UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No. 99-005 (SLR)
vs.	)	
DENTSPLY INTERNATIONAL, INC.,	)	**Public version**
Defendant.	)	

PLAINTIFF UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT DENTSPLY'S MOTION FOR SUMMARY JUDGMENT

Dated: May 3, 2000

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NATURE AND STAGE OF THE PROCEEDING

The United States filed this case on January 5, 1999, to prevent Dentsply International, Inc. ("Dentsply") from continuing to violate the antitrust laws by denying rival tooth manufacturers access to independent tooth dealers and maintaining its monopoly in the prefabricated artificial tooth market. On April 3, 2000, Dentsply moved for summary judgment (D.I. 230).

SUMMARY OF ARGUMENT

Dentsply, with a 70%-80% share of the artificial tooth market, has repeatedly coerced tooth dealers to drop (or not add) competing tooth lines, in order to "block competitive distribution points [and] not allow competition to achieve toeholds in dealers." (B-315).[1] In doing so, it has maintained its monopoly power. It has kept prices artificially high. It has restricted the availability of aesthetically superior teeth sold by Dentsply's competitors. It has raised barriers to entry. And it has foreclosed its closest competitors from approximately 80% of the market. These anticompetitive effects far outweigh the theoretical and unsubstantiated justifications Dentsply has proffered.

The evidence set forth below should be viewed in the light most favorable to the United States, the non-moving party. Redden v. Unum Life Ins. Co. of Am., 2000 WL 135137, *1 (D. Del. Jan. 18, 2000). Dentsply's motion provides no basis for judgment as a matter of law. First, Dentsply fails to address the relevant case law under Section 2 of the Sherman Act ("Section 2"). Second, Dentsply mischaracterizes exclusive dealing cases under Section 1 of the Sherman Act

[1] This document appears on page 315 of the appendix. Cites to deposition testimony include the deponent's last name, employer, and appendix page cite. A list of Dentsply deponents cited herein, and their primary positions within the company, begins at B-01.

("Section 1") and Section 3 of the Clayton Act ("Section 3"). Those cases involved defendants with lower market shares, lower foreclosure rates, and few, if any, demonstrated anticompetitive effects.[2] Indeed, most of the cases Dentsply relies upon are private cases, brought by a single, terminated dealer (e.g., Roland Machinery) or a single, disgruntled competitor (e.g., CDC Technologies) where there was little if any evidence of harm to competition or consumers. In this case, there is substantial evidence of market-wide effects on consumer choice, price, and quality, resulting from foreclosure that has been widespread, pervasive and longstanding.

While appropriate in some circumstances, summary judgment is infrequently merited in complex antitrust litigation because of its fact-intensive nature. Barr Lab., Inc. v. Abbott Lab., 978 F.2d 98, 105 (3d Cir. 1992). Courts should be especially cautious before entering summary judgment where, as here, liability turns on factual questions about the purpose and effects of conduct whose existence is not disputed. See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482-86 (1992)

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[2] Omega Envtl., Inc. v. Gilbarco Inc., 127 F.3d 1157, 1160, 1162, 1164 (9th Cir. 1997) (55% market share; 38% foreclosure; evidence of "increasing output, decreasing prices, and significantly fluctuating market shares"); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596, 599 (1st Cir. 1993) ("no monopoly or anything close to it"; 25% foreclosure); Barr Lab., Inc. v. Abbott Lab., 978 F.2d 98, 110-11, 112 (3d Cir. 1992) (50% market share; 15% foreclosure); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1233-34 (8th Cir. 1987) (8%-10% market share; foreclosure "neither substantial nor even apparent"); Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 382, 394 (7th Cir. 1984) (16%-17% market share; no foreclosure rate cited; whether industry competitive "a matter of conjecture"). The only case cited by Dentsply in which the market share and foreclosure rate come close is CDC Technologies, Inc. v. IDEXX Laboratories, Inc., 186 F.3d 74, 76 (2d Cir. 1999) (no effects), aff'g, 7 F. Supp.2d 119, 121 (D. Conn. 1998)(80% market share; 65% foreclosure). In that case, the court found that dealers played a "quite 'limited role'" in the market -- indeed, dealers did not even sell or demonstrate the product. 186 F.3d at 77. In contrast, tooth dealers are very important in the market for artificial teeth. See pp. 32-35.

STATEMENT OF FACTS

1. Dentsply is the world's leading manufacturer of dental prosthetics and other dental products. (B-769). Its Trubyte Division sells products, including artificial teeth, used by dental laboratories to make dentures and other removable dental prosthetics. (B-770).

2. Vita Zahnfabrik ("Vita") and Ivoclar AG ("Ivoclar") are Dentsply's closest competitors in the tooth market.[3] Dentsply, dealers, and labs agree that Vita and Ivoclar sell "excellent," "high quality" teeth.[4] Each has achieved significant success in several foreign markets.

Vita and Ivoclar have competed in the U.S. market since the late 1970s. (Rebuttal Expert Report of Prof. Howard P. Marvel.,).

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[3] Prasse (DS), B-2029; Nugent (DS), B-2014-15; Yacola (DS), B-2279-80; Turner (DS), B-2197.

[4] Clark (DS), B-1577 ("Ivoclar and Vita make very solid quality teeth");

Cavanaugh (Frink Dental), B-1563 (Ivoclar teeth had better quality); Mazz (Schein), B-1908 (Vita quality "very, very good"); Kashfian (Pearson Dental), B-1849 (Vita and Dentsply both excellent); McLees (DiMartino Dental Lab), B-1919-20 (Vita quality "significantly greater"; "almost no comparison").

3. Over the past ten years, Dentsply has maintained a market share in the artificial tooth market of 70% to 80%. (Expert Report Dr. David Reitman, B-1060).[5] In a 1991 study commissioned by Dentsply, its market share was 80%. (B-294-302; B-280-93; Thumim (DS), B-2179-95). In two other studies, survey results were "comparable." Thumim (DS), B-2187-90; see also Weiland (DS), B- 2253 (Dentsply's share during his 1991-96 tenure was 80%). Dentsply's competitors in the U.S. tooth market each have single-digit market shares. Vita's share is below 5%.[6] Ivoclar's share is only slightly larger.[7] Austenal, Inc.'s share is likely below 5%.[8]

4. Dentsply sells Trubyte teeth only to independent dealers. These dealers sell thousands of products manufactured by hundreds of vendors to dental laboratories. These dealers market themselves under their own name, and not the name of Dentsply or any other vendor.[9]

5. In 1993, through publication of its "Dealer Criteria," Dentsply expressly stated its refusal to deal with dealers that added its rivals' tooth lines. (B-273) (Dealer Criterion 6, stating that dealers "may not add further tooth lines to their product offering"). Dentsply's practice of

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[5] Dr. Reitman is the United States' expert economist. This Court may rely on expert reports in determining whether a genuine issue of material fact exists. Callahan v. A.E.V., Inc., 182 F.3d 237, 259 (3d Cir. 1999).

[6] Dentsply's 1991 study showed a share of 2.4% for Vita (B-286, showing Vita's share as 12% of 20%). The 1998 survey of dental laboratories conducted by Professor Jerry Wind of the Wharton School of Business estimated Vita's share as 3.37%. (Wind Rept., B-1286).

[7] According to Dentsply's 1991 study, Ivoclar's share was 2% (B-286, 10% of 20%). Professor Wind's survey estimated Ivoclar's share to be 5.05%. (Wind Rept. at 14, B-1286).

[8] Dentsply's 1991 study showed a combined share of 4.2% for Austenal's Myerson and the Swissedent lines, which Austenal later acquired. (B-286)(21% of 20%).

[9] E.g., Kashfian (Pearson), B-1810, 1813-14 (buys from "thousands" of vendors, sells 40,000 products); DesPortes (Thompson Dental), B-1624-25 (400-500 vendors); Frazier (Saturn Dental), B-1652 (130 vendors, 4,000 products); Dhuet (Valley Dental), B-1630-31, 1634 (250 vendors, 10,000-15,000 products); Raths (DTS), B-2040-41 (12,000-14,000 products).

refusing to deal on these terms existed and was enforced before 1993.[10] This policy appears to be unique in the industry; no other vendor prohibits dealers selling its lab products from adding competitive products.[11]

6. Dealers offer many services for dental lab customers, including the regular reordering and restocking of teeth, facilitating tooth returns, and "one-stop shopping" for the numerous products labs need.[12] Dealers with a nearby tooth stock are also able to provide teeth on a same-day basis, either by pick up or delivery, which is important generally and essential for cases involving denture repairs and other emergencies. (Reitman Rept., B-1063-64).[13] Labs prefer to buy teeth from a dealer, even when those same teeth may be purchased directly from the manufacturer. Id., B-1062-68.[14]

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[10] Borgelt (DS), B-1453-55; Cavanaugh (Frink), B-1514-48; Harris (Atlanta Dental), B-1732-37 (had several "heated discussions" with Dentsply, starting 15 years ago).

