03-4097

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, **FINAL BRIEF**
Plaintiff-Appellant,
v.

DENTSPLY INTERNATIONAL, INC.,
Defendant-Appellee.

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

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Cases: **Page**

Cases: **Page**

FEDERAL STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

Dentsply's brief ignores the findings that: (1) Dentsply maintained a 75%-80% market share (80%-90% of the premium segment) for over a decade, FF 238, 240, 240(e) (A84-A85); (2) its nearest rival has a 5% share, FF 239 (A84); (3) Dentsply is a "price leader" known for its "aggressive price increases in the market," FF 226, 230 (A83); (4) it adopted and enforces Dealer Criterion 6 with the "express," "sole," and "anti-competitive" rationale of excluding competitors, FF 176, 216-217, 331-332 (A74, A80, A101); and (5) it repeatedly prevented independent dealers from selling the teeth of Dentsply's rivals, FF 186-211 (A75-A79).[1] Dentsply misstates the legal standards governing monopoly maintenance under Section 2 of the Sherman Act. In general, Dentsply depicts (as did the district court) a market governed by irrationality and highlighted by what in Dentsply's logic is an obviously unnecessary and pointless 15-year campaign to exclude its rivals.

[1]Dentsply's claim that in this appeal from a civil bench trial the Court should "disregard" the government's statement of facts, and instead consider the facts "in the light most favorable to Dentsply" (DSBr. 5), is frivolous. The argument relies solely on *United States v. Pelullo*, 964 F.2d 193, 197 (3d Cir. 1992), a criminal appeal from a jury verdict, and it runs counter to FED. R. CIV. P. 52(a).

I. UNDER THE PROPER MONOPOLY MAINTENANCE STANDARDS, DENTSPLY VIOLATED SECTION 2

A. Dentsply's Exclusionary Conduct

Conduct is "predatory" or "exclusionary," within the meaning of Section 2's prohibition against maintaining a monopoly, if it would make no economic sense but for its tendency to harm competition. See USBr. 24-27; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) ("exclusionary" conduct includes that which "'tends to impair the opportunities of rivals'") (quoting a passage now found in 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 79 (2d ed. 2002) ("AREEDA & HOVENKAMP")).

Dentsply asserts that a monopolist's exclusive dealing "cannot be considered predatory" if rivals can reach the "ultimate consumers" through alternative means–regardless of the effectiveness of those alternative means and regardless of the economic rationality of the conduct. DSBr. 28-30, 41-43. But this is not the law, and none of the cases relied on by Dentsply addressed the uniquely Section 2 concepts of monopoly maintenance or "predatory" conduct.[2] See pp. 6, 25-27, below.

[2]Rather, those cases stand for entirely different propositions. See *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-1165 (9th Cir. 1997) (no Clayton § 3 violation when all competitors sold both directly and through dealers, the restraint did not prevent a competitor from putting together a network of over 100 dealers, and the market was characterized by "increasing output, decreasing prices, and significantly fluctuating market shares"); *CDC Techs., Inc. v. IDEXX*

Dentsply then adopts the "no economic sense test"[3] and argues that Dealer Criterion 6 could not have been exclusionary because its "genesis . . . was profit maximization." DSBr. 38-40. But *all* rational business conduct has its genesis in profit maximization. Conduct is exclusionary when its profitability is attributable to elimination of competition, rather than to successful competition on the merits. The issue raised by Section 2 is not whether Dealer Criterion 6 was profitable, but *why* it was profitable.

Dentsply argues that, once it won the business of laboratories from rivals, it became "vulnerable" to losing that business and was thus entitled to "preclude[]" such a loss by adopting Dealer Criterion 6. DSBr. 40. But the vulnerability

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Labs., Inc., 186 F.3d 74, 80-81 (2d Cir. 1999) (no Sherman § 1 violation when all competitors sold directly, the "distributors" did not buy or sell the product, and the restraint did not prevent plaintiff from "achiev[ing] distributor coverage almost nationwide" and growing its sales); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994) (rejecting Section 1 tying claim by distributor because it complained only of lost profits, not reduced competition); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394-395 (7th Cir. 1984) (reversing preliminary injunction under Section 3 because of plaintiff's failure to show "a substantial anticompetitive effect, actual or potential," and defendant's plausible procompetitive justification); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1572-1573 (11th Cir. 1991) (no Section 1 violation when single distributor was exclusive).

[3]Dentsply contends that exclusionary conduct must entail a "short-term sacrifice." DSBr. 38-39. In monopoly maintenance cases like this, however, exclusionary conduct can make a net positive contribution to profit at all times, by preserving ongoing monopoly profits.

