished this by entering into "exclusive or near-exclusive agreements" to "rob[] its competitors of the opportunity to challenge Intel's dominance in key segments of the market." *Id.*; *see, e.g., id.* ¶¶ 3, 45, 48, 49, 51, 54, 56, 61. New York's allegations thus make clear that its monopoly maintenance case rests on competitor exclusion. Yet, as New York's economic expert, Frederick Warren-Boulton ("FWB"), admitted: (1) New York cannot demonstrate that Intel excluded AMD, the only relevant competitor during the period at issue; and (2) New York does not base its claim of

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[1] In other words, New York's theory of antitrust liability is not that Intel acquired a monopoly illegally, but rather that it unlawfully "maintain[ed]" a lawfully acquired monopoly. Compl. ¶¶ 1-4, 257, 260, 266, 270 (emphasis added).

higher microprocessor prices—the alleged injury-causing mechanism—on the exclusion of AMD. Each of these concessions provides an independent ground for granting summary judgment to Intel on New York's Sherman Act and Donnelly Act claims.

In addition, Intel is entitled to judgment on both of New York's Executive Law § 63(12) claims, which are predicated on violations of the Sherman Act and Donnelly Act. New York cannot demonstrate that Intel engaged in illegality under either the Sherman Act or Donnelly Act by excluding AMD, and cannot show that any of the consumers on whose behalf it brings suit have suffered cognizable injuries under those statutes.

Finally, Intel is also entitled to judgment on New York's Donnelly Act damage claim on behalf of New York state governmental entities and non-state public entities (collectively "State and Public Entities") because its damages calculation is speculative, deficient, and ignores the best, most accurate available measure of how many computers those Entities purchased.

I. STATEMENT OF THE CASE

Intel and AMD sell microprocessors to Original Equipment Manufacturers ("OEMs") that combine those microprocessors with other components to build computers, which OEMs sell to consumers, resellers, or retailers, which in turn resell the computers to consumers. *See* Declaration of Daniel S. Floyd (Oct. 14, 2011) (hereinafter "Floyd Decl.") Ex. A, Expert Report of FWB ("FWB Rep.") 8, 10 (July 25, 2011); Floyd Decl. Ex. B, Deposition of FWB ("FWB Dep.") 493:12-499:25, 769:22-770:13. During the period of alleged anticompetitive conduct, AMD competed vigorously with Intel to sell microprocessors (FWB Dep. 23:22-25:3, 507:24-508:4), and increased its sales and market share (FWB Rep. 16, Ex. L-2, FWB Dep. 27:3-5, 349:16-18). New York's complaint alleges that Intel "maintained a monopoly" (Compl. ¶¶ 257, 260) by entering into anticompetitive arrangements with OEMs in order to "rob[] its competi-

tor[]"—AMD—"of the opportunity to challenge Intel's dominance in key segments of the market" (*id.* ¶ 1).

New York's theory of consumer injury, as articulated by FWB, is that Intel elevated market prices through "exclusionary pricing"—FWB's label for certain Intel discounts—but that it did so without foreclosing competition in the relevant market. FWB Rep. 17. This theory posits that Intel provided discounts that AMD could not profitably meet except at a higher price than if Intel had not discounted, which enabled Intel to raise its prices to OEMs.[2] As a result, Intel's discounts supposedly induced OEMs, retailers, and resellers to charge higher prices for computers containing Intel microprocessors. *See* FWB Rep. 18-22. FWB testified that under his theory of consumer injury, it is "not relevant" "whether or not AMD was harmed by Intel's exclusionary pricing," "nor do I care, frankly." FWB Dep. 281:9-16. He also admitted that this theory of consumer harm "is not inconsistent with a story that says that AMD could well have been worse off if Intel" had not engaged in the challenged conduct (*id.* 281:17-19) and that "I don't even have an opinion that AMD was significantly harmed by" Intel's conduct (*id.* 280:13-14).[3]

Finally, to calculate the amount of damages that the roughly 4,000 State and Public Entities allegedly suffered as a result of Intel's conduct, FWB did not rely on business records showing the Entities' computer purchases. FWB Dep. 698:15-700:9. Rather, he estimated the num-

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2 This is a generous interpretation of FWB's report, as he offered this "theory" in a hypothetical example that he never even applied to Intel and AMD. Moreover, FWB admitted that the hypothetical example is not "supposed to approximate the conditions in the X 86 microprocessor market." FWB Dep. 261:10-13.