[11] E.g., McGalliard (Jahn Dental), B-1910; Silcox (Jack Silcox), B-2119; Buckley (Smith Holden), B-1506; Hendon (Hendon Dental), B-1783-84; Liddle (Burkhart), B-1881-82.

[12] E.g., B-351; B-419; Vetrano (DLDS), B-2212-13; Nordhauser (Darby Dental), B-1973; Weinstock (Zahn Dental), B-2266; Kashfian (Pearson), B-1811-18; Harris (Atlanta), B-1703-07; Challoner (Lord's Dental Lab), B-1565-68; Mariacher (National Dentex), B-1896-1901; Cook (Oral Arts Dental Lab), B-1600, 1607-08; Zuckerman (Zuckerman Lab Supply), B-2317-20; Henderson (Marcus Dental), B-1778; Haynes (Pittman Dental Lab), B-1767; Murphy (Saylors Dental Lab), B-1962.

[13] See also Weinstock (Zahn), B-2272-74; Harris (Atlanta), B- 1708-14, 1721-25; B-321; DesPortes (Thompson), B-1622-23; Henderson (Marcus), B-1775-77.

[14] See also Harris (Atlanta), B-1737-40, 1744-45, 1759, 1761; Kashfian (Pearson), B-1864-66; Vetrano (DLDS), B-2216-20; McLees (DiMartino), B-1922; Ryan (Sonshine Dental Lab), B-2085, 2088-90;

7. Since 1987, Dentsply has used its monopoly power to coerce dealers into dropping (or not adding) Vita, Ivoclar, and other rival tooth lines. For example:

- In 1987, Frink Dental agreed to start selling Ivoclar teeth because its owner, Thomas Cavanaugh, saw aesthetic advantages with them. Dentsply terminated Frink as both a tooth and merchandise dealer. Dentsply also threatened to terminate other dealers that were supplying Frink with Trubyte teeth. When his supply of Trubyte teeth dried up, and he began worrying about losing other Dentsply business, Cavanaugh agreed to drop the Ivoclar teeth and was promptly reinstated. (Cavanaugh (Frink), B-1514-48; Brennan (DS), B-1494).

- Sometime after 1993, Atlanta Dental Supply ("ADS") became interested in selling Vita teeth because it had received a number of requests for them from its lab customers. ADS came to a tentative agreement with Vident, but backed off after Dentsply threatened ADS with termination. (Harris (Atlanta), B-1737-58).

- In 1994, after receiving customer requests for Vita teeth, Pearson Dental Supply ("Pearson") took on a consignment of Vita teeth and began advertising them in its catalog. When Dentsply threatened to terminate Pearson, it not only dropped Vita but also declined to add Austenal's Myerson line, in which it also had an interest. (Kashfian (Pearson), B-1827-48, 1864-66, 1869-70).

- In 1995, Dental Technicians Supply ("DTS") was permitted to resume selling Trubyte teeth only after DTS agreed to stop selling Vita, Ivoclar, and Justi teeth at its Kansas City and Denver locations. In New York, it was required to stop selling Ivoclar and limit the areas in which it marketed and sold Vita. (Raths (DTS), B-2048-71, 2075-80;

ARGUMENT

I. Dentsply is not entitled to summary judgment under § 2 of the Sherman Act.

Section 2 of the Sherman Act prohibits a firm with monopoly power from maintaining that monopoly power through means that go beyond competition on the merits:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Kodak, 504 U.S. at 480 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)).

A. Dentsply possesses monopoly power.

Monopoly power is "the power to control market prices or exclude competition." United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). A defendant's high market share is sufficient to support an inference of monopoly power unless ease of entry negates the inference. Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir. 1988). In this case, Dentsply's high market share is sufficient to infer monopoly power, and there are significant barriers to entry and expansion.

1. Dentsply's market share of 70%-80% is sufficient to infer monopoly power.

Dentsply does not dispute, nor could it, that its market share is sufficiently high to infer the existence of monopoly power. A market share in excess of 70% is almost always sufficient for this purpose. American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (over 66% of the market is a monopoly). Dentsply has consistently maintained over the past ten years a market share between 70% and 80%. (Statement of Facts ("Facts") ¶ 3).

2. There are significant barriers to entry and expansion.

Dentsply claims that "[i]t is apparent that there are no barriers to entry in the market for artificial teeth." Dentsply Memorandum ("DS Mem.") (D.I. 231) at 38. But within the last ten years, at least two companies declined to enter the United States tooth market after concluding that entry barriers are high and that Dentsply's control over dealers would limit their ability to achieve more than a minimal market share.

Similarly, Heraeus Kulzer, Inc. ("Heraeus"), a subsidiary of its German parent Heraeus Kulzer GmbH ("Heraeus GmbH"), considered and rejected entering the tooth market on several occasions, concluding that the "barriers to introduce [teeth] were just too great and it would not be financially worthwhile to be successful." (Foyle (Heraeus), B-1646-47; see also id., B-1644-45). A "key factor" in its decision was Dentsply's dealer criteria. (Id., B-1648).

Dentsply asserts that Heraeus GmbH has recently entered the market through a different affiliate, and that this demonstrates the lack of entry barriers. DS Mem. at 18, 22, 38. But the only evidence it cites -- the testimony of Austenal's General Manager James Swartout that an Austenal manager once saw one Heraeus tooth stock (of undetermined size) in one laboratory (Swartout (Austenal), B-2162) -- shows that any such entry would be too small and ineffective to be a serious threat to Dentsply. And because Heraeus GmbH would be selling directly, Swartout expects that it would have a difficult time succeeding in the market. (Id., B-2163-65).[15]

[15] The other evidence cited does not support Dentsply's position: (1) Robert Foyle, who until last October was Heraeus's president (Foyle (Heraeus), B-1643), testified to the opposite: "They don't sell [teeth] in North America," Dentsply App. A-921; (2)

; and (3) a Heraeus GmbH

Such "entry" would be insufficient to prevent Dentsply from exercising monopoly power. "The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power." Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1440 (9th Cir. 1995). Thus, in Oahu Gas, the court affirmed a finding of monopoly power even though two rivals entered the market and collectively gained a 32% market share. 838 F.2d at 366, 367. In Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951 (10th Cir. 1990), despite 200 rivals and theoretically low barriers, "the fact remains that no other entrant remotely approached [defendant's] domination of the market." Id. at 971.[16]

In the tooth market, no entrant has remotely approached Dentsply's dominant position. (Facts ¶ 3). Dentsply cites increases in Vita and Ivoclar's sales (see DS Mem. at 20-21, 38), but ignores the even larger growth in its own sales.[17] Despite competing for over 20 years, the market shares of both Vita and Ivoclar are still stuck in the mid-single digits. (Facts ¶ 3). Austenal's share is similarly low. Id.

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promotional brochure says nothing about entry into the U.S. market (A-444-51).

[16] Dentsply also relies on Handicomp, Inc. v. U.S. Golf Association, No. 99-5372 (3d Cir. Mar. 22, 2000), DS Mem. at 38, without indicating that the Third Circuit designated that decision "UNREPORTED - NOT PRECEDENTIAL" or even including the full text of the opinion in its appendix (A-2049), a violation of this Court's Local Rule 7.1.3(a)(7). For the Court's convenience, the United States has included the full text of the Handicomp decision in our appendix, at B-1430. In any event, unlike the market for calculating golf handicaps, entry into the tooth market is nowhere near "child's play." (Id., B-1436).

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Dentsply's own documents and the testimony of its executives show that the failure of its competitors to achieve greater success is tied to their lack of an effective dealer network.[18] As a result, none of its rivals has been able to expand sufficiently to discipline Dentsply's exercise of monopoly power.

Dentsply's monopoly power is evident from its ability to sell, for many years, an aesthetically inferior tooth without losing substantial market share. Dentsply was aware throughout the early 1990s that its premium teeth were rated below both Ivoclar's and Vita's in overall aesthetics, and that more and more dentists were prescribing teeth using Vita's popular shade guide. (B-544-45, 547).[19] Because the vast majority of Dentsply's teeth did not match these Vita shades, consumers were dissatisfied. (B-549).[20] This dissatisfaction existed for a long time, and Dentsply was "late" in addressing it. (B-260).[21]

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[18] See B-249 (one of Vita's "key weaknesses is their distribution system"); Golden (DS), B-305 & B-1661 (Ivoclar's "limited distribution" is a weakness because "dealer distribution is a paramount advantage"); Kirchheimer (DS), B-1875-76 ("Sometimes [Vita's] teeth are difficult to get . . . because they don't have the distribution . . . ."). See also n. 68 (testimony from rivals regarding need for dealer network).

[19] The Vita shade guide had become an industry standard for ensuring that artificial teeth match the shade of a person's remaining natural teeth. Turner (DS), B-2202-03 (Vita shade guide was "predominant shade system used by dentists for all of their work"); Howe (DS), B-1786 (Vita guide "taking over more and more as time went forward").

