UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

PLAINTIFF'S RESPONSES AND OBJECTIONS TO DEFENDANT'S SECOND REQUEST FOR DOCUMENTS AND FIRST SET OF INTERROGATORIES

Plaintiff, by and through its attorneys, and pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure and the Local Rules of this Court, responds and objects to Defendant Dentsply International, Inc.'s ("Dentsply") Second Request for Documents and First Set of Interrogatories as follows:

PRELIMINARY STATEMENT

1. Plaintiff's investigation and development of all facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, Plaintiff's right to rely on other facts or documents at trial.

2. By making the accompanying responses and objections to Defendant's requests for documents and interrogatory, Plaintiff does not waive, and hereby expressly reserves, its right to assert any and all objections as to the admissibility of such responses into evidence in this action, or in any other proceedings, on any and all grounds including, but not limited to,

competency, relevancy, materiality, and privilege. Further, Plaintiff makes the responses and objections herein without in any way implying that it considers the requests and interrogatory, and responses to the requests and interrogatory, to be relevant or material to the subject matter of this action.

3. Plaintiff will produce responsive documents only to the extent that such documents are in the possession, custody, or control of the Antitrust Division of the U.S. Department of Justice, as set forth in the Federal Rules of Civil Procedure. Plaintiff's possession, custody, or control does not include any constructive possession that may be conferred by Plaintiff's right or power to compel the production of documents or information from third parties or to request their production from other divisions of the Department of Justice or agencies of the United States.

4. A response to a document request or interrogatory stating that objections and/or indicating that documents will be produced shall not be deemed or construed that there are, in fact, responsive documents, that Plaintiff performed any of the acts described in the document request, interrogatory, or definitions and/or instructions applicable to the document request or interrogatory, or that Plaintiff acquiesces in the characterization of the conduct or activities contained in the document request, interrogatory, or definitions and/or instructions applicable to the document request or interrogatory.

5. Plaintiff expressly reserves the right to supplement, clarify, revise, or correct any or all of the responses and objections herein, and to assert additional objections or privileges, in one or more subsequent supplemental response(s).

6. Plaintiff will make available for inspection at Plaintiff's offices responsive

documents. Alternatively, Plaintiff will produce copies of the documents.

7. Publicly available documents including, but not limited to, newspaper clippings, court papers, and documents available on the Internet, will not be produced.

GENERAL OBJECTIONS

1. Plaintiff objects to each instruction, definition, document request, and interrogatory to the extent that it purports to impose any requirement or discovery obligation greater than or different from those under the Federal Rules of Civil Procedure and the applicable Rules and Orders of the Court.

2. Plaintiff objects to each document request and interrogatory that is overly broad, unduly burdensome, or not reasonably calculated to lead to the discovery of admissible evidence.

3. Plaintiff objects to each document request to the extent that it calls for production of a privilege log for internal documents of Plaintiff. A request for such a log is unreasonable and unduly burdensome in light of the work product doctrine, governmental deliberative process privilege, and other privileges protecting such internal documents from discovery.

4. Plaintiff objects to each instruction, definition, document request, and interrogatory to the extent that it seeks documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work product doctrine, or any other applicable privilege. Should any such disclosure by Plaintiff occur, it is inadvertent and shall not constitute a waiver of any privilege.

5. Plaintiff objects to each instruction, definition, document request, and

interrogatory as overbroad and unduly burdensome to the extent it seeks documents or information that are readily or more accessible to Defendant from Defendant's own files, from documents or information in Defendant's possession, or from documents or information that Defendant previously produced to Plaintiff. Responding to such requests and interrogatory would be oppressive, unduly burdensome, and unnecessarily expensive, and the burden of responding to such requests and interrogatory is substantially the same or less for Defendant as for Plaintiff. This objection encompasses, but is not limited to, documents and answers to interrogatories previously produced by Defendant to Plaintiff in the course of Plaintiff's civil investigation of Dentsply's distribution and marketing of artificial teeth, all transcripts of depositions of employees and former employees of Defendant, all correspondence between the Plaintiff and Defendant, all other information provided by Defendant to Plaintiff, and all information produced by Plaintiff to Defendant in response to discovery requests of Defendant. All such documents and information will not be produced.

6. Defendant's document requests and interrogatory call for the production of documents and information that were produced to the Plaintiff by other entities and that may contain confidential, proprietary, or trade secret information.

7. To the extent any of Defendant's document requests or its interrogatory seek documents or answers that include expert material, including but not limited to survey materials, Plaintiff objects to any such requests and interrogatory as premature and expressly reserves the right to supplement, clarify, revise, or correct any or all responses to such requests, and to assert additional objections or privileges, in one or more subsequent supplemental response(s) in accordance with the time period for exchanging expert reports set

by the Court.