3 FWB further admitted that AMD could meet any above-cost discount if it priced at (or above) marginal cost but claimed that having to offer a discount to match Intel's discount—in other words, having to compete on price to win business—amounted to a "tax" on AMD. FWB Dep. 755:19-24.

ber of Intel-based computers that the Entities allegedly bought from nationwide data of expenditures by all federal, state, and local governments. FWB Rep. 61-63, Exs. D-15, D-16. FWB calculated that New York State and Public Entities accounted for 4.8% of all governmental spending in the United States and presumed (without considering any evidence of actual purchasing practices) that they therefore accounted for 4.8% of the purchases of Intel-based computers. *Id.* FWB based his damage estimate for the Entities on this conjecture, instead of on the available data of the Entities' computer purchases. FWB Rep. 64-65, Ex. D-20.[4]

In Claim I, New York seeks damages under the Sherman Act based upon claims allegedly assigned to New York by certain OEMs. Compl. ¶ 258. In Claim II, New York seeks damages under the Donnelly Act for alleged harm to OEMs, consumers and roughly 4,000 State and Public Entities. *Id.* ¶ 260-61.[5] In Claims III and IV, New York seeks damages for consumers under New York's Executive Law on the ground that Intel's "conduct . . . violates the Sherman Act" and "the Donnelly Act." *Id.* ¶¶ 267, 271. Intel is entitled to judgment on all of these claims.

II. ARGUMENT

To establish a monopolization claim under the Sherman Act or the Donnelly Act, New York must satisfy three elements: "(1) a violation of the antitrust laws . . . (2) individual injury resulting from that violation, and (3) measurable damages." *Behrend v. Comcast Corp.*, ____

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[4] FWB also employed this national-average method to estimate damages for Intel-based computers purchased by educational Entities (FWB Rep. 64-65, Exs. D-17, D-21), and Intel-based servers purchased by the Entities (FWB Rep. 63, Exs. D-19, D-20).

[5] Intel has separately moved to dismiss the Donnelly Act claim brought on behalf of non-state Public Entities because none of those Entities specifically requested that New York bring this claim, as required by New York General Business Law § 342-b. *See* D.I. 167. That motion (unlike the present one) does not seek dismissal of New York's claims on behalf of State Entities.

F.3d ____, at *6 (3d Cir. 2011) (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008)). The undisputed evidence establishes that New York has satisfied none of these elements, and Intel is therefore entitled to judgment on all of New York's claims.

A. Intel Is Entitled To Judgment On New York's Sherman Act And Donnelly Act Claims Because The Alleged Injuries For Which New York Seeks Recovery Are Not Attributable To Any Purported Exclusion Of AMD

Antitrust injury is a "distinct" inquiry from whether the defendant violated the antitrust laws, and "must be shown independently." *Atl. Richfield* , 495 U.S. at 344 (citation omitted). The "plaintiff[] in any antitrust case" must prove that it has suffered antitrust injury (*In re Ins. Brokerage Antitrust Lit.*, 618 F.3d 300, 315 n.9 (3d Cir. 2010)), which is an "injury of the type the antitrust laws were intended to prevent," specifically, injury that "flows from that which makes defendants' acts unlawful" (*Brunswick*, 429 U.S. at 489). The plaintiff's "injury, although causally related to an antitrust violation, nevertheless will not qualify as an 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny." *Atl. Richfield*, 495 U.S. at 334 (emphasis added).[6]

Thus, to establish a compensable antitrust claim, a plaintiff must both demonstrate that the defendant engaged in anticompetitive conduct (the first element of an antitrust claim), and show that the injury for which it seeks recovery is "attributable to" that which makes defendants' conduct unlawful (the second element of such a claim). New York cannot meet either of these

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[6] New York courts, relying upon the principle that the Donnelly Act "'should generally be construed in light of Federal precedent,'" have adopted this same antitrust injury requirement under that Act. *See, e.g.*, *Rubin v. Nine W. Group, Inc.*, 1999 WL 1425364, at *5–6 (N.Y. Sup. 1999) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1998)); *see also OTR Media Group, Inc. v. City of New York*, 46 A.D.3d 314, 315 (1st Dep't 2007).

