03-4097

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

DENTSPLY INTERNATIONAL, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RESPONSE OF THE UNITED STATES TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

This case is about Dentsply's anticompetitive maintenance of a monopoly in prefabricated artificial teeth by preventing current dealers from adding competitive lines of teeth, and requiring prospective dealers to drop most or all competing brands in order to become a Dentsply tooth dealer. After a bench trial, the district court determined that Dentsply had long held a 75%-80% share of the artificial tooth market (fifteen times its nearest competitor), that it was a "price leader" and "has not reacted with lower prices when others have not followed its price increases," that the "express" and "sole" purpose of its challenged policies "has clearly been anticompetitive," and that Dentsply's proffered non-exclusionary business justifications were "merely pretextual." *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387 (D. Del. 2003) (Findings of Fact (FF) 238-40, 226, 229, 216-17; Conclusions of Law (CL) 23, 34, 37).

The district court also found, however, that direct distribution to dental laboratories—bypassing dealers—provided Dentsply's rivals with a "'viable' method of distributing artificial teeth." FF 71; see also CL 11 (direct distribution is a "viable and, in some ways, advantageous method of distribution"); CL 26; CL 35 ("[i]n sum, because direct distribution is viable . . ."). This finding formed the basis for its conclusions that Dentsply did not violate the exclusive dealing

prohibitions of Sherman Act § 1 or Clayton Act § 3, did not possess monopoly power, and did not violate Sherman Act § 2's prohibition of monopoly maintenance, 15 U.S.C. 1, 14, 2.

The United States appealed the adverse decision regarding monopoly maintenance under Section 2. Panel Op. 8 (Op.). A highly experienced panel (McKee, Rosenn, and *Weis*, JJ.) unanimously reversed and remanded "with directions to grant the Government's request for injunctive relief." Op. 3. In so holding, it corrected the district court's errors of law regarding the standards for liability under Section 2, Op. 10, 21, 25, and found clearly erroneous the district court's findings regarding monopoly power and the "viability" of direct distribution to the laboratories as an alternative to distribution through dealers. Op. 20, 24.

Dentsply's petition does not challenge the panel's holding that Dentsply possessed monopoly power or its substantive legal analysis under Section 2. Instead, Dentsply asserts that the panel erroneously changed the market definition in this case, failed to apply the proper legal standard of clear error in reviewing the district court's findings, and never should have considered Section 2 liability in the first place. Pet. 4-9, 9-13, 13-15. Dentsply's assertions of error are incorrect, and the panel decision does not conflict with any decision of this Court or of the

Supreme Court. The Court, therefore, should deny the petition. See FED. R. APP. P. 35(a); 3D CIR. R. 35.4; 3D CIR. I.O.P. 9.3.1.

I. SCOPE OF THE RELEVANT MARKET

a. Dentsply is wrong to assert that the panel "rejected the uncontested market definition on which all parties agreed" and that its "reversal *depends entirely* on its own reassessment of the relevant market," Pet. 4, 1 (emphasis added). The panel did not alter the district court's market definition at all. Rather, in rejecting Dentsply's apparent attempt to narrow the market to include only direct sales to laboratories, the panel made clear its agreement with the district court that the market includes all U.S. sales by tooth manufacturers, regardless of the method of distribution.

The district court found that a "relevant product market" is "the sale of prefabricated artificial teeth in the United States," FF 1, and that dental laboratories are the "relevant consumer . . . because they choose the brand of tooth" the vast majority of times and because "labs represent the last purchaser of artificial teeth as teeth standing alone," FF 61. It also found that Dentsply, which distributes its teeth "exclusively [through] independent dealers," has maintained a 75%-80% market share "for at least" a decade. FF 20, 238, 240. Dentsply's "primary competitors," Ivoclar and Vita, which, due to Dentsply's conduct sell

virtually all of their teeth directly to laboratories, have 5% and 3% market shares, respectively. FF 26-27, 36, 175, 239, 349. Smaller firms divide the rest of the market and distribute their teeth either directly or through a "hybrid" system of direct and dealer sales. Op. 4-5; FF 13, 40, 43, 45, 47-48, 52, 239. Thus, the district court included in the market sales of *all* teeth that ended up in laboratories' hands, whether the teeth came directly from manufacturers or through dealers.

The panel, in turn, agreed that "[t]here is no dispute that the laboratories are the ultimate consumers." Op. 12. Further, it held that "the relevant market here is the sale of artificial teeth in the United States both to laboratories and to the dental dealers." Op. 14. Thus, far from rejecting the district court's market definition, the panel embraced it. See Op. 13 (the "findings are persuasive that the *District Court understood, as do we,* the relevant market to be the total sales of artificial teeth to the laboratories and the dealers combined") (emphasis added).

The panel, however, *did* reject a narrow market definition Dentsply's counsel appeared to raise at oral argument limited to teeth bought directly by laboratories:

> During oral argument . . . Dentsply argue[d] that the District Court understood the relevant market to be the sales of artificial teeth to dental laboratories in the United States. Although the [District] Court used the word "market" in a number of different contexts, the findings demonstrate that the relevant market is not as narrow as Dentsply would have it.

