IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY GENERAL ERIC T. SCHNEIDERMAN,	:	C.A. No. 09-827 (LPS)
Plaintiff,	:	**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS**
v.	:	
INTEL CORPORATION, a Delaware corporation,	:	August 3, 2011
Defendant.	:	

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New York submits this Memorandum of Law and the accompanying Declaration of Richard L. Schwartz, Esq., dated August 3, 2011, in opposition to Intel Corporation's Motion for Partial Summary Judgment on statute of limitations grounds.

PRELIMINARY STATEMENT

New York has asserted antitrust claims against Intel arising under both federal and state law. The federal claims, brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, are brought on behalf of the State itself. These claims arise by operation of assignment clauses contained in centralized purchase contracts for computers that New York enters into with computer manufacturers ("OEMs"). These clauses assign to the State itself federal and New York state law antitrust claims arising in connection with the products the OEMs supply to the New York public entities which purchase under these contracts. Accordingly, New York has been assigned, to the extent of its purchases, any direct claims its suppliers may have against Intel arising out of the illegal conduct charged in this action. These are called direct purchaser claims.

New York has also brought direct and indirect purchaser claims under New York's antitrust law, the Donnelly Act, and under Section 63(12) of New York's Executive Law. Those claims are brought on behalf of both New York public entities and natural persons who purchased computers containing x86 microprocessors and were overcharged as a result of Intel's illegal conduct.

As to its Sherman Act direct purchaser claims, New York does not dispute that the applicable statute of limitations is four years, extending back from the November 3, 2009 filing of its complaint. But, New York seeks damages and injunctive relief arising

from a continuing violation by Intel, beginning at least as early as 2001 and continuing at least through 2006 and after. New York is thus entitled to recover damages suffered within the limitations period for acts which occurred prior to it.

As to New York's direct purchaser and indirect purchaser state law claims, there is no dispute that the Court must apply applicable state law. Here, under Delaware law, the Court should apply the limitations periods prescribed by New York law, where the injuries complained of occurred -- four years for the Donnelly Act, six years for Executive Law 63(12). Delaware's Borrowing Statute has been interpreted to deter forum shopping -- and was not intended to apply its shorter limitations periods to pendant state claims brought by another State pursuing its claims in the most efficient federal forum.

As to the natural persons for whom New York is seeking damages under its Donnelly Act *parens patriae* and Executive Law claims, the statute of limitations was tolled by the filing of a class action complaint containing Donnelly Act claims of which they were potential members at least as early as July 13, 2005.[1] The widely-accepted class action tolling doctrine under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), applies under both Delaware or New York law. Accordingly, New York may recover damages for natural persons extending back at least to July13, 2001 (four year statute of limitations under New York's Donnelly Act; six years under New York's Executive Law).

[1] Intel acknowledges that Donnelly Act claims were added to the indirect purchaser class action pending against Intel before this Court on that date. Intel Mem. at 10 n.4.

STATEMENT OF FACTS

New York natural persons have been potential members of the proposed national indirect purchaser class action ("National IP Action") since at least July 13, 2005. It is undisputed that, on that date, Donnelly Act claims were asserted in the National IP Action. Intel Mem. at 10 n.4. It is also undisputed that those claims were dismissed from the National IP Action on July 12, 2007. *Id.* New York's investigation of Intel's conduct began in 2007, prior to the July 12, 2007 dismissal of the Donnelly Act claims. Schwartz Aff., ¶ 2. That investigation proceeded continuously until November 3, 2009, Schwartz Aff., ¶ 3, on which date New York's Attorney General exercised his authority to bring *parens patriae* damage claims on their behalf (pursuant to both the Donnelly Act and § 63(12) of the Exec. Law) as part of a broader lawsuit seeking injunctive and other relief.

ARGUMENT

I. NEW YORK IS ENTITLED TO RECOVER DAMAGES SUFFERED WITHIN THE LIMITATIONS PERIODS FOR ACTS OCCURRING OUTSIDE THEM

New York does not dispute that that the statute of limitations applicable to its federal direct claims is four years, extending back from the November 3, 2009 filing of its complaint. However, this and other applicable limitations periods must be viewed in the context of Intel's continuing violation, which began at least as early as 2001 and continued through 2006 and after. New York is entitled to recover for acts that caused injury within these periods, even if certain acts that formed part of Intel's continuing

scheme to monopolize the x86 microprocessor market occurred prior to them. *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa.*, 815 F.2d 270, 278 (3d Cir. 1987) (permitting recovery for damages arising from continuing violation including acts outside four year period since "each time a plaintiff is injured by a continuing conspiracy to violate the antitrust laws, a new cause of action for damages accrues."); *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 127-28 (5th Cir. 1975) (same).

