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** November 14, 2011

NEW YORK'S COMBINED OPPOSITION TO DEFENDANT'S
MOTIONS FOR SUMMARY JUDGMENT (D.I. 231 & 234)

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES……..iii

PRELIMINARY STATEMENT……1

STATEMENT OF FACTS……..4

A. Monopoly Power……...5

B. Intel's Abuse Of Monopoly Power…...…….....6

1) Explicit Or *De Facto* Exclusive Dealing Agreements……6

2) Conditional Market Share Discounts……...7

3) Downstream Distribution Restrictions……7

4) Payments To Terminate Or Delay AMD-Based Products……...8

5) Threats To Supply, Roadmaps, Price Pull-Forwards & Technological Cooperation……..8

C. Effects Of Intel's Anticompetitive Conduct……11

D. Analysis Of New York's Economic Expert……..……..12

ARGUMENT……14

I. Because There Are Central Questions of Fact, Summary Judgment Cannot Be Granted..……16

II. Intel's Conduct Is Plainly Exclusionary For Section 2 Purposes...……...……..15

A. Intel's Conduct, And Its Effects, Should Be Considered In Their Totality……...16

B. Intel's Exclusive Deals With OEMs Are Exclusionary Conduct……..……17

C. Intel's Market Share Discounts With Oems Are Exclusionary Conduct Whether Considered Independently Or As *De Facto* Exclusive Deals……...…….....19

D. New York Can Show Harm To Competition And Antitrust Injury.……..……23

i) Intel Harmed Competition……..25

ii) New York's Injury Flows From This Harm To Competition...……...…..26

iii) Intel Harmed AMD…….……27

III. Intel Engaged In Exclusionary Conduct And Exclusionary – Not Predatory – Pricing… ……..……..……28

A. A Below-Cost Pricing Test Does Not Apply To New York's Claims Of Exclusionary Conduct And Foreclosure……...28

B. Intel's Authorities Do Not Apply Where, As Here, Exclusive Deals And Market Share Discounts Are Coercive And Binding And The Purpose Is To Tax Rivals……...……30

IV. Intel's Arguments Regarding New York's Executive Law And Damages Do Not Support Summary Judgment……...…….…..33

A. New York's Executive Law Claim Is Supported By Its Federal And State Law Antitrust Claims...……..34

B. New York's Damages Calculation Satisfies Applicable Standards……..……..36

CONCLUSION……..42

TABLE OF AUTHORITIES

PAGE

Cases

Allied Orthopedic Appliances v. Tyco Health Care, 592 F.3d 991 (9th Cir. 2010) ... 21, 22, 31, 33

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986) 14

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884 (1990) 29

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) 21, 31

Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011) 39

Bigelow v. RKO Radio Pictures, 327 U.S. 251, 66 S.Ct. 574 (1946) 37

Blue Shield v. McCready, 457 U.S. 456, 1021 S. Ct. 2540 (1982) 24

Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802 (3d Cir. 1984) 39

Brantley v. NBC Universal, --- F.3d ----, 2011 WL 5122495 (9th Cir. 2011) 27

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578 (1993). 23, 30

Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502 (1962) 23

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690 (1977) 24

Callahan v. A.E.V., Inc., 182 F.3d 237 (3d Cir. 1999) 15

Cont'l Ore Co. v.Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404 (1962) 17

Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008) 30

Church & Dwight v. Mayer Labs, 2011 WL 1225912 (N.D. Cal. 2011) 22, 32

Concord Boat v. Brunswick, 207 F.3d 1039 (8th Cir. 2000) 31, 32

Conwood Co. v. United State Tobacco Co., 290 F.3d 768 (6th Cir. 2002) 27

Dooley v. Crab Boat Owners Assn, 2004 WL 902361 (N.D.Cal.2004 16

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U. S. 451, 112 S. Ct. 2072 (1992) 16

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S. Ct. 400 (1927) 37

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) 25

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) 25

Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425 (3d Cir. 1993) 24, 25

Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 748 S. Supp. 1399 (D. Ariz. 1990) 40

Harrison Aire, Inc. v. Aerostar Int'l Inc., 423 F.3d 374 (3d Cir. 2005) 24

ILC Peripherals Leasing Corp. v. Intl Business Machines Corp., 458 F. Supp. 423 (N.D. Cal. 1978) 40

In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677 (2d Cir. 2009) 24

In re Remeron Antitrust Litigation v. Organon, Inc., 335 F.Supp.2d 522, 528 (D.N.J. 2004) 17

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 101 S. Ct. 1923 (1981) 37

LePage's, Inc. v. 3M, 324 F. 3d 141 (3d Cir. 2003) ..... passim

Lepage's Inc. v. 3M, 1999 WL 346223 (E.D. Pa. May 14, 1999) 15

Link v. Mercedes-Benz of North America, 1975 WL 953 (E.D. Pa. 1975) 40

Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181 (1951) 16

Marino v. Indus. Crating Co., 358 F.3d 241 (3d Cir. 2004) 15

Massimo Corp. v. Tyco Health, 2006 WL 1236666 (C.D. Cal. 2006), *rev'd in part on other grounds by 350 Fed.Appx. 95, 2009 WL 3451725 (9th Cir. 2009)* 21, 22

Med Alert Ambulance, Inc. v. Atl. Health Sys., Inc., No. 04-1615, 2007 WL 2297335 (D.N.J. Aug. 6, 2007) 15

N.Y. citizens Comm. on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802 (S.D.N.Y. 1986) 24

Natchitoches Parish Hospital Service Dist. v. Tyco Intern., 2009 WL 4061631 (D.Mass. 2009) 19, 21, 31

Natchitoches Parish Hosp. Service Dist. v. Tyco Intern., Ltd. 247 F.R.D. 253 (D. Mass. 2008) 21

Nathanson v. Med. College of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991) 15

New York v. Feldman, 210 F. Supp. 2d 294 (S.D.N.Y. 2002) 35

Nicsand v. 3M, 507 F.3d 442 (6th Cir. 2007) 31

Omega Environmental v. Gilbarco, 127 F.3d 1157 (9th Cir. 1997) 33

Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109 (2009) 29, 30

People v. American Motor Club, Inc., 179 A.D.2d 277 (1st Dep't 1992) 35

Pepsico, Inc. v. Coca-Cola, 315 F.3d 101 (2d Cir. 2002) 33

Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224 (3d Cir. 1993) 15

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 24

Riss & Co. v. Association of Am. Railroads, 190 F. Supp. 10 (D.D.C. 1960) 40

S. Pac. Commun. Co. v. AT&T, 556 F. Supp. 825 (D.C.C. 1983, *aff'd*, 740 F.2d 980

(D.C. Cir. 1984) 40

Southeast Missouri Hospital v. C.R. Bard, 642 F.3d 608 (8th Cir. 2011) 31, 32, 33

State v. Daicel Chem. Indus., Ltd., 2005 WL 6056054 (N.Y. Sup. Aug. 9, 2005) 34, 36

State v. Daicel Chem. Indus., Ltd., 42 A.D.3d 301 (1st Dept. 2007) 36

State v. Frink Am., Inc., 2 A.D.3d 1379 (4th Dep't 2003) 34

State v. Maiorano, 189 A.D.2d 766 (2d Dep't 1993) 34

State v. Scottish-Am. Assoc., Inc., 52 A.D.2d 528 (1st Dep't 1976) 34

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 37, 39

T.A.M., Inc. v. Gulf Oil Corp., 553 F. Supp. 499 (E.D. Pa. 1982) 15

U.S. HealthCare v. HealthSource, Inc., 986 F.2d 589 (1st Cir. 1993) 33

United States v. Dentsply Intern., Inc., 2001 WL 624807 (D.Del. Mar. 30, 2001) 15

United States v. Dentsply, 399 F.3d 181 (3d Cir. 2005) 2, 17, 18, 9, 27

United States v. Griffith, 334 U.S. 100, 68 S. Ct. 941 (1948) 16

United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698 (1966) 16

United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) 2, 18

Univac Dental Co. v. Dentsply Int'l, Inc., 2010 U.S. Dist. LEXIS 41130 (M.D. Pa. Apr. 27, 2010) 37

Virgin Atlantic Airways v. British Airways, 257 F.3d 256 (2d Cir. 2001) 31

Wallach v. Eaton Corp., --- F. Supp. 2d ---, 2011 WL 4527313 (D.Del. Sept. 30, 2011) 2, 24, 25

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 127 S. Ct. 1069 (2007) 29, 30

ZF Meritor v. Eaton, 769 F. Supp. 2d 684 (D. Del. 2011) 2, 15, 19

Statutes

Donnelly Act, N.Y. Gen. Bus. Law §§ 340 *et. seq.* 36

N.Y. Exec. Law § 63(12) 34, 35

Section 2 of the Sherman Act, 15 U.S.C. § 2 16

Other Authorities

Areeda & Hovenkamp, Antitrust Law 16, 13, 27

Newberg on Class Actions § 10:7 (4th ed.) 41

State of New York ("New York") submits this Combined Memorandum of Law, together with the supporting Affidavit of Donald R. Greene, dated November 10, 2011, in opposition to Intel Corp.'s Motion for Summary Judgment Due to Lack of Anticompetitive Exclusion, Antitrust Injury, and Measurable Damages (D.I. 234) and its Motion for Summary Judgment Based on the Lawfulness of Its Discounting Practices (D.I. 231).[1]

PRELIMINARY STATEMENT

Intel is a "must-carry" CPU monopolist that has abused its dominance. Beginning in at least 2001, Intel engaged in a broad campaign of exclusionary conduct to exclude its only rival, AMD, from competition and, thereby, illegally maintain its monopoly. Intel's illegal conduct included *de facto* exclusive dealing agreements, restrictions on how computer manufacturers could market AMD's products, and market share discounts. Intel accompanied these unlawful acts with repeated threats and coercion, described below, to pressure its dependent customers to accept these terms, even when AMD's products were cheaper and better. These facts undercut the chief premise of Intel's summary judgment motions – that the conduct at issue is nothing more than legitimate discounting offered to willing buyers. This is *not* a case about discounting or predatory pricing, as Intel would have the Court believe. Rather, this is a case about exclusionary conduct and raising rivals' costs, and it is well supported by the facts and law.