Dentsply sought to avoid is the natural and socially desirable product of competition, so Dentsply's argument hardly suggests the absence of exclusionary conduct under the "no economic sense" test; rather, it confirms the district court's finding that "Dentsply's express purpose in enacting and enforcing Dealer Criterion 6 was anti-competitive." FF 332 (A101); see also FF 216 (the "express purpose of Dealer Criterion 6 has been exclusionary—to block competitors from dealers selling Trubyte teeth by tying up those dealers") (A80); FF 217-223 (A80-A82); USBr. 10-11. The court expressly rejected as "pretextual" Dentsply's contention that Dealer Criterion 6 served a legitimate purpose. FF 331-369 (A101-A109); CL 37 (A114); USBr. 11.[4]

Dentsply's contention that administering Dealer Criterion 6 did not "impose[] a financial or manpower burden" on it (DSBr. 40-41) misses the point of the "no economic sense" test. Conduct is exclusionary, even if its cost poses minimal "burden," if incurring that cost makes sense only because the conduct serves to eliminate competition. For example, enforcing a fraudulently obtained patent may cost little but may well be exclusionary conduct. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-178 (1965). Likewise, sham

[4]Dentsply wrongly suggests (DSBr. 24-25) that the court found that Dentsply's motives were merely "in part" anticompetitive. The findings are unequivocal, and overwhelm Dentsply.

litigation or bad-faith administrative filings may cost little but still violate Section 2. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

The district court's findings show considerable costs in administering Dealer Criterion 6. It cost Dentsply goodwill because its "dealers vigorously oppose the policy." FF 358 (A107); USBr. 27-28. More concretely, Dentsply devoted significant management resources to enforcing Dealer Criterion 6. When Frink Dental Supply decided to sell Ivoclar's teeth, "three of Dentsply's high-level executives" flew to Illinois in an attempt to persuade Frink to reverse its decision. FF 188-189 (A76). After persuasion failed, Dentsply both terminated Frink and "tracked down" dealers supplying Frink and "threatened to cut them off if they continued to supply Frink." FF 190-191 (A76). High-level persuasion through "telephone calls and personal meetings" with Dentsply executives was successful in the case of Zahn Dental Supply. FF 193-194 (A76-77). It took persuasion and litigation in the case of Darby Dental Supply. FF 181, 207-210 (A74-A75, A79).

Finally, Dentsply also added dealers it had terminated or previously rejected, solely to deny them to rivals. FF 221 (Darby) (A81-A82); FF 183-185 (DTS) (A75). Dentsply courted dealers that were poised to sell rivals' teeth, FF 220-222 (Jan, Darby, DTS) (A81-A82), when Dentsply already "had more dealers than

needed to properly distribute its teeth." FF 223 (A82); CL 38 (A114). Thus, Dentsply's assertion that the district court found that it "did not keep more dealers than it needed" (DSBr. 41 n.13 (citing FF 141 (A69))) is misleading. Rather, FF 141 merely found that Dentsply "rejected many dealer applicants," which is wholly consistent with our point.

B. The Substantiality Of Dentsply's Conduct

1. The United States also demonstrated (USBr. 32-47) that Dentsply had "engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (quoting a passage now found in 3 AREEDA & HOVENKAMP ¶ 651f, at 83-84). This is the relevant test for the "substantiality" of exclusionary conduct. 3 AREEDA & HOVENKAMP ¶ 651f, at 83.

Dentsply claims that this legal standard is wrong and that as a matter of law a monopolist may freely practice exclusive dealing if alternative channels allow rivals to reach end-users. DSBr. 41-43. But Dentsply relies on cases that do not involve monopoly maintenance claims. In a monopoly maintenance case, the question is whether those alternative channels allow rivals to "pose a real threat" to the defendant's monopoly. *Microsoft*, 253 F.3d at 71. For example, Microsoft

unlawfully maintained its operating system monopoly by closing off the most efficient channel of distributing browsers, even though (1) the rival could still reach every consumer with its free browser through other channels, and (2) the government had not proved that the potential threats to Microsoft's monopoly would in fact erode that monopoly. See *id.* at 64, 107.

2. Dentsply also argues that Dealer Criterion 6 is "competitively neutral" (DSBr. 44) because rivals can use the "preferred," "viable," and "effective"[5] channel of direct distribution or, if rivals want dealers, they can use non-Trubyte dealers or "steal" dealers from Dentsply. DSBr. 10-12, 28-29, 31-33, 36. The argument implies utter irrationality by Dentsply (USBr. 28-32): adopting and enforcing Dealer Criterion 6 for over a decade "solely" to harm competition (FF 176, 216-217, 331-332 (A74, A80, A101)) that it now claims it was incapable of harming. Not surprisingly, Dentsply's argument does not hold up factually.

a. Dentsply's rivals plainly do not "prefer[]" selling teeth directly (DSBr. 54); indeed, if they did, Dentsply would not have imposed Dealer

[5]Dentsply's assertion (DSBr. 28) that the government waived the argument "that the 'efficient use of common dealers' would be more effective than direct distribution" is frivolous. It has been the gravamen of the government's claim throughout these proceedings that Dealer Criterion 6 violated Section 2 of the Sherman Act by denying rivals the access to dealers that would have made them stronger competitors. See, e.g., Complaint ¶¶ 33, 36 (A128-A129).

Criterion 6. Rather, rivals sell directly because that is the best channel open to them, *given* Dealer Criterion 6. E.g., Ganley (Ivoclar) Tr. 1119-1120 (A953-A954). The presidents of Vident and Myerson testified that they would stop selling direct if they could obtain effective dealer distribution. Whitehill (Vident) Tr. 271 (A327); Swartout (Myerson) Tr. 1311 (A1113).[6] The findings show that Dentsply's exclusive dealing policies have repeatedly thwarted rivals' good-faith attempts to obtain effective dealer distribution. See FF 178-211 (A74-A79).