II. THE DELAWARE BORROWING STATUTE IS READ IN LIGHT OF ITS PURPOSE AND DOES NOT SHORTEN NEW YORK'S LIMITATIONS PERIOD

Intel claims that the Court must apply the Delaware borrowing statute, which in turn requires the application of Delaware's arguably shorter statute of limitations periods. Intel's argument ignores the holding of Delaware's highest court, sitting *en banc*, which relies on the purpose of the Delaware's borrowing statute in deciding when it should apply. Delaware courts have made clear that the statute is applied to prevent forum shopping. Where that tactic is not implicated, courts have not invariably selected the shorter of two potentially applicable limitations periods. In fact, Intel cites no case in which the borrowing statute was read literally to shorten otherwise applicable limitations periods on pendent state claims.

Here, New York's suit invokes federal jurisdiction and it is not forum shopping to take advantage of a longer statute of limitations period. Further, New York's filing in Delaware was consistent with efficiency considerations which should not be used against it. The limitations period for Donnelly Act claims is four years and six years for claims

brought under section 63(12) of New York's Executive Law (both subject to tolling, as set forth in Point III, supra). For the reasons set forth below, those limitations periods should apply here.

New York's suit rests on federal question jurisdiction, and its pendant state law claims sound in New York law. In a federal question case, a District Court entertaining pendent state law claims should follow the choice of law rules of the forum state. *Shields v. Consolidated Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987). The Delaware Supreme Court's *en banc* decision has made clear that the borrowing statute is to be applied in light of its purpose. *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 16-17 (Del. 2005). As the *Saudi* Court explained, the underlying purpose behind Delaware's borrowing statute is to prevent forum shopping. *Id.* at 15. Borrowing statutes such as Delaware's "are typically designed to address a specific kind of forum shopping scenario-cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations. Under that 'standard scenario,' the borrowing statute operates to prevent the plaintiff from circumventing the *shorter* limitations period mandated by the jurisdiction where the cause of action arose." *Saudi*, 866 A.2d at 16-17 (applying the longer statute of limitations of Saudi Arabia); *B. Lewis Prod., Inc., v. Bean*, 2005 WL 273298 (D. Del. 2005) at *2 (emphasis added). The purpose of Delaware's borrowing statute "is to prevent forum shopping … if the foreign statute of limitations prescribes a *shorter* period." *Delargy by Delargy v. Hartford Accident and Indemnity Co.*, 1986 WL 11562, *2 (Del. Super. Oct. 8, 1986) (emphasis added); *Pack v. Beech Aircraft Corp.*, 132 A.2d

54 (Del. 1957).

Here, Intel argues that a three year statute of limitations should apply to both New York's antitrust and Executive Law claims. Assuming arguendo that those are the correct statute of limitations periods under Delaware law, they are *shorter* than what would apply if New York had filed its case in New York. Because New York has not engaged in forum shopping, Delaware law instructs that its shorter limitations period is not applied. Instead, the Court should apply the longer periods -- New York's four year Donnelly Act limitations period and the six year statute of limitations under Executive Law 63(12). [2]

This outcome makes particular sense in this case. Enabling Intel to prevail on a limitations defense that would never have been available to it had the suit been brought in New York would not further the purpose of the Delaware borrowing statute. Moreover, penalizing New York for filing in Delaware, the site of a pending MDL, also would be contrary to the purpose of the Delaware statute. Indeed, New York's filing in Delaware is consistent with the efficiency considerations that underlie the handling of multi-district litigation. In such circumstances, ". . . [t]here is absolutely no threat of forum shopping and the Delaware 'borrowing' statute is inapplicable." *In re Mervyn's Holdings LLC*, 426 B.R. 488, 503 (Bankr. D. Del. Mar. 17, 2010).