Courts have repeatedly held that acts like Intel's can constitute exclusionary conduct under Section 2 of the Sherman Act. *LePage's, Inc. v. 3M*, 324 F. 3d 141 (3d Cir. 2003); *United*

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[1] New York incorporates by reference its contemporaneously filed opposition to Intel's *Daubert*
(continued next page…)

States v. Dentsply, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); *ZF Meritor LLC v. Eaton*, 769 F. Supp. 2d 684 (D.Del. 2011); *Wallach v. Eaton Corp.*, __ F. Supp. 2d __, 2011, 2011 WL 4527313 (D.Del. Sept. 30, 2011).

Here, as in those cases, a monopolist used various forms of exclusive dealing to broadly foreclose sales from a rival, thus preventing it from gaining the market acceptance and additional sales it needed to challenge the monopoly. Here, as well, Intel's actions excluded price competition from AMD and limited its market share among major computer manufacturers ("Original Equipment Manufacturers" or "OEMs"). By imposing substantial penalties, essentially a "tax" on purchases made by major OEMs from AMD, Intel raised AMD's costs and the costs of customers purchasing from AMD, thus leading to higher prices.

Intel made frequent use of market-share discounts – agreements which conditioned so-called "discounts" on a customer's agreement to limit the share of CPUs sourced from AMD. These were generally used in conjunction with *de facto* exclusive agreements and payments to OEMs not to launch or market AMD products. It bears emphasis that, in Intel's aggressive hands, market share discounts were not legitimate price competition. It is not price competition when Intel, owning most of an OEM's business anyway, *conditions* an all-or-nothing discount on the customer buying most or all of its remaining requirements from Intel. That is not low pricing. Rather, it inflicts a penalty that any OEM which transgresses Intel-imposed thresholds on its dealing with AMD must pay – or demand that AMD compensate it for. As a result, OEMs

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motion, as well as the supporting declaration.

that dealt with AMD saw their costs rise. Confronted with this high wall of taxes imposed on purchases of its products, AMD could not effectively discipline Intel's monopoly pricing. New York consumers and governmental entities paid the price in monopoly overcharges on the Intel-based computers they purchased.

On these motions, Intel does not establish *any* undisputed facts on which it would be entitled to summary judgment. Instead, Intel mischaracterizes the facts, New York's claims, and its economist's opinions. First, Intel combines a denial that New York has shown "exclusionary conduct" for Section 2 purposes with the unfounded claim that any such showing requires a showing that AMD was "harmed" or "weakened." But Intel has it backwards. There was certainly harm to AMD, since its sales were foreclosed and its drive for market acceptance blunted by Intel's tactics. But as a consumer plaintiff, New York need only show harm to competition, from which its own injuries flow, not the financial crippling or market exit of a competitor. Second, Intel again brings forward an argument which the Third Circuit and other courts have repeatedly rejected in exclusionary conduct cases: That exclusive dealing and conditional discounts are lawful unless they involve below-cost, "predatory" pricing. As shown below, that argument ignores both the facts – that this is an exclusionary conduct case, not a below-cost pricing case – and the law, which draws a clear distinction between the standards applicable to predatory pricing and those applicable to other conduct violative of Section 2.

Finally, Intel makes two separate arguments concerning New York's Executive Law and New York's damages claims. With respect to the Executive Law claim, Intel's argument is that it depends on New York's federal and state law antitrust claims. That is true, but for the reasons set forth herein, they firmly support the Executive Law claim. And Intel's claims regarding New

York's calculation of damages provides no basis for summary judgment.

STATEMENT OF FACTS

From 2001 through 2006, Intel feared the increasing competitive threat from AMD, which had begun developing high quality x86 CPUs that were – by Intel's own admission – more desirable. *See* Kasha Decl., Ex. 1 (admission by Intel expert). OEMs began to consider offering more AMD-based computer products to meet an increasing demand for them. *See* Kasha Decl., Exs. 2, 3. Intel was years behind the technology, and AMD was poised to gain significant market share. Intel chose not to compete on the merits, instead launching its campaign to deprive AMD of sales, thereby depriving consumers of product choice and lower prices.

As part of its anticompetitive scheme, Intel made illicit payments, totaling billions of dollars. Intel's so-called "rebates" were, in one form or another, conditional on each OEM's refusal to deal, or limitations in dealing, with AMD. New York has retained an expert economist, Dr. Frederick Warren-Boulton ("Dr. Warren-Boulton" or "FWB"), who will testify at trial that Intel's conditional "rebate" scheme was, in practice, a *tax* imposed on OEMs for dealing with AMD beyond the arbitrary limits set by Intel, and that this tax lead to monopolistic profits by Intel and injury to New York consumers. Floyd Decl., Ex. A (D.I.235) ("FWB Report").[2] New York is not alone in calling Intel's "rebate" system a "tax." One of Intel's leading

[2] In order to avoid duplication, New York relies on Intel's copy of New York's expert report by FWB, which is attached to Intel's Declaration of Daniel Floyd (D.I.235), as Exhibit A.

customers, Dell, regularly referred to Intel's payments internally as a [redacted] for keeping AMD CPUs out of Dell's product offerings. *See* Kasha Decl., Ex. 4. For its part, Intel used the term "alignment" as a code word for OEMs that complied.

CPUs are not interchangeable, so an OEM is "locked into" a particular supplier for years after it designs a new product. For OEMs that were not "in alignment" with Intel, Intel could impose the monogamy tax on *all* of the OEM's purchases from Intel – even for unrelated product lines that had been launched months or years earlier and for which the OEM had no substitute. Thus, when an OEM considered launching a new product line with AMD CPUs, Intel's tax system led OEMs to fear that their costs could escalate for *all product lines* that would still need Intel microprocessors for years to come. In this way, *uncontested* product lines were held hostage by Intel to an OEM's decision on *contested* lines, or as HP put it, Intel had them [redacted] *See* Kasha Decl., Ex. 5

A. Monopoly Power

Intel posses monopoly power, controlling more than 75% of the market. FWB Report at 15. All major OEMs depend on Intel for a majority of their microprocessors, which cannot be switched after the initial design. *Id.* at 16. There are extremely high barriers to market entry, including intellectual property, years of design, and manufacturing facilities costing billions of dollars. *Id.* at 4-5.

Intel's customers also considered Intel to be a monopolist. [redacted] *See* Kasha Decl., Ex. 6. In 2004, [redacted]

[redacted]

B. Intel's Abuse of Monopoly Power

Intel's basic *quid pro quo* was exclusion of competition, in exchange for "rebate" payments that could be summarily withheld if the OEM ceased to be "aligned" with Intel, enforced by threats. Intel implemented this scheme in several ways: (1) full exclusion through an explicit or *de facto* exclusive dealing agreement; (2) market share discounts, where an OEM's discount was conditioned on "alignment;" (3) payments in exchange for restricting downstream distribution of AMD-based products; (4) payments in exchange for terminating or delaying the introduction of an AMD-based product; and (5) threats to OEMs concerning supply, roadmaps, price pull-forwards, and technological cooperation. There is ample evidence of each of these. Below is but a sample. Upon request, New York can submit additional evidence, which will ultimately be presented at trial.

1. Explicit Or *De Facto* Exclusive Dealing Agreements

In exchange for billions of dollars as well as other benefits, Dell did not sell any AMD-based products for years. FWB Report at 7-8. *See also* Kasha Decl., Ex. 4. Intel deliberately did not reduce its exclusivity arrangement with Dell to a formal written contract, likely to avoid antitrust exposure. Kasha Decl., Ex. 4. But the course of conduct, as well as certain communications, demonstrate that the arrangement was *de facto* exclusive. *Id.* [redacted] By 2005-06, Intel was paying [redacted] to buy Dell's [redacted] *See* FWB Report at 34-35; *see also* Kasha Decl., Ex. 8 [redacted] Kasha Decl.,

Ex. 9 at -9876 [redacted]; Kasha Decl., Ex. 10 [redacted] As discussed below, Intel also bought full exclusion in certain product lines at IBM, by means of large payments.