[20] Dentsply's surveys showed that "[a]esthetics are more important to labs than wear resistance or any other tooth attribute measured," and that "[s]hade matching is a key tooth selection criteria with labs." (B-259). "Aesthetics and shade matching accuracy are critical." (B-553).

[21] Dentsply had been fielding complaints from lab customers "for years." Brennan (DS), B-1483-84. Zahn Dental's Norman Weinstock may have been complaining to Dentsply for as many as five years before Portrait was introduced. Weinstock told Dentsply that Zahn needed a tooth in Vita shades "at least a year to two years" before Dentsply introduced its TruBlend line, which was introduced in 1992. Weinstock (Zahn), B-2268-69 (complaints to Dentsply); Brennan (DS), B-1485 (TruBlend in 1992). It was not until the end of 1995, when it introduced its Portrait line of

Despite this long-running dissatisfaction, Dentsply did not lose substantial market share. When receiving a prescription for a Vita-shaded tooth, labs continued to settle for a Trubyte tooth 72% of the time, (B-548), and Vita's market share remained low due to this "significant lab substitution and cross-matching to [Dentsply's] shades." Id. Dentsply vigorously exercised its monopoly power during this period to ensure that dealers did not respond to the growing consumer demand for Vita-shaded teeth.[22] Dentsply's ability to prevent dealers from adding rival tooth lines in spite of the consumer demand for them is telling evidence of its monopoly power and the inability of its competitors to challenge that power. See Byars v. Bluff City News Co., 609 F.2d 843, 853 n.26 (6th Cir. 1979)(evidence of inferior service "lends strong support" to finding of monopoly power).[23]

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premium teeth, that Dentsply addressed these issues: B-542-55; Turner (DS), B-2202-03; Clark (DS), B-1572-74.

[22] See Facts ¶ 7. In addition, in 1995, Dentsply forced Darby Dental to agree not to add the Vita line, B-224, and to discontinue (within three months of Portrait's introduction) the sale of Odipal teeth, a "higher priced quality" tooth in Vita shades made by a Spanish company. B-223; Nordhauser (Darby), B-1990-92, 2003-04. Darby was interested in selling Odipal because of the demand for Vita-shaded teeth. B-223; Nordhauser (Darby), B-1990-91. Because of its agreement with Dentsply, Darby cancelled its initial order for Odipal teeth. Nordhauser (Darby), B-2001-02. Odipal "sell[s] all over the world . . . but not in this country." Id., B-1992.

[23] Dentsply's introduction of the Portrait line does not mean it lacks monopoly power, particularly given its lengthy delay in doing so. A firm may possess monopoly power in an industry notwithstanding that innovation has occurred. See, e.g., United States v. Microsoft Corp., 87 F. Supp.2d 30, 37 (D.D.C. 2000)("neither Microsoft's efforts at technical innovation nor its pricing behavior is inconsistent with the possession of monopoly power") (citing 84 F. Supp.2d at 26-28 (Findings of Fact ¶¶ 61-66)). Moreover, there is some evidence that the Portrait line did not completely solve Dentsply's problem. Ryan (Sonshine Dental Lab), B-2085-87. Nevertheless, labs continue to opt to use Dentsply teeth, and forego using Vita, simply because they are available from dealers. Id., Harris (Atlanta), B-1762-63.

B. Dentsply has willfully maintained its monopoly through anticompetitive conduct.

The second element under Section 2 is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Grinnell, 384 U.S. at 570-71. This requires a determination of whether the monopolist has engaged in exclusionary conduct that "'either does not further competition on the merits or does so in an unnecessarily restrictive way.'" Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) (quoting 3 P. Areeda & D. Turner, Antitrust Law ¶ 626, at 78 (1978)). A monopolist's refusal to deal or its coercive imposition of an exclusive dealing agreement can constitute the requisite anticompetitive act under Section 2. E.g., Lorain Journal Co. v. United States, 342 U.S. 143, 152-53 (1951)(monopolist that refused to do business with customers that did business with its rival violated § 2); 3M v. Appleton Papers, Inc., 35 F. Supp.2d 1138, 1145-46 (D. Minn. 1999)(monopolist's exclusive dealing precluded summary judgment on § 2 claim).

1. Dentsply's intent has been exclusionary and anticompetitive.

Evidence of Dentsply's intent in foreclosing its competitors from tooth dealers is "relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" Aspen Skiing, 472 U.S. at 602. Dentsply's documents reflect very clearly its intent to "block competitive distribution points [and] not allow competition to achieve toeholds in dealers." (B-315). Dentsply's exclusionary intent was particularly apparent before its introduction of the Portrait line in late 1995, when blocking the distribution of Vita and Ivoclar's aesthetically superior teeth was of paramount importance.

In 1987, when Dentsply learned of Frink Dental's interest in Ivoclar teeth, its high-level executives met with Frink's owner, Thomas Cavanaugh. (Borgelt (DS), B-1451-52; Cavanaugh (Frink), B-1514-15, 1534-35). When Cavanaugh asked why Dentsply would terminate him for adding Ivoclar teeth, Dentsply's chief executive officer replied, "[w]e cannot let Ivoclar get a foothold in the United States. This is our most highly profitable product . . . ." (Cavanaugh (Frink), B-1536).[24] According to Gordon Hagler, who became Trubyte's Director of Sales and Marketing two years later, "Ivoclar was a threat; they had a different mold and different shading technique, and we never wanted them to get a foothold in the distributor network." (Hagler, B-1677).[25]

Dentsply executives have conceded that it has had more dealers than necessary to properly distribute its teeth. (Brennan (DS), B-1497-98; Clark (DS), B-1591). Nonetheless, it has recruited new dealers for the purpose of depriving its closest competitors of effective distribution. For example, Dentsply initially turned down several requests from Jan Dental, which wanted to sell Trubyte teeth, because Dentsply felt it had sufficient distribution and had concerns that Jan Dental posed a credit risk and ran a "pretty loose operation." (Hagler, B-1678-80; B-253-54; Brennan (DS), B-1473). But then in October 1992, Dentsply agreed to sell teeth to Jan Dental in exchange for its agreement to drop Vita and other lines. (B-250-52; Mazz (Schein), B-1907).

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[24] Borgelt viewed Ivoclar as a formidable competitor in Europe at the time and feared that Dentsply would lose market share to Ivoclar if Frink started selling the Ivoclar line. Borgelt (DS), B-1457, 1459-60.

[25] According to Hagler, who was tasked, in part, "to keep competitive lines of teeth out of the distributors" (Hagler, B-1670), "[t]here was only one purpose for this policy, and that's to dominate the tooth market and . . . get as much market share as you can." Id., B-1671. After Dentsply fired Hagler in 1993, he was employed by Universal (id., B-1668-69, 1684).

The agreement was beneficial to Dentsply because it "eliminate[d] several competitors." (B-250).[26]

Likewise, Dentsply began selling Trubyte teeth to Darby Dental to prevent it from selling Vita teeth. In June 1994, Dentsply turned down Darby's request to sell Trubyte teeth, stating that it had adequate distribution in Darby's area. (B-258). Subsequently, Vident asked Darby's Sidney Nordhauser to sell Vita teeth. (Nordhauser (Darby), B-1993-94). When Nordhauser told his Dentsply representative, who was visiting his office, of his interest in Vita, "she said 'Wait a minute,' and she got on the phone right there and then . . . and she said, 'Don't do anything, we will see you next week.'" (Id., B-1995-96). Shortly thereafter, Dentsply authorized Darby as a Trubyte tooth dealer upon Darby's agreement not to add the Vita tooth line. (B-224; Nordhauser (Darby), B-1998-2000). Internally, the "key issue" for Dentsply in recognizing Darby was that Vita was "having a tough time getting teeth out to customers" and that one of Vita's "key weaknesses [was] their distribution system." (B-249).[27]

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[26] Dentsply's subsequent actions are also telling. After Dentsply drove Vita teeth from Jan Dental, Vident turned to Trinity Dental, another Chicago-area dealer selling Trubyte merchandise, but not teeth. Morgano (Trinity), B-1959-60; Brennan (DS), 1474. When Trinity Dental added Vita, Dentsply terminated it as a merchandise dealer. Dentsply's "free riding" defense cannot justify this retaliatory action, given that Trinity did not sell Trubyte teeth. Even Dentsply executives agree Dealer Criterion 6 should not be interpreted to prohibit merchandise-only dealers from adding a competitor's teeth. ; Brennan (DS), B-1489-93.