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[2] *See In re DRAM litigation*, 2007 WL 2517851 at *11 (N.D. Cal. Aug. 31, 2007) (Six year limitation period applied because antitrust claim under New York Executive § 63(12) "was recognized at common law"), *aff'd and reconsideration denied*, 2007 WL 3034369 at *1. *See also State v. Cortelle Corp.*, 38 N.Y.2d 83, 87-89 (1975) (stating that 63(12) incorporates actions that were already unlawful prior to its enactment, and consequently, plaintiffs were correctly brought within the six-year limitation of CPLR 213(1)). *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 208 (2001) (stating that if a statute merely codifies an existing cause of action [antitrust], that action is governed by the common law statute of limitations [six years].).

The cases Intel does cite confirm that courts have read the borrowing statute in light of its purpose. In *Burrell v. Astrazeneca LP*, Nos. 07C-01-412, 07C-04-110, 07C-04-267, 2010 WL 3706584 (Del. Super. Sept. 20, 2010) the Court citing to *In re W.R. Grace & Co.*, 418 B.R. 511 (D. Del. 2009), stated that the purpose of the borrowing statute is to prevent forum shopping. The Court distinguished *In re W.R. Grace & Co.* on the ground that forum shopping was not a concern there as it was in *Astrazeneca*. *Id*. at *3-*4. In *Cerullo v. Harper Collins Publishers, Inc.*, No. 01C-03-21-CHT, 2002 WL 243387 (Del. Super. Feb. 19, 2002), the plaintiffs filed an action first in New York and then two years later, filed another action in Delaware involving the same parties and the same issues. *Id*. at *1. Plaintiffs' action was barred by the statute of limitations in New York and plaintiffs filed in Delaware to take advantage of the *longer* Delaware statute of limitations. The Court stated, "[t]he Delaware Borrowing Statute proscribes such forum shopping and requires that the Court apply the law of the state wherein the action arose." *Id*. In *Youell v. Maddox*, 692 F. Supp. 343 (D. Del. 1988), applying the Delaware borrowing statute, the Court stated, "Delaware has adopted a 'borrowing statute' in an effort to prevent nonresident plaintiffs from 'forum-shopping' for a statute of limitations that is *longer* than the one imposed by the State in which the action arose." *Id*. at 355. (emphasis added).

III. NEW YORK'S REPRESENTATIVE ACTION ON BEHALF OF NATURAL PERSONS BENEFITS FROM AMERICAN PIPE TOLLING

Pursuant to *American Pipe*, New York's *parens patriae* claims brought on behalf of natural persons should be tolled. Under *American Pipe* and *Crown, Cork & Seal Co.*

v. Parker, 462 U.S. 345 (1983), the filing of a class action tolls the statute of limitations for all potential class members until class certification is decided. The rule marries the separate policies underlying class actions on the one hand and time limitations of claims on the other. The policy behind the class action mechanism is that the efficient aggregation of claims is necessary to enable suit that "paltry potential recoveries" would otherwise discourage. *Yang v. Odom*, 392 F.3d 97, 106 (3d Cir. 2004) (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997)). In this context, tolling is not unfair to defendants, because they "will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification." *Crown Cork*, 462 U.S. at 353.

Intel does not dispute that *American Pipe* can toll the statute of limitations. Instead, it argues that *American Pipe* tolling should not apply here. First, Intel points to the absence of specific Delaware authority applying *American Pipe* to consumers on whose behalf a state attorney general brings *parens patriae* claims. While apparently no Delaware court has explicitly applied or declined to apply *American Pipe* tolling, Delaware has adopted Fed. R. Civ. P. 23 and the policies regarding class actions that underlie it. *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094 (Del. 1989) ("Chancery Court Rule 23 is almost identical to Rule 23 of the Federal Rules of Civil Procedure…[W]e find persuasive authority in the … interpretation of that rule by the federal courts."). *See also O'Malley v. Boris*, 2001 WL 50204 at *4 (Del. Ch. 2001) ("Court of Chancery Rule 23 is modeled substantially on Rule 23 of the Federal Rules of

Civil Procedure. This Court, therefore, often looks to federal decisions interpreting that rule for precedent that may help to construe and apply its Court of Chancery counterpart."); *Noerr v. Greenwood*, 2002 WL 31720734 at *6 (Del. Ch. 2002) ("F.R.C.P. 23 is substantively similar to Ch. Ct. R. 23, therefore, interpretations of the federal rule are persuasive authority in the interpretation of this Court's Rules."); *Paine Webber R&D Partners v. Centocor, Inc.*, 1997 WL 719096 at *4 (Del. Super. 1997) ("since the Rule is the near twin of the well-established Court of Chancery Rule 23 and Federal Rule of Civil Procedure 23, it stands to reason that case law interpreting those rules will apply with equal force here.").