2. Conditional Market Share Discounts

In 2002, Intel induced HP to enter into an unusual one-page agreement, [redacted] Intel scrubbed the final version of [redacted] of its key anticompetitive terms, but not the drafts, [redacted] *See* Kasha Decl., Ex. 11 [redacted]. [redacted] scrubbing. *See* Kasha Decl., Ex. 12. In 2004, the illegal terms of [redacted] continued in an [redacted] successor agreement. *See* Kasha Decl., Ex. 13.

3. Downstream Distribution Restrictions

Intel's [redacted] agreements severely limited the remaining 5% of AMD's distribution. HP had to sell its AMD-based computers [redacted] from a customer. *See* Kasha Decl., Ex. 12. As a result, AMD couldn't even reach the 5% cap, rising only to 2%. *See* Kasha Decl., Ex. 2 at -2567. This was not due to competition on the merits: [redacted]

In 2003, IBM launched an AMD-based "2 way" server designed for the "high performance computing" or "HPC" segment. Intel threatened retaliation if IBM did not pull back support for the AMD line. , *See* Kasha Decl., Ex. 14 at -437. IBM relented on the AMD 2 way server, *See* Kasha Decl., Ex.15

4. Payments to Terminate or Delay AMD-Based Products

In 2004, IBM canceled one planned AMD-based product in the profitable server market after being offered . *See* Kasha Decl., Exs. 16, 17.

See Kasha Decl., Ex.18.

5. Threats To Supply, Roadmaps, Price Pull-Forwards & Technological Cooperation

Intel used threats to bring its customers into "alignment." A *See* Kasha Decl., Ex.19. Indeed, when Dell finally *did* launch

AMD-based products in 2006, Intel retaliated by cutting off *hundreds of millions of dollars* of rebates *per quarter* that Dell had previously taken for granted. FWB Report at 34-35.

In 2002, HP was considering a deal with AMD to launch HP's first commercial AMD desktop. Senior HP executives feared Intel's retaliation [redacted] *See* Kasha Decl., Ex. 3. [redacted] *See* Kasha Decl., Ex. 20. [redacted] *See* Kasha Decl., Ex. 21

Intel also pressured HP by threatening a joint HP-Intel development project in which HP had invested heavily, called "Itanium" or "IPF." Itanium was a proprietary, *i.e.*, non-x86, server microprocessor technology which, HP expected, would provide the backbone for its future high-end server business and affect other segments of its business. [redacted]. *See* Kasha Decl., Ex. 3. Therefore, Intel had leverage over HP that it was prepared to use.

[redacted] *See* Kasha Decl., Ex. 3. [redacted]

[redacted] *See* Kasha Decl., Ex. 22. [redacted] *See* Kasha Decl., Ex. 23.

In 2004, HP surprised Intel when it announced the launch of a range of AMD Opteron-based server products. *See* Kasha Decl., Ex. 24. This gave AMD the opportunity to compete for the highly profitable corporate market where Intel had enjoyed no competition and high margins – but now those profits were at stake. The problem for Intel was that for some applications, the AMD Opteron was markedly superior. *See* Kasha Decl., Ex. 1 [redacted]. Again, Intel threatened to punish HP for this AMD launch. *See* Kasha Decl., Ex. 25 [redacted]. *See* Kasha Decl, Ex. 24. And Intel threatened the Itanium project again in 2005. *See* Kasha Decl., Ex. 5 [redacted]

Intel used threats to try to keep IBM in "alignment" with respect to "blade servers," which Intel and IBM were developing in collaboration. [redacted] *See* Kasha Decl., Ex. 26 at -964. In late 2004, IBM informed Intel that it planned to launch an AMD Blade [redacted]

[redacted] Intel refused, instead threatening IBM. *See* Kasha Decl., Exs. 27, 28 at -050 [redacted] *See* Kasha Decl., Ex 33 at -761. Because of customer demand for the blade server, IBM nevertheless launched the AMD blade server in Spring 2005. Thereafter, Intel sought to impose marketing and sales restrictions the AMD blade server, [redacted]. *See* Kasha Decl., Exs. 29 - 33. Intel also pressured IBM to limit other sales and collations with AMD, [redacted] *See* Kasha Decl., Ex. 35 at -792.

C. Effects Of Intel's Anticompetitive Conduct

By foreclosing AMD from competing at the top OEMs, Intel injured consumers by increasing costs, decreasing choice, and reducing innovation in the long run. That foreclosure was substantial. For example, as calculated over the three most exclusionary kinds of Intel's conduct (full exclusion, market share discounts, and restrictions on downstream marketing), the percentages of OEM purchases affected by at least one of those practices stood at approximately 50-70% in late 2005 and early 2006. FWB Report at 32-33. The evidence shows that Intel's goal was to charge artificially high prices. [redacted] *See* Kasha Decl., Exs. 7, 19 [redacted] *See also* Kasha Decl.,. Ex. 36. HP expressed similar

concerns in internal emails. *See* Kasha Decl., Ex. 20 [redacted] In violation of the law, Intel engaged in its illegal practices to stop such a "price war."

D. Analysis Of New York's Economic Expert

New York's expert, Dr. Frederick Warren-Boulton ("FWB"), is a distinguished economist who has analyzed the evidence in this case and concluded that Intel's conduct excluded AMD, harmed competition, and harmed New York consumers. *See generally* FWB Report. FWB's theory of liability is based on exclusionary practices and raising rivals' costs, two well-accepted theories of Section 2 liability.

In one of Intel's summary judgment motions, and in its *Daubert* motion, Intel complains that FWB's testimony somehow precludes a finding of exclusionary conduct under Section 2 because his opinion is not based on an assessment of the magnitude of harm to the competitor, AMD. A consumer plaintiff has no obligation to show harm to the competitor, once it has shown harm to competition giving rise to the consumer injury. But, even if such a showing were required, New York can show that AMD was in fact "weakened." In fact, FWB's report and testimony show both how Intel's exclusion of AMD occurred and how it had anticompetitive effects on consumers.

FWB categorized and summarized some of the principal kinds of Intel's exclusionary acts in "conduct indices," noting explicit or *de facto* exclusive dealing agreements, Intel-imposed restrictions on whether, when and how OEMs were permitted to market AMD products, market share discounts, and threats directed against non-compliant OEMs. FWB Report at 29-31. This behavior is embraced within FWB's umbrella term "exclusionary pricing." *Id.* at 4.

FWB testified that "Intel's behavior in this case … was not being used … to drive AMD

out of the market, but rather to limit the effectiveness of AMD as a competitor, particularly during the period when AMD's products were becoming increasingly technically equivalent or superior to Intel." Kasha Decl., Ex. 37 at 167. This obviously constitutes "weakening" of a competitor, if such a showing need be made.

FWB also concluded that by imposing a substantial penalty or "tax" on purchases made by major OEMs from AMD, Intel raised AMD's costs and the costs of the OEMs purchasing from AMD. FWB Report at 24-25, 35. The effect of raising AMD's and the OEMs' costs is to decrease AMD's ability to discipline Intel's monopoly pricing. Kasha Decl., Ex. 37 at 751:16-757:10.[3]

FWB concluded that Intel's conduct was reasonably calculated to protect its monopoly pricing power. He testified that "Intel's choice during the damage period was to either compete on a … price basis … or to try and use its great advantage, which is that it is a must-carry brand for a significant number of …. OEMs. And that … strategy, as a way to limit AMD, is simply much more profitable." Kasha Decl., Ex. 37 at 167:11-25.

Finally, FWB's report shows that New York and New York consumers were injured by Intel's illegal acts. FWB Report at 4, 36.

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[3] This accords with accepted economic and antitrust law principles: "Several anticompetitive actions by dominant firms are best explained as efforts to limit rival's market access by increasing their costs. Such strategies may succeed where more aggressive ones involving the complete destruction of rivals may not. Once rivals' costs have been increased, the dominant firm can raise its own price or increase its market share at the rivals' expense." Areeda & Hovenkamp, *Antitrust Law* ¶ 651b5.

ARGUMENT

The law and evidence show that New York's claims present genuine issues of material fact for a jury to decide at trial. Specifically, the evidence supports New York's claims of a violation of Section 2 of the Sherman Act, including the "antitrust injury" requirement.

Intel has made two motions for summary judgment: one concerning exclusion, antitrust injury and measurable damages (the "Exclusion Motion," D.I. 234), and the other concerning the lawfulness of its "discounting" practices (the "Discounting Motion," D.I. 231). The Court has granted New York permission to file a combined response.

As discussed at length below, Intel has confused the legal issues in its motions. In order to clarify, after the standard of review in Part I, New York affirmatively states and analyzes the applicable law of exclusion under Section 2, including the antitrust injury requirement. (New York responds in particular to the arguments in Intel's Exclusion Motion concerning "weakening a competitor" and the "linkage" of harm to the plaintiffs in Part II.D.) In Part III, New York addresses Intel's erroneous assertion that all above-cost pricing is immune from antitrust liability. Finally, in Part IV, New York responds to Intel's arguments concerning New York's Executive Law claims and the evidence of damages.

