UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

PLAINTIFF UNITED STATES' BRIEF IN SUPPORT OF ITS MOTION TO COMPEL DEFENDANT DENTSPLY TO COMPLY WITH DISCOVERY RELATING TO ITS COMPETITIVE POSITION IN FOREIGN MARKETS

Dated: January 4, 2000

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I. STATEMENT OF NATURE AND STAGE OF THE PROCEEDING

On January 5, 1999, the United States filed its Complaint (D.I. 1) against Defendant, Dentsply International, Inc., seeking equitable and other relief for Defendant's continuing violations of Section 2 of the Sherman Act, Section 3 of the Clayton Act, and Section 1 of the Sherman Act, through exclusive dealing arrangements that deny effective distribution outlets to competing manufacturers of prefabricated artificial teeth. In its Complaint, the United States alleges that both domestic and foreign artificial tooth manufacturers other than Defendant compete more successfully outside the United States, where their access to dealers is not restricted by Defendant. Complaint ¶¶ 11-13.

On January 20, 1999, Defendant filed its Answer. (D.I. 5). From the outset, Defendant has largely stonewalled the United States' efforts to obtain the information held by Defendant regarding competition in other countries. It is noteworthy that Defendant did not refuse to answer the allegations regarding its competitors' success outside the United States, or otherwise move to strike. Instead, it answered the allegations selectively. Defendant either denied these allegations or stated that it is "without sufficient information to form a belief" as to their truth. Answer ¶ 11-13. It is, of course, hard to imagine how a multinational corporation such as Defendant could lack the information necessary to form a belief on these matters. Indeed, given that Defendant is headquartered in the United States and that its senior officers work here, it would not seem to place a significant burden on Defendant to have obtained this

information before filing its Answer. On February 11, 1999, Defendant filed an Amended Answer and repeated these averments. (D.I. 14, at ¶ 11-13).

The United States has tried in a variety of ways at several different times to obtain the information and documents that Defendant possesses on this issue. The United States first served document requests, then an interrogatory, asked questions regarding these issues at depositions of Defendant's officers and employees, and finally served a deposition notice under Fed.R.Civ.P. 30(b)(6). Defendant has selectively allowed discovery into the international aspects of its business by producing a handful of documents and permitting questioning of some of its officers and employees at depositions. At the same time, according to correspondence between counsel for Defendant and one of its competitors, Defendant has obtained discovery from at least one rival manufacturer, Vident, regarding its Canadian operations. See December 27, 1999 Letter from Monte Cooper to Richard A. Ripley (Appendix A-1 - A-2).

On March 2, 1999, the United States served its First Request for Production of Documents ("First Document Request"), which included two requests for documents pertaining to Defendant's competitive position in foreign markets. See First Document Request, Nos. 22 and 23 (Appendix A-3 - A-21). In Dentsply's Objections and Responses to Plaintiff's First Request for Production of Documents ("Objections and Responses to First Document Request"), Defendant initially objected only on the grounds that the United States should have requested the documents pursuant to the discovery procedures of the forum states where the documents were located but further stated that it would produce responsive documents maintained in the United States. See

Objections and Responses to First Document Request (Appendix A-22 - A-51). Defendant later reversed course and asserted for the first time that these requests sought documents not relevant to this action and that it would not produce any documents responsive to Request Nos. 22 or 23 whether maintained inside or outside the United States.

After numerous attempts to resolve the dispute, the United States informed Defendant that it would ask the Court to compel production of documents responsive to Request Nos. 22 and 23 regarding international matters, as well as to certain other requests, if the parties were unable to reach an agreement beforehand. See May 3, 1999 Letter from William E. Berlin to Kelly A. Clement (Appendix A-52 - A-53). In subsequent negotiations, Defendant agreed to produce some of the disputed categories of documents, including specifically those regarding Defendant's international divisions held in certain files located in the United States.[1] The United States agreed to review those documents to see whether they contained the information the United States was seeking, before deciding whether it was necessary to compel production of additional documents. See May 24, 1999 Letter from Mark J. Botti to Richard A. Ripley (Appendix A-54 - A-56).