[27] See also Raths (DTS), B-2072-73 & B-269 ("significant reason" for selling teeth to DTS, despite earlier position that DTS would never get the Dentsply line, was "eliminat[ing] Vita and Ivoclar competition in Kansas City and the surrounding areas"). Dentsply's targeting of its closest rivals is also clear from its allowing dealers such as Jan Dental to keep teeth sold by Universal, a far weaker competitor, while requiring it to drop Vita (B-250-52), and permitting dealers such Pearson Dental to add a competitor's economy teeth. Kashfian (Pearson), B-1821-26. This specific targeting of Vita and Ivoclar violates the principle, espoused by Dentsply's general counsel in his compliance manual that refusals to deal with customers "must not be a part of a scheme to monopolize a market, . . . or to handle or not handle a particular product or brand, or

2. Dentsply has maintained its monopoly through exclusionary and anticompetitive means.

A monopolist may not engage in conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." Kodak, 504 U.S. at 482-83 (quoting United States v. Griffith, 334 U.S. 100, 107 (1948)). Moreover, "[w]here a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist." Kodak, 504 U.S. at 488 (Scalia, J., dissenting) (citing 3 P. Areeda & D. Turner, Antitrust Law ¶ 813, at 300-02 (1978)).[28] Instead of competing "on the merits" by allowing dealers selling Trubyte teeth to decide for themselves whether to complement their product offerings, Dentsply excludes its closest rivals from dealers and maintains its monopoly power.

Dentsply's exclusionary conduct has caused numerous anticompetitive effects. First, it has restricted the availability of teeth that consumers want to buy, thereby keeping its own market share artificially high. Dentsply concedes that in the absence of Dealer Criterion 6, some of its dealers would take on rival tooth lines and it would lose market share.[29] Given the number of dealers it has pressured since 1987, this market share loss likely would be significant. Indeed, in

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otherwise to intrude on the customer's independence in the conduct of its business." B. Addison, "Antitrust Compliance Programs." B-771.

[28] The material fact issues precluding summary judgment under Sections 1 and 3 also provide a basis for denying Dentsply's motion to dismiss the Section 2 count. A monopolist violates Section 2 if it "maintain[s] monopoly [power] by means of those restraints of trade which are cognizable under [Sherman Act] § 1." United States v. Griffith, 334 U.S. 100, 106 (1948); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d. 227, 239 (1st Cir. 1983).

[29] ; Brennan (DS), B-1481; ; Clark (DS), B-1580.

seeking a declaratory judgment against the United States on these same issues in December 1998, Dentsply alleged rival tooth lines could displace an "enormous" amount of Trubyte teeth in its dealerships if it were forced to surrender Dealer Criterion 6.[30]

Second, Dentsply's conduct has caused tooth prices to remain artificially high. Based on the survey of dental laboratories conducted by Professor Jerry Wind of the Wharton School of Business, Dr. David Reitman has estimated that without Dealer Criterion 6, the average price for premium artificial teeth would fall in the short term by 5%-20%. (Reitman Rept., B-1078, 1080). Dr. Reitman's opinion is supported not only by his analysis of data from Professor Wind's survey but by other evidence demonstrating that Dentsply is currently insulated from vigorous price competition.

; see also Reitman Rept., B-1060 (Dentsply's share stable for at least a decade)). In the absence of Dealer Criterion 6, the market would become more responsive to price differences among products as "demand elasticity" increases. (Reitman Rept., B-1078).[32]

Third, for many years Dentsply restricted the availability of Vita and Ivoclar's aesthetically superior teeth, causing many consumers to receive aesthetically inferior denture teeth. (See pp.

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[30] B-1390 (Complaint for Declaratory and Injunctive Relief ¶ 26, Dentsply International, Inc. v. Antitrust Division of the U.S. Department of Justice, No. 98-693 (D. Del., filed Dec. 10, 1998)).

[31] Even a monopolist faces competition at the margin of its monopoly pricing. See United States v. Aluminum Co. of Am., 148 F.2d 410, 425-26 (2d Cir. 1945).

[32] There is also some evidence that Vita and Ivoclar's teeth are currently less expensive than Dentsply's. Clark (DS), B-1577 ("they are cheaper"); Turner (DS), B-2198-99 (Dentsply's Portrait tooth about 10% higher priced than Vitapan);

10-11). Given Vita's aesthetic superiority during this period, it is not surprising that labs wanted to buy Vita teeth from their dealers. (E.g., Harris (Atlanta), B-1737-38, 1744-45; Vetrano (DLDS), B-2238). But because Dentsply successfully excluded Vita and others from dealers, labs kept buying Trubyte teeth. (B-548 ("Vita's denture case share (brand share) is low"); B-259 (labs converted Vita shades 72% of the time)). This was a substantial consumer harm, given how long the problem lasted and the importance of aesthetics and shading.

Fourth, Dentsply has caused dealers selling Trubyte teeth to be less efficient than they would have been without Dealer Criterion 6. Several dealers have attempted to add rival lines of teeth and, if they had done so, they would have achieved greater economies of scale as their fixed costs were spread over more units of sales. (Reitman Rept., B-1081; see also id., B-1056-57, 1080-82 (other adverse effects include higher entry barriers and lower marketing expenditures)).

II. Dentsply is not entitled to summary judgment under § 1 of the Sherman Act or § 3 of the Clayton Act.

Dentsply argues that the Section 1 and 3 counts should be dismissed because there is no genuine issue of material fact that: (1) it does not have "agreements" with dealers (DS Mem. at 30-32); (2) any agreements are terminable at will, and thus dealers are "free to walk away" at any time (id. at 32-34); and (3) there is no foreclosure because its rivals are free to sell teeth to other "dental dealers" (who do not sell teeth) or directly to labs themselves (id. at 26-30). Dentsply misstates the law and ignores the factual record on each issue.[33]

[33] Dentsply also argues that it is entitled to summary judgment under Sections 1 and 3 based on its alleged procompetitive business justifications. DS Mem. at 34-37. That argument is equally unfounded. See pp. 36-39.

A. Dentsply has coerced independent tooth dealers to agree not to sell competitive lines of teeth.

Both Dentsply and its dealers consider Dealer Criterion 6 to be an agreement between them. Christopher Clark, general manager of the Trubyte Division from 1996 to 1999, testified that Dealer Criterion 6 is "an understanding" between Dentsply and its dealers. (Clark (DS), B-1571). An internal Dentsply document stated that "[d]ealers, being considered partners in selling the Divisions products, agree to the stipulations of the DEALER CRITERIA . . . ." (B-219). In the late 1980's, when Norman Weinstock of Zahn Dental considered adding Ivoclar teeth, Dentsply called him and told him "of an agreement that [Zahn] had with Dentsply that we couldn't take on a premium line of teeth." (Weinstock (Zahn), B-2260-61; see also id. at B-2270 ("That's what they told us, that we have an agreement")).[34]

A written contract signed by both Dentsply and its dealers is not required; even under United States v. Colgate & Co., 250 U.S. 300 (1919), and its progeny, an agreement may be inferred from a course of dealing and other circumstances.[35] Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 392 (7th Cir. 1984). An agreement exists "[w]hen [a] manufacturer's

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[34] To this day, Weinstock believes he is still bound by the agreement. Weinstock (Zahn), B-2255.

[35] Colgate involved a resale price maintenance claim, an area where the courts have been cautious. Dentsply assumes, without analysis, that Colgate applies to exclusive dealing claims. Similarly, Roland Machinery assumed Colgate applied to exclusive dealing cases, but its discussion of Colgate was clearly dicta, as the court found no "hint" of a meeting of minds. 749 F.2d at 392. Likewise, Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989), addressed territorial restrictions, not exclusive dealing. It is not at all clear that Colgate applies where the case is based on a defendant's exclusion of competitors. This Court need not resolve any issue regarding the applicability of Colgate, however, to decide the present motion, given the record evidence supporting the finding of agreement under the Colgate doctrine.

actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence . . . ." United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). An announced policy, accompanied by threats of termination, active surveillance, and reinstatement conditioned on assurances of future compliance, is sufficient. Yentsch v. Texaco, Inc., 630 F.2d 46, 52 (2d Cir. 1980); Baker's Carpet Gallery, Inc. v. Mohawk Indus., Inc., 942 F. Supp. 1464, 1477-79 (N.D. Ga. 1996)(summary judgment denied; agreement found where threats of termination made while dealer "on hold").

Dentsply has gone beyond a mere announcement of a policy by actively monitoring[36] and coercing compliance, and seeking and obtaining assurances of continued compliance, with Dealer Criterion 6. When it has found violators, it has not terminated them immediately but given them a chance to "comply, explain, [or] discuss" the situation. (Brennan (DS), B-1495-96).[37] And

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[36] See Hagler, B-1681-82; Yacola (DS), B-2287; Pohl (DS), B-2019-20.

[37] See also Hagler, B-1673-75 ("the first thing [Dentsply] did was tell that dealer, you're not allowed to do this and here is what we will do if you do. And if they continued to do that, then the regional manager would make a visit to that dealer and tell them the same thing").

Dentsply has induced several dealers expressly to agree not to sell competitive teeth.[38]

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The Frink incident in 1987 was the one time Dentsply failed initially to persuade a dealer not to add a competitive line of teeth. Despite Dentsply's effort to talk Frink's owner Tom Cavanaugh out of adding Ivoclar teeth, he began selling them. (Cavanaugh (Frink), B-1540-50)). So Dentsply went a step further. Through some "detective work," it identified the dealers that were secretly supplying Cavanaugh with Trubyte teeth, met with them, and threatened to "take away the[ir] dealership" if they didn't stop.[40] Then Dentsply's representatives from other divisions started telling Cavanaugh that Dentsply was "very unhappy" with him, and he began to worry about losing those other product lines as well. (Id., B-1548-53). Finally, Cavanaugh relented and agreed to drop the Ivoclar line. (Id., B-1555-57. As a result, he was promptly reinstated. Id.; Borgelt (DS), B-1461-62; Brennan (DS), B-1470-72).