I. SUMMARY JUDGMENT MUST BE DENIED BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT

Summary judgment may only be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, even if the facts are undisputed, summary judgment may not be granted if there is a

disagreement as to the inferences that can be drawn from the facts. *Nathanson v. Med. College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991); *T.A.M., Inc. v. Gulf Oil Corp.*, 553 F. Supp. 499, 504 (E.D. Pa. 1982) (exclusive dealing may be inferred from deposition testimony despite the undisputed absence of a written exclusivity agreement).

At the summary judgment stage, a court is not to weigh the evidence or make credibility determinations. *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993); *Med Alert Ambulance, Inc. v. Atlantic Health Sys., Inc.*, No. 04-1615, 2007 WL 2297335 at *2 (D.N.J. Aug. 6, 2007) (quoting *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004)). To raise a genuine issue of material fact, therefore, the summary judgment opponent need not "match, item for item, each piece of evidence proffered by the movant," but simply must exceed the "mere scintilla" standard. *Petruzzi*, 988 F.2d at 1230. This Court has decided Section 2 cases where the plaintiff has survived summary judgment on general exclusion/foreclosure theories. *See, e.g.*, *United States v. Dentsply*, 2001 WL 624807, *9 (D.Del. 2001) (material issue of fact on foreclosure and the viability of a particular chain of distribution for competitors); *cf. ZF Meritor*, 769 F. Supp. 2d at 691-92 (affirming jury verdict because "there was sufficient evidence for the jury to find that defendant had foreclosed the market to competition by tying discounts to market penetration goals"). The nonmoving party is permitted to use affidavits and depositions – including those of experts – to create material issues of fact to defeat summary judgment. *See Callahan v. A.E.V., Inc.*, 182 F.3d 237, 259 (3d Cir. 1999) (expert created material issue of fact); *LePage's Inc.*, 1999 WL 346223 at *6 (E.D. Pa. May 15, 1999). Here, there are plainly numerous questions of fact for trial as to both the conduct New York has alleged and its effects. There is simply no basis for summary judgment.

II. INTEL'S CONDUCT IS PLAINLY EXCLUSIONARY FOR SECTION 2 PURPOSES

A. Intel's Conduct, And Its Effects, Should Be Considered In Their Totality

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person … to monopolize any part of the trade" is guilty of an offense and subject to penalties. A violation of Section 2 consists of two elements: (1) possession of monopoly power and (2) "maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (citing *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)).

To violate Section 2, a defendant must have committed illegal conduct "to foreclose competition, gain a competitive advantage, or to destroy a competitor." *Id.* at 482-83 (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)); *See generally Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist. *LePage's*, 324 F. 3d at 151-52 ("A monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.") *See also* Areeda & Hovenkamp, Antitrust Law ¶813. Threats and other retaliatory acts used by a monopolist to obtain or maintain monopoly power may constitute unlawful, exclusionary conduct.[4]

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[4] *See e.g., Dooley v. Crab Boat Owners Assn*, 2004 WL 902361 (N.D.Cal.2004)(threats and tort-
(continued next page…)

Here, New York's expert has estimated the combined effects of Intel's exclusionary conduct in various ways, including a measure of foreclosure of AMD's sales opportunities to major OEMs and estimates of the tax which Intel's actions imposed on AMD. These and other effects should be considered in their totality. "[T]he relevant inquiry is their overall effect of a monopolist's practices considered together." Areeda & Hovenkamp, Antitrust Law ¶ 310C7. The allegations of anticompetitive conduct should be looked at together in an overall totality. "A group of factual allegations may be viewed in their totality, even while pieces of legal theory may not be added up and taken as a whole." *In re Remeron Antitrust Litig. v. Organon*, Inc., 335 F. Supp. 2d 522, 528 (D.N.J. 2004); *LePage's*, 324 F.3d at 162 (courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404 (1962) ("the duty of the jury was to look at the whole picture and not merely at the individual figures in it.")

B. Intel's Exclusive Deals With OEMs Are Exclusionary Conduct

Intel claims that New York cannot state an exclusive dealing claim, and that in any event complete exclusivity is required. Intel is wrong on both counts.

Exclusive dealing refers to practices between buyers and sellers that have the purpose and effect of resulting in exclusivity or partial exclusivity. "Exclusive dealing arrangements can be an improper means of maintaining a monopoly." *Dentsply*, 399 F.3d at 187. Payments

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like conduct by fisherman that prevented rivals from competing may amount to exclusionary conduct). *See also Dentslpy*, 399 F.3d at 190, 195 (discussing how Dentslpy "threatened" and "pressured" customers not to use rival's products).

conditioned on exclusivity or near exclusivity may be structured as an exclusive dealing. *LePage's* 324 F. 3d at 157-59. "Exclusive dealing arrangements can be an improper means of maintaining a monopoly." *Dentsply*, 399 F.3d at 187.

Intel's anticompetitive conduct is similar to that condemned by the Third Circuit in *Dentsply* and *LePage's*. *Dentsply* concerned exclusivity practices imposed by a manufacturer of artificial teeth (used in dentures and other restorative appliances) that held at least a 75% market share for many years. Although the Court found that dental labs were the ultimate customers of the teeth (as they procured them and incorporated them into other products), the primary and most effective means of distribution for artificial teeth was via dealers. *Dentsply*, 399 F.3d at 185-88, 195. In response to competition, Dentsply instituted a policy mandating exclusivity for dealers that carried its products. *Id.* at 185.

Focusing on the "economic realities" of the artificial teeth market, the Court concluded that the policy, and threats used to enforce the policy, were exclusionary. *Id*. at 189, 196. The Court focused on the vital role of "dealers as a gateway to the laboratories." *Id*. at 195. The Court rejected Dentsply's contention of insufficient foreclosure, finding that alternative, less efficient means of distribution were not viable alternatives in the market for artificial teeth: "The proper inquiry is not whether direct sales enable a competitor to 'survive' but rather whether direct selling 'poses a real threat' to defendant's monopoly." *Id*. at 193 (citing *Microsoft*, 253 F.3d at 71).

LePage's involved various exclusionary practices by 3M, a monopolist in the transparent tape market. 3M's exclusionary conduct included (but was not limited to) exclusive dealing and "bundled rebates" offered to certain retailers, aggregated across numerous products that 3M

offered.[5] *LePage's*, 324 F.3d at144-45. The Court separately evaluated the exclusive dealing and "bundled rebates" claims. *Id.* at 157. As a preliminary matter, the Court rejected 3M's argument that exclusive dealings must be express. *Id.* And the Court found "powerful evidence" to support a jury verdict that the exclusive dealing when used in conjunction with the exclusionary rebates were anticompetitive. *Id.* at 158-59. The primary exclusionary effect of 3M's conduct was that it "cut LePage's off from key retail pipelines necessary to permit it to compete profitably." *Id.* at 160.

In both *Dentsply* and *LePage's*, foreclosure from the most efficient means of distribution was sufficient for the exclusive dealing to be exclusionary.[6] *See also ZF Meritor v. Eaton*, 769 F. Supp.2d 684 (D.Del. 2011) (exclusive dealing with major OEMs resulted in substantial, exclusionary foreclosure); *Nachitoches Parish Hospital Service Dist. v. Tyco Inter.*, 2009 WL 4061631, *7 (D.Mass. 2009) ("This foreclosure from the GPO market [by defendant's sole-source contracts] raised rivals' costs and created barriers to entry. The plaintiffs having presented evidence of this foreclosure, Covidien must defend its exclusive dealing contracts by providing a precompetitive justification for the sole source contract.")

C. Intel's Market Share Discounts With OEMs Are Exclusionary Conduct Whether Considered Independently Or As *De Facto* Exclusive Deals

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[5] Other conduct alleged to be exclusionary included "large lump-sum cash payments, promotional allowances and other cash incentives to encourage them to enter into exclusive dealing arrangements with 3M." *Id.* at 145.

[6] In *Dentslpy* the Court found substantial foreclosure even though Dentsply only controlled a network of 23 out of "hundreds of dealers." *Dentsply*, 399 F.3d at 185.

Intel attempts to distinguish *LePage's* by maintaining that it is applicable only to "a multi-product producers' exclusion of single-product producers." Intel's Discounting Mem. at 12. But nothing in *LePage's* expressly limits application of the Court's analysis of market share discounts to cases where the discounts are aggregated across product markets, and its reasoning applies to the facts of this case.

Intel is a "must carry" brand. At any point in time when AMD sought an OEM's business, a large volume of the OEM's x86 CPU needs were effectively closed to AMD, or "uncontestable." *See* FWB Report at 7-8, 15. Thus, AMD was only able to bid for a limited "contestable" amount of the x86 CPU market. Intel acknowledges as much, [redacted]. *See* Kasha Decl., Ex. 39 at 16, 50-52 ([redacted]).

