UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

UNITED STATES' BRIEF IN RESPONSE TO DEFENDANT DENTSPLY INTERNATIONAL, INC.'S MOTION TO CONSOLIDATE CASES FOR PRETRIAL PROCEEDINGS

Dated: July 19, 1999

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I. STATEMENT OF THE 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 to enjoin defendant's continuing violations of the federal antitrust laws. The Complaint alleges that defendant has engaged, and continues to engage, in a variety of actions that unlawfully maintain its monopoly power and deny competing manufacturers of artificial teeth access to the independent distributors of most of the artificial teeth sold in the United States. On February 11, 1999, defendant filed an amended answer (D.I. 14).

Subsequent to the filing of the United States' suit, two private class actions were filed based on the same alleged anticompetitive conduct: Robert B. Raiber v. Dentsply International, Inc. ("Raiber") and Howard Hess Dental Laboratories Inc., et al. v. Dentsply International, Inc. ("Hess"). Following the removal and transfer of Raiber, these two actions -- both of which seek a jury trial and money damages -- are now also pending before this Court.

On July 2, 1999, defendant moved to consolidate Raiber and Hess with the United States' enforcement action. Class counsel have not sought consolidation. As of the filing of this brief, the United States and defendant are close to filing, with the Court, a stipulated proposed protective order that would allow attorneys for class plaintiffs in Raiber and Hess, and those entitled under the protective orders in those cases, to gain access to any confidential information produced in response to future subpoenas to be issued in the United States' action.

II. ARGUMENT

Congress and the courts have recognized that antitrust enforcement actions brought by the United States are of special urgency because they seek to enjoin the ongoing exercise of market power through anticompetitive actions, and therefore that these cases should not be delayed or otherwise encumbered by combination with private antitrust suits seeking damages. Congress and the courts have indicated that federal antitrust suits should be allowed to proceed, both in pretrial proceedings and at trial, separately from any related private actions.

Even aside from the strong public policy reasons against consolidation in federal enforcement antitrust cases in general, defendant has not justified consolidation of the United States' enforcement action with Raiber and Hess in the particular circumstances of this case. Quite to the contrary, the balance of factors used by the courts in considering consolidation weighs strongly against consolidation in this case. In fact, defendant suggests nothing unique or even different about the present matter from every other antitrust enforcement action that is followed by a private, class action seeking treble damages. Thus, its argument, if widely adopted, would require consolidation every time that a federal antitrust enforcement action is succeeded by class actions and would significantly hinder government enforcement efforts.

A. Congress and the Courts Have Expressed a Strong Public Policy Against Consolidating or Otherwise Combining Antitrust Injunction Actions Brought by the United States with Private Antitrust Actions

Congress clearly stated a policy judgment against combining government antitrust injunction suits with "tag-along" private suits, even during pretrial

proceedings, when it specifically exempted antitrust injunction actions brought by the United States from the multi-district litigation program under 28 U.S.C. § 1407. That statute provides for coordinated or consolidated pretrial proceedings of most civil actions involving one or more common questions of fact pending in different districts. Even where the actions involve common questions of fact, the statute indicates that "[n]othing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. . . ." 28 U.S.C. § 1407(g).[1]

The legislative history of Section 1407 demonstrates Congress's concern with delaying government suits:

> Subsection (g) excludes from the operation of the bill antitrust actions in which the United States is a complainant. This limitation was requested by the Department of Justice and concurred in by the Coordinating Committee and the Judicial Conference of the United States, on the basis that consolidation might induce private plaintiffs to file actions merely to ride along on the Government's cases. Government suits would then almost certainly be delayed, often to the disadvantage of those injured competitors who would predicate damage actions on the outcome of the Government's suit. Furthermore, since section 5(b) of the Clayton Act (15 U.S.C. 16(b)) tolls the statute of limitations during the pendency of the Government's action, there is no need for injured competitors to join in the Government's suit.

H.R. REP. NO. 90-1130, at 5 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902-03. At the same time, Congress was well aware that forbidding consolidation would

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[1] Section 1407 distinguishes government cases brought under Sections 4A and 4C of the Clayton Act. 28 U.S.C. § 1407(g-h). Under these sections, the government entity -- either the United States or the attorney general of a state, as parens patriae -- seeks damages, not an injunction, and thus stands in a position similar to that of a private litigant. In these circumstances, consolidation may be more appropriate. See H.R. REP. NO. 90-1130, at 8 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1905.

occasionally impose a burden on defendants:

> While exempting the Government from this legislation may occasionally burden defendants because they may have to answer similar questions posed both by the Government and by private part[ie]s, this is justified by the importance to the public of securing relief in antitrust cases as quickly as possible. To treat the Government differently is not arbitrary, for the purpose of the governmental suit normally differs from that of a private suit; the Government seeks to protect the public from competitive injury, while private parties are primarily interested in recovering damages for injuries already suffered. . . .