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[38] In 1992, Dentsply sold teeth to Jan Dental after it agreed to drop its Vita, Kenson, Dentorium and Justi lines. B-250-52; Mazz (Schein), B-1907. In 1994, to ensure Pearson would acquiesce to Dentsply's demand and withdraw its new stock of Vita teeth, Dentsply told Pearson to send a letter to Dentsply stating its intention to comply. Kashfian (Pearson), B-1835-44. Pearson discussed the "contents of the letter" with Dentsply prior to sending it, and Dentsply told Pearson that "this would be sufficient." Id., B-1842-43 ("he was happy and satisfied and [said] that that's the way we do it"). In 1995, DTS acquired the Trubyte line after it agreed to drop Vita, Ivoclar, and Justi teeth from its Kansas City, Denver, and Orlando outlets, and not sell Vita teeth from its New York location outside of the Northeast. Brennan (DS), B-1475-80 & B-245-46, B-558-59; Raths (DTS), B-2056-64, 2048-51 (agreement to keep Vita in New York the "compromised position"). That same year, Dentsply reinstated Darby Dental after it agreed to drop certain lines of teeth. Nordhauser (Darby), B-1983-91.

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[40] Brennan (DS), B-1494; see also Weinstock (Zahn), B-2264-65 (Zahn was "admonished"); Harris (Atlanta), B-1726-31 (Atlanta was threatened with termination).

This evidence is more than enough to demonstrate agreement between Dentsply and dealers selling Trubyte teeth.[41] In the cases cited by Dentsply, the defendants had not sought their dealers' agreements through coercive tactics. Roland Machinery, 749 F.2d at 393 (no evidence that defendant used "stick that forced dealers into a tacit understanding"); Acton v. Merle Norman Cosmetics, Inc. 1995-1 Trade Cas. (CCH) ¶ 71,025 at 74,815-18 (C.D. Cal. May 16, 1995) (no evidence defendant sought agreement from, or terminated, a dealer).[42]

B. Dentsply's exclusive dealing agreements have unreasonably restrained competition.

Exclusive dealing agreements are evaluated under the rule of reason. The lawfulness of any particular exclusive dealing agreement depends not on mechanical measures or formulas, but on a careful investigation of all of the facts in the case. The ultimate question is whether the arrangement is "'unreasonable,' i.e., whether its anticompetitive effects outweigh its procompetitive effects," Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 & n. 12 (1990), and thus "whether the challenged agreement is one that promotes competition or one that suppresses competition." National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

Analysis of an exclusive dealing agreement examines "probable" or "likely" anticompetitive effects. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); Barry Wright, 724

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[41] See Barr Lab., Inc. v. Abbott Lab., 1989-1 Trade Cas. (CCH) ¶ 68,647 at 61,404-05 (D. N.J. June 1, 1989) (summary judgment denied on agreement issue); T.A.M., Inc. v. Gulf Oil Corp., 553 F. Supp. 499, 504 (E.D. Pa. 1982) (denying summary judgment on agreement issue based on evidence of de facto exclusive dealing agreements).

[42] Parkway Gallery is also inapposite. That case, which did not involve exclusive dealing, centered on whether the defendant, in terminating a discounting retailer, conspired with other dealers. 878 F.2d at 804, 805-06. The court determined, on the facts there, that there was no conspiracy, though it also recognized its approach conflicted with two other circuit courts. Id. at 806 n.4.

F.2d at 327. Exclusive dealing agreements violate the antitrust laws if they "tend[] to 'foreclose' existing competitors or new entrants." Gilbarco, 127 F.3d at 1162. Specific factors, such as duration of contracts or percentages of market foreclosure, are sometimes useful guides for predicting the likely effects of an exclusive dealing arrangement, but neither alone is dispositive.[43] Moreover, harm to competition and consumers can result not only from the elimination of a rival through complete foreclosure, but also from the imposition of added costs that impair the ability of rivals to lower price or innovate to improve their products. See T. Krattenmaker & S. Salop, "Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price," 96 Yale L.J. 209, 214 (1986). Thus, the Court needs to "evaluate the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market." Id. (quoting American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1251-52 n.75 (3d Cir. 1975)).

There is overwhelming evidence that Dentsply's exclusive dealing agreements have harmed competition. This evidence, summarized above, which must be accepted as true for purposes of Dentsply's summary judgment motion, demonstrates that Dentsply's exclusive dealing agreements have persistently foreclosed its rivals from the market. As a result, Dentsply has maintained its monopoly market share, increased prices, lowered the quality of teeth available to denture wearers, and deterred entry. (See pp. 15-17).

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[43] Tampa Electric, 365 U.S. at 334-35 (must look at "particularized considerations of the parties' operations"); United States v. Microsoft Corp., 1998-2 Trade Cas. (CCH) ¶ 72,261 at 82,682 (D.D.C. Sept. 14, 1998) (duration "only one among many factors the Court will consider and does not admit of, much less compel, summary judgment . . . ."); Barr Labs, 978 F.2d at 111 ("the degree of market foreclosure is only one of the factors involved in determining the legality of an exclusive dealing agreement").

1. Dentsply's agreements with dealers selling Trubyte teeth are, as a practical matter, self-perpetuating.

Dentsply's argument that at-will agreements are lawful per se was raised and rejected in 3M v. Appleton Papers, Inc., 35 F. Supp.2d 1138 (D. Minn. 1999). In that case, Appleton had a 67% share of the carbonless paper sheet market. 3M sued Appleton, alleging that its exclusive dealing agreement with paper merchants blocked the avenues of distribution. Id. at 1140. Appleton moved for summary judgment, arguing, among other things, that its agreements were terminable at will and that 3M and other rivals were free to convert its distributors at any time. Id. at 1144. The court disagreed:

> [T]here are genuine issues of fact as to whether Appleton's agreements are actually terminable at will. . . . 3M has produced evidence that Appleton's sole-sourcing agreements often include incentives that have the practical effect of tying up the paper sheet inventory of a merchant over a period of several years. . . . Further, 3M asserts that Appleton's high market share and the deeply rooted customer preference for [Appleton's] brand of paper prevent merchants from surrendering Appleton as a supplier, which they must do under these agreements if they desire to distribute non-Appleton brands. Id.[44]

The same holds true in this case. Dentsply's agreements do not, as a technical matter, include a stated duration. But they are, as a practical matter, self-perpetuating. Dealer Criterion 6 presents Dentsply's tooth dealers with an all-or-nothing choice: if they add a rival's tooth line, they lose all of their Trubyte teeth. Given Dentsply's monopoly market share, no dealer is willing to "walk away" from its substantial Trubyte tooth sales to take on a competitive line of teeth. Indeed, the United States is not aware of any dealer that has given up its Trubyte tooth business

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[44] See also PepsiCo, Inc. v. Coca-Cola Co., 1998-2 Trade Cas. (CCH) ¶ 72,257 at 82,644-45 (S.D.N.Y. Aug. 27, 1998) (refusing to dismiss complaint despite at-will nature of exclusive agreements); United States v. Dairymen, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,651 at 69,338 (W.D. Ky. June 9, 1983) (defendant's 59.5% market share rendered otherwise-legitimate contract duration unreasonable).

to take on a rival tooth line. For example, Zahn Dental decided not to add Ivoclar teeth, which could have brought an additional $800,000 in sales, because it would have lost $10 million in Dentsply business. (Weinstock (Zahn), B-2262-63). DLDS gave up Vita and Universal because it "couldn't operate without the Trubyte line." (Vetrano (DLDS), B-2230-31). When put to a choice between Dentsply and Vita, Pearson Dental chose Dentsply because it was "doing a tremendous amount of business" with it. (Kashfian (Pearson), B-1828). DTS wanted Dentsply's business "at almost any conditions." (Raths (DTS), B-2034-35). And Betsy Harris of Atlanta Dental Supply decided not to sell Vita to "protect [her] business" and avoid "losing a million dollars a year business." (Harris (Atlanta), B-1751-56). Ms. Harris testified, "I wished that I was brave enough to do it because the only person that's ever called [Dentsply's] bluff was Mr. Cavanaugh [of Frink Dental] . . . ." (Id., B-1751).[45]

Even Mr. Cavanaugh's decision to start selling Ivoclar in 1987 illustrates that dealers cannot freely "walk away" from the Trubyte business. Cavanaugh took on the Ivoclar line because he thought Dentsply's threats were a bluff. (Cavanaugh (Frink), B-1540). When he was terminated, Cavanaugh continued selling Ivoclar only because other dealers were supplying him with Trubyte teeth. (Id., B-1545-48). When Dentsply closed off that supply, Cavanaugh had to choose between Dentsply and Ivoclar, and he returned to Dentsply. (Id., B-1547-55).