two elements, and Intel is therefore entitled to summary judgment on all of New York's Sherman Act and Donnelly Act claims.[7]

1. New York's Monopoly Maintenance Theory Requires Proof That Intel's Conduct Excluded AMD, But New York Cannot Make Any Such Showing

Summary judgment is proper because New York's theory of the case makes clear that it is not seeking recovery for injuries flowing from the type of conduct that gives rise to a monopoly maintenance claim. The "essence" of a monopolization claim is proof that the defendant has acted "to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993). Here, New York's complaint alleges that Intel unlawfully "maintained a monopoly" (Compl. ¶¶ 257, 260) by excluding AMD and "robb[ing] it of the opportunity" to challenge Intel's alleged dominance (*id.* ¶ 1).

To prove monopoly maintenance on this theory, New York must demonstrate that Intel engaged in "'some 'exclusion' of competitors.'" *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000) (quoting *United States v. Alum. Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945)). As the leading antitrust treatise explains, the "sine qua non of anticompetitive conduct is

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[7] Failure to prove antitrust injury is a particularly appropriate ground for dismissal of an antitrust claim prior to trial, including at the summary judgment stage: "[T]he antitrust injury requirement often enables antitrust courts to dispose of more claims at an early stage of litigation by simply examining the logic of the plaintiff's theory of injury." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 337a (3d ed. & Supp. 2011). The Supreme Court has held that a plaintiff is not entitled to a trial where the undisputed facts establish, at the summary judgment stage, that the plaintiff "failed to demonstrate that it has suffered any antitrust injury." *Atl. Richfield*, 495 U.S. at 346; *see also Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours and Co.*, 826 F.2d 1235, 1236 (3d Cir. 1987) (same).

that it enlarges (or preserves) the defendant's market share at the expense of rivals." Areeda & Hovenkamp ¶ 651d.[8]

Proof of exclusion is essential because the "mere possession of monopoly power, and the concomitant charging of monopoly prices," is "not unlawful." *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004); *see Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294, 297 (2d Cir. 1979) ("Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive," and a "pristine monopolist . . . may charge as high a rate as the market will bear."). As the Supreme Court has explained, "[t]he law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

The Ninth Circuit's recent decision in *Brantley v. NBC Universal, Inc.*, ___ F.3d ___ (9th Cir. 2011), demonstrates that harm to competition is essential for a violation of the antitrust laws outside the narrow range of *per se* offenses, such as price fixing, for which anticompetitive harm is presumed. *Brantley* held that harm to competition could not be established in a tying case under Section 1 of the Sherman Act simply by evidence that consumers were forced to buy products they did not want. To establish an antitrust violation, the plaintiff instead had to prove the exclusion of a competitor that would have competed to supply a tied product. *Id.* at *6. The court explained that "[i]n the absence of any allegation of injury to competition, as opposed to injuries to consumers, we conclude that plaintiffs have failed to state a claim for an

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[8] Harm to a competitor is a necessary but not sufficient condition for establishing harm to competition in a monopoly maintenance case. "It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" *Brooke Group*, 509 U.S. at 224 (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis added).

antitrust violation." *Id.* Only after the plaintiff has established harm to competition is it possible to inquire if the consumer injuries of which it complains were "attributable to" that harm.

To prove its monopoly maintenance claim, therefore, New York must show that Intel's conduct "excluded" AMD. New York will not be able to do so because it has adopted a theory of harm that eschews any claim of anticompetitive exclusion. FWB admitted that New York cannot make this showing. He testified that New York's theory of injury "did not depend on the weakening of a competitor." *Id.* 579:10-11. He also conceded that "I don't even have an opinion that AMD was significantly harmed by" Intel's conduct (FWB Dep. 280:13-14), and made clear that he was not asserting that Intel's conduct "affected AMD's ability to compete" (*id.* at 417:5). Indeed, FWB admitted that during the period when he alleged that consumers were harmed by Intel's conduct, AMD's market share increased (FWB Rep. Ex. L-2, FWB Dep. 27:3-5), and AMD "continued to invest in R&D and chip-making capacity," which "implies that it expected a return sufficient to cover an appropriately risk-adjusted cost of capital" (FWB Rep. 16; FWB Dep. 25:4-27:2). He also asserted that the increase in AMD's market share was so large as to cause Intel to cease engaging in its alleged misconduct. FWB Dep. 349:16-18.[9]

FWB's testimony revealed that New York cannot establish what its complaint alleges—and what is a necessary predicate for the antitrust violations that it asserts—namely, that Intel excluded AMD. This is an independently sufficient ground for entering summary judgment in Intel's favor on New York's Sherman Act and Donnelly Act claims.