In particular, Vita and Ivoclar—Dentsply's "primary" competitors, FF 36, 26 (A54, A53), and the only significant brands *not* grandfathered by *any* Trubyte dealer, FF 349 (A105-A106)—have tried in vain to obtain effective dealer distribution. Vita, despite its small network (USBr. 6),[7] has exhaustively tried to

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[6]When rivals gained access to significant dealers, they stopped selling directly in that dealer's territory. See Ganley (Ivoclar) Tr. 1004 (Frink and DTS) (A838); Whitehill (Vident) Tr. 260-261 (DTS) (A316-A317).

[7]Although Vident is akin to Zahn in some ways (DSBr. 33), it differs in important respects, and is not completely independent of Vita. Vident is Vita's exclusive importer, FF 33, 129 (A54, A67); is partially owned by the same family that owns Vita, Whitehill (Vident) Tr. 222 (A278); and sells only Vita products and only from one location, FF 33, 36, 129, 131 (A54, A67). By contrast, Zahn and other Trubyte dealers are independent businesses, collectively have about 100 tooth stocks, and sell the "full range of products" used by dental labs, products made by "hundreds of different manufacturers." FF 55, 56, 212 (A56-A57, A79-A80); GX 160 (A3751); USBr. 5-6. Vident does sell to and through 18 small dealers, FF 133 (A67-A68), but they are hardly the equal of Trubyte dealers. See USBr. 6-7.

secure effective dealer distribution with numerous Trubyte (and non-Trubyte) dealers.[8] Meanwhile, Ivoclar sold teeth through DTS from 1991 until 1995, when DTS was forced to give up Ivoclar to become a Trubyte dealer. FF 183, 185 (A75). Ivoclar has continued talks with national dealers Zahn and Patterson about selling Ivoclar teeth, but Dealer Criterion 6 prevented those discussions from advancing. Ganley (Ivoclar) Tr. 1021 (A855). Thus, Dentsply's assertion that Ivoclar gave up on dealers after it "terminated" Frink in 1989 (DSBr. 11, 54) is doubly wrong: Ivoclar continued to pursue dealers even after, as the district court found, *Frink* terminated *Ivoclar* in response to Dentsply's threats and pressure, FF 187-192 (A76).

b. Nor did the district court find that "most" or "virtually all" labs unconditionally prefer buying direct or that labs necessarily obtain better prices when buying direct. DSBr. 10, 32, 48, 55 (citing FF 73-74, 81 (A59-A60)). Dentsply ignores findings that labs *requested* dealers to carry rival brands. USBr. 31 & n.19; see also Ryan (Sonshine) Tr. 1252-1255, 1286 (Sonshine Lab would buy more Ivoclar teeth from DLDS than it would from Ivoclar directly)

[8]See FF 179 (Jan) (A74); FF 180, 207-210 (Darby) (A74, A79); FF 183-185 (DTS) (A75); FF 198 (repeated attempts with Zahn) (A77); FF 199-201 (Atlanta Dental) (A77-A78); FF 202 (DLDS) (A78); FF 211 (Pearson) (A79); Whitehill (Vident) Tr. 255, 258 (Patterson) (A311, A314).

(A1054-A1057, A1088). The government never disputed that some labs prefer buying direct. Reitman (expert) Tr. 1484-1485 (A1271-A1272). But this hardly demonstrates that Dealer Criterion 6 is competitively benign.

Of the nation's 7,000 labs, FF 59 (A57), no doubt some prefer buying direct. These tend to be the largest labs, which desire fewer dealer services. But large labs represent only 7% of the denture-producing labs, FF 59(a) (A57), and even for them, price is not always the determinative factor. For example, most National Dentex labs chose a Zahn program that combined a 4% discount with a higher level of dealer services, over a 9% discount with less service. Mariacher (National Dentex) Tr. 2966-2967 (A2500-A2501). See also Brennan (Dentsply) Tr. 1713-1714 ("price can never replace service over the long haul") (A1497-A1498). Critically, many labs do not prefer buying direct, but Dealer Criterion 6 forces Dentsply's rivals to employ less desirable, less efficient, less competitive alternatives for serving them.

Finally, the district court did not find that selling directly results in lower prices to labs. DSBr. 10, 48, 55. Rather, it found that "many" labs do "or would consider purchasing direct *if* cost savings were available." FF 73 (emphasis added) (A59); FF 81 (some labs "would rather purchase teeth directly from manufacturers *if* they could obtain a price discount") (emphasis added) (A60).

c. Dentsply's claim that *it* would sell directly if only it were not trapped in its dealer distribution network (DSBr. 12, 31), is a red herring. If it sold direct, Dealer Criterion 6 would be unnecessary. Miles (Dentsply) Tr. 3508 (sealed) (A5260). The reality is that Dentsply continues to distribute through dealers and to enforce Dealer Criterion 6. Unlike Dentsply's unilateral ability to decide what distribution system works best for it,[9] Dealer Criterion 6 deprives competitors and dealers of *their* ability to distribute as they think best. This lawsuit is an effort to redress that anticompetitive harm by enjoining Dealer Criterion 6. Dentsply will remain free to use dealers or direct distribution as it likes, and the district court did not find that Dentsply would begin selling directly if Dealer Criterion 6 were enjoined.