LePage's analysis of bundled rebates -- offering rebates on product lines that a rival does not offer and cannot effectively compete against -- applies directly to competition between AMD and Intel in the x86 market. During the entire period at issue, there was always a share of the product market that was "non-contestable," *i.e.*, not available to AMD. When Intel imposed penalties or made payments on the "non-contestable" share, it was for the purpose of preventing competition in the "contestable" share. This had the effect of foreclosing competition and raising prices to consumers.

Following *LePage's*, courts have rejected price-cost tests when evaluating market share discounts on single products, focusing instead on their foreclosure effects. For example, in

Massimo Corp. v. Tyco Health, 2006 WL 1236666 (C.D. Cal. 2006), *rev'd in part on other grounds by* 350 Fed.Appx. 95, 2009 WL 3451725 (9th Cir. 2009), the Court of Appeals for the Ninth Circuit upheld a jury verdict that "loyalty discounts" on pulse oximetry systems were exclusionary without evidence that pulse oximetry systems were ever sold below cost. The allegation was that a defendant with market power used exclusionary conduct, including "loyalty discounts" to hospitals on condition that hospitals limit purchases from its competitors to a specified percentage. Concluding that there was sufficient evidence of foreclosure caused by the "loyalty discounts," the Court upheld the jury verdict. *Id*. at *97-98

Similarly, in *Nachitoches Parish Hospital Service Dist. v. Tyco Inter.*, 2009 WL 4061631 (D. Mass. 2009), the Court rejected Defendant's argument on summary judgment that its market share discounts could only be exclusionary if evaluated under a predatory pricing test. The market share discounts required purchasers to buy as much as 90% of their needs from Defendant and had substantial "penalty prices" if the percentages were not met, with the effect of substantially foreclosing competitors. *Id*. at *3; *see also Natchitoches Parish Hosp. Service Dist. v. Tyco Intern., Ltd.* 247 F.R.D. 253, 258-59 (D. Mass. 2008) (discussing the facts and allegations in more detail). The Court held that "this case deals with a claim of exclusionary dealing, not predatory pricing." *Id.* While the Court acknowledged that some courts have applied predatory pricing cases to market share discounts – citing several of the same cases Intel relies on – the Court nevertheless disagreed that those cases, including *Barry Wright Corp. v. ITT Grinnell*, 724 F.2d 227 (1st Cir. 1983), mandated an above-cost test to *all* market share discounts in *all* situations. Instead, the Court cited with approval *Massimo*, and distinguished it from *Allied Orthopedic Appliances v. Tyco Health Care*, 592 F.3d 991 (9th Cir. 2010), a similar

case in the same Court (and cited by Intel) that also involved alleged exclusionary market share discounts in the market for pulse oximetry systems:

> What was present in *Massimo*, but not in *Allied Orthopedic, was an element of coercion beyond the loss of above-cost discounts*… Plaintiffs do not rely solely on the market share discounts to demonstrate exclusionary conduct. They highlight at least two additional coercive factors. First, they emphasize the contractual and *practical obstacles preventing hospitals from terminating the contracts.*… In addition to these formal contractual obligations, Plaintiffs assert that, in at least some instances, most notably the Spectrum contract with Novation, the largest GPO, Covidien *policed and bullied its customers* to ensure satisfaction of their ex ante purchasing commitments… Second, Plaintiffs offer evidence that at least some of Covidien's end-user contracts applied not just to single products, but across a range of bundled items, requiring buyers to commit to purchasing a substantial portion of their requirements for all products in order to receive rebates on any of them. *Such programs may be exclusionary even where the discounts are above cost . . .* *Id*. at *5-*6 (citing *LePage*'s) (emphasis added).

Consistent with *Massimo* and *Natchitoches*, the Court in *Church & Dwight v. Mayer Labs*, 2011 WL 1225912 (N.D. Cal. 2011) also rejected Defendant's argument that market share discounts must be evaluated under a price-cost predatory pricing test. *Church & Dwight* involved the market for retail condoms, of which Church & Dwight had a market share of over 75%. Plaintiff (Mayer), a competitor, alleged that Church & Dwight had market power and maintained it via various exclusionary tactics, including offering a three tier rebate program that conditioned substantial rebates (as high at 8.5%) on guaranteeing Church & Dwight increasing product space. *Id*. at *2. Citing *Linklin*e and predatory pricing cases, in a motion to dismiss, Church & Dwight argued that the anticompetitive effects of its markets share discount must be evaluated by a predatory pricing framework. *Id*. at *8. The Court rejected the argument, focusing on the allegations concerning the purpose and effects of the conditions attached to the

rebates.[7] In sum, courts have recognized that in certain situations, single product market share discounts may have "coercive effects" resulting in substantial foreclosure similar to tying and exclusive dealings.

D. New York Can Show Harm to Competition And Antitrust Injury

Intel argues that to show a Section 2 violation, New York must show harm to Intel's competitor, AMD. As Intel's own authorities show, that is incorrect: "It is axiomatic that the antitrust laws were passed for the 'protection of *competition*, not competitors.'" *Brooke Group Ltd, v. Brown & Williamson,* 509 U.S. 209, 224, 113 S.Ct. 2578 (1993)(*quoting Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502 (1962) (emphasis added)).

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[7] *Id.* at *9-10 ("Each of the above authorities on which C & D relies involved some form of predatory pricing— pricing of goods or services at a level with which competitors cannot compete—such that pricing itself operates as an exclusionary tool. (citations omitted). However, this line of cases is inapposite here because Mayer's claim is not a predatory pricing claim. Instead, Mayer asserts an entirely different species of Sherman Act violations.. . . The gravamen of the claims here is not that the wholesale prices charged by C & D (net of the planogram rebates) are so low that Mayer can't compete. Rather than a "price-based claim," the complaint is "*about the conditions that Church & Dwight imposes in exchange for the rebates*—namely, the exclusion of competitors (all competitors, not just Mayer) from the vast majority of crucial display space in crucial retailers' stores." Opp'n at 31. The claims focus on the tactics used by C & D to monopolize the display space that the parties agree constitutes virtually the sole means by which condoms are marketed. *While money is involved* (the amount of money may be relevant in determining the *coercive effect and efficacy of C & D's Planogram Program* in minimizing the proportion of display space devoted to competitors), *Mayer does not claim that the rebates* (the closest element here akin to pricing) *themselves exclude competition*. Rather, it is the exclusive display space that C & D "buys" through the rebates, as well as the exploitation of the category captain positions and exclusive dealing arrangements, that harms competition. The alleged anticompetitive conduct amounts to a vertical restraint which does not involve predatory pricing. It asserts the same kind of harm that occurs in exclusive dealing cases—the foreclosure of a substantial share of competition—via the variety of means described above.")(emphasis added).

Instead, to establish "antitrust injury" standing, plaintiff's injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct.690 (1977). The *Brunswick* test is to be analyzed as two subparts: "(1) harm of the type the antitrust laws were intended to prevent and (2) an injury to the plaintiff that flows from that which makes the defendant's acts unlawful." *Wallach v. Eaton Corp.*, __ F. Supp. 2d __, 2011 WL 4527313, *7 (D. Del. Sept. 30, 2011). "Prong one of the … test can be satisfied by pleading *any one of several types of harm." Id.* (emphasis added). For example, a "'decrease in competition' is one type of harm the antitrust laws were intended to prevent." *Id.* (citing *Gulfstream III Assoc. v. Gulfstream Aerospace*, 995 F.2d 425, 429 (3d Cir. 1993)). "Another is the payment of higher consumer prices as a result of monopolistic activity or anticompetitive conduct." *Id.* (*citing Harrison Aire, Inc. v. Aeorstar Int'l*, 423 F.3d 374 (3d Cir. 2005); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009)); *N.Y. Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 811 (S.D.N.Y. 1986); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979) (it is well-established that "[t]he essence of the antitrust laws is to ensure fair price competition in an open market"). Both of these harms are present here.

The second prong requires that the injury "flow" from the unlawful acts and is "satisfied by showing a 'significant causal connection' such that the harm to plaintiff can be said to be 'inextricably intertwined' with" the antitrust violation. *Id.* (quoting *Gulfstream*, 995 F.2d at 429; *Blue Shield v. McCready*, 457 U.S. 456, 484, 102 S.Ct. 2540 (1982)). *See also Wallach*, 2011 WL 4527313, at *7.

i. Intel Harmed Competition

Here, as Dr. Warren-Boulton testified, Intel took exclusionary measures to limit AMD's effectiveness as a competitor, thereby assuring prices would be maintained at an artificially high level. As demonstrated above, AMD sales to major OEMs were broadly foreclosed through outright exclusivity, threats and coercion, and conditioning of discounts on exclusionary conditions. By hobbling its only rival, Intel was able to decrease competition, "one type of harm the antitrust laws were intended to prevent," *Wallach*, 2011 WL 4527313 at *7 (citing *Gulfstream*, 995 F.2d at 429), while "otherwise maintain[ing] prices at an anti-competitive level." *Cf. FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082-83 (D.D.C. 1997) (merger that would eliminate "significant head-to-head competition" with only rival, allowing merged firm to increase or maintain high prices, held unlawful); *see also Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir.2000) ("As people forced to pay an alleged monopolistic overcharge, [consumers] have described *the kind of injury the antitrust laws are designed to redress*, which is to say they have satisfied the 'antitrust injury' requirement of *Brunswick.*")[8]

As the evidence will show, Intel's behavior both decreased the ability of AMD to compete and as such decreased competition, allowing Intel to maintain anticompetitive high prices. Both acts have been demonstrated to harm competition.