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[9] FWB also admitted that, during the period in question, AMD increased the number of engineers it employed tenfold and spent billions of dollars on manufacturing capacity and a corporate acquisition. FWB Dep. 504:1-506:9.

2. The Theory Of Injury That FWB Expounded Cannot Establish Antitrust Injury Because It Does Not Link Exclusion Of AMD To Any Consumer Harm

Even if New York could establish that Intel excluded AMD (which it cannot), Intel would still be entitled to summary judgment. To establish antitrust injury—a separate and independent element of its antitrust claims—New York must show that the harms it complains of are "attributable to" that which makes Intel's acts allegedly unlawful. This requires New York to establish that the consumer injury of which it complains is "attributable to" the exclusion of AMD. New York cannot satisfy this burden.

FWB admitted that his discounts-equal-overcharges theory of injury—the only theory of injury under which New York seeks damages in this case—is not related to (let alone "attributable to") any exclusion of AMD. As noted above, he testified that this theory "did not depend on the weakening of a competitor." FWB Dep. 579:10-11. He further explained that this theory of injury "is not inconsistent with a story that AMD could well have been worse off if Intel" had not "us[ed] market share discounts and other exclusion activities." *Id.* 281:17-20. FWB also testified that he had not analyzed any theory of "foreclosure affecting the competitive capability of AMD"—*i.e.*, the weakening of competition—as a basis for his assertion that Intel's conduct led to higher prices. *Id.* 15:12-14. Indeed, he even admitted that it is "not relevant to my opinion" "whether or not AMD was harmed by Intel's exclusionary pricing," "nor do I care, frankly." *Id.* 281:9-16; *see also id.* 655:8-11 ("even if AMD isn't harmed, I would say that Intel's market share discounts were anticompetitive and harmful to consumers").

Thus, as FWB conceded, the alleged injury for which New York seeks recovery is not "attributable to" the antitrust violation that New York alleges, *i.e.*, the exclusion of AMD. This is fatal to New York's claims. *See Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) ("We concede Discon's claim that the petitioners' behavior hurt consumers by raising telephone ser-

vice rates. But that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is lawfully in the hands of a monopolist."). New York is unable to link its claimed injury to the exclusion of AMD, which is both the gravamen of its complaint and the only basis on which Intel's conduct could be deemed anticompetitive in a monopoly maintenance case. Because the alleged harms for which New York seeks recovery are not "attributable to" Intel's exclusion of AMD, New York fails to satisfy the antitrust injury requirement.

B. Intel Is Entitled To Judgment On New York's Executive Law Claims Because New York Has Not Demonstrated Anticompetitive Exclusion Or Antitrust Injury

New York alleges that Intel violated the Executive Law because Intel allegedly engaged in repeated conduct that violated the Sherman Act and the Donnelly Act. Compl. ¶¶ 268, 272. New York may bring a claim under Executive Law § 63(12) to recover "restitution and damages" only if it can identify "repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." N.Y. Executive Law § 63(12). This Court should grant Intel's motion for summary judgment as to both Executive Law claims, because New York has not demonstrated anticompetitive exclusion or antitrust injury. *See supra* 5-10.

First, New York's inability to show that Intel excluded AMD means that it has not established a required predicate for "illegality" (N.Y. Executive Law § 63(12)) under either the Sherman Act or the Donnelly Act (*see supra* 5-8). Failure to demonstrate that the defendant violated the predicate statutes is fatal to an Executive Law claim. *See State by Lefkowitz v. Parkchester Apts. Co.*, 307 N.Y.S.2d 741, 748 (N.Y. Sup. 1970) (dismissal of an Executive Law claim is required where there is "no evidence of any fraud or illegality").