Op. 12-13. In its petition, Dentsply once more erroneously asserts that the district court found that the "relevant market should include only sales to dental laboratories." Pet. 6. The panel correctly rejected that argument, emphasizing that a market limited to direct sales to laboratories, ignoring all teeth sold through dealers, would be "completely inconsistent" with the district court's findings, because it would mean that Dentsply—which makes no direct sales to laboratories—was not even a market participant, let alone the dominant manufacturer with the 75%-80% share the district court found.[1] Op. 4, 13. Thus, it is Dentsply, not the panel, that seeks to abandon the district court's market definition.

The case law offers no support for Dentsply's challenge to the finding of the district court and the panel that the market must account for all teeth, and not merely those sold directly to laboratories. Although Dentsply claims (Pet. 5) a conflict with *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), and *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98 (3d Cir. 1992), neither case addressed this market definition issue. In *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194 (3d Cir. 1994) (Pet. 6), this Court concluded that the district

[1]Dentsply never claimed that the district court's market share figures—which presuppose that the market includes all sales to dealers and laboratories—are clearly erroneous.

court had erroneously double-counted sales of new IBM computers in a way that substantially underestimated IBM's market share and market power. *Id.* at 201-02. But in this case neither the district court nor the panel committed the "analytical flaw" of "double counting." *Id.* at 202.[2] Every tooth sale was counted just once.

b. Likewise, Dentsply does not enhance its argument by citing (Pet. 7) exclusive dealing foreclosure cases under Clayton Act § 3, such as *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997). First, as its petition makes clear, this contention rests on its factual assertion that the panel changed the district court's market.[3] Pet. 7. As already demonstrated (see pp. 3-5, above), however, that assertion is flat wrong.

Second, despite its placement of the point in its discussion of market definition, Dentsply may be arguing that the panel erred in assessing the competitive effect of its conduct. Dentsply might be understood to suggest that the panel wrongly treated dealers as end-users and concluded that Dentsply's precluding rivals from selling teeth through dealers is necessarily illegal,

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[2]*Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220-21 (10th Cir. 1986) (Pet. 7), which faulted the district court's market definition as too narrow, represents merely a corollary of that counting principle.

[3]Dentsply's separate contention (Pet. 13-15)—that the government was prohibited from appealing its Sherman Act § 2 claim because it did not also appeal its Clayton Act § 3 claim—is addressed at pp. 10-12, below.

regardless whether it impairs rivals' ability to market teeth to the laboratories. Pet. 5-7.

The panel, however, did no such thing. Rather, it correctly concluded that an effective dealer network is necessary to compete successfully for the business of *laboratory* customers. See Op. 18 ("[t]he evidence in this case demonstrates that for a considerable time, through the use of Dealer Criterion 6 Dentsply has been able to exclude competitors from the dealers' network, a narrow, but heavily traveled channel *to the dental laboratories*") (emphasis added); *id.* at 32 ("Dentsply's dealers provide a critical link to end-users"). Indeed, if the panel had treated the dealers as end-users themselves, rather than as just the most effective distribution channel to dental laboratories, it would not have needed to detail its disagreement with the district court's conclusions regarding the importance of dealers and the "viability" of direct distribution. See Op. 21-25.

II. CLEAR-ERROR STANDARD

The panel found clearly erroneous the district court's findings that direct distribution was "viable." Op. 24; see FF 71; CL 11, 26, 35.[4] The "viability" of

[4]The panel also found clearly erroneous the district court's determination that Dentsply lacks monopoly power. Op. 20. Dentsply's petition does not seek review of that ruling.

direct distribution was the key to the district court's and Dentsply's approach to the case. The panel, however, recognized that the proper standard for monopoly maintenance under Section 2 "is not whether direct sales enable a competitor to 'survive' but rather whether direct selling 'poses a real threat' to defendant's monopoly." Op. 25 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir. 2001) (en banc) (per curiam)). The district court's misunderstanding of this important legal principle led it to important and clearly erroneous findings of fact. See Op. 32 (district court "erred when it minimized that situation and focused on a theoretical feasibility of success through direct access to the dental labs").

Rather than challenge the panel's legal standard for monopoly maintenance, Dentsply claims that the panel failed to give adequate deference to the district court's findings of fact and that its decision conflicts with *DiFederico v. Rolm Co.*, 201 F.3d 200, 208 (3d Cir. 2000), and *Feather v. United Mine Workers of America*, 711 F.2d 530, 542-43 (3d Cir. 1983). Pet. iv, 11, 14. The panel, however, stated the correct standard of review: clear error. Op. 9; FED. R. CIV. P. 52(a). Moreover, the panel employed the exact formulation of the clear-error standard (Op. 24) that the Supreme Court has used for nearly 60 years: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Accord *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *Gypsum*); *United States v. Igbonwa*, 120 F.3d 437, 440 (3d Cir. 1997) (ultimately quoting *Gypsum*)). Thus, Dentsply's claim for rehearing comes down to a disagreement about the application of the clear error standard, but such disagreement is a poor basis for rehearing en banc. 3D CIR. I.O.P. 9.3.2 (this Court "does not ordinarily grant rehearing en banc when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case").