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[8] Moreover, in *Wallach*, the Court found that the consumers had properly established antitrust injury merely by virtue of being "consumers." *Wallach*, 2011 WL 4527313 at *8. Certainly, that is the case here.

ii. New York's Injury Flows from This Harm to Competition

Here, New York consumers and public entities suffered injury that flowed directly from Intel's illegal acts – they paid higher prices than would have prevailed in a more competitive market. Intel claims that New York has not sufficiently linked Intel's exclusionary acts to consumer harm, but the linkage is plain.

In *LePage's*, the Third Circuit affirmed that "the jury could reasonably infer" that the exclusion of a competitor "would channel consumer selection to the higher priced … brand and lead to higher profits" for the monopolist. *LePage's*, 324 F. 3d at 162. Similarly, *Wallach* affirmed standing for consumer antitrust plaintiffs in essentially the same posture as New York, *i.e.*, consumers suing under Section 2 for injury caused by a monopolist that excluded its key competitor by conditioning rebates and discounts on market share targets

Here, both New York's economic expert and the factual record establish the connection. Dr. Warren-Boulton specifically estimated the amount by which Intel's conduct raised average prices paid by New York consumers and public entities.[9] In addition, there is evidence, such as OEM business documents, that reveal Intel's fears of an industry price war if AMD were not blocked from the market. *See* Kasha Decl., Exs. 7, 9, 20. Such evidence is sufficient to show the connection and defeat a motion for summary judgment and allow the case to proceed to trial.

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[9] "I estimate that Intel's exclusionary conduct raised the average price per unit that New York end users paid for Intel microprocessors in desktop and mobile PC's and in servers from late 2001 through at least mid-2006 by between $15.01 and $23.41, depending on the quarter considered, or between about 11 percent and 15 percent of the average selling price per Intel microprocessor, depending on the quarter considered." FWB Report at 4.

iii. Intel Harmed AMD

Even if harm to AMD needed to be shown, which is does not, there is ample evidence – also relied upon by Dr. Warren-Boulton – of harm to AMD, in the form of foreclosure of sales to major OEMs.

One such kind of harm is raising costs. Exclusive dealing is a well-recognized means by which a monopolist may raise a rival's costs and thus suppress a competitive threat. *Dentsply*, 399 F.3d at 191 ("A set of strategically placed exclusive dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its products or rely at least temporarily on inferior or more expensive outlets.") (quoting Areeda & Hovenkamp, Antitrust Law ¶1802c).

As evidence that AMD was not harmed, Intel points to the fact that Dr. Warren-Boulton acknowledged the obvious fact that AMD's market share increased for some time despite the campaign of anticompetitive conduct directed against it. Intel's Exclusion Mem. at 8. But an increase in market share is not inconsistent with harm to either competition or a competitor. Plaintiffs in AMD's position have recovered for Section 2 violations even where they grew their market shares and earned high profits, because their gains would have been *greater* absent the monopolist's illegal conduct. Areeda & Hovenkamp, Antitrust Law ¶ 651b; *Conwood Co. v. United State Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002) (Section 2 violation where rival had "grown [its] market share and earned high profits even through the period that the exclusionary practices were occurring.")

Finally, Intel's reliance on *Brantley v. NBC Universal*, 649 F.3d 1078 (9th Cir. 2011), is misplaced. To begin, *Brantley* was a Section 1, not Section 2 case. *Id.* at 1080. More

importantly, *Brantley* is entirely distinguishable because, unlike here, the Brantley "plaintiffs *disavow* any intent to allege that the practices engaged in by [defendants] foreclosed rivals from competing." *Id.* at 1084. In fact, *Brantley* was, as the Court noted, "a consumer protection class action masquerading as an antitrust suit," which involved nothing more than the bundling of cable channels. *Id.* at 1080. There was simply no campaign of anticompetitive conduct directed at a rival.

III. INTEL ENGAGED IN EXCLUSIONARY CONDUCT AND EXCLUSIONARY – NOT PREDATORY – PRICING

A. A Below-Cost Pricing Test Does Not Apply To New York's Claims Of Exclusionary Conduct And Foreclosure

The vast majority of Intel's memorandum in support of the Discounting Motion is spent applying cases involving the "predatory" or "below-cost" pricing test. That test and those cases are completely irrelevant here. New York's exclusionary conduct and foreclosure claims do *not* fall within the predatory pricing line of cases and are not subject to a price-cost test. New York's injuries do not flow from low pricing or discounts, but from various forms of exclusionary conduct, including *conditioning* "discounts" on exclusionary conditions. Intel's own expert, Dr. Kevin Murphy, conceded that a price-cost test is not appropriate to evaluate certain of New York's conduct allegations. *See* Kasha Decl., Ex. 38 at 445-446 [redacted] Consequently, as a matter of law, under controlling Third Circuit authority, a predatory pricing test does not apply.

LePage's, Inc. v. 3M, 324 F. 3d 141 (3rd Cir. 2003), expressly declined to apply the *Brooke Group* below-cost test. The court considered and rejected essentially the same argument that Intel advances here – that New York must prove below-cost pricing in a Section 2

monopolization case involving exclusionary conduct. *Id.* at 151-152. "Assuming *arguendo* that *Brooke Group* should be read for the proposition that a company's pricing action is legal if its prices are not below its costs, nothing in the decision suggests that its discussion of the issue is applicable to a monopolist with its unconstrained market power." *Id*. Moreover, LePage's, "unlike the plaintiff in *Brooke Group,* does not make a predatory pricing claim." *Id*. at 151-52.

None of the cases Intel relies on, including the Supreme Court cases,[10] mandate or even suggest a price-cost test for conditional discounting by a monopolist. Intel asks this court to ignore controlling Third Circuit precedent because the Supreme Court's decisions in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) and *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) applied *Brooke Group*'s analysis to predatory-bidding and price-squeeze cases. *Brooke Group* established two requirements for predatory pricing: below-cost retail pricing and a "dangerous probability" that the defendant will recoup any *lost profits*. *linkLine*, 555 U.S. at 444 (citing *Brooke Group*, 509 U.S. 209 at 222-24). (emphasis added). The Court in *Weyerhaeuser* applied the *Brooke Group* test because "[p]redatory-pricing and predatory-bidding claims are analytically similar." *Weyerhaeuser Co.*, 549 at 321. "[T]he same [predatory pricing] reasoning applies to predatory bidding. A predatory-bidding scheme requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future." *Id*. at 323.

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[10] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990), like Intel's other authorities, stands only for the proposition that where unconditioned "low prices benefit consumers," a predatory pricing test is properly applied. It has, like Intel's other authorities, no application to cases like this one, where rebates are conditioned on assent to exclusionary terms..

The *linkLine* decision also has no bearing here because similar to predatory pricing, "[t]he other component of a price-squeeze claim is the assertion that the defendant's retail *prices are 'too low.'*" *linkLine*, 555 U.S. at 451. (emphasis added). Recognizing the analytical similarity between predatory pricing and a price-squeeze, the Court noted that the plaintiffs "appear to acknowledge that those claims [price-squeeze] must meet the *Brooke Group* requirements," however, plaintiffs' complaint "does not contain allegations meeting those requirements." *linkLine*, 555 U.S. at 446, 448. As the *linkLine* plaintiffs' complaint failed to state a *Brooke Group* claim, *linkLine* certainly did not hold as Intel argues that "pricing practices cannot be challenged as anticompetitive without proof of below-cost pricing." (Intel Discounting Motion, D.I. 231 at 13). The underpinnings of the Supreme Court rulings applying *Brooke Group* – low retail prices, intentionally incurring losses, and possible future recoupment of lost profits – are absent here. These aspects of predatory pricing are absent because Intel is a rational, profit-maximizing firm that has enjoyed large profits for many, many years. "Predatory pricing schemes are rarely tried, and even more rarely successful." *Brooke Group*, 509 U.S. at 226.

"Of course, in neither *Brooke Group* nor *Weyerhaeuser* did the Court go so far as to hold that in every case in which a plaintiff challenges *low prices* as exclusionary conduct the plaintiff must prove that those prices were below cost." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 901 (9th Cir.2008) (emphasis added). Since New York is not challenging low prices, a below-cost test is inapplicable to Intel's exclusionary conduct.