While not formally adopting *American Pipe*, Delaware courts have applied its principles. *See, e.g., In re Maxxam, Inc./Federated Development Shareholders Litigation*, 698 A.2d 949, 958 (Del. Ch. 1996) ("as long as a defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense."). Most other states, including New York, have adopted *American Pipe*. *See, e.g. Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1989) ("New York courts have … long embraced the principles of *American Pipe."*)[3]

[3] States which have explicitly adopted or codified *American Pipe* tolling include Alabama (*White v. Sims*, 470 So.2d 1191, 1193 (Ala. 1985)); Alaska (*Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1042 (Alaska 1981)); Arizona (*Hosogai v. Kadota*, 700 P.2d 1327, 1331-32 (Ariz. 1985), *superseded by statute*, 1986 Ariz. Sess. Laws, Ch. 186, § 1); Arkansas (*Blaylock v. Shearson Lehman Bros., Inc.*, 954 S.W.2d 939, 941 (Ark. 1997); Colorado (*Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522, 531 (Col. Ct. App. 1994)); Connecticut (*Grimes v. Housing Auth.*, 242 Conn. 236, 243 (1997)); Hawaii (*Levi v. Univ. of Haw.*, 67 Haw. 90, 93 (1984)); Illinois (*Steinberg v. Chi. Med. Sch.*, 371 N.E.2d

In the face of this widespread adoption of *American Pipe* tolling, Intel's argument that this Court should not apply it because no Delaware state court has yet explicitly done so has little force. Further, Intel misquotes the only case it cites for that proposition -- *In re Fosomax Prods. Liab. Litig.*, 694 F. Supp. 2d 253, 258 (S.D.N.Y. 2010). The statement Intel relies on to support its position was limited to "cross-jurisdictional" tolling, where the filing of a class action in one state is asserted to toll the statute of limitations in another state. Intel simply omitted the limiting term from its quotation. Accordingly, this Court should adopt *American Pipe* and apply it here.

Throughout, Intel confuses tolling with the type of action used to enforce the rights of potential class members -- a distinction the Supreme Court itself drew in this context. "Tolling the statute of limitations thus creates no potential for unfair surprise, *regardless of the method class members choose to enforce their rights upon denial of class certification.*" *Crown Cork,* 462 U.S. at 353 (emphasis added).

Here, there is no genuine question that *American Pipe* tolling applies -- Intel acknowledges as much, but simply wants to limit the actions which can benefit from

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634, 645 (Ill. 1977)); Indiana (*Arnold v. Dirrim*, 398 N.E.2d 426, 439 (Ind. Ct. App. 1979)); Kansas (*Waltrip v. Sidwell, Corp.*, 234 Kan. 1059, 1063 (1984)); Maryland (*Philip Morris USA v. Christensen*, 394 Md. 227, 247 (Md. Ct. App. 2007)); Michigan (MCR 3.501(F); as stated in *Cowles v. Bank West*, 476 Mich. 1, 15 (2006)); Missouri (*Hyatt Corp. V. Occidental Fire & Cas. Co.*, 801 S.W.2d 382, 389 (Mo. Ct. App. 1990)); New Jersey (*Staub v. Eastman Kodak Co.*, 726 A.2d 955, 966-67 (N.J. Super. Ct. App. Div. 1999)); New York (*Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1989)); North Dakota (N.D.R.Civ.P. 23(r)); Nevada (*Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1135 (1999)); Ohio (*Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002)); Oregon (*Berquist v. Int'l Realty, Ltd.*, 537 P.2d 553, 561 (Ore. 1975)); Pennsylvania (*Mun. Auth. of Westmoreland County v. Moffat,* 670 A.2d 747, 749 (Pa. Commw. Ct. 1996)); Texas (*Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 370 (Tex. App. 1987)); Utah (*Am. Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 762 (Utah 1992)); and Washington (*Picket v. Holland-America Line Westours, Inc.*, 145 Wash. 2d 178, 194-95 (2001)).

tolling to "*individual* actions." Intel Mem. at 8 (emphasis in original). The *correct* question is whether New York's *parens patriae* claims brought on behalf of natural persons may enjoy the same tolling benefit that applies to individual actions. While no Delaware court has specifically decided the question, the answer is clearly "yes."

