

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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STATE OF NEW YORK, BY ATTORNEY	:
GENERAL ERIC T. SCHNEIDERMAN,	: C.A. No. 09-827 (LPS)
	:
Plaintiff,	: PLAINTIFF'S OPPOSITION TO
	: DEFENDANT'S MOTION UNDER
v.	: RULE 12(c) FOR DISMISSAL WITH
	: RESPECT TO NEW YORK'S
INTEL CORPORATION, a Delaware	: DONNELLY ACT DAMAGES CLAIM
corporation,	: ON BEHALF OF CONSUMERS
	:
Defendant.	: August 3, 2011
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PRELIMINARY STATEMENT

New York's exercise of *parens patriae* authority is firmly grounded in New York state law. New York's highest court, the Court of Appeals, has defined a three-prong test for the Attorney General's invocation of *parens patriae* power. New York courts have affirmed the application of that standard and have allowed treble damages in *parens patriae* actions under the Donnelly Act. The Complaint here satisfies the three-prong test and this action should be permitted to proceed.

Intel confuses the issue by relying on a line of federal cases that were never applicable to state law and which have, in any event, been expressly overruled by statute. On this issue, it is New York law which governs, and this Court should follow the clearly expressed holdings of New York courts.

ARGUMENT

NEW YORK LAW PERMITS TREBLE DAMAGES ACTIONS ON BEHALF OF CONSUMERS UNDER COMMON LAW *PARENS PATRIAE* AUTHORITY

The New York Attorney General is permitted to recover Donnelly Act damages for injury to consumers. *People v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378, 861 N.Y.S.2d 294, 295-296 (N.Y. App. Div. 1st Dep't 2008); *People v. Coventry First LLC*, slip op., C.A. No. 0404620/2006, 2007 WL 2905486 (N.Y. Sup. Ct. Sept. 25, 2007)¹; *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 520-21 (E.D. Mich. 2003) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386-87 (E.D. Mich. 2003)).

¹ Copies of unpublished decisions, briefs and congressional materials are annexed to this memorandum of law.

Intel makes several errors in its motion. To begin, Intel ignores the three-prong test set forth by the Court of Appeals in *People v. Grasso*, 11 N.Y.3d 64, 893 N.E.2d 105 (2008). The *Grasso* test is the applicable standard for the attorney general's assertion of common law *parens patriae* authority. As shown in Part A below, New York satisfies all three prongs of the *Grasso* test.

Moreover, as shown in Part B, New York has independent statutory bases for its claim for damages to consumers, in addition to its common law *parens patriae* authority under *Grasso*.

Finally, Intel incorrectly tries to frame the issue as if it were a question of federal law. Intel relies on a now-defunct line of cases, including *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), to argue that federal law prohibits state *parens patriae* claims for damages actions under state antitrust law. As shown in Part C below, this is misguided for two independent reasons: (1) those cases were expressly overruled by statute, and in so doing, Congress specifically noted that State Attorneys General are the best suited to bring such damages claims; and (2) in any event, even before they were overruled by Congress, the *Frito-Lay* line of cases from the Ninth Circuit only applied to *parens claims* under the federal Clayton Act, which is not at issue here.²

² New York does not assert consumer claims under federal law. *Accord* Intel Mem. at 1.

A. New York Has Common Law *Parens Patriae* Authority To Seek Damages on Behalf of Consumers Under the Donnelly Act

New York's highest court, the Court of Appeals, has set forth a three-prong test for the Attorney General's assertion of common law *parens patriae* authority: "To invoke the doctrine, the Attorney General must [1] prove a quasi-sovereign interest [2] distinct from that of a particular party and [3] injury to a substantial segment of the state's population." *Grasso*, 11 N.Y.3d at 69 n.4 (bracketed numerals added) (citing *Alfred L. Snapp & Son, Inc. v Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)); see also *New York v. McLeod*, 2006 NY Slip Op. 50942U, 12 Misc. 3d 1157A, 819 N.Y.S.2d 213 (Table), 2006 WL 1374014 (N.Y. Sup. Feb. 9, 2006). The Attorney General has been found to meet this test where, as here, New York asserts a quasi-sovereign interest in maintaining a competitive marketplace. See, e.g., *New York v. Merkin*, 26 Misc. 3d 1237(A), 907 N.Y.S.2d 439, 2010 WL 936208, *9 (N.Y. Sup. Feb. 8, 2010) ("New York's vital interest in securing an honest marketplace in which to transact business' was a sufficient basis for *parens patriae* standing."). Here, the Claim in the Complaint which asserts *parens patriae* authority to recover for consumers makes specific allegations about Intel's manipulation of the market, the protection from which is a sovereign interest. See, e.g., Complaint, ¶¶ 260, 263. Even if that interest were insufficient, New York otherwise satisfies all three prongs of the *Grasso* test.