d. Dentsply repeats the district court's findings on the "viability" of direct distribution, but never responds substantively to the government's arguments. DSBr. 28-29. For example, Dentsply repeats Dr. Reitman's testimony that direct distribution is "viable" for rivals (DSBr. 32, citing FF 71 (A59)), but ignores Dr. Reitman's use of "viable" in the ordinary, dictionary sense of "capable of

[9]Dentsply studied direct distribution. FF 114-128 (A65-A67). One important risk of going direct was loss of market share because rivals would be free to sell through the dealer network. FF 118 (A66); Miles (Dentsply) Tr. 3506-3507 (sealed) (A5258-A5259).

living." See USBr. 32-35. Similarly, Dentsply cites CL 12, 26 (A110-A111, A113), but does not attempt to rebut the United States' critique of those conclusions.[10] DSBr. 28-29, 31-32; USBr. 34-36. The "viability" of alternative channels of distribution does not mean they allow rivals to "pose a real threat" to Dentsply's exercise of monopoly power. USBr. 38-44.

Likewise, the district court's finding that non-Trubyte dealers are available, DSBr. 32 (citing FF 140 (A69)), is not a finding that such dealers are "equivalent" to Dentsply's dealers (DSBr. 30) or are likely to allow Dentsply's rivals to become effective competitors. USBr. 12-13.[11] Nor could such a finding rationally have been made given that, as the court found, FF 220-223 (A81-A82), Dentsply woos dealers once they are poised to help rivals improve their competitive position—and no dealer can resist.

Finally, although some dealers sell "grandfathered" brands (DSBr. 33, 54), this does not diminish the effect of Dealer Criterion 6. Vita and Ivoclar are not

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[10]Dentsply misrepresents the findings when it asserts that the "court found that Ivoclar could 'readily compete'" for labs' tooth business "by adapting" its crown-and-bridge sales force. DSBr. 30. The phrase "readily compete" is not in the opinion or the cited exhibit, and the findings say nothing about Ivoclar's ability to compete by adapting its sales force.

[11]See also FF 56(c), 57 (smaller dealers carry narrower range of products and have fewer resources, while tooth counters are "extremely labor-intensive operations") (A57); FF 144, 198 (Lincoln Dental sells $800,000 worth of teeth total, while Zahn sells $18 million just in Trubyte teeth) (A69, A77).

grandfathered. FF 36, 26, 349 (A54, A53, A105-A106). Among those that are, Universal is a "diminishing competitor." FF 44 (A55). And all of the grandfathered competitors remain foreclosed from a substantial percentage of the laboratory dealer outlets; none is able to develop a dealer network that approaches Dentsply's.[12]

e. Dentsply's argument that rivals may "steal" dealers from Dentsply (DSBr. 36-37) fares no better. Although dealers are not contractually precluded from dropping Dentsply's teeth in favor of rivals', the pertinent issues are: (1) whether it would ever make economic sense for one of Dentsply's dealers to do this; and (2) if not, whether it is unlawful for Dentsply to refuse to allow efficient use of common dealers.

In arguing that all it takes is a rival with "a more attractive tooth at a better profit margin" (DSBr. 38), Dentsply ignores findings that dealers desire rivals' teeth,[13] and that volume is the critical element. The district court found ample

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[12]See USBr. 33 n.23 (Vita and Ivoclar foreclosed from 78%-87% of dealer outlets, while grandfathered brands foreclosed from at least 60%). Dentsply suggests that the district court discredited Dr. Reitman's calculation as "inaccurate." DSBr. 42 n.15. Not so. The court never discredited Dr. Reitman's analysis of the percentage of *dealers* foreclosed to Dentsply's rivals; rather, it thought that question irrelevant.

[13]See FF 186-211 (dealers tried to add rival lines) (A75-A79); USBr. 41 (Vita and Ivoclar make high-quality teeth).

evidence that dealers stick with Dentsply because no rival can offer total dealer profits (margin × volume) that compares. See USBr. 8-9, 36-38. Otherwise, the dealers' ire at Dentsply's "dictatorial and arrogant" behavior, FF 215(a) (A80), would cause them to switch.

Dentsply tries to circumvent these findings by arguing that an individual dealer may account for such a small share of Trubyte teeth that it "would actually *increase* its share of tooth sales in its local area" if it "dropped Dentsply teeth for the teeth of a rival." DSBr. 37. As its sole illustration, Dentsply offers JB Dental, which accounts for a very small share of Trubyte's sales in California. DSBr. 38 n.12. But Dentsply's illustration is unconvincing because JB Dental has larger shares in other states—vastly larger in Oregon (DX 1674 (sealed) (A7014, A7052)), which it would have to give up if it switched brands in California because Dentsply pulls its teeth from *all* of a dealer's locations if the dealer violates Dealer Criterion 6 at any location. Brennan (Dentsply) Tr. 1730-1731 (A1514-A1515). JB Dental would not rationally trade the Trubyte tooth line for that of any rival (or rivals) with a single-digit share. Moreover, the district court found that Dentsply used its Trubyte merchandise and other lines of business as additional leverage in coercing dealers not to walk away from Trubyte teeth. FF 189-190, 219 (A76, A81); CL 38 (A114).