No case has held that exclusive dealing agreements of short duration are lawful without regard to their effect on competition. The cases cited by Dentsply considered duration as only one

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[45] See Lorain Journal, 342 U.S. at 153 (§ 2 violation when newspaper refused to deal with advertisers who dealt with competing radio station; "[n]umerous Lorain advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio").

factor in assessing the legality of the agreements, and in each case the court noted that the defendant lacked market power and the agreements did not restrict competition.[46] For example, Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996), involved exclusive distributorships, not exclusive dealing, see id. at 46 (describing difference), and the court emphasized that the plaintiff newspaper was not foreclosed from "hundreds, if not thousands of opinion and entertainment features." Id. at 44. In Concord Boat Corp. v. Brunswick Corp., 2000 WL 303035 (8th Cir. Mar. 24, 2000), plaintiffs failed to prove that defendant's program had excluded competitors, given evidence of significant market share shifts when defendant's rivals lowered prices. Id. at *1, *17. And in Roland Machinery, defendant's market share of only 16%-17% made the lack of market power obvious and plaintiff had made "very little effort" to show that any competitor had been hindered or that prices were higher because of defendant's conduct. 749 F.2d at 382, 394. The court's oft-quoted dicta[47] that agreements of less than a year are "presumptively lawful" cited no cases and was merely one of many reasons plaintiff had failed to prove its § 3 claim. Even if this Court relies on that dicta and applies such a presumption, the facts here are more than sufficient to overcome it.[48]

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[46] Whether "agreements" exist and, if so, their duration are issues relevant only to the Section 1 and 3 counts. Section 2 applies to a monopolist's unilateral conduct. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.13 (1984).

[47] Roland Machinery's holding is that Section 3 was not violated because Roland had failed to prove the requisite "agreement" between itself and Dresser. 749 F.2d at 392-93.

[48] See also CDC Techs., 186 F.3d at 76, 90 ("scant" evidence exclusive dealing impeded CDC's ability to reach customers because dealers not important to success in marketplace). Dentsply also relies (DS Mem. at 33-34) on Maxim Integrated Prods., Inc. v. Analog Devices, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,366 (9th Cir. 1996), but fails to note that that case is unpublished and, therefore, not precedential and should not be cited. Id. at 76,841 n.**.

2. Dentsply's agreements have foreclosed a substantial share of the market.

Dentsply argues that the mere "existence" of alternative channels of distribution entitles it to judgment as a matter of law. DS Mem. at 26-30. Dentsply misstates the proper legal standard for assessing the competitive effects of exclusive dealing arrangements.

a. Dentsply has foreclosed its closest rivals from approximately 80% of the market, and its other competitors from a very high percentage of the market.

By any measure, Dentsply has foreclosed Vita and Ivoclar, and, to a lesser extent, its other competitors, from a large majority of the market. In Omega Environmental, Inc. v. Gilbarco Inc., 127 F.3d 1157 (9th Cir. 1997), a case on which Dentsply relies heavily, the Ninth Circuit held that foreclosure was properly defined as the percentage of the defendant's market share sold through its distributors. Id. at 1162. Under that method, Vita and Ivoclar are foreclosed from 70%-80% of the market.[49]

Foreclosure could also be defined as the percentage of dealer outlets (or their tooth stocks) foreclosed to Dentsply's rivals. See Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1258 (5th Cir. 1988) (foreclosure referred to as "comparison between the number of distribution outlets available and the number of those foreclosed"). That is a particularly appropriate way to measure foreclosure where, as here, direct sales of teeth are an inadequate

[49] All of Dentsply's tooth sales are made through dealers, so the foreclosure rate for rivals that do not sell any teeth to these dealers is identical to Dentsply's market share (100% of 70%-80%). That is true for Ivoclar, which sells teeth only directly. DS Mem. at 13. It is also true for Vident with the exception of one outlet of one dealer that sells Vita teeth, by an agreement with Dentsply, in a limited area only.

substitute for sales to tooth dealers. (See pp. 31-35).[50] Vita and Ivoclar have been foreclosed from 86.9% and 87.3%, respectively, of the outlets operated by tooth dealers. (B-04). The foreclosure rates for American Tooth (78.7%), Austenal (81.3%), and Universal (67.4%) are high as well. Id.[51] Given that some dealers do not stock teeth at all of their locations

, foreclosure may also be measured as the percentage of dealer tooth stock locations from which Dentsply's competitors are foreclosed. These numbers are also high: Ivoclar (79.1%); Vita (78.3%); American Tooth (67.4%); Austenal (69.8.%); and Universal (59.7%). Id. (also measuring foreclosure from outlets operated by dealers that sell products other than teeth to labs).

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[50] Indeed, Dentsply itself seems to concede the validity of this approach in its motion concerning the damage claim in the Howard Hess Dental Labs private action. There, Dentsply argues that the plaintiff labs are indirect purchasers because Dentsply sells its teeth exclusively to dealers. B-1404 ("Defendant Dentsply International, Inc.'s Memorandum in Support of its Motion for Summary Judgment on Standing Grounds," Howard Hess Dental Laboratories Inc., et al. v. Dentsply International, Inc., No. 99-255 (D. Del.), filed April 3, 2000). If that is true, then dealers are the relevant consumers for antitrust purposes, and foreclosure should be measured by the percentage of dealers foreclosed.

[51] The foreclosure rates for American Tooth, Austenal and Universal are lower because these brands are most commonly "grandfathered" under Dealer Criterion 6. Contrary to Dentsply's assertion (DS Mem. at 30 n.42), this grandfathering does not cure the anticompetitive effects of Dentsply's exclusive dealing agreements. Dairymen, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,651, at 69,338 (W.D. Ky. 1983)(exclusive dealing contracts with similar grandfather clauses found unlawful). Dentsply's reliance on Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 97 (2d Cir. 1987) is misplaced because in that case the defendant's franchise agreement did not prevent plaintiff from selling a rival's car at a separate salesroom facility. Id.

In addition, Dentsply's claim that Universal has "nearly one hundred dealers" (DS Mem. at 22) is misleading because many dealers carry Universal merchandise but not its teeth.

The foreclosure rates in this case far exceed those that have been found sufficient to support a violation.[52] In American Motor Inns, the Third Circuit analyzed an exclusive dealing arrangement that Holiday Inns imposed upon its franchisees. Because Holiday Inns constituted the largest hotel group in the country, and was three times larger than its largest competitor, the court stated that a foreclosure rate of only 14.7% might well have been sufficient to find liability under Section 3 of the Clayton Act. 521 F.2d at 1252.[53] Here, the foreclosure rates are not only far higher, but Dentsply's market share dwarfs those of its closest rivals. (Facts ¶ 3). By contrast, in the cases cited by Dentsply in which the foreclosure rate was even mentioned, the rates were lower, and in most cases far lower, than 80%. See n. 2 (foreclosure rates of 15%, 25%, 38%, and 65%).

As the Eighth Circuit stated in Ryko, "[w]here the degree of foreclosure caused by the exclusivity provisions is so great that it invariably indicates that the supplier imposing the provisions has substantial market power, we may rely on the foreclosure rate alone to establish the violation." 823 F.2d at 1233.[54] The high foreclosure rates here corroborate the evidence of Dentsply's substantial market power, (see pp. 7-11), and together these facts are more than sufficient to defeat its motion for summary judgment.[55]

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[52] See Microsoft, 1998-2 Trade Cas. (CCH) ¶ 72,261 at 82,680 (in general, foreclosure must be at least 40% for plaintiff to prevail); 11 Herbert Hovenkamp, Antitrust Law ¶ 1821 at 160 (1998) (foreclosure above 50% "routinely condemned").

[53] Because the district court had not properly defined the relevant market, however, the court of appeals reversed the lower court's entry of judgment on this issue. 521 F.2d at 1252-53.

[54] See also Beltone Electronics Corp., 100 F.T.C. 68, 107 (1982) (if foreclosure suggests defendant has market power, then foreclosure is a "more significant factor" supporting violation).

[55] These foreclosure rates understate the competitive harm because the few dealers left for Dentsply's rivals are much smaller and less efficient than dealers selling Trubyte teeth. Reitman

b. Operatory dealers are properly excluded from the foreclosure analysis.