1. New York Has Alleged a "Quasi-Sovereign Interest"

The first *Grasso* prong requires that the Attorney General seek redress for a "quasi-sovereign interest." *Grasso*, 11 N.Y.3d at 69 n.4. Without analysis or support, Intel summarily concludes that the Attorney General's claims are "the prototypical example of a claim brought to vindicate private interests," rather than a "quasi-sovereign interest," and that New York therefore

cannot establish the first prong of the *parens patriae* test. Intel. Mem. at 5. “A quasi-sovereign interest is a judicial construct that does not lend itself to simple or exact definition.” 81A C.J.S. States § 530 (2011). There are, however, guides to determine whether a claim vindicates a quasi-sovereign interest. “[T]he three factors that normally determine whether a quasi-sovereign interest is sufficiently important to permit standing are (1) the size of the segment of the population that has been adversely affected, (2) the magnitude of the harm inflicted, and (3) the practical ability of those injured to obtain complete relief without intervention by the sovereign.” 72 Am. Jur. 2d States, Etc. § 91 (2011). Intel ignores these factors, likely because they favor New York’s *parens patriae* standing.

In the modern context, nearly every household has a computer. Thus, the first factor favors New York because virtually the entire population of New York has been affected.

The second factor favors New York because the magnitude of the harm is enormous, in terms of total dollar damage, harm to competition, harm to innovation, and the number of persons affected. Indeed, the magnitude is only confirmed by the large sums Intel has paid in settlements and fines around the globe for essentially the same conduct.³

The third factor also favors New York because it would be impractical for those individuals to seek relief without “intervention by the sovereign.” 72 Am. Jur. 2d States, Etc. § 91. This is true because of the complexity of proving an antitrust case involving unilateral

³ The European Commission, for example, has imposed a penalty of €1 billion. James Kanter, *Europe Fines Intel \$1.45 Billion in Antitrust Case*, N.Y. Times, May 13, 2009 (available at <http://www.nytimes.com/2009/05/14/business/global/14compete.html>).

conduct, as well as the transaction costs (*i.e.*, legal and expert fees) that would drastically outweigh the damage for any individual purchaser. Finally, “complete relief” may require not only damages, disgorgement or restitution, but also – to prevent future injury – injunctive relief and civil penalties. Only the Attorney General is suited to obtain all of those forms of relief, for various reasons, including the fact that the Donnelly Act only permits civil penalty actions by the Attorney General.

2. **New York’s Quasi-Sovereign Interest Is “Distinct From That of a Particular Party”**

The second *Grasso* prong requires that the quasi-sovereign interest be “distinct from that of a particular party.” *Grasso*, 11 N.Y.3d at 69 n.4. This prong is satisfied where, as here, “recovery of damages for aggrieved [consumers] is just a part of the AG’s case.” *Merkin*, 2010 WL 936208 at *9. New York seeks a variety of related relief, including an injunction and civil penalties, as well as damages for its proprietary injury. *See* Complaint, Prayer for Relief. In such circumstances, New York courts have upheld the Attorney General’s assertion of Donnelly Act damages claims, rejecting the argument Intel makes here that recovery of such damages is inconsistent with a quasi-sovereign purpose. *Liberty Mut.*, 52 A.D.3d 378, 861 N.Y.S.2d 294; *Coventry First*, 2007 WL 2905486.

3. **New York Has Alleged “Injury to a Substantial Segment of the State’s Population”**

The third prong is satisfied if the Attorney General seeks to recover for “injury to a substantial segment of the state’s population.” New York seeks to recover damages for *all* New York consumers injured by Intel’s conduct, numbering in the millions. *See Merkin*, 2010 WL 936208 at *10 (“substantial segment” element satisfied where several thousand investors were

victim of the Madoff Ponzi scheme). The “substantial segment of the state’s population” requirement must therefore be met where, as here, there has been injury to an enormous swath of the state’s population.