8. Plaintiff incorporates by reference every general objection set forth above into each specific response set forth below. A specific response may repeat a general objection for emphasis or some other reason. The failure to include any general objection in any specific response does not waive any general objection to that request. Moreover, Plaintiff does not waive its right to amend its responses.

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Plaintiff objects to Definition No. 2 regarding "DOJ." The Definition is overbroad and unduly burdensome to the extent it attempts to extend the scope of this document request to documents in the possession, custody, or control of individuals, agencies, or entities other than the Antitrust Division of the Department of Justice and its present employees, principals, officials, agents, attorneys, economists, and consultants either assigned to or reviewing this case.

2. Plaintiff objects to Definition No. 4 regarding "document" or "documents" to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Plaintiff further objects to Definition No. 4 to the extent that it calls for documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work product doctrine, or any other applicable privilege.

3. Plaintiff objects to Definition No. 5 regarding "third party" to the extent it relies on the undefined term "CID investigation." While "CID" is defined in Definition No. 3 to refer to "Civil Investigative Demand No. 13009 issued to Dentsply by the DOJ in connection with its antitrust investigation of Dentsply prior to the filing of its complaint on

January 5, 1999," that definition gives no greater meaning to the phrase "CID investigation," unless it is intended to limit the definition of "third party" to those individuals and entities interviewed by Plaintiff pursuant to Civil Investigative Demand Number 13009. In the course of its civil investigation of Dentsply's distribution and marketing of artificial teeth, Plaintiff interviewed a number of individuals, but interviewed none pursuant to Civil Investigative Demand Number 13009, a document request issued to Dentsply. Therefore, there are no "third part[ies]" as that term is defined. Subject to and notwithstanding this objection, in responding to these discovery requests, Plaintiff will treat the term "third party," as extending to all individuals and entities, not named as parties to this lawsuit, listed on Plaintiff's Rule 26(a)(1) Initial Disclosures.

4. Plaintiff objects to Definition No. 6 regarding "statement" to the extent it relies on the undefined term "CID investigation" and the defined term "third party." While "CID" is defined in Definition No. 3 to refer to "Civil Investigative Demand No. 13009 issued to Dentsply by the DOJ in connection with its antitrust investigation of Dentsply prior to the filing of its complaint on January 5, 1999," that definition gives no greater meaning to the phrase "CID investigation," unless it is intended to limit the definition of "statement" to any comment, observation, remark, observation, or affirmation, whether in written or oral form, made by a third party to Plaintiff during the Civil Investigative Demand Number 13009 investigation. Civil Investigative Demand Number 13009 was not an investigation, it was a document request. Furthermore, Civil Investigative Demand 13009 was issued to Dentsply, not to third parties. Therefore, there are no "statements" as that term is defined. Subject to and notwithstanding this objection, Plaintiff will use the more expansive definition of "third

party" that it has provided in above Objection 3, and it will treat "statements" as covering those made by the individuals and entities listed in Plaintiff's Rule 26(a)(1) Initial Disclosures during Plaintiff's civil investigation of Dentsply's distribution and marketing of artificial teeth. Plaintiff further objects to this definition to the extent that it uses the undefined term "during." "During" can be construed to mean "at the time of," instead of "in the course of." To the extent that "during" is intended to mean "at the time of," Plaintiff objects to this definition as overbroad because it would call for materials unrelated to this action. Plaintiff will construe "during" to mean "in the course of."

5. Plaintiff objects to Instruction No. 2 to the extent that it calls for documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work product doctrine, or any other applicable privilege.

6. Plaintiff objects to Instruction No. 3 on the grounds that it is vague and ambiguous, that it calls for the production of documents that are irrelevant to this action and not reasonably calculated to lead to the discovery of admissible evidence, and that it is overly broad and unduly burdensome, to the extent that it calls for the production of documents in the format as they may be maintained in files outside of the principal investigatory and case files. Copies of certain materials, including internal memoranda to which documents obtained from outside parties may have been attached, are circulated to and may be maintained in files kept in Antitrust Division files other than the principal investigatory and case files. The originals of all such memoranda and documents are maintained in the principal investigatory and case files, and any handwritten annotations or comments that may be added to such documents by others in the Division would be protected by the work product doctrine, governmental deliberative

process privilege, or other applicable protection. Plaintiff objects to producing these duplicative, privileged materials from files other than the principal investigatory and case files. Plaintiff will produce responsive, non-privileged documents in the order or arrangement in which they are maintained within the principal investigatory and case files.

