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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY
GENERAL ANDREW M. CUOMO,

Plaintiff,

v.

INTEL CORPORATION, a Delaware
corporation,

Defendant.

C.A. No. 09-827 (LPS)

**NOTICE OF PLAINTIFF STATE OF
NEW YORK'S MOTION FOR LEAVE
TO AMEND COMPLAINT
PURSUANT TO FED. R. CIV. P. 15(a)**

December 9, 2010

Pursuant to Fed. R. Civ. 15(a)(2), Local Rules 7.1.2 & 15.1, and the scheduling order in this action, Plaintiff State of New York hereby moves for leave to amend its complaint. Pursuant to Local Rules 15.1(a) & (b), an executed copy of New York's proposed amended complaint is attached hereto as Exhibit A, and a blackline showing the changes in the amended complaint compared to the original complaint is attached hereto as Exhibit B.

Pursuant to Local Rule 7.1.1, undersigned counsel aver that "reasonable effort has been made to reach agreement" with Defendant Intel Corporation, but that Intel has not consented to this amendment. Specifically, on December 2, 2010, New York informed counsel for Intel that New York proposed to move for leave to amend, provided a blackline version of the complaint showing the proposed amendments, and requested that Intel inform New York prior to December 9 whether it would consent to the amendments. On December 8, 2010, Intel responded that it was "not in a position to stipulate to the filing of the amendment."

The Federal Rules provide that a party may amend its pleading with leave of the Court, and that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

1 The Supreme Court has held that, “[i]n the absence of any apparent or declared reason – such as
2 undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure
3 deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue
4 of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the
5 rules require, be ‘freely given.’” *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also In re*
6 *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). Absent such grounds
7 for denial, the Third Circuit has found it to be “an abuse of discretion to deny leave to amend.”
8 *Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000) (citations omitted). The motion is made in
9 conformity with the deadline for amendment of pleadings, December 9, 2010 contained in the
10 scheduling order proposed by Intel and ordered by the Court. Scheduling Order, ¶ 2, D.E. 70.

13 New York’s Amendments

14 New York’s amendments involve changes to three paragraphs of the complaint (¶¶ 263,
15 268 and 272) and have a single purpose: To clarify and more precisely define the group of
16 consumers on behalf of which New York seeks redress pursuant to its common law and statutory
17 *parens patriae* authority.

19 New York has asserted claims under the federal Sherman Act (Claim One) and under
20 two state statutes, New York State’s own antitrust law, the Donnelly Act (Claim Two) and
21 § 63(12) of New York’s Executive Law (Claims Three and Four).¹ The proposed amendments
22 concern only the state law claims, specifically, one of the branches of New York’s Donnelly Act
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24
25 ¹ Section 63(12) provides, in pertinent part: “Whenever any person shall engage in repeated
26 fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying
27 on, conducting or transaction of business, the attorney general may apply ... for an order ...
28 directing restitution and damages...” N.Y. Exec. Law § 63(12).

1 claim and New York's Executive Law claims.

2 In brief overview, New York's Sherman Act claim asserts direct purchaser claims against
3 Intel. For purposes of those claims, which New York obtained by contractual assignment from
4 its vendors, New York stands in the shoes of the computer manufacturers who dealt with Intel.
5 Those claims are not affected by the proposed amendments.
6

7 New York also asserts both direct and indirect Donnelly Act claims against Intel. The
8 direct claims (again, obtained from New York's vendors by contractual assignment) are asserted
9 on behalf of the State; the indirect claims are asserted on behalf of both the State itself and
10 numerous New York public entities, as indirect purchasers of x86 microprocessors. Again, these
11 claims are not implicated by the proposed amendments.
12

13 Finally, New York, as *parens patriae*, seeks damages and other relief on behalf of New
14 York consumers-at-large, pursuant to both its Donnelly Act and Executive Law claims. The
15 amendments are intended to clarify these claims by more precisely delimiting the group of
16 consumers on whose behalf New York seeks such relief. The precise changes are these:
17

- 18 • Paragraph 263 of the original complaint is a Donnelly Act claim for "treble
19 damages on behalf of all New York consumers who suffered directly or
20 indirectly as a result of Intel's illegal conduct." That paragraph is now amended
21 to replace the unmodified term "consumers" with the words "consumers,
22 including small and medium businesses."
23