The government's objection to Dealer Criterion 6 is that it prevents Dentsply's rivals from *any* access to independent dealers used by Dentsply (USBr. 36-37), not that it prevents "unfettered" access (DSBr. 36). By contrast, in *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (DSBr. 37), the plaintiff's claim was rejected because of the failure to show "a substantial anticompetitive effect, actual or potential." And in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1063 (8th Cir. 2000), the critical fact was not that "dealers were free to walk away . . . at any time" (DSBr. 36-37), but that "they did so." 207 F.3d at 1063. Here, however, "no dealer has agreed to walk away from its Trubyte tooth business to take on a competitive line." FF 177 (A74).

3. In the absence of Dentsply's exclusivity policies, tooth prices and Dentsply's market share would fall, and rivals' promotion and competition would increase. USBr. 38-44.[14] In response, Dentsply now attacks the government's expert, disavows its own expert and executives, argues that predicted price and share shifts do not matter, and ignores key findings.[15]

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[14]Despite the clear evidence in the government's favor, the court made no findings on prices and market share in the absence of Dealer Criterion 6.

[15]Preliminarily, Dentsply erroneously lists six supposedly benign and uncontroverted effects of Dealer Criterion 6. DSBr. 43-44, items (i)-(vi). We note

Dentsply's cases regarding the admissibility of expert testimony (DSBr. 46-47) are irrelevant because the district court admitted all of Dr. Reitman's testimony on which the United States relies. The court excluded only the survey and testimony "to the extent [his] opinions are based on the survey." CL 39 (A114-A115); FF 304-330 (A96-A101); USBr. 39-40. Dr. Reitman made clear that his opinions—that in the absence of Dealer Criterion 6, both prices and Dentsply's market share would fall—were based on the record evidence independent of the survey. See Reitman (expert) Tr. 1463-1464, 1527-1529, 1533-1534, 1650-1651, 1692, 3904 (A1250-A1251, A1314-A1316, A1320-A1321, A1437-A1438, A1479, A3176); USBr. 39-40. Those opinions—and their bases—were detailed in his expert reports and at trial, and subject to Dentsply's cross-examination.[16] They were hardly "guesswork lack[ing] an identifiable factual basis" (DSBr. 47).

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the findings of: (i) frustrated consumer demand to buy rival brands through dealers, FF 186-211 (A75-A79); (ii) reduced promotional efforts by Dentsply and competitors, FF 344, 353, 355 (A103-A104, A106, A107); (iii) blocked entry, FF 182 (A75); (iv) Dentsply's persistently high market share, FF 238 (A84); (v) its reputation for aggressive price increases, FF 230 (A83); and (vi) its difficulty, for several months in 2000, producing enough teeth for dealers, FF 203 (A78).

[16]See USBr. 39 n.30 (bases of Dr. Reitman's opinions); Reitman (expert) Tr. 1529-1530, 1534-1535 (sealed), 1693 (record examples that confirm expert opinion) (A1316-A1317, A4921-A4922); *id.* at 1650-1651 (Dentsply counsel switches subjects after Dr. Reitman reaffirms that his opinion was not based on the survey) (A1437-A1438).

Moreover, both Dentsply's expert, Prof. Marvel, and former Trubyte general manager Christopher Clark, agreed with Dr. Reitman that in the absence of Dealer Criterion 6, tooth prices would fall. See USBr. 40-41. Faced with this bi-partisan consensus, Dentsply is forced to disavow its own witnesses. DSBr. 47 n.18, 51 n.19.

Dentsply also concedes, as it must, that labs in Connecticut and Southern California bought grandfathered Myerson teeth from local Dentsply dealers at lower prices than they would pay Myerson directly,[17] but argues that Zahn's prices for Myerson teeth somehow matter more. DSBr. 49. The government, however, proved that Zahn beat Myerson's direct prices. See USBr. 51; Obst (DSG) Tr. 2752-2753 (Zahn's prices to DSG lab on Myerson teeth are cheaper than Myerson's direct sales price to DSG) (A2312-A2313). The evidence also showed that cutting prices is effective at increasing sales only with effective distribution. Thus, in Connecticut, where Myerson has good distribution, labs saved 10% by buying through dealers, and Myerson's sales have grown 20% annually. Swartout (Myerson) Tr. 1317-1318 (A1119-A1120). By contrast, Ivoclar has not seen its sales increase when it cut price on direct sales. Ganley (Ivoclar) Tr. 1011-1012 (A845-A846).

[17]The district court expressly relied on the testimony supporting those examples. FF 355 (A107); USBr. 42.

Dentsply erroneously asserts (DSBr. 51) that the government's "sole proof" of a shift in market shares was the excluded survey. In fact, Dentsply's top executives anticipated a loss of market share in the absence of Dealer Criterion 6. USBr. 41-42; DSBr. 50-51.[18] Moreover, Dr. Reitman reached his opinions about market share independently of the survey. See USBr. 39-40; p. 16, above.

Dentsply's argument that the price and share effects should be ignored because they are only at the dealer level, not the lab level (DSBr. 50-51, 67), is unsound. First, the United States showed that prices would decrease at the dealer *and* lab level.[19] Second, prices and shares at the dealer level are relevant because Dentsply sells only to dealers. Thus, a loss of market share at the dealer level translates to a loss of share at the lab level, and because there is competition among dealers, FF 67 (A58), lower prices to dealers mean lower prices to labs. Moreover, as Dentsply says (DSBr. 40), Dealer Criterion 6 was first intended to minimize the risk that labs would buy more Ivoclar (and less Dentsply) teeth after

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[18]Dentsply is not helped (DSBr. 50-51) by FF 122 (A66), which deals not with the end of Dealer Criterion 6, but with the different issue of Dentsply selling directly (see p. 11 & n.9, above).