4. New York Courts Have Allowed *Parens Patriae* Treble Damages Actions Under the Donnelly Act

New York courts have specifically allowed *parens patriae* treble damages actions under the Donnelly Act. *Liberty Mut.*, 52 A.D.3d 378 (finding quasi-sovereign interest and upholding *parens patriae* claim for Donnelly Act damages arising from bid-rigging scheme); *Coventry First*, 2007 WL 2905486 (upholding Donnelly Act damages claim in bid-rigging case since “[t]he *parens patriae* doctrine enables the State to seek damages, restitution, and civil penalties on behalf of New York residents that are harmed by wrongful acts”).

In *Liberty Mutual*, defendants were accused of a bid rigging scheme concerning insurance commissions. *Liberty Mutual*, 52 A.D.3d at 379. The Attorney General sued for, *inter alia*, injunctive relief and damages.⁴ Brief for Plaintiff-Respondent, *People v. Liberty Mut. Ins. Co.*, No. 2008-03972, 2008 WL 5934817 at 2 (N.Y. App. Div. 1st Dep’t April 2, 2008) (copy attached). The Appellate Division held that “[t]he Attorney General stated valid claims against defendants for their participation in a bid-rigging scheme in violation of the Donnelly Act.” *Liberty Mutual*, 52 A.D.3d at 379. The court further found that the rigging of bids for insurance business is a valid basis to assert the Donnelly Act, and that “[t]he State has inherent authority to

⁴ As discussed in the next section, Intel is wrong to assert that *Liberty Mutual* was not an action for damages.

act in a *parens patriae* capacity when it suffers an injury to a quasi-sovereign interest.” *Id.*

Therefore, “the Attorney General [may] sue[] to redress injury to its ‘quasi-sovereign interest in securing an honest marketplace for all consumers.’” *Id.* New York has asserted an equally valid quasi-sovereign interest here, and the Attorney Generals’ *parens patriae* authority therefore must be upheld.

5. Intel Fails to Distinguish or Refute New York’s Authority

Intel cites to a number of cases, which either are inapposite, incorrectly cited or actually support New York’s position. For example, Intel argues, incorrectly, that the *Liberty Mutual* Court did not address whether a *parens patriae* claim can be maintained to recover damages. This is wrong. Although it is true that the word “damages” itself does not appear in the ruling, there is no question that it was a damages action, that the Attorney General’s *parens patriae* authority to assert damages claims was the issue on appeal, and that it was affirmed without reservation or distinction. Specifically, the publicly available appellate briefs show that the appeal centered on the Attorney General’s ability “in his *parens patriae* authority to recover treble damages” under the Donnelly Act. Brief for Plaintiff-Respondent, *People v. Liberty Mut. Ins. Co.*, No. 2008-03972, 2008 WL 5934817 at 9 (N.Y. App. Div. 1st Dep’t April 2, 2008). Defendants’ challenge to the State’s *parens patriae* authority to recover damages under the Donnelly Act failed. *Liberty Mut.*, 52 A.D.3d at 379. In fact, defendants in *Liberty Mutual* did not even challenge New York’s *parens patriae* power with respect to injunctive relief or remedies. In other words, the court’s affirmation of New York’s *parens patriae* power in that context was therefore specifically a confirmation of its right to recover damages under the Donnelly Act. Intel’s distinction is therefore unfounded. Indeed, *Liberty Mutual* requires denial

of Intel's motion.

Intel also fails to distinguish *Coventry First*, another case finding that the Attorney General of New York may bring *parens patriae* actions for damages under the Donnelly Act. While addressing an unrelated issue, the court clearly states: "The *parens patriae* (sic) doctrine enables the State to seek damages, restitution and civil penalties on behalf of New York residents that are harmed by wrongful acts occurring within and outside this State." *Coventry First*, 2007 WL 2905486.