B. Intel's Authorities Do Not Apply Where, As Here, Exclusive Deals And Market Share Discounts Are Coercive And Binding And The Purpose Is To Tax Rivals

Courts do not apply a predatory pricing test to evaluate whether a particular exclusive dealing arrangement is exclusionary.[11] Intel relies upon three cases for the principle that market share discounts are not exclusionary: *Southeast Missouri Hospital v. C.R. Bard*, 642 F.3d 608 (8th Cir. 2011), *Allied Orthopedic Appliances v. Tyco Health Care*, 592 F.3d 991 (9th Cir. 2010), and *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000).[12] But none of these cases requires the use of a price-cost test to evaluate the exclusionary effect of the market share discounts. At most, the two opinions from the Eighth Circuit might be interpreted as favoring the use of a price-cost test to evaluate market share discounts applied to a single-

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[11] Only one exclusive dealing case cited by Intel, *Barry Wright Corp. v. ITT Grinnell Corp*., 724 F.2d 227 (1st Cir. 1983), has even applied a predatory-pricing type price-cost test to evaluate the lawfulness of an exclusive dealing and that was in the circumstances very different from those presented here. In any event, the holding of *Barry Wright* does not require the use of a price-cost test. Rather, after evaluating "the severity of the foreclosure" the Court upheld the District Court's finding that there was insufficient evidence of foreclosure. *Barry Wright*, 724 F.2d at 237-238. And District Courts in the Court of Appeals for the First Circuit have not interpreted *Barry Wright* as requiring use of a price-cost test to evaluate the lawfulness of exclusive dealings. *See Nachitoches Parish Hospital*, 2009 WL 4061631, at *4, *7. Neither does *Nicsand v. 3M*, 507 F.3d 442 (6th Cir. 2007) require a price-cost test to evaluate exclusive dealing. While the *Nicsand* Court found the defendant "did not engage in below-cost or predatory-pricing," the Court did not hold that a predatory-pricing test was necessary to evaluate exclusive dealing. *Id*. at 447. Rather, the court concluded that "given the realities of this market" the exclusive dealings were not anticompetitive "because five of the six large retailers demanded exclusivity as a precondition for doing business." *Id*. *See also Id*. at 454 ("If *retailers* have made supplier exclusivity a barrier to entry, one cannot bring an antitrust claim against a *supplier* for acquiescing to that requirement. ") (emphasis in original).

[12] Intel also cites *Virgin Atlantic Airways v. British Airways*, 257 F.3d 256 (2d Cir.2001) as supporting a price-cost test to conditional payments. However, in *Virgin Atlantic*, Plaintiff's "predatory foreclosure" theory expressly alleged below-cost pricing and so a predatory pricing analysis was appropriate. *Id.* at 259 ("Virgin theorizes that these agreements offered below-cost pricing").

product.

New York does not contend that market share discounts are always exclusionary. Rather, New York argues that based on market realities, conditional payments structured as a market share discount (or otherwise), may result in a "coercive effect" with "the same kind of harm that occurs in exclusive dealing cases—the foreclosure of a substantial share of competition." *Church & Dwight*, 2011 WL 1225912 at *10. In the cases cited by Intel, the "coercive effect" was not present. Thus, in *Concord Boat*, factors the court found persuasive included that the discounts were not conditioned on buyers not purchasing competing products, and insignificant barriers to entry. *Concord Boat*, 207 F.3d at 1045, 1059.[13] *Southeast Missouri Hospital* concerned market share discounts (among other things) offered by catheter manufacturers and sold to hospitals via Group Purchasing Organizations (GPOs). The court rejected plaintiff's contention that GPOs were essentially a distribution channel for catheters, finding evidence that hospitals did in fact purchase catheters by other means and that non-GPO

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[13] In his deposition, Dr. Warren-Boulton, who testified in *Concord Boat*, explained why the discount in that case were not exclusionary. According to Dr. Warren-Boulton, two characteristics of the discounts in *Concord Boat* were particularly significant. First, the discounts "kicked-in at very low market shares." Second, and the discounts "were, in fact, not binding." Kasha Decl., Ex. 37 at 158:13-14, 358-359 ("[R]ivals were operating at market shares well above where the discounts were effective"; thus, "the purpose of the market share discounts in the *Concord Boat* case . . . was not to restrict or tax rivals."). This distinction was recognized by the Court, which noted that non-binding nature of the market share discounts did not result in foreclosure to Brunswick's rivals. *Concord Boat*, 207 F.3d at 1063 ("Boat builders and dealers were free to walk away from Brunswick's discounts at any time . . . and the evidence showed that they did so when Brunswick's competitors offered better discounts . . . .") Brunswick's conduct contrasts with Intel's because Intel's market share discounts were binding and set in at very high levels with the intent of restricting and taxing AMD expansion. Thus, Dr. Warren-Boulton's testimony in *Concord Boat* is inapposite to the instant case.

purchases were viable alternatives for procuring catheter. *Southeast Missouri Hospital*, 642 F.3d at 617. Finally, *Allied Orthopedic* involved claims that exclusive dealing and market share discounts by a manufacturer of pulse oximetry systems were exclusionary under Section 1 of the Sherman Act. Based on its evaluation of the market for pulse oximetry systems and the specific discounts at issues, the court found insufficient evidence of foreclosure resulting from either the market share discounts or exclusive dealings. *Allied Orthopedic*, 592 F.3d at 996-998.

Intel also cites a few cases for its contention that exclusive dealings of short duration are "presumptively lawful." (Intel Discounting Motion, D.I. 231 at 19). That is incorrect and none of the cases Intel cites support Intel's sweeping assertion. Rather, for each of the cases Intel cites, there were various factors why the specific exclusive dealing was not exclusionary.[14] Moreover, in this case, the OEMs are in effect bound in long term relationships with Intel because CPUs are not substitutable after the initial design phase, and OEMs therefore are "locked in" to Intel for several years, i.e., the product line's life span – irrespective of contractual formalities. FWB Report at 16.

IV. INTEL'S ARGUMENTS REGARDING NEW YORK'S EXECUTIVE LAW AND DAMAGES DO NOT SUPPORT SUMMARY JUDGMENT

Finally, Intel challenges the claims under New York's Executive Law – on the same

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[14] *Omega Environmental v. Gilbarco*, 127 F.3d 1157, 1062-63 (9th Cir.1997) (finding that direct sales to end-users was a viable alternative distribution channel, and that the contracts were in fact were easy to terminate); *Pepsico, Inc. v. Coca-Cola*, 315 F.3d 101, 109-109, 111 (2d Cir.2002) (finding that "Pepsico clearly has access to alternative distribution channels," and that "no evidence was proferred" to show that distribution channel subject to the exclusives were the best, most efficient channel); *U.S. HealthCare v. HealthSource*, Inc., 986 F.2d 589, 595-97 (1st Cir.1993) (plaintiff failed to provide any evidence of foreclosure).

erroneous grounds as their challenges to the antitrust claims. Intel also criticizes New York's damages calculation, arguing that better data could have been used, which is both incorrect and has no bearing on a motion for Summary Judgment. These two arguments are addressed below in Parts A and B.

A. New York's Executive Law Claim Is Supported By its Federal and State Law Antitrust Claims

New York has demonstrated persistent anticompetitive conduct on Intel's part, as detailed in Part II.A above. Therefore, New York has established the persistent illegality component required under Executive Law § 63(12), and Intel's argument in Part B of its Exclusion Motion D.I. 234, is without basis. (Exclusion Motion at 10-12.) Furthermore, Intel relies almost exclusively on *State v. Daicel Chem. Indus., Ltd.*, 2005 WL 6056054 (N.Y. Sup. 2005) in asking for summary judgment on this point, but gets the case wrong.

New York has wide latitude in establishing the predicate element for relief under Executive Law § 63(12). The statute is liberally construed to invest the Attorney General with broad authority to assure the public's protection. *See, e.g., State v. Maiorano,* 189 A.D.2d 766, 767 (2d Dep't 1993) ("Executive Law § 63(12) should be liberally construed in furtherance of its intended purpose"). To establish the "predicate" element for relief under § 63(12), New York may prove violations of state law or federal laws or regulations. *New York v. Feldman,* 210 F. Supp. 2d 294, 300 (S.D.N.Y. 2002) (Attorney General may use § 63(12) to remedy antitrust violations); *see also State v. Frink Am., Inc.*, 2 A.D.3d 1379 (4th Dep't 2003) (§ 63(12) claim properly based on violations of Labor Law §§ 191-c & 198); *State v. Scottish-Am. Assoc., Inc.*, 52 A.D.2d 528 (1st Dep't 1976) (§ 63(12) claim properly based on violation of Civil Aeronautics Board regulations). Upon the Attorney General's proof of the predicate violation or fraud, the

court may award damages or the other relief set out in § 63(12).

New York brought its Executive Law claims based upon Intel's violations of the Sherman Act and of the Donnelly Act. Pursuant to those statutes, New York can show persistent illegal conduct by Intel in the form of anticompetitive exclusionary acts and foreclosure, as discussed more fully in Part II above.

Consequently, New York satisfies the § 63(12) predicate by alleging Intel's repeated or persistent violations of the federal Sherman Act, or of the state's Donnelly Act. *See Feldman*, 210 F. Supp. 294 (upholding § 63(12) claim based on bid-rigging scheme that violated federal and state antitrust laws). If, for some reason, the court decides to dismiss the claims pursuant to one of these statutes, the other would remain as a viable predicate.