[19]See Reitman (expert) Tr. 1527-1529, 1533-1534, 1692 (A1314-A1316, A1320-A1321, A1479); Marvel (expert) Tr. 3648-3649 (A2975-A2976); Clark (Dentsply) Tr. 2584-2585 (A2190-A2191); Obst (DSG) Tr. 2752-2753 (Zahn's prices to DSG lab on Myerson teeth are cheaper than Myerson's direct sales price to DSG) (A2312-A2313).

Frink added the Ivoclar line. The loss of share among labs, not just dealers, was the genesis of Dealer Criterion 6.

Finally, the district court found that in the absence of Dealer Criterion 6, Dentsply *and* its rivals would promote more, not less—findings Dentsply ignores. FF 344, 353, 355 (A103-A104, A106, A107). In other words, Dealer Criterion 6 has caused *all* manufacturers to invest less in promotion.[20] Yet despite their reduced focus on teeth, Vita and Ivoclar manufacture high-quality teeth (USBr. 41 & n.31); they remained Dentsply's "primary" competitors, FF 36, 26 (A54, A53); and several dealers sought to sell their teeth, FF 178-211 (A74-A79). Dentsply and the district court should not have placed the blame on Vita and Ivoclar: to the extent their shortcomings are because they slighted teeth, FF 244-268 (A86-A90), a major reason is Dealer Criterion 6, FF 355 (A107).

II. MONOPOLY POWER

"Monopoly power is generally defined as the power to control prices or to exclude competition, and the size of market share is a primary determinant of whether monopoly power exists." *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984) (citations omitted). The district

[20]These findings, based on competitor testimony, rebut Dentsply's charge (DSBr. 53) that the government did not elicit the proper testimony.

court concluded that "[b]ased on Dentsply's predominant market share, monopoly power may be inferred." CL 23 (A112).[21] Dentsply does not contest that conclusion.

"Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power—the power to raise prices." *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 209 (3d Cir. 1994). Here, the decisive issue with respect to ease of entry is the impact of Dealer Criterion 6. Dentsply offers no substantive response[22] to the argument that the district court's findings and uncontroverted trial evidence demonstrate that Dealer Criterion 6 prevented entry by some competitors, delayed entry by others, and limited the growth of incumbents. USBr. 36-38, 41-42, 55-56. And because Dealer Criterion 6 materially protected Dentsply's dominant market position from competition, there is inadequate basis for the court's conclusion that Dealer

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[21]The district court's findings contain considerable evidence apart from Dentsply's dominant share indicating Dentsply possessed monopoly power. USBr. 49-60.

[22]Dentsply's resort to "facts" outside the trial record regarding two Unidesa brands (DSBr. 62 n.23) is improper. Instead, see USBr. 55-56 (citing record evidence). Dentsply is correct (DSBr. 63 n.23), however, that the "Ortholux" references in our brief and in the findings should read "Ortolux." USBr. 56; FF 182 (A75).

Criterion 6 "does not exclude competitors from the consumer—the dental laboratories," CL 26 (A113), and for its ultimate conclusion that the government "failed to prove that Dentsply has the power to control prices or exclude competitors," CL 25 (A113).

A. Dentsply's Power To Exclude Competition

The district court cited evidence of recent entry in concluding that Dentsply lacked the power to exclude competitors. CL 28 (A113). The United States' opening brief argued as a matter of law that monopoly power may exist despite the presence of entry, and as a matter of fact that the entry cited by the district court was "not competitively significant." USBr. 56-58.

On the law, Dentsply attempts to distinguish on procedural grounds the cases we cited. DSBr. 61 n.22. But the propositions of law in these cases are not limited to any particular procedural posture. For example, *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995), holds that: "The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. . . . Barriers may still be 'significant' if the market is unable to correct itself despite the entry of small rivals." Moreover, it is perverse to suggest that actual entry negates the possibility of monopoly power, because it is basic economics that some entry is apt to be induced by the price elevation that

accompanies an exercise of monopoly power. USBr. 56-58; F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 361-364 (3d ed. 1990).

On the facts, Dentsply points to "significant growth of these entrants" (DSBr. 62), but fails to note that the largest entrant has achieved a market share of only about 1%. USBr. 57. Dentsply also argues that the district court's findings indicate that the entry was competitively significant. DSBr. 61-62. But the findings do not say that this entry was competitively significant and instead suggest only trivial effects. The court found that the small drop in Dentsply's unit market share[23] was attributable "in part" to entry; it did not find that entry was a material factor, and the entrants collectively gained far less share than Dentsply lost. FF 243 (A86). Although the court found Dentsply offered a price concession to the largest lab in response to entry, that concession had a dollar value under $25,000.[24] Moreover, the court found that Dentsply imposed regular price increases notwithstanding the entry. FF 227-230 (A83).

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[23]There is no dispute, however, that Dentsply's share at all times remained at a monopoly level. CL 23 (A112).

[24]See FF 243 (extra 1% rebate) (A86); DX 1213 at DPLY-A131092 (National Dentex's 2001 purchases anticipated to be $2.0-$2.4 million) (A3982).