Second, New York's failure to demonstrate that the consumers on whose behalf it brings its Executive Law claims have suffered antitrust injuries that are "attributable to" Intel's alleged misconduct (*see supra* 9-10) also requires judgment for Intel on those claims. The Executive Law does not allow New York to bring suit on behalf of individuals who have suffered no cognizable injury under the Sherman and Donnelly Acts. For this reason, *People v. Daicel Chem. Indus., Ltd.*, 2005 WL 6056054 (N.Y. Sup. 2005), dismissed an Executive Law claim on behalf of indirect purchasers based on conduct predating New York's recognition of indirect purchaser damages suits. The court explained that recovery would be "improper" because, under the Executive Law, "the focus must remain on the nature of the wrong" and "[h]ere, the wrong is an antitrust violation for which New York State's antitrust laws permit the indirect purchasers no recovery." *Id.* at *22.

Similarly, where—as here—the persons on whose behalf New York is seeking relief have suffered no cognizable injury under the predicate antitrust statutes, New York may not bring an Executive Law claim to recover damages based on those statutes. Allowing New York to recover under the Executive Law in the absence of compensable injury would be inconsistent with the Executive Law's requirement that New York must show "damages." In the antitrust context, there can be no damages in the absence of antitrust injury. Additionally, with respect to the Sherman Act-based Executive Law claim, New York must also be denied relief on precisely the same grounds as the unsuccessful plaintiffs in *Daicel*, because (just like those plaintiffs) it is suing on behalf of persons who have no right to sue for indirect damages under the Sherman Act itself. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

As *Daicel* recognized, the Executive Law does not give New York license to assert anti-trust claims for "injuries" that are not actionable under the antitrust laws. Accordingly, this Court should grant judgment to Intel on both of New York's Executive Law claims.

C. Intel Is Entitled To Judgment On New York's Donnelly Act Claim On Behalf Of State And Public Entities Because New York's Measure Of Damages Is Speculative, Deficient, And Not Supported By Evidence

Intel is also entitled to judgment on New York's Donnelly Act claim on behalf of State and Public Entities because New York has not satisfied the element of "measurable damages." *Behrend*, ____ F.3d ____, *6. An antitrust plaintiff must put forth sufficient evidence of "measurable damages," such that the jury is not asked to "render a verdict based on speculation or guesswork." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (emphasis added). As part of this burden, a plaintiff must use "the best, most accurate measure of damages that is reasonably available." *S. Pac. Commc'ns Co. v. AT&T*, 556 F. Supp. 825, 1090 (D.D.C. 1983) (emphasis added), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984); *see also Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 748 F. Supp. 1399, 1406 (D. Ariz. 1990) (same), *aff'd*, 850 F.2d 477 (9th Cir. 1998); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 436 (N.D. Cal. 1978) (granting a directed verdict where the antitrust plaintiff failed to provide the jury with "the best measure [of damages] available"), *aff'd*, 636 F.2d 1188 (9th Cir. 1980); *Riss & Co. v. Ass'n of Am. R.R.*, 190 F. Supp. 10, 18 (D.D.C. 1960) ("In antitrust cases, a party has the burden of furnishing the best available evidence that the subject matter permits, as to what the impact of the claimed illegal conduct was on its business."), *aff'd*, 299 F.2d 133 (D.C. Cir. 1960). Intel is entitled to judgment because FWB estimated the number of Intel-based computers that State and Public Entities purchased during the relevant period using a speculative and deficient method,

while ignoring any and all evidence of the Entities' actual computer purchases, let alone the "best, most accurate measure . . . that is reasonably available" of those purchases.[10]

The number of Intel-based computers State and Public Entities purchased is a critical input to New York's damages calculus, as New York derived the amount of damages by multiplying the number of computers purchased by the Entities by the allegedly imbedded overcharge in each computer. FWB Rep. 64-65, Ex. D-21. New York presented only one method of calculating this crucial input: its expert's conjecture of the number of computers purchased, based on New York's share of all government spending in the United States. FWB Rep. 61-63. This approach is speculative and ignores the available records of the Entities' actual computer purchases, which are the "best, most accurate measure . . . that is reasonably available."