The foreclosure percentages asserted by Dentsply (DS Mem. at 26, 29) are lower because it includes dealers that do not sell teeth -- and have no interest in doing so -- in the universe of dealers "available" to its artificial tooth competitors. Dentsply has failed to show that these additional dental dealers, called "operatory" dealers because they sell various merchandise and equipment to dentist office operatories (not to labs, which purchase teeth), would be willing to enter into the entirely new business of selling teeth to labs -- in other words, could "readily" and "easily" compete. Gilbarco, 127 F.3d at 1162, quoting 2A P. Areeda, et al., Antitrust Law ¶ 570b1 at 278 (1995). In fact, the record shows just the opposite.[56]

Dental lab dealers sell artificial teeth and other products (e.g., acrylics, waxes, and gypsums) to dental laboratories. (E.g., B-779). Operatory dealers sell impression materials, dental chairs, x-ray units, handpieces, and other

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Rept., B-1074; e.g., Silcox (Jack Silcox), B-2112-18 (Justi dealer turned down by Dentsply in 1995; has two active employees, has no sales force, customer service department or catalog; has difficulty competing against larger dealers); Zuckerman (Zuckerman Lab Supply), B-2309-11, 2320-24 (two employees, no marketing or customer service department, no advertising, no catalog, "not a major player"); Young (Young Dental), B-2289-93 (one-man, one-room Vita dealer, no advertising, no catalog). Dealers selling Trubyte teeth are considerably larger. E.g., Kashfian (Pearson), B-1803, 1819-20; B-779 (150 employees, prints 40,000-50,000 catalogs for distribution); Harris (Atlanta), B-1697-1702, 1715-17; B-802

[56] Vident's "distributing labs" (see DS Mem. at 15) are also properly excluded. Even Dentsply has recognized that using labs to sell to other labs is an ineffective strategy. B-264 ("Vita has poor distribution and depends on consignments to get teeth into the laboratory. Then the lab is supposed to sell to other labs and that is a laugh!"); Howe (DS), B-1789-90 ("labs don't like buying from another competitive lab"); see also Raths (DTS), B-2045-47.

merchandise and equipment primarily to dentists.[57] One Dentsply regional manager testified that he does not know of any operatory dealers who do not carry teeth that might be candidates to sell teeth. (Gosney (DS), B-1666).

The "general view" at Dentsply has been that very few dealers who do not sell teeth are interested in selling teeth. (Crane (DS), B-1615-17). Indeed, every operatory dealer deposed during this case testified that it has no interest in selling teeth.[58]

Dentsply has touted Becker-Parkin and Sullivan Dental Products as operatory dealers that could serve as potential "significant distribution outlet[s]" for the distribution of competitors' artificial teeth. (Miles (DS), B-1952-54).[59] But Becker-Parkin doesn't sell teeth and is "very leery about doing lab business." (Salzman (Becker-Parkin), B-2095). As its president testified, "I think there is the dental supply industry, then there is the dental laboratory industry and we are into the dental supply industry." (Id., B-2099). Similarly, despite several attempts by Dentsply itself to persuade Sullivan to sell Trubyte teeth, Kevin Ackeret of Sullivan testified that

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[57] (Dhuet (Valley), B-1628; Buckley (Smith Holden), B-1505; Warren (Direct Dental Supply), B-2245; B-752.

[58] See Shemowitz (Island Dental), B-2108-09 (tooth business "too costly"; "I would have to spend money to make sales"); Dhuet (Valley), B-1632, 1634 ("we don't call on the dental lab trade"; "we would need to have more expertise in order to be able to effectively sell [teeth]"); Warren (Direct), B-2242-43, 2246 (no interest due to need for more inventory and personnel); Buckley (Smith Holden), B-1502-08 (labs are poor credit risks and teeth are too labor intensive).

[59] In 1995, Becker-Parkin actually inquired about distributing Dentsply's teeth at the request of one customer. Salzman (Becker-Parkin), B-2096, 2100. But Dentsply questioned whether Becker-Parkin could add incremental business, and it never started selling Trubyte teeth. Id., B-2101 & B-329. Indeed, a major consideration in Dentsply's decision to begin selling teeth to a new dealer is "whether or not they [have] a very strong and dedicated focus on the laboratory market." Pohl (DS), B-2026.

it was not considering entering the market. (Ackeret (Sullivan), B-1445-46). In order to sell teeth effectively, Sullivan would need to start selling other lab products (such as gypsums and porcelains) as well. Like other operatory dealers, Mr. Ackeret felt that Sullivan did not have the time or the expertise to add teeth to its inventory. (Id., B-1440-44). Even Chris Clark, then Trubyte General Manager, testified in 1996 that Sullivan has not "been overly interested in getting into the tooth business. . . ." (Clark (DS), B-1589-90). Operatory dealers that do not sell teeth, and particularly those that have declined an offer from the largest tooth manufacturer to enter the market, should not be considered available dealers for Dentsply's much smaller rivals. FTC v. Cardinal Health, Inc., 12 F. Supp.2d 34, 57 (D.D.C. 1998) (entry into pharmaceutical distribution market by suppliers of other medical and surgical products "theoretical at best" in light of recent rejection of offer to enter).[60]

c. Direct sales are not an adequate substitute for sales to independent tooth dealers.

Dentsply contends it should prevail merely because Vita and Ivoclar make some direct sales and thus have not been completely foreclosed from the market. Yet the law does not require complete foreclosure, only foreclosure of "a substantial share of the line of commerce affected." Tampa Electric, 365 U.S. at 327. See also Barr Labs, 978 F.2d at 110.[61] Were it otherwise, a

[60] Dentsply claims to have received one to two inquiries each month since 1992 from "dental products dealers" seeking to become Trubyte dealers (DS Mem. at 7). Dentsply's evidence does not support its contention that there are numerous operatory dealers who want to start selling teeth. The former head of the Trubyte Division testified that he didn't know the details of such requests and that Dentsply may not have kept such records. Clark (DS), B-1586, 1588.

[61] In Microsoft, the court recently held that Microsoft's exclusive dealing arrangements with various equipment manufacturers, internet content providers and others did not violate Section 1. Although the court found that Microsoft's agreements had restricted its rival's access to the most efficient distribution channels for browsers, and thus supported a finding of liability under Section 2, it concluded that under the relevant case law it could not find those agreements violated

plaintiff would have to prove a foreclosure rate of 100% in order to prevail under Sections 1 and 3. The existence of alternative channels of distribution is relevant where those channels are adequate to enable rivals to compete effectively. E.g., CDC Technologies, 186 F.3d at 80-81 (plaintiff's sales increased by "successfully" reaching customers through alternatives); Ryko, 823 F.2d at 1234 (no evidence that exclusive dealing prevented competitors from finding "effective" distributors or other means of promoting and selling products); Roland Machinery 749 F.2d at 394 (Komatsu, the competitor, became "a major factor in the U.S. market, apparently in a short period of time").[62]

In this case, direct distribution has not been successful. "It's much more expensive to sell direct than it is through the dealer network." (Hagler, B-1685). A manufacturer must absorb the cost of all the services dealers provide for them: "the cost of inventory, the cost of sales force, of distribution of product and carrying the receivable for the customer." (Wiltz (Patterson), B-2277).

Section 1 because they did not "foreclose absolutely outlets that together accounted for a substantial percentage of the total distribution of the relevant products." 87 F. Supp.2d at 52. Here, however, there is abundant evidence of substantial foreclosure. See pp. 26-28.

[62] Roland Machinery stated that a plaintiff must prove that at least one significant competitor was kept from doing business in the relevant market. 749 F.2d at 394. Given Komatsu's success, it is unlikely the court would have remanded the case believing Roland might prevail on a fuller record (id. at 396) had it actually meant that complete exclusion was required. Indeed, Judge Wright declined to follow that dicta in Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 885 n.34 (D. Del. 1987). Yet even if that standard were accepted, decision not to enter (pp. 7-8) is sufficient to meet it. So, too, is Dentsply's 1995 agreement with Darby Dental that excluded Odipal teeth from the market. See n.22.

And it would need to set up local tooth stocks around the country. "[I]f we were a direct company, we would have to have multiple buildings around the United States to house teeth. We couldn't do it out of York. We would have to hire all new people. We would have major expense. Why wreck a good thing?" (Kirchheimer (DS), B-1878-79).[64]

For a variety of reasons, labs often prefer to buy teeth from a local dealer. (Facts ¶ 6). Dentsply concedes that "most of [their] dealers . . . are local dealers serving a rather local area," (Clark (DS), B-1585), and that having Dentsply teeth "readily available" to labs "makes it more convenient for the laboratory and ultimately the dentist to get the right teeth, the right shape, the right size, the right color quickly to fulfill any denture case." (Turner (DS), B-2205). Delivery

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[63] See also Howe (DS), B-1787-88 (increased staffing in billing, collections and distribution areas); Francoeur (DS), B-1650 ("[t]o set the process up directly, I think, would be a hard thing to do").

[64] See also Turner (DS), B-2200-01 ("additional distribution resources to make sure the product was available to laboratories on a timely basis at least equal to the availability that they now enjoy"); Howe (DS), B-1788.