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[1] The United States understands from correspondence and conversations with Defendant's counsel that Defendant selectively searched its domestic files. Defendant did not attempt to review files located in this country for documents regarding these international issues beyond those files pertaining to its domestic artificial tooth business, even if those additional files were likely to include documents relating to its tooth business in foreign markets. Rather, Defendant limited its search to files likely to contain information about Defendant's domestic tooth business.

On April 16, 1999, the United States served its First Set of Interrogatories to Defendant ("First Set of Interrogatories"), which included one interrogatory seeking the Defendant's annual unit and dollar sales of artificial teeth outside the United States. See First Set of Interrogatories, No. 2 (Appendix A-57 - A-69). Defendant refused to answer this interrogatory, on the grounds that such information is beyond the scope of the subject matter of the litigation, and would impose an undue burden and expense on Dentsply. See Objections and Responses to Plaintiff's First Set of Interrogatories, filed on May 17, 1999 (Appendix A-70 - A-81). When the United States inquired why, in light of its partial production of documents relating to international issues, Defendant was refusing to answer an interrogatory regarding the same general topic, Defendant was unable to provide an answer and simply restated its refusal to provide international data in response to the United States' First Set of Interrogatories.

Defendant did not make copies of any responsive documents available for inspection by the United States until early June, 1999, and the United States did not receive copies of all of the remaining documents that Defendant had agreed to produce until early August, 1999, when Defendant provided the disks containing the imaged documents. Depositions of third parties and Defendant's officers and employees began in early July, and approximately 80 depositions have been taken to date. During the depositions of at least six Dentsply employees, taken by the United States over an almost three-month period from August 19, 1999, to November 5, 1999, the United States asked questions regarding Defendant's market share and means of distribution in other

countries, as well as other international issues.[2] Defendant did not object to the relevance of any of the questioning on international issues at any of these depositions, and its employees and officers provided answers to those questions.

Subsequently, however, Defendant reasserted its relevancy objection. On December 15, 1999, during the deposition of Chris Clark, former Vice President and General Manager of Dentsply's Trubyte division, when the topic of Defendant's international operations was broached, counsel for Defendant indicated that Mr. Clark would not be permitted to answer any questions regarding international issues. After the United States filed and served its Fed.R.Civ.P. 30(b)(6) deposition notice for testimony on Defendant's competitive position in Canada, Australia, and several European countries, Defendant informed the United States on December 17, 1999, that it would not produce any witnesses to testify about international issues because this Court had previously stated that this subject matter was irrelevant to this case. (D.I. 161). When asked, however, to provide a cite for such a statement, Defendant was unable, and the United States recalls no such discussion with the Court.

In an attempt at compromise, the United States made a final effort to avoid filing this motion by narrowing significantly the time period and geographic scope of its

[2] In its Fed. R. Civ. P. 26(a)(1) disclosure, Dentsply identified certain employees of its Ceramco Division as likely witnesses who have "discoverable information" concerning the direct distribution of dental products and supplies to dental laboratories. The deposition testimony of these witnesses demonstrated their knowledge of Defendant's distribution of dental products and supplies in foreign countries.

requests. Defendant again stood on its relevancy objection and declined to produce any more responsive information or documents.

II. ARGUMENT

A. The United States Is Seeking Production of a Very Narrow Range of Information and Documents Relating to Defendant's Tooth Business in Five Countries Outside the United States.

The United States is seeking information relevant to a comparison between Defendant's market share in the United States and in five other countries where the United States believes Defendant does not restrict its dealers from carrying or adding competing tooth lines. Specifically, the United States seeks the following relating to Defendant's sale of prefabricated artificial teeth in Canada, Australia, England, France, and Germany:

(1) Defendant's market share in each of its two most recent, complete fiscal years, along with any estimates of the market shares of its competitors;

(2) annual strategic or business plans for each of its two most recent, complete fiscal years;

(3) a statement of whether it has a policy that is the same as, or similar to, its Dealer Criteria #6 in the United States, which provides that its dealers "may not add further tooth lines to their product offering," and, if not, a full and complete description of why it does not have such a policy; and

(4) any documents created since January 1, 1990 discussing any plan or proposal to adopt a policy that is the same as, or similar to, its Dealer Criteria #6 in the United States.