As an "independent basis" for affirming the district court, Dentsply argues that incumbent rivals can "expand output." DSBr. 63-64. Producing more teeth, however, cannot constrain Dentsply's monopoly power as long as Dealer Criterion 6 prevents the teeth from being distributed. Although Myerson could expand its production (DSBr. 64), it has not done so *because* it lacks access to dealers. Swartout (Myerson) Tr. 1317-1320 (A1119-A1122).

B. Dentsply's Power To Control Prices

Pricing evidence might be used to prove market power directly. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999); *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196-197 (1st Cir. 1996). However, there is "no case . . . requiring direct evidence to show monopoly power." *United States v. Microsoft Corp.*, 253 F.3d 34, 57 (D.C. Cir. 2001) (en banc) (per curiam). Rather, a "primary criterion used to assess the existence of monopoly power is the defendant's market share." *Weiss v. York Hosp.*, 745 F.2d 786, 827 (3d Cir. 1984). Thus the district court, in concluding that the government "failed to prove that Dentsply controls prices," CL 30 (A113), should be understood as holding that the pricing evidence negated any inference of monopoly power that otherwise might be drawn. This conclusion is unsupportable.

Dentsply has exercised considerable power over price. USBr. 49-50, 53. Although some price competition exists, this does not disprove monopoly power (DSBr. 64-65) because it is a "myth that a monopolist can charge any price it wants." *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1203 (3d Cir. 1995). A former Dentsply executive,[25] credited by the district court, stated that Dentsply was "the price leader" while rivals "compete[d] under that broad umbrella." FF 226 (A83). It may be that some rivals' prices were not "under" Dentsply's prices (DSBr. 66), but the upshot of the testimony is that Dentsply controlled market pricing. See also FF 229 (Dentsply "has not reacted with lower prices when others have not followed its price increases") (A83).

That Dentsply's prices were not always the highest in the market (DSBr. 64-65; FF 224-225 (A82-A83))[26] cannot negate the inference of monopoly power. Particularly when products are highly differentiated, the highest-priced products typically have especially high quality and tiny market shares (e.g., Ferraris). Such

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[25]Dentsply suggests (DSBr. 66) that Mr. Turner's "recollection" was faulty, but he testified just four days "since [he] left Dentsply." Turner (Dentsply) Tr. 402-403 (A435-A436).

[26]On economy teeth, the United States relied directly (USBr. 5, 53) on the district court's *finding*, not on Dentsply's expert, that "Dentsply charges a premium substantially higher than its rivals." FF 343(b) (A103). Dentsply's backhanded challenge to this finding as unsupported by the record (DSBr. 65 n.24) does not come close to showing clear error.

products could not undermine the ability of a dominant firm to exercise monopoly power. Nor would it negate the inference of monopoly power even if the evidence showed that Dentsply's prices were lower than average. Microsoft priced its operating system well below its rivals, but the D.C. Circuit properly rejected Microsoft's argument that relatively low prices disproved monopoly power. *Microsoft*, 253 F.3d at 57.

Cutting through the stark differences in distribution systems between Dentsply and its rivals, however, the apples-to-apples comparisons demonstrate that Dentsply's prices were higher and that the district court's analysis is wrong. USBr. 51-53. Where, as here, the critical issue is whether the pricing evidence negates the inference of monopoly power, "any incompleteness inures" (DSBr. 66-67) to the government's benefit, not detriment.[27]

C. The Effectiveness Of Alternative Distribution Channels

Dentsply contends that the mere "*availability* of alternative channels of distribution" implies that "Criterion 6 cannot, as a matter of law, constitute an entry barrier." DSBr. 60 (emphasis added). This contention that the *effectiveness*

[27]Dentsply's claim to be an "innovator" (DSBr. 5-6, 17, 43-44, 55) does not negate the inference of monopoly power. See *Microsoft*, 253 F.3d at 57 ("because innovation can increase an already dominant market share and further delay the emergence of competition, even monopolists have reason to invest in R&D").

of the alternative channels is irrelevant plainly is not the law—at least in a monopoly maintenance case (see p. 2, above)—nor do the cases cited by Dentsply suggest it is.

Dentsply's reliance on *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 110-111 (3d Cir. 1992), is misplaced. That court did not reject the exclusive dealing claim because of the availability of alternative-but-inferior distribution channels, but rather, because the challenged contracts were merely alleged to "foreclose nearly 15% of the relevant market" and because there were "legitimate business justifications for the contracts." The fact that "six new manufacturers entered" was used only to support the court's conclusion that there was not "any significant reduction in the number of manufacturers." *Id.* at 114.

Nor did *Microsoft* reject the claim of attempted monopolization of the browser market because of the availability of alternative-but-inferior distribution channels. In reversing the district court, the D.C. Circuit did not even mention alternative distribution channels. 253 F.3d at 80-84. Significantly, the D.C. Circuit affirmed the district court's holding that Microsoft's exclusive contracts with internet access providers "are exclusionary devices, in violation of § 2 of the Sherman Act," "even though the contracts foreclose less than the roughly 40% or

50% share usually required in order to establish a § 1 violation." *Id.* at 70-71.[28] The existence of alterative distribution channels did not preclude a finding that Microsoft unlawfully maintained its operating system monopoly.