The New York Attorney General is the legal representative of consumers in his State, and as such his action is a representative action. But, Intel argues that New York's case is a "successive representative action," and is barred by *Yang* which limited the circumstances in which such actions might be maintained. Intel's argument is flawed on multiple levels, however.

To begin with, the circumstances here are wholly different from those in *Yang.* There, class certification was denied in a federal court in Georgia, and a "substantially identical class action" was filed a few months later in a different forum against the same defendants. The *Yang* Court was therefore addressing "sequential class actions" and ruled that "*American Pipe* tolling will not apply to sequential class actions where the earlier denial of certification was based on a Rule 23 defect in the class itself." *Yang*, 392 F.3d at 104. The Third Circuit wanted to avoid potentially endless re-litigation, in identical class actions, of issues already decided on a class certification motion. Its holding was limited to the situation where "the suitability of the claims for class treatment" had already been determined, *id*. at 112, and another class action was brought, which would necessarily involve re-litigating the same Rule 23 issues.

Neither the rule nor the rationale of *Yang* apply to New York's representative action for several reasons. First, New York's case is not a "sequential" or a "successor" action under *Yang*. In *Yang*, one class action followed the denial of class certification in

a virtually identical one. In contrast, New York's case was filed well before any decision on class certification had been made -- and of course no final decision on class certification has yet been made. The fact that New York's action was filed after the initiation of the National IP action does not make it a "successor" action for this purpose. Such a rule would discourage enforcement of the antitrust laws by state attorneys general, who are superior representatives of consumers.

Second, New York's representative action is plainly not a Rule 23 class action. New York represents consumers pursuant to its *parens patriae* authority as a sovereign, as more fully set forth in New York's Brief in Opposition to Intel's Motion to Dismiss New York's Donnelly Act Claim on behalf of Consumers, filed herewith. New York need not have its consumers certified as a class pursuant to Rule 23 in order to represent them and recover on their behalf; its authority to do so derives from New York state law.

Third, the concerns against expanding tolling expressed in *Yang* are not present here. A ruling that *parens patriae* actions brought by state attorney generals may benefit from *American Pipe* tolling would not be susceptible to abuse by "unhappy plaintiffs' lawyers who cannot obtain certification in the original court of their choosing." *Yang*, 392 F.3d at 112.

In sum, neither the rule nor the rationale of *Yang* bar application of *American Pipe* tolling in this case. New York's *parens patriae* claims on behalf of consumers therefore properly benefit from *American Pipe* tolling. The fact that New York filed prior to any decision on class certification further weighs in favor of that conclusion. Under decisions of the majority of circuits to rule on the matter, individual consumers would have so benefited had they filed when New York did, years prior to any class

certification decision. *See, e.g.*, *In re WorldCom Securities Litig.*, 496 F.3d 245, 247 (2d Cir. 2007) (potential class members get benefit of *American Pipe* "regardless of whether they file an individual action before resolution of the question whether the purported class will be certified"); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008) ("although … *American Pipe* … protects plaintiffs from being forced to file suit before the certification decision, that doesn't mean that plaintiffs who file before certification are not entitled to tolling"); *State Farm Mut. Auto Ins. v. Boellstorff*, 540 F.3d 1223, 1230-31 (10th Cir. 2008) (filings prior to resolution of class certification question benefit from tolling).

Two Circuits that have considered the question have not allowed individual filers who bring suit before the resolution of the class certification to benefit from *American Pipe* tolling. *Wyser-Pratt Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983). Those courts, however, were concerned that many individual filings would clutter the courts while class actions were pending. New York's single representative action avoids that clutter because the damages for millions of consumers are represented in a single action. Accordingly, the fact that New York filed before any class certification decision is no bar to *American Pipe* tolling.

Moreover, even were Intel correct that New York's action should be treated as a "successor" to the National IP Action, that would provide no basis for denying tolling at this point, before a final decision on class certification has been made. Because the basis for any denial of such certification is purely hypothetical, there is not even a threshold basis for any showing as to what the effect of such a denial on New York's action might

be.