Each of these items is encompassed by one of the discovery requests already served by the United States. These five countries were chosen because Defendant's own documents categorize them as "mature markets" like the United States; thus, these

countries provide a useful basis for the market share comparison the United States intends to present to the Court. To reduce the burden of compliance even further, the United States advised Defendant and maintains for purposes of this Motion that, apart from the documents requested in item no. 4 above, Defendant may produce the requested information in the form most convenient to it -- as an interrogatory answer, responsive documents, or the deposition testimony of a person who can provide the information requested.[3]

B. The Information and Documents Sought Are Relevant to Assessing the Competitive Effects of Defendant's Conduct in the United States.

The information requested falls easily within the broad scope of discovery under Fed. R. Civ. P. 26(b)(1). Under that Rule, relevance has been construed broadly to "encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). "[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." Id. Rule 26(b)(1) "has been given a very broad reading, and relevancy is construed more loosely in the discovery context than at trial." Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 259 (D. Del. 1979). This Court has recognized that "'discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.'"

[3] During the parties' conferences on this issue, Defendant has provided no facts as to why it would be unduly burdensome to gather and produce the relevant information.

In re ML-Lee Acquisition Fund II, 151 F.R.D. 37, 39 (D. Del. 1993) (quoting La Chemise Lacoste v. Alligator Co., Inc., 60 F.R.D. 164, 171 (D. Del. 1973)). Moreover, this Court has observed a "general policy of allowing liberal discovery" because "broad discovery may be needed to uncover evidence of invidious design, pattern or intent." Kellam Energy, Inc. v. Duncan, 616 F. Supp. 215, 217 (D. Del. 1985).

In this case, the Court need not look beyond the pleadings to assess relevance because Defendant's sale and distribution of prefabricated artificial teeth outside the United States is placed squarely at issue by the specific allegations of the Complaint. As noted in the Complaint, "[t]wo manufacturers of premium artificial teeth, Vita Zahnfabrik ('Vita') and Ivoclar AG ('Ivoclar'), compete successfully outside the United States against Dentsply and have succeeded, at least in one country, in unseating Dentsply as the dominant brand." Complaint ¶ 11. Yet "[d]espite their substantially greater success elsewhere in the world, Vita and Ivoclar teeth combined account for less than 10% of the artificial tooth sales by dollar in this country." Complaint ¶ 12. Further, "rival manufacturers [are not] able to obtain effective, alternative channels of distribution. Direct sales to dental laboratories are not a reasonable or adequate substitute for the established dealers… ." Complaint ¶ 33. The information requested is designed to obtain the information and documents Defendant has on these issues, and is thus well within the scope of permissible discovery under Rule 26(b). See Oppenheimer, 437 U.S. at 351; Pennwalt, 85 F.R.D. at 259; United States v. International Business Machines, Corp., 66 F.R.D. 215, 218 (S.D.N.Y. 1974).

Information received thus far in discovery confirms the Complaint's allegations that Defendant does not restrict its dealers outside the United States and that its competitors are more successful in competing with Defendant in those other countries. For example, Norman Weinstock, president of Zahn Dental, the largest dental laboratory dealer in the United States, testified REDACTED

REDACTED See Weinstock Depo. at 485:15-487:5 (Appendix A-82 - A-83). Both Michael Crane, Dentsply's Senior Vice President of International Operations, and John H. Weiland, who preceded Mr. Crane as Senior Vice President, were not aware of any Dentsply dealer criteria in Canada restricting its dealers from adding competing lines of teeth such as it has in the United States. See Crane Depo. at 73:24 - 74:4 (Appendix A-84 - A-87); Weiland Depo. at 181:4-8 (Appendix A-88 - A-89).