Even absent demonstrable damages, the Attorney General also has authority to pursue restitution under § 63(12). Indeed, the statute's overarching effect is to expand the remedies available to protect the public. The Executive Law provides for a remedy of either restitution or damages. The statute's reach is not limited to the remedies or procedures available in the underlying statutes. *See People v. American Motor Club, Inc.*, 179 A.D.2d 277, 283 (1st Dep't 1992) (court granted restitution under § 63(12) for misconduct covered by other laws, even where that law provided no restitution remedy). If the court dismisses New York's Donnelly Act claim for damages, New York should still be permitted to pursue a remedy for restitution under § 63(12).

Defendant Intel relies almost exclusively on *Daicel* in arguing for summary judgment on New York's Executive Law claim. Because the facts leading to dismissal in *Daicel* are not similar to this case, such reliance is misplaced. The *Daicel* case was not dismissed because the

antitrust claim asserted by the Attorney General was inadequate, as Intel argues. (Intel Exclusion Motion, D.I. 234 at 11.) Rather, the court found that the Executive Law claim relied on a section of the Donnelly Act that did not exist at the time the defendants established and perpetrated their illegal price-fixing cartel, and the statute could not be applied retroactively. *Daicel*, 2005 WL 6056054 at *14. The price-fixing by defendants occurred wholly prior to the enactment in 1998 of Donnelly Act § 340(6), which enabled the Attorney General to bring cases on behalf of indirect purchasers. *Id*. Because the defendants' cartel had ceased operations by 1998, the *Daicel* court dismissed the Donnelly Act claim.

As the trial court made clear, the Donnelly Act would have formed an adequate basis for the Executive Law claim had it applied retroactively. *Daicel*, 2005 WL 6056054 at *21 ("[defendants'] conspiracy would constitute…the 'illegal activity' underlying the State AG's Executive Law 63(12) claim"); *see also State v. Daicel Chem. Indus., Ltd.*, 42 A.D.3d 301, 303 (1st Dept. 2007) (§ 63(12) claim dismissed as time-barred). But here, New York has demonstrated anticompetitive conduct by Intel, providing an adequate predicate for the Executive Law claim.

B. New York's Damages Calculation Satisfies Applicable Standards

New York used a practical and efficient method to calculate its damages caused by Intel's anticompetitive conduct, given that it must estimate the prices that New York governmental entities *would have paid* absent Intel's manipulation of the market and its maintenance of artificially inflated prices. Faced with the difficulties involved in attempting to collect data piecemeal from the large number of state and non-state entities represented by New York that purchased computers, New York's method of estimating damages was both practical

and eminently reasonable.

Damages in antitrust cases need not be measured with absolute certainty. Supreme Court precedent has long permitted plaintiffs to demonstrate antitrust damages through reasonable estimates. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). Courts allow some uncertainty in plaintiffs' measurement of damages because "the vagaries of the marketplace usually deny us 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 U.S. 557, 566 (1981); *see also Univac Dental Co. v. Dentsply Int'l, Inc.*, 2010 U.S. Dist. LEXIS 41130, at *7 (M.D. Pa. Apr. 27, 2010) (calculating damages in an antitrust case is "governed by a liberal standard").

Intel premises its argument that New York's measure of damages is deficient and speculative on the assumption that New York has better purchase data that it failed to use. (Intel Exclusion Motion, D.I. 234 at 12-13.) This assumption is incorrect. New York does not have complete or adequate purchase data and therefore could not use purchase records to formulate its measure of damages.

The data available to New York's expert was incomplete and varied widely in quantity and detail. Much of the available data came from the files of the New York State Office of General Services (OGS), which receives periodic sales reports from the computer vendors with which it enters into centralized contracts. Affidavit of Donald R. Greene, dated Nov. 10, 2011 ("Greene Aff.") ¶ 3. These sales reports, which show the vendors' computer-related sales to New York state and non-state entities, vary widely in the amount of information provided,

especially for the first five years of the damages period, 2001-2005. Greene Aff. ¶¶ 4-7, 10.

As the witness for OGS testified in a 30(b)(6) deposition, the requirements for reporting varied throughout the period, and OGS does not have detailed sales records for all of the vendors. Floyd Dec. Ex. E at 18:19-19:5; Greene Aff. ¶¶ 10-12. Because the relevant data was either not available, not consistent or not detailed enough in identifying the items purchased, New York could not formulate its damages estimate from actual sales data. In addition, New York's expert could not isolate the amount spent specifically on computers themselves or on x86 processors.[15]

OGS does not require entities that use the centralized contracts to report their purchases. Greene Aff. ¶ 25. New York did not attempt to collect data showing actual amounts of computer purchases from each of the approximately 4,000 entities it represented, as that would have been virtually impossible. Besides OGS, New York collected purchase data from the Office of the State Comptroller ("OSC") and the twenty entities that Intel selected for discovery. However, this data generally did not provide itemized product detail or break out purchases of Intel-based computers. Finally, neither OGS nor OSC receives or maintains any records of computer purchases that either state or non-state entities make outside of the centralized contracts. Greene Aff. ¶ 28-29.

Faced with incomplete purchase records, as discussed above, New York's expert was

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[15] New York entities did not purchase x86 processors separately from computers, and they did not appear as separate items offered on the centralized contracts. In addition, entities did not specifically keep records of purchases of Intel-based computers.

required to formulate an estimate of spending by a multitude of New York governmental entities. Given the difficulties of using purchase records and the absence of detailed or itemized data for meaningful parts of the relevant period, it was reasonable for New York's expert to estimate New York state and non-state entities' purchases based on national figures.[16]

This method demonstrates New York's damages as "a matter of just and reasonable inference, although the result be only approximate." *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir.2011) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). The Third Circuit has held that "[i]n constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative." *LePage's*, 324 F.3d at 166 (quoting *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 812 (3d Cir.1984)).

Intel further claims that New York's damages calculation does not account for the purchases that some New York public entities make outside the centralized contracts, for which New York is not seeking damages in this action. Since New York's expert report was served prior to completion of fact discovery from the 20 Public Entities from which such discovery was taken, New York reserved its right to make any appropriate adjustments to its public entity damages at a later date. New York will make any necessary adjustment in its public entity damages calculations once the Court has ruled on the pending motions to dismiss affecting those claims.

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[16] It may be just as likely that New York's computer purchases exceed the national average as that they are lower, as Intel claims. (Intel Exclusion Mem. at 14).

Although Intel argues that New York should have used purchase data extracted from individual records, it cites no cases supporting that conclusion. In most of the cases Intel cites, the methods used were too deficient to allow a reasonable measure of damages. *See ILC Peripherals Leasing Corp. v. Intl Business Machines Corp.*, 458 F. Supp. 423, 435-36 (N.D. Cal. 1978) (court directed a verdict based on plaintiff's failure to provide a "theory of recovery" that took into account adverse factors other than defendant's antitrust violations that affected plaintiff's business); *Riss & Co. v. Association of Am. Railroads*, 190 F. Supp. 10, 17-18 (D.D.C. 1960) (party proving damages failed to offer any evidence of the volume of its business or its relationship to overall business in the relevant market); *S. Pac. Commun. Co. v. AT&T*, 556 F. Supp. 825, 1093-94 (D.C.C. 1983), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984) (plaintiff did not disaggregate its damages and failed to account for factors not caused by defendant's conduct). By contrast, in *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 748 F. Supp. 1399, 1406 (D. Ariz. 1990), while the court ordered that "not necessarily reliable" data be removed from the damages calculation, it allowed the plaintiff to proceed with its case using the rest of the database.

Estimation of damages in a representative antitrust action like this one can be analogized to the way damages are treated in class actions, where there are large numbers of injured class members. Simplifying the method of proof through expert testimony with a reliable basis promotes efficiency. *See Link v. Mercedes-Benz of North America*, 1975 WL 953, *3 (E.D. Pa. 1975) ("Obviously the court is not going to hold 300,000 separate jury trials to determine the damages for each member of the class….[P]laintiffs should be given an opportunity to develop a method of proving damages which satisfies constitutional and procedural safeguards and still

permits the efficient use of court time.") Individual claims are aggregated and estimated through a reasonable measure. *See* 3 Newberg on Class Actions § 10:7 (4th ed.) ("Because antitrust violations typically involve relatively small injuries to an extremely large number of people, a jury may make a reasonable estimate of the damage based on relevant data.") Given the leeway afforded plaintiffs in constructing damages models and New York's reasonable methodology, there is no basis for summary judgment.

CONCLUSION

For the reasons set forth above, Intel Corporation's Motion for Summary Judgment Due to Lack of Anticompetitive Exclusion, Antitrust Injury, And Measurable Damages (D.I. 234), and Intel Corporation's Motion for Summary Judgment Based on the Lawfulness of Its Discounting Practices (D.I. 231) should be denied in all respects.

Dated: November 14, 2011
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