Next, Intel argues that allowing tolling here would not be consistent with the Supreme Court's "rationale for permitting tolling where class members are relying on the pending class action to protect their rights." According to Intel, New York did not rely on the class action. Intel Mem. at 9. But the Supreme Court in *American Pipe* foreclosed that argument, explicitly ruling that such reliance was not required, and that tolling should extend to "those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit." 414 U.S. at 551.

Intel also complains that allowing tolling would give plaintiffs "two bites at the apple." Intel Mem. at 10. But as the Supreme Court made clear in *Crown Cork*, rules regarding statutes of limitations are not intended to shield defendants from multiple actions. "[A]lthough a defendant may prefer not to defend against multiple actions in multiple forums … this is not an interest that statutes of limitations are designed to protect." 462 U.S. at 353; *In re Worldcom Securities Litig.*, 496 F.3d at 256 ("Nor was the purpose of *American Pipe* to protect the desire of a defendant not to defend against multiple actions in multiple forums") (quotations and citations omitted). Indeed, New York's action is efficient in this respect, as an alternative to numerous individual actions. And there will be no duplication with respect to recovery; the single satisfaction rule ensures that Intel will pay only once for a single injury. *See generally* 50 C.J.S. Judgements § 907 (2011).

Finally, Intel claims tolling should not apply because New York is guilty of "delay," Intel Mem. at 10 n.9, because it did not bring its action until November 3, 2009, even though Donnelly Act claims were dismissed from the National IP Action on July 12, 2007. In fact, New York had already opened a preliminary inquiry into Intel's relevant conduct *prior to* that date. Schwartz Aff. ¶ 2. That inquiry resulted in the issuance of a subpoena directed to Intel on January 10, 2008, and then the filing of this action. *Id*. ¶ 2. Therefore, there is no basis to suggest that New York slept on its rights. Nor can Intel assert that it was not fairly on notice of the claims of New York consumers, given the opening of New York's investigation.[4]

It is highly appropriate then, that New York's action benefit from *American Pipe* tolling. There can be no question that a "State's attorney general is the best representative conceivable for the State's consumers -- as the courts have repeatedly recognized." 122 Cong. Rec. at H30,879 (1976) (Statement of Chairman Rodino on Hart-Scott-Rodino Act, granting state attorneys general federal *parens patriae* authority); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D.N.Y. 1971) ("it is difficult to imagine a better representative of retail consumers within a state than the state's attorney general.") Accordingly, when New York filed its representative action, it did so as the superior representative of New York natural person consumers. S*ee Pennsylvania v. Budget Fuel Co., Inc.*, 122 FRD 184, 185 (E.D. Pa. 1988) (attorneys general are superior representatives of a class of consumers when there are competing claims to that

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[4] That is particularly the case since the Supreme Court, in *Shady Grove Orthopedic Associates, P.A. v. All State Ins. Co.*, 130 S. Ct. 1431 (2010) has removed the basis for the 2007 dismissal of the Donnelly Act claims, so that Donnelly Act claims, brought by either private parties or the New York Attorney General, may once again serve as the basis for Rule 23 class certification in federal court.

representation). New York's action provides, as the laws of New York contemplate, an efficient vehicle for the vindication of consumer claims.

CONCLUSION

For all the reasons set forth above, and in all of the papers and pleadings submitted herein, New York respectfully requests that the Court find as follows:

1. As to New York's federal direct purchaser claims, the applicable statute of limitations is four years, extending back from the November 3, 2009 filing of its complaint, subject to Intel's liability for its continuing violation, which began at least in 2001 and continued at least through 2006 and after;

2. As to New York's state law indirect purchaser claims, pursuant to the Donnelly Act and New York's Executive Law, the Court should apply the statutes of limitations prescribed by New York law, four years for the Donnelly Act, six years for Executive Law section 63(12), subject to Intel's liability for its continuing violation, which began at least in 2001 and continued at least through 2006 and after;

3. As to the natural persons for which New York is seeking damages under its Donnelly Act *parens patriae* and Executive Law claims, the statute of limitations was tolled by the filing of a class action complaint containing Donnelly Act claims of which they were potential members at least as early as July 13, 2005, so that New York may recover damages for natural persons extending back at least to July 31, 2001.

Dated: August 3, 2011
New York, New York

Respectfully submitted,
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