David Pohl, the managing director for Dentsply Australia, testified that both Vita and Ivoclar had a greater market share in Australia than Dentsply. See Pohl Depo. at 240:19-241:5; 242:20-243-15 (Appendix A-90 - A-92). In addition, he testified that Dentsply's competitors in Australia have access to significant dealers in that each "major" dealer in the Australian tooth market is aligned with a particular tooth manufacturer. Id. at 240:19-241:5. Michael Crane similarly testified that Dentsply's market share of teeth in Australia during the period from 1989 to 1995 was under ten percent. See Crane Depo. at 60:6 - 60:8 (Appendix A-93 - A-95).

Mr. Crane also testified that, in Europe, Dentsply's market share for teeth was 15-20% and that the other significant suppliers of teeth to Europe at that time were Ivoclar,

Vita and Bayer. Id. at 19:14 - 19:20 (Appendix A-96). Mr. Crane was unaware of any restrictions on Dentsply's European dealers carrying or adding other lines of teeth. Id. at 21:14 - 21:22 (Appendix A-96).

In addition, in depositions of Defendant's Ceramco Division employees that Dentsply identified as likely witnesses regarding direct distribution of dental products to laboratories, those witnesses stated that, in contrast to the United States where Ceramco distributes its crown & bridge products directly to the dental laboratory, in all other countries except Canada its products are distributed through dealers.[4] For example, James Mandell, formerly the Vice President and General Manager of Ceramco, testified that Ceramco does not have the level of sales in any foreign country to support or justify the expense of the additional infrastructure, specifically a sales force, accounting and invoicing, customer service, and distribution, that it would need to implement in order to sell directly to labs in those countries. See Mandell Depo. at 122:24 - 124:9 (Appendix A-97 - A-98). In fact, in Canada, where Defendant sells these products directly, Mr. Mandell testified that as of April, 1998, Defendant was losing money because it did not have "significant enough sales" to cover its high distribution and sales costs. Id. at 117:20 - 120:1 (Appendix A-99). Susan Crawford, formerly Ceramco's marketing manager, similarly testified that Ceramco sells through dealers in other countries rather than directly because it does not have sufficient sales in those individual countries, such as it has in the United States, to justify hiring a sales force. See Crawford Depo. at 46:11 - 47:8

[4] It bears noting that Defendant's Ceramco witnesses also have acknowledged that Ceramco utilizes dealers outside of the United States even though crown & bridge products can more readily be sold directly (i.e., without dealers) than can artificial teeth.

(Appendix A-100 - A-101). These Ceramco witnesses' testimony supports the Complaint's allegations that direct distribution is not a reasonable, adequate, or effective alternative channel of distribution for Defendant's rival manufacturers who are attempting to build their tooth sales in the United States.

Defendant did not make a relevancy objection to any of this deposition testimony. The United States is entitled to the discovery it is requesting of similar, relevant information regarding these issues to clarify, confirm, or supplement the selected information Defendant has produced. Comparing Defendant's market share in the United States, where it restricts its dealers, with its market share outside the United States, where it does not, is a relevant factor in assessing the competitive effects of Defendant's dealer criteria. See generally Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 116 n.11 (1969) (in private action, damages calculated by comparing plaintiff's market share in related market unaffected by the unlawful conduct). Moreover, Defendant should not be permitted to selectively decide when it will or will not produce the responsive information. Its attempts to do so throughout fact discovery thus far suggest that it believes the information is harmful to its position in this case.[5]

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[5] In addition, at least with respect to the document requests, it appears that Defendant waived its relevancy objection early on by failing to assert it in its April 1, 1999 Objections and Responses to Plaintiff's First Request for Production of Documents. In those Objections and Reponses, Defendant objected to the two requests at issue solely on the basis that the United States was seeking production of documents held outside the country without requesting them pursuant to the procedures applicable in each of those countries. The objection actually made -- namely, that this Court lacked authority to command production of responsive documents held outside of the United States -- was frivolous. This Court has the power to compel Defendant to produce responsive information held outside the United States. See Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 539-40

III. CONCLUSION

The United States seeks the Court's intervention with regard to these narrow categories of information and documents. For the reasons stated above, the United States respectfully requests that the Court grant its Motion to Compel.

Respectfully submitted,

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