1 • Paragraphs 268 and 272 of the original complaint is an Executive Law claim “to
2 recover damages sustained as a result of Intel’s violation” on behalf of “all
3 natural persons.” That paragraph is now amended, parallel to the amendment of
4 the Donnelly Act claim, to replace the term “natural persons” with the words
5 “all consumers, including small and medium businesses”.
6

7 Thus, in both instances where New York, using its *parens patriae* authority, currently
8 seeks redress on behalf of consumers (including natural persons and governmental entities), the
9 amendments now more specifically state that such redress is sought on behalf of all “consumers,
10 including small and medium businesses.” As amended, therefore, the term consumers is
11 clarified to include not only natural persons and governmental entities, but also small and
12 medium businesses. The latter are, however, included only in their capacity as end-users of x86
13 microprocessors, not as dealers or resellers of such products. Such claims are well within New
14 York’s common law and statutory *parens patriae* authority, as federal courts have recognized.
15 See *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 521 (E.D. Mich. 2003) (citing *In re*
16 *Lorazepam & Clorazepate Antitrust Litig.* 205 F.R.D. 369, 386-87 (D.D.C. 2002); N.Y. Exec.
17 Law § 63(1), N.Y. Gen. Bus. Law §§ 340, 342, and 349).² Nor is there any genuine question that
18 New York has a quasi-sovereign interest in redressing generalized harm to its economy when
19 that harm is inflicted on business entities as well as natural persons and governmental entities.
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24 ² Although one federal district did not accept New York’s claim that it had *parens patriae*
25 authority to recover damages on behalf of consumers under the Donnelly Act, the same court
26 later specifically upheld New York’s authority to do so under § 63(12) of the Executive Law.
27 See *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, slip op., 2007 WL
28 2517851, *8-10 (N.D. Cal. Aug. 31, 2007); *In re Dynamic Random Access Memory (DRAM)*
Antitrust Litig., slip op., 2008 WL 1766763, *2-4 (N.D. Cal. April 15, 2008).

1 See, e.g. *State v. Feldman*, 210 F. Supp. 2d 294, 300 (S.D.N.Y. 2002) (“[C]ourts have held that
2 section 63(12) should be ‘construed quite broadly’ to apply to ‘all business activity accompanied
3 by repeated acts of illegality.’”) (upholding use of § 63(12) to obtain restitution for injury
4 resulting from rigging of public stamp auctions) (quoting *People v. MacDonald*, 69 Misc.2d 456,
5 330 N.Y.S.2d 85, 88 (N.Y. Sup. 1972)). Including small and medium businesses in the group of
6 those New York seeks to protect from Intel’s anticompetitive conduct is particularly appropriate
7 here, where Intel’s conduct was directed at preventing competition which would have benefited
8 such businesses. See, e.g., Amended Complaint ¶¶ 151-181 (detailing Intel’s threats and bribes
9 directed at HP, which were successful in capping at 5% the share of AMD-based commercial
10 desktop computers marketed by HP in at least 2002-2005).

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13 **Conclusion**

14 New York respectfully submits that these amendments are made in good faith, are not
15 untimely, dilatory or futile, and will not prejudice Intel, nor impact the discovery schedule
16 proposed by Intel and ordered by the Court, which allows ample further time for discovery, with
17 a fact discovery cut-off of June 1, 2011. (Scheduling Order, ¶ 3.c., D.E. 70). Accordingly, leave
18 to amend should be granted.
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Dated: December 9, 2010
New York, New York

Respectfully submitted,
ANDREW M. CUOMO
Attorney General of the State of New York

By: /s/ Richard L. Schwartz
MARIA VULLO
Executive Deputy Attorney General
For Economic Justice
MICHAEL BERLIN
Deputy Attorney General
For Economic Justice
RICHARD L. SCHWARTZ
Acting Bureau Chief
JEREMY R. KASHA
Assistant Attorney General

120 Broadway, 26th Floor
New York, New York 10271-0332
Tel: (212) 416-8262
Fax: (212) 416-6015
Richard.Schwartz@oag.state.ny.us
Jeremy.Kasha@oag.state.ny.us

*Attorneys for Plaintiff State of New York
Admitted Pro Hac Vice*

Ex. A