FWB's national-average method failed to provide a non-speculative approach for determining the number of Intel-based computers that the Entities purchased. FWB conceded that his estimates are based on the assumption that "all governments allocate the same shares of their budgets to purchasing PCs." FWB Rep. 62. Yet FWB offered no reason to believe that the 4,000 Entities in this case allocated the same portion of their budgets to purchasing Intel-based computers as is reflected in the average for all governments—federal, state and local—across the United States. *See e.g.*, FWB Dep. 699:6-700:9 (refusing to articulate any basis for his "as-

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[10] To be sure, "in the absence of more precise proof" (*Bigelow*, 327 U.S. at 264 (emphasis added)), a wrongdoer may not "defeat[e] the recovery of damages against him by insisting upon a rigorous standard of proof" in a case where "vagaries of the marketplace usually deny . . . sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation" (*J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 US 557, 566-68 (1981)). That principle has no application to the straightforward question of the number of Intel-based computers the Entities purchased, a figure that New York and those Entities possess independently of any alleged actions by Intel.

sum[ption]" that New York Entities had the "same average [computer purchases] as the average of everybody else"). FWB admitted he had no economic or scientific literature to support his assumption that New York was average, and claimed he did not need any such support. *See* FWB Dep. 700:21-701:4. Indeed, FWB's approach failed to account for the very real possibility that New York Entities purchased less computers—or at least less Intel-based computers—than the national average, in proportion to their overall spending.

FWB's national-average method is also deficient because—even if one assumes that the Entities purchased an average number of Intel-based computers—it failed to account for the fact that many of the Entities' purchases are not part of New York's case. New York has represented that it "does not intend to" assert any damages for "off-contract purchases," *i.e.*, purchases that Entities made outside the state's Centralized Contracts with OEMs. *See* Floyd Decl. Ex. C, New York Resp. to Intel Requests for Admission pgs. 11-12. This admission is "conclusively" binding on New York. Fed. R. Civ. P. 36(b). FWB has attempted to remove the "off-contract" purchases for only one Entity, the New York City Schools. *See* FWB Rep. 63, Ex. D-17. Yet New York has admitted that other Entities may also either make off-contract purchases or make no purchases at all by leasing their computer systems. *See* Floyd Decl. Ex. F, Letter from R. Schwartz to D. Floyd, dated March 8, 2011, (noting that "Monroe County and Westhampton Beach School District, appear to have significant off-contract purchases, in the form of leases of computers containing x86 CPUs"). FWB has made no attempt to estimate the number or size of these off-contract purchases and is seeking damages for these "purchases" whether they happened or not. In addition, various Entities have explicitly opted out of being represented by New York in this case (*See* Floyd Decl. Ex. D), and thus New York cannot possibly recover for any damages on these Entities' behalf even under its own erroneous theory that it can represent any

Entity that does not explicitly opt out of the litigation (D.I. 214, at 10-11; *but see supra* 4, n.5). Yet, FWB's national-average method awards damages both for off-contract purchases and for Entities that opted out of this case.

FWB's national-average method—beyond being speculative and deficient in its own right—also was not the "best, most accurate measure . . . that is reasonably available." This is because FWB had available to him New York's records regarding these Entities' actual computer purchases during the relevant period. *See* Floyd Decl. Ex. E., Rule 30(b)(6) Deposition of Office of General Services, 18:2-20:9, 20:23-21:17, 217:23-218:18, 219:2-221:2, 222:24-223:24. But FWB decided to avoid the heavy lifting of determining the actual damages based on purchase records, and opted instead to rely entirely on his speculative conjecture. *See e.g.*, FWB Dep. 609:14-700:2 (admitting he "d[id]n't know" whether his staff ever asked New York for additional data in order to calculate actual computer purchase amounts).

Intel is therefore entitled to judgment on New York's Donnelly Act claim on behalf of those Entities for failure to satisfy the "measurable damages" element.[11]

III. CONCLUSION

For the foregoing reasons, this Court should grant Intel's motion for summary judgment.

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[11] All of these errors apply with equal force to FWB's national-average approach to calculating damages for both Intel-based servers the Entities purchased and Intel-based computers that educational Entities bought. *See supra* 4, n.4.

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