H.R. REP. NO. 90-1130, at 8 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1905 (letter of Deputy Attorney General Ramsey Clark, incorporated into Report).

Thus, Congress struck the balance between the public interest in prompt and efficient resolution of government antitrust actions and the potential burden on private defendants from duplicative discovery in favor of the public interest in expedited relief. It is also noteworthy that this principle is found in a context in which even greater efficiencies could be realized from consolidation than in the present case. The creation of a procedure for multi-district litigation recognizes the unique and difficult problems posed by related matters in different districts as opposed to related cases that are all in the same district or before the same judge.

For similar reasons, the Supreme Court and other courts have prohibited private parties from intervening in government antitrust suits. In Sam Fox Publishing Company v. United States, 366 U.S. 683 (1961), the Supreme Court emphasized "the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government . . ." and ruled that such intervention should not be permitted even if private litigants were aligned with

the government. Id. at 689, 693. In that case, publisher members of ASCAP sought to intervene in a proceeding to modify a consent decree previously entered in a government antitrust suit. The Court noted that "[(t)]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages." Id. at 689 (quoting United States v. Borden Co., 347 U.S. 514, 518-19 (1954), quoting United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D.N.Y. 1949)); see also, United States v. International Business Machines Corp., 62 F.R.D. 530, 532 n.1 (S.D.N.Y. 1974) ("It is a firmly established general principle that a private party will not be permitted to intervene in government antitrust litigation.").

Finally, the primacy of federal antitrust enforcement actions is recognized by the provision in the antitrust statutes that a finding for the United States is prima facie evidence of a violation in a subsequent private suit. See 15 U.S.C. § 16. Thus, the antitrust laws themselves anticipate that judgment in a federal enforcement actions will precede and, by implication, take priority over related private antitrust suits.

Allowing federal enforcement actions to proceed without the delay occasioned by consolidation expedites ultimate resolution of the government's suit, and, with it, the imposition of relief for conduct adjudged illegal. Moreover, a judgment in favor of the government becomes available as prima facie evidence for injured competitors or customers. Accordingly, giving federal enforcement actions priority over related private antitrust suits promotes judicial efficiency and reduces the burden on the courts by reducing the scope of evidence necessary in the subsequent private suits and by

fostering settlement.

B. Consolidation is Not Warranted in this Matter

Even absent the strong public policy against consolidating federal enforcement actions with private suits, consolidation is not warranted in this case. Among the reasons that consolidation is inappropriate are: (1) it will cause delay; (2) the United States' situation is different from that of the class action plaintiffs; and (3) consolidation will adversely affect the rights of the United States. See generally FED. R. CIV. P. 42(a) (noting unnecessary costs and delay as factors in decisions relating to consolidation); 8 Moore's Federal Practice § 42.10[5][a-d], at 42-18-21 (3d ed. 1999) (discussing reasons that courts have denied consolidation).

There are already substantial and growing indications that consolidation would delay the progress of discovery in the United States' action. Such indications are not surprising. As the Court is often reminded by defendant, the United States filed its suit after substantial investigation -- known about and participated in by defendant, but in which the class plaintiffs were not involved. The United States and defendant thus have a head start over the class plaintiffs in their knowledge of the dental industry, its participants, the allegations of anticompetitive conduct, and other details regarding this matter.

The indications of potential delay, however, go beyond this. Local counsel for Raiber did not even enter an appearance until July 15, and defendant and Raiber have not yet stipulated to a proposed discovery order in that action. Further, the discovery order originally proposed by defendant and plaintiffs in Hess extended forty-six days

beyond the schedule in the United States' action.[2] Finally, the United States has already delayed its depositions somewhat because of the class actions. While the United States, through its own efforts, was able to coordinate the depositions and related document productions so that discovery could proceed in all of the matters and to minimize the burden on nonparties, the delay of these depositions indicates that complete pretrial consolidation would slow progress in the United States' action to the pace of the slowest of the class actions.[3]

Next, the situation of the United States in antitrust enforcement actions in general, and in this action in particular, is different from the situation of private antitrust plaintiffs.[4] The suit filed by the United States seeks to end the continuing harm from the ongoing antitrust violation, while the suit filed by defendants seeks to identify and recover damages for injuries suffered. This distinction applies not only during the relief phase of the proceedings, but will color proof of liability in the government and private cases as well.