[65]

from a direct selling manufacturer is more expensive and often takes longer.[66] Immediate availability is particularly important in emergency cases requiring same-day service, (Facts ¶ 6), as Dentsply itself recognized when opening a new dealer in Miami that was located very close to an existing dealer. (B-262-63 ("customers in the Miami area need a local presence to be able to drive over and pick up teeth in rapid turnaround situations")). Same-day pick up or delivery can constitute a significant percentage of a dealer's business.[67]

Dealers also offer their labs the benefit of one-stop shopping, something that a direct-selling manufacturer could not offer even if it set up numerous tooth stocks nationwide. (Facts ¶ 6). Dealers agree: "most customers prefer being able to get as many products if not all of their products from one supplier . . . ." (Weinstock (Zahn), B-2266; see also Nordhauser (Darby), B-1978-82; Kashfian (Pearson), B-1859-63; Ryan (Sonshine Dental Lab), B-2091-93 ("I would like to have a choice of all the brands that are available").

Labs develop loyalty to their local dealer because personal representation is important to the sale of teeth to labs. (Miles (DS), B-1945-46). This "is an age-old industry and the relationships have been built over the years on personal delivery by dental supply personnel to laboratories within reach via car or truck." (Turner (DS), B-2205-06).

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[66] Murphy (Saylors Dental Lab), B-1966-68 (lab obtains Ivoclar teeth in two days and Vita teeth in three to four days); id., B-1968-69 ("That's the reason why we stopped dealing with Vita as much as possible . . . . it just took forever to get the teeth to Virginia, to us").

[67] Weinstock (Zahn), B-2277 (33% of one Zahn branch); Kashfian (Pearson), B-1852-54, 1867-69 (10%-20%); Henderson (Marcus), B-1776 (25%).

It is not surprising, therefore, that Dentsply's rivals have fared so poorly in the market despite years of trying. As its major competitors have testified, direct distribution is a poor alternative to a national dealer network.[68]

3. Dentsply's agreements have caused substantial anticompetitive effects.

By foreclosing such a substantial share of the market, Dentsply's exclusive dealing agreements have caused numerous anticompetitive effects. It has kept prices too high, quality too low, and raised barriers to entry. (See pp. 15-17). Even if Dentsply had offered evidence to support its procompetitive justifications, these adverse effects are more than sufficient to raise a genuine fact issue about whether its agreements are, on balance "'unreasonable,' i.e., whether

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[68] Swartout (Austenal), B-2172 ("to have any success in the United States market you need to have a distribution network for your products"); id., B-2171 (contrasting to Canada, a "very similar market," where Austenal sells through a wide dealer network and has much greater success); Bremer (Austenal), B-1467-68 (Austenal would have larger market share if it had additional major dealers); Hagler, B-1683 ("[t]here's no way Universal or companies like Universal could give anywhere near the service that a distributor can. From a financial point, from consignment stocks, from inventory, from distribution, from a tooth exchange, we can't do any of those things. Dealers are set up to do that").

[their] anticompetitive effects outweigh [their] procompetitive effects." Atlantic Richfield Co., 495 U.S. at 342 & n. 12.

III. Dentsply is not entitled to summary judgment based on its unsupported "business justifications."

Dentsply contends that it is entitled to summary judgment merely because it engages in promotional marketing activity that increases demand for its teeth. DS Mem. at 34-37.[69] Dentsply cites no cases supporting this astoundingly bold assertion. To the contrary, to prevail as a matter of law, Dentsply must show not only that its exclusive dealing agreements have procompetitive benefits, but also that those benefits are valid and sufficient in light of the evidence of substantial foreclosure and adverse effects.

Dentsply simply cannot prevail by making theoretical and unquantified "business justifications"; instead, Dentsply must prove that there are no disputed material facts regarding the validity and sufficiency of those justifications.[70] The United States is not aware of any case, and Dentsply has cited none, holding that a monopolist that had foreclosed 80% of the market was entitled to judgment as a matter of law based on its asserted procompetitive justifications.[71]

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[70] E.g., Kodak, 504 U.S. at 483-85 ("[f]actual questions exist [] about the validity and sufficiency of each claimed justification, making summary judgment inappropriate"); NCAA v. Board of Regents, 468 U.S. 85, 113 (1984)

[71] Dentsply's argument that the mere fact that it creates demand for Trubyte teeth means that "plaintiffs cannot establish that Dentsply's dealer policy has adverse competitive effects" (DS Mem. at 34-35) is ludicrous, particularly given that the case it cites to support this proposition involved a defendant with a 50% market share and foreclosure of only 15% of the market. Barr Lab, 978 F.2d at 110-12.

Where it is apparent that the defendant's asserted justifications are pretextual, summary judgment should be denied. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1010-13 (3d Cir. 1994). That is the case here, where the evidence "makes it less likely that the free rider problem was really uppermost in the minds of defendants' executives." Brokers' Assistant, Inc. v. Williams Real Estate Co., 646 F. Supp. 1110, 1120 n.38 (S.D.N.Y. 1986).[72] Here, there is more than sufficient evidence to raise a genuine issue that what was "uppermost" in the minds of Dentsply's executives was not free riding, but an intent to "block competitive distribution points" and prevent its closest competitors from gaining a "foothold" in the U.S. market. (See pp. 12-14).[73]

Moreover, Dentsply has not met its burden of offering evidence to support its justifications. Dentsply has not shown there is no genuine fact issue that in the absence of Dealer Criterion 6, free riding would occur and Dentsply would reduce its demand-creating promotional expenditures. Fourteen dealers selling Trubyte teeth today, already sell some of the "grandfathered" competitive lines (such as Austenal and American Tooth brands). (DS Mem. at 19; .[74] Yet Dentsply has not offered evidence that it has been

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[72] See also High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 991 (9th Cir. 1993) (evidence that "proffered business justification is suspect . . . is sufficient to raise a genuine issue of material fact"); Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667, 675 (7th Cir. 1992) (affirming injunction because "[a]voidance of free-riding [] does not justify" defendant's policy in that case).

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[74] Of all of the dealers selling Trubyte teeth, not one also sells Ivoclar teeth, and only one also sells Vita teeth (but, under an agreement with Dentsply, only from one location and in a limited area).

unable to promote its teeth effectively through these dealers. It also has not offered evidence that non-exclusive dealers today actively convert their Trubyte tooth customers over to less expensive brands, and there is substantial evidence to the contrary. Zahn Dental is a large, non-exclusive dealer selling not only Trubyte teeth but the Myerson, Kenson, Universal, Justi, Dentorium, and Accutone brands as well. (Weinstock (Zahn), B-2256). Despite its broad product line, Zahn considers itself "neutral" and strives first and foremost to meet the needs of its customers, not to sell one product over another. (Id., B-2267).[75] As one of Dentsply's own high-level executives frankly admitted, there is no incentive for dealers to switch customers from one brand to another, and "there's a huge risk in doing so . . . ." (Crane (DS), B-1613. See also Reitman Rebuttal Rept., B-1114 (evidence that dealers could or would switch customers "weak, at best")).

Indeed, Dentsply continues to treat its non-exclusive and exclusive dealers equally, in the amount of training it provides and otherwise.[76]

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[75] See also McGalliard (Jahn Dental), B-1911-13 (his lab customers do not expect him to promote one tooth brand over another, and even when he had an opportunity to convert a Universal customer to Dentsply, he did not do so).

[76] Clark (DS), B-1575-76; Golden (DS), B-1659-60; Yacola (DS), B-2286).

Moreover, the real issue is not whether Dentsply's own promotional efforts might decrease, but rather the effect on promotional efforts industrywide. (Reitman Rebuttal Rept., B-1059). If Dentsply's rivals are given greater access to dealers, promotional spending is likely to increase, not decrease. For example, when Frink Dental sold Ivoclar teeth for six months, Ivoclar trained Frink's entire sales force. (Cavanaugh (Frink), B-1522-23). The training it offered was equal to Dentsply's training, and Ivoclar's samples and other materials were better. Id. at 93. Similarly, Zuckerman Dental, a small dealer selling Vita teeth, testified that Vident is "supportive with information if I need it, and [has] a tremendous marketing group and support group . . . ," and that it has provided marketing materials for distribution to customers. (Zuckerman (Zuckerman Dental), B-2313-16). Even without access to dealers today, Ivoclar and Vita also call upon dentists and labs and provide many of the same types of promotion and training services as Dentsply.[77] With a dealer network, these rivals would increase their expenditures even more. (Reitman Rept., B-1080-81).

In short, Dentsply has not met its burden of showing there are no disputed factual issues regarding its alleged business justifications. Even if these justifications are not pretextual, they are unsupported by the facts. And even if they have some factual support, they fall far short of outweighing the significant adverse effects of Dentsply's exclusive dealing agreements or justifying such substantial foreclosure.

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[77] See, e.g., Haynes (Pittman Dental Lab), B-1765, 1768-71 (Ivoclar advertises and promotes teeth; Ivoclar rep visits to discuss new products and offer training and seminars; Vident rep has offered training to Pittman's technicians); Cook (Oral Arts Lab), B-1596-99, 1609-10 (Vident and Ivoclar provide marketing literature and brochures; Vident rep visits for training, to introduce new products and take orders); Murphy (Saylors Dental Lab), B-1964-65, 1969-71 (Ivoclar offers courses to labs and dentists on setting up teeth and processing finished dentures; Murphy attended three-day Ivoclar seminar on placement and arrangement of teeth).