Intel errs to rely on *New York ex rel. Abrams v. Seneci*, 817 F.2d 1015 (2d Cir. 1987). Aside from the fact that *Seneci* was a federal RICO – not state antitrust – case, *Seneci* is distinguishable because, unlike here, the Attorney General in *Seneci* sought to recover monetary relief under RICO for *only 79 individuals*, not for a larger number of similarly affected persons. In other words, the *Seneci* case arguably failed the *Grasso* prong that requires "injury to a substantial segment of the state's population." *Grasso*, 11 N.Y.3d at 69 n.4. Moreover, the *Seneci* decision can be distinguished on other grounds, including a previous decision in a parallel case granting an injunction against the defendant and awarding restitution to consumers. *Id.* The circumstances could not be more different here, where no court has yet ordered Intel to recompense New York consumers. Intel's reliance on *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1061 (E.D. Pa. 1969), is similarly misguided. *See id.* at 1062 (precluding *parens patriae* authority for "suits for the benefit of particular individuals").

Intel also errs by relying on the intermediate appellate decision *New York v. Grasso*, 54 A.D.3d 180, 198-99 (N.Y. App. Div. 1st Dep't 2008), because in that case restitution was sought

on behalf of a *single* entity, a stock exchange. This is not the case here. Moreover, the defendant in *Liberty Mutual* also tried to rely on the intermediate court decisions in *Grasso*, but the *Liberty Mutual* appellate court rejected the argument that its earlier *Grasso* opinion could be read to preclude the attorney General from bringing a *parens patriae* action for treble damages under the Donnelly Act. *Liberty Mut.*, 52 A.D.3d at 379 (expressly rejecting defendants' reliance on *Grasso*).

Intel also cites *Canal Ins. Co. v. Underwriters at Lloyd's London*, 435 F.3d 431, 436 (3d Cir. 2006), apparently for the uncontroversial proposition of how a federal court resolves questions of state law. However, *Canal Insurance* supports New York, not Intel, because New York's highest court *has* affirmed *parens patriae* damages actions and set forth the three-prong *Grasso* test. *Canal Insurance* teaches that the federal courts should look to (1) what that state's highest court "has said in related areas, (2) the decisional law of the state intermediate courts, [and] (3) federal cases interpreting state law." *Id.* As set forth herein, the overwhelming weight of authority by New York's Court of Appeals, the intermediate appellate courts, and the trial courts support New York's assertion of *parens patriae* authority here. *Grasso*, 11 N.Y.3d at 69 n.4; *Liberty Mut.*, 52 A.D.3d 378; *Coventry First*, 2007 WL 2905486; *Cardizem*, 218 F.R.D. 508, 520-21.⁵

⁵ *People v. Gold Medal Farms*, 113 Misc. 2d 574, 578 (N.Y. Sup. Ct. 1982), is even farther off point. *Gold Medal Farms* concerned a choice between civil and criminal penalties. This is simply not at issue here and has no bearing on *parens patriae* authority.

Intel relies heavily on an unreported decision in *In re DRAM Antitrust Litig.*, Civ. A. No. 02-1486 PJH, 2007 WL 2517851 (N.D. Cal. Aug. 31, 2007), as well as the decision *People v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002). However, both the *DRAM* and *Feldman* decisions were made before – and therefore did not have the benefit of – the *Grasso*, *Merkin*, *Liberty Mut.*, or *Coventry First* decisions, discussed below. The later all expressly affirm the Attorney General’s *parens patriae* authority, and set forth the applicable test. It is doubtful that the *Feldman* or *DRAM* decisions would have been decided as they were if they had had the benefit of the more recent state law authority. *See Canal Ins.*, 436 F.3d at 436 (federal courts should follow state courts when ruling on state law). In addition, *Feldman*’s passing observation, in a footnote, that the Donnelly Act itself has no *parens patriae* provision, is *dictum* because the Donnelly Act was not at issue in that ruling.⁶ *Id.* at 302 n.4.

B. New York Has Statutory Authority to Seek Damages on Behalf of Consumers Under the Donnelly Act

Independent of its common law authority, New York may also bring its Donnelly Act claim on behalf of consumers by virtue of separate statutes. Section 63(1) of the Executive Law authorizes the Attorney General to “[p]rosecute and defend all actions and proceedings in which the State is interested.” Section 63(12) authorizes the Attorney General to sue “*in the name of the people of the State of New York*” when any person shall “[e]ngage in repeated fraudulent or

⁶ The *Feldman* court’s observation is limited to the non-controversial fact that the Donnelly Act itself does not recite *parens patriae* authority; but New York relies on common law and the Executive Law as authority to recover on behalf of consumers – not a provision in the Donnelly Act itself. Therefore, even if it were not *dictum*, and even if it were not superseded by evolving (continued next page...)

illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting, or transaction of business.” (emphasis added). Courts have held that New York’s Executive Law §§ 63(1) and 63(12) constitute “express state statutory authority [allowing the Attorney General] to represent consumers in a capacity that is the functional equivalent of *parens patriae* authority.” *Cardizem*, 218 F.R.D. at 521 (citing *Lorazepam*, 205 F.R.D. at 386-87).