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[2] As of July 14, 1999, a new discovery order had not been filed in Hess.

[3] While the policy considerations discussed above specifically recognize the potential burden on defendants in government antitrust suits and the justification of this burden by the importance to the public of securing relief in antitrust cases as quickly as possible, the United States has sought, and will continue to seek, to minimize the burden on nonparties to its action. See H.R. REP. NO. 90-1130, at 8 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1905 (letter of Deputy Attorney General Ramsey Clark).

[4] In addition, as noted by the Court at the July 7, 1999 Telephone Conference in Hess ("July 7 Conference"), Raiber is further different in that it is not brought under the federal antitrust laws, but rather under the Donnelly Act, the New York state law dealing with antitrust violations. Transcript of July 7, 1999 Telephone Conference in Hess ("Conf. Tr.") at 18-19.

Finally, consolidation will adversely affect the rights of the United States. Because of the differences between discovery focused on enjoining anticompetitive practices versus that focused on establishing standing and recovering damages in a jury trial, there is a substantial likelihood that discovery in the United States' action and in the class actions will diverge. As a result, even with postponement of damages and class discovery in the class actions, consolidation would require the United States to participate in discovery unimportant to its case and would require it to alter the manner in which it would pursue other discovery. For example, the class actions may wish to select or emphasize different evidence or witnesses, and therefore to pursue different discovery relative to those individuals. Consolidation would force the United States to attend depositions of those individuals, noticed in the class actions, or risk having evidence from those depositions used against it. In addition, the class actions may wish to pursue different evidence at a different time or by different means than the United States does, therefore altering the order and manner in which the United States would pursue its enforcement action. Even with the postponement of damages and class discovery in the class actions, consolidation might compel the United States to participate in discovery that it would not otherwise undertake.

Defendant's arguments as to the need for consolidation are unpersuasive. Defendant claims that the "fact that the cases are currently separate has raised a host of problems for Dentsply in discovery, all of which can be avoided through consolidation." Memorandum in Support of Defendant Dentsply International, Inc.'s

Motion to Consolidate Cases For Pretrial Proceedings at 5 (emphasis added).[5] Interestingly, defendant then points to only one "problem" that has actually imposed even the slightest burden on it: the cross-noticing of depositions. Every other argument raised by defendant is speculative and contradicted by events thus far. Thus, in the one example given, defendant argues that to enable it to use discovery in the United States' case in the class actions as well, it must follow the United States' document and deposition subpoenas with its own subpoenas in the class actions, or it must obtain agreement from the nonparties subpoenaed by the United States to the production of documents to, or the participation in depositions of lawyers for, the class plaintiffs. While issuing subpoenas can hardly be classified as a significant burden, defendant neglects to mention that, as noted by counsel for Hess at the July 7 Conference, largely through the efforts of the United States, such agreement has been reached in every deposition scheduled thus far and as to every set of documents thus far produced, except as to one company and the related deponent. See Conf. Tr.at 7-8. There have been no motions to quash, no motions practice, and no duplicative second depositions. Further, the protective order that the parties are close to filing, by allowing access of the class action lawyers to confidential material to be produced in the United States' action, substantially reduces the potential of such motions or duplicative discovery in the future. Thus, defendant is left, in the face of actual

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[5] Dentsply's arguments, at the July 7 Conference, reflect that its only concern is with its own convenience, not that of the other parties, the Court, or of nonparties. "[T]he fact is its obvious that none of the plaintiffs need consolidation because they don't need to use evidence in one case against each other." Conf. Tr. at 14.

experience thus far, with speculation alone.[6]

Defendant's argument would, in fact, require consolidation every time a private class action is filed following a government enforcement suit. Defendant can point to nothing about the cases at issue that would not be true of every such situation. Defendant's argument would, therefore, flip on its head the well-established policy against combining government antitrust actions with the private suits that follow them.

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[6] Defendant does not argue that consolidation will avoid delay, nor does it argue that consolidation will substantially promote judicial economy.

III. CONCLUSION

Consolidation of the United States' action is contrary to public policy. Moreover, defendant has failed to demonstrate that consolidation of these matters is warranted. Any minimal burden that is imposed on defendant by proceeding separately here is outweighed by the likelihood that consolidation will delay the United States' suit and the resulting burden that delay will impose upon the Court and the public. For these reasons, and the reasons stated above, the United States respectfully requests that the Court deny defendant's Motion.

Respectfully submitted,

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