Dentsply fares no better in trying factually to distinguish *LePage's Inc. v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003) (en banc), *cert. denied*, 124 S. Ct. 2932 (2004) (Pet. 12-13), because Dentsply's conduct is much easier to condemn than 3M's conduct in that case. 3M's bundled rebates and other price incentives were at least plausibly procompetitive so that condemning that conduct ran at least some risk of "curtailing price competition and a method of pricing beneficial to consumers." *Id.* at 179 (Greenberg, J., dissenting). Here, by contrast, condemning Dentsply's conduct under Section 2 runs no risk of deterring procompetitive conduct, given the district court's findings of a complete absence of a procompetitive business

justification for Dentsply's conduct, Op. 32-33; FF 331-369, and the panel's conclusion (relying on *both* parties' experts) that Dealer Criterion 6 has artificially *increased* prices, Op. 19.

III. AVAILABILITY OF RELIEF UNDER SECTION 2

Although Dentsply points to no error in the panel's legal standards for a claim of monopoly maintenance under Section 2, it nevertheless argues that, because the government did not appeal its loss under Clayton Act § 3, the panel erred as a matter of law by even considering the meritorious Section 2 claim. Pet. 14-15. Dentsply's argument, which would force the waste of judicial resources on needless appeal issues,[5] is counter to this en banc Court's recent ruling that: "The jury's finding against LePage's on its exclusive dealing claim under § 1 of the Sherman Act and § 3 of the Clayton Act does not preclude the application of evidence of 3M's exclusive dealing to support LePage's § 2 claim." *LePage's*, 324 F.3d at 157 n.10; Op. 33-34.[6]

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[5]Appealing the Sherman Act § 1 and Clayton Act § 3 claims was unnecessary given that, as the panel held (Op. 34), the government may obtain all the relief it seeks having prevailed under its Section 2 monopoly maintenance claim.

[6]The en banc Court was unanimous on this point, although there was a dissent on other issues. Dentsply cites no intervening decision that would call into question this *LePage's* ruling.

As *LePage's* recognizes, Sherman § 2 and Clayton § 3 are different offenses, with different elements and standards. Clayton § 3 looks at the anticompetitive effects caused by a defendant's exclusive dealing contract. See 15 U.S.C. 14 (focusing on whether "effect of such . . . contract . . . may be to substantially lessen competition"). Sherman Act § 2, however, is not limited to the effect of a contract and can encompass a range of noncontractual behavior. That is what happened here. The panel concluded that Dentsply's refusal to do business with dealers that distributed rivals' teeth effectively excluded the rivals "despite the lack of long term contracts between the manufacturer and its dealers." Op. 3. See *id.* at 25-26 (same); *id.* at 17, 25-32 (anticompetitive effects caused by Dentsply's threats and its monopoly power). Dentsply "imposes an 'all-or-nothing' choice on the dealers. The fact that dealers have chosen not to drop Dentsply teeth in favor of a rival's brand demonstrates that they have acceded to heavy economic pressure." Op. 30-31. Thus, as in *LePage's*, the Section 3 result does not determine the Section 2 result.[7]

[7]In *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (Pet. 14), which reversed a lower court's determination that a requirements contract violated Clayton Act § 3, once the Supreme Court determined that the requirements contract foreclosed less than 1% of the relevant market, it was obvious that no monopoly could have been created in violation of Section 2. *Id.* at 321, 333, 335; Op. 33.

Moreover, when the panel applied the correct legal standard for monopoly maintenance—whether Dentsply's conduct "reasonably appears to be a significant contribution to maintaining monopoly power" and whether alternative distribution channels such as direct distribution "pose a real threat" to Dentsply's monopoly, Op. 10, 25 (quoting and citing *United States v. Microsoft Corp.*, 253 F.3d 34, 71, 79 (D.C. Cir. 2001) (en banc) (per curiam))—it was clear that the United States had met that standard and proved anticompetitive effects under Section 2. See, *e.g.*, Op. 21 (Dentsply's "Dealer Criterion 6 has a significant effect in preserving Dentsply's monopoly" and is a "solid pillar of harm to competition"); *id.* at 19 (prices would fall in the absence of Dealer Criterion 6).

CONCLUSION

This Court should deny Dentsply's Petition For Rehearing And Rehearing En Banc.

Respectfully submitted.

May 3, 2005

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CERTIFICATE OF SERVICE

I certify that on May 3, 2005, two true and correct copies of the foregoing Response Of The United States To Petition For Rehearing And Rehearing En Banc were served by first-class mail, postage prepaid, and by electronic mail, on:

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