Dentsply's heavy reliance (DSBr. 57-58) on *Handicomp, Inc. v. United States Golf Ass'n*, 2000-1 Trade Cas. (CCH) ¶ 72,879 (3d Cir. 2000), is doubly misplaced. That decision is designated "Not Precedential."[29] It also is plainly distinguishable: the Court was "satisfied that there are *no* barriers to entry" because even the plaintiff's president admitted that it is easy to produce a competing product. *Id.* at 87,539-87,540 (emphasis added).

III. NON-APPEAL UNDER CLAYTON ACT § 3 DOES NOT IMMUNIZE DENTSPLY'S VIOLATION OF SHERMAN ACT § 2

For the reasons just stated, Dentsply has maintained its monopoly in violation of Section 2 of the Sherman Act. Nonetheless, Dentsply argues (and the district court agreed) that this is legally irrelevant because: its only predatory conduct was

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[28]The district court had held that Microsoft's foreclosure of "the most direct, efficient ways" of distribution "is legally irrelevant to . . . plaintiffs' § 1 claims," but that the absence of "a § 1 violation in no way detracts from the Court's assignment of liability for the same arrangements under § 2." *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 53-54 (D.D.C. 2000).

[29]The caption of the CCH report of the case clearly says "NOT FOR PUBLICATION," and the Clerk's office has confirmed the "Not Precedential" designation to counsel for the United States.

exclusive dealing; the exclusive dealing did not violate Clayton Act § 3; and the United States chose not to appeal that ruling. DSBr. 19-23. This argument is wrong for two reasons.

First, the government's decision not to appeal the Clayton § 3 ruling does not affect its ability to appeal the Sherman § 2 ruling. The decision not to appeal the Clayton § 3 ruling finalizes that ruling, but does not preclude attacks on the common findings of fact or conclusions of law supporting the Sherman § 2 holding. Moreover, a successful appeal under Section 2 mandates reversal of the judgment and gives all needed relief.

Second, Dentsply's argument that its exclusive dealing cannot be illegal under Section 2 without also being illegal under Section 3 is unsound because it ignores the critical distinction in Section 2 law between the conduct of existing monopolists (monopoly maintenance) and of firms that seek to become monopolists (acquisition of monopoly power or attempted monopolization). As this Court held in *LePage's*—a monopoly maintenance case—"a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take . . . . *See*, *e.g.*, *Aspen Skiing*, 472 U.S. at 601-04." *LePage's Inc. v. 3M Co.*, 324 F.3d 141, 151-152 (3d Cir. 2003) (en banc), *petition for cert. pending*, No. 02-1865 (June 20, 2003). Justice Scalia has made the same point:

"Behavior that might otherwise not be of concern to the antitrust laws . . . can take on exclusionary connotations when practiced by a monopolist." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (dissenting opinion). See also *Microsoft*, 253 F.3d at 70-71.[30] The exclusive dealing in the present case is exclusionary conduct practiced by a monopolist to maintain its monopoly.

By contrast, in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (DSBr. 19-20, 22), the parties and the Supreme Court addressed the Section 2 claim quite cursorily.[31] Moreover, the case had nothing to do with monopoly maintenance. Plaintiffs alleged only that the exclusive dealing coal supply contract "created" a monopoly. MAJOR BRIEFS at 415. Once the Court determined that there was no violation of Clayton § 3 because the requirements

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[30]This reflects the fact that Sherman § 2 and Clayton § 3 have different elements and standards. For example, in a Section 2 monopoly maintenance case, exclusive dealing can be actionable even though it would not be in a Clayton § 3 case; but in that same Section 2 case, the plaintiff must prove monopoly power, which is not required under Clayton § 3.

[31]See Brief For Respondents 61-62; Reply Brief For Petitioner 26-27 (No. 59-87), *reprinted in* 7 ANTITRUST LAW: MAJOR BRIEFS AND ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, 1955 TERM - 1975 TERM, at 415-416, 446-447 (Philip B. Kurland & Gerhard Casper eds., 1979) ("MAJOR BRIEFS"); *Tampa Electric*, 365 U.S. at 335.

contract foreclosed less than 1% of the relevant coal market, it was obvious that no monopoly had been "created." 365 U.S. at 335.

Because *Tampa Electric* is not germane, Dentsply's extended indirect attack on *LePage's* as being contrary to *Tampa Electric* (DSBr. 19-23) is flat wrong. Accordingly, the Court can readily give full effect to *LePage's* ruling that "[t]he jury's finding against LePage's on its exclusive dealing claim under . . . § 3 of the Clayton Act does not preclude the application of evidence of 3M's exclusive dealing to support LePage's § 2 claim" of monopoly maintenance. 324 F.3d at 157 n.10. Dentsply's argument that this does not mean what it says rests on its incorrect view that, otherwise, *LePage's* would be in conflict with *Tampa Electric*.[32] But *Tampa Electric* is not applicable to monopoly maintenance cases, and so Dentsply's argument collapses.

[32]Although Dentsply contends that the *LePage's* Court meant that exclusive dealing could be considered only in conjunction with "other predatory conduct" (DSBr. 21), the court said no such thing.

CONCLUSION

For the reasons stated here and in our principal brief, the judgment of the district court should be reversed and remanded with instructions to enter judgment for the United States.

Respectfully submitted.

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CERTIFICATION CONCERNING LENGTH LIMITATIONS

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CERTIFICATE OF SERVICE

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