C. Intel Errs to Rely on Federal Law, Which in Any Event Permits New York’s *Parens Patriae* Authority

The Supreme Court long ago affirmed state attorney general *parens patriae* actions in general. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945); *see also Cardizem*, 218 F.R.D. at 520-21 (quoting *Alfred L. Snapp & Son*, 458 U.S. at 607 (1982); citing *Lorazepam*, 205 F.R.D. at 386-87). Intel nevertheless relies on two later cases, *Frito-Lay* and *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), to assert a federal limitation on state attorney general damages actions. Because those cases never applied to state law and, more importantly, they were expressly overruled by statute, Intel is wrong to rely on them.

Almost forty years ago, the Ninth Circuit held that the California Attorney General did not have common law *parens patriae* authority to assert a federal Clayton Act claim. *Frito-Lay, Inc.*, 474 F.2d at 431. This holding had no bearing on a state attorney general’s ability to assert a *parens patriae* action under state antitrust laws, which itself is determined largely by reference to state, not federal, law. *Illinois v. AU Optronics*, ___ F.Supp.2d ___, 2011 WL 2214034 (N.D.Ill. 2011) (“*Frito Lay* is not persuasive authority” with respect to state law *parens patriae* actions

state case law, it would still have no bearing on the issue here.

because “[a]ttorneys general have a sovereign interest in enforcing their own state laws.”) (citing *Pennsylvania v. Mid-Atlantic Toyota Distribs.*, 704 F. 2d 125, 131 (4th Cir. 1983)) (West citation not yet available, copy attached). Therefore, it is not applicable on this motion, which targets only the state law Donnelly Act claim.

In any event, the *Frito-Lay* holding was short-lived. Congress recognized that *Frito-Lay* was an error and *expressly* overruled it when it enacted the Hart-Scott-Rodino Antitrust Improvement Act of 1976. 15 U.S.C. § 15c (specifically permitting state attorney general *parens patriae* damages actions under the Clayton Act). The House Report observed that a “State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.” P.L. 94-435, Hart-Scott-Rodino Antitrust Improvements Act of 1976, House Report No. 94-499(1), Sept. 22, 1975 at Part III (copy attached). The House Report went on to specifically criticize the *Frito-Lay* decision. *Id.* Indeed, the House Committee found that “the best deterrent to a resumption of the illegal conduct might be a suit by the state which deprives the violator of the profits gained from his bad conduct and provides relief which compensates the injured consumers.” *Id.*

Intel glosses over both points. First, Intel ignores the fact that *Frito-Lay* and *Standard Oil* were limited to federal law, and have no bearing on a state Donnelly Act claim. Second, although Intel acknowledges, in a footnote, that *Frito-Lay* was specifically overruled by statute, Intel nevertheless believes that *Frito-Lay* still applies to state law because there was no state legislative equivalent to the Hart-Scott-Rodino amendment overruling those decisions. Intel

Mem. at 7 n.4. This latter point is flawed for two distinct reasons: (1) because *Frito-Lay* applied only to federal Clayton Act claims, not state law claims, a state legislative enactment would be nonsensical; and (2) after *Frito-Lay*, New York's highest court (and lower courts) specifically reaffirmed the Attorney General's right to assert *parens patriae* damage claims under the Donnelly Act, where New York satisfies the three-prong *Grasso* test. *See* Part A above.

Thus, no express amendment of New York's Donnelly Act was necessary to address federal decisions limited to federal law, particularly since those rulings were in any event overruled by Congressional action. The decisions of New York's Court of Appeals and lower courts resolve the issue in New York's favor.

CONCLUSION

For the reasons set forth above, Intel Corporation's Motion Under Rule 12(c) For Dismissal With Respect To New York's Donnelly Act Damages Claim on Behalf of Consumers (Dkt. No. 161) should be denied with prejudice.

Dated: August 3, 2011
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