7. Plaintiff objects to Instruction No. 8 regarding documents "in your possession, custody, or control" and "created, transmitted, or received by you" to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Plaintiff further objects to this instruction as overbroad and unduly burdensome to the extent it seeks (a) documents in the possession, custody, or control of individuals, agencies, or entities other than the Antitrust Division of the Department of Justice and its present employees, principals, officials, agents, attorneys, economists, and consultants either assigned to or reviewing this case, (b) documents and answers to interrogatories previously produced by Defendant to Plaintiff in the course of Plaintiff's civil investigation of Dentsply's distribution and marketing of artificial teeth, all transcripts of depositions of employees and former employees of Defendant, all correspondence between the Plaintiff and Defendant, all other information provided by Defendant to Plaintiff, and all information produced by Plaintiff to Defendant in response to discovery requests of Defendant, and (c) documents in possession, custody, or control of the Antitrust Division of the Department of Justice and its present officers, employees, principals, officials, agents, attorneys, and consultants to which the attorney work product doctrine, governmental deliberative process privilege, attorney-client privilege, or any other lawful privilege is applicable.

OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

DOCUMENT REQUEST NO. 1:

All documents reflecting any statement of a third party to the DOJ and signed and/or adopted, formally or informally, by those third parties.

RESPONSE TO DOCUMENT REQUEST NO. 1:

Plaintiff objects to this document request as vague and ambiguous to the extent that it relies on the term "reflecting," which is not defined in Defendant's Second Request for Documents and First Set of Interrogatories. Plaintiff will treat this request as if it called for documents (1) that contain, include, or are derived from any statement made by a third party to the DOJ and (2) that were signed and/or adopted, formally or informally, by that third party.

Plaintiff further objects to this request as duplicative and burdensome to the extent that it calls for documents already produced to Defendant in response to Defendant's February 2, 1999 Request for Documents, including but not limited to transcripts of depositions of third parties and correspondence from third parties to Plaintiff. Documents already produced will not be produced again.

Subject to the above objections, Plaintiff has no responsive documents in its possession, custody, or control, other than those that have already been produced to Defendant and those being produced as verbatim statements of a third party in response to Request No. 2.

DOCUMENT REQUEST NO. 2:

All documents reflecting any verbatim statement of a third party.

RESPONSE TO DOCUMENT REQUEST NO. 2:

Plaintiff objects to this document request as overbroad, burdensome, vague, and ambiguous to the extent that it relies on the term "reflecting," which is not defined in Dentsply's Second Request for Documents and First Set of Interrogatories. In its Response to Document Request No. 1, which also used this undefined term, Plaintiff used "contain, include, or are derived from" as the equivalent of "reflecting" in an attempt to read the request broadly. Such a reading here demonstrates the problems with the use of this undefined term. The documents containing, including, or derived from "any verbatim statement of a third party" would include all documents created by Plaintiff in the course of the investigation preceding this case that touch explicitly or implicitly on any factual matter. "Verbatim statements of a third party" include, but are not limited to, transcripts of the depositions of third parties, oral statements from any third party or its counsel, and correspondence from third parties to Plaintiff. Nearly all, if not all, documents in Plaintiff's files would thus "reflect" some such verbatim statement because to some degree the documents contain information derived from verbatim statements. Accordingly, Plaintiff objects to this request as overbroad and burdensome.

Plaintiff further objects to this request as duplicative, overbroad, and burdensome even if the term "reflected" were construed more narrowly to include only documents containing or including verbatim statements. Even so construed, the request is duplicative, overbroad, and burdensome to the extent that it calls for documents already produced to Defendant in response

to Defendant's February 2, 1999 Request for Documents, including, but not limited to, documents produced to Plaintiff by third parties, transcripts of the depositions of third parties, and correspondence from third parties to Plaintiff. Documents already produced will not be produced again.

Plaintiff further objects to this request, whether broadly or more narrowly construed, to the extent it seeks production of documents protected by the work product doctrine, the governmental deliberative process privilege, or the attorney-client privilege. Such documents include notes of Plaintiff's attorneys and staff and draft and final internal memoranda of Plaintiff, including, but not limited to, interview memoranda, status memoranda, and recommendation memoranda.

At the March 8, 1999 conference with the Court, Defendant's counsel suggested that interview memoranda were discoverable. Interview memoranda of the Antitrust Division, however, and notes of such interviews are protected from discovery by the work product doctrine. See Federal Rule of Civil Procedure 26(b)(3); Hickman v. Taylor 329 U.S. 495 (1947). These interviews were conducted by attorneys and staff of Plaintiff. Such materials contain the mental impressions, conclusions, opinions, and legal theories of the Government's attorneys in summarizing the Government's understanding of information obtained in the interview, for instance by the emphasis in memoranda of the specific issues of interest to the Division's legal analysis. In addition, such materials often summarize the reasons the Division conducted the interview, characterize the importance of the information learned in the interview, draw inferences based on that information, describe the author's impressions concerning the cooperativeness, credibility, or knowledge of the interviewee, and/or identify

potential areas of further inquiry. The materials thus provide at least a snapshot of the mental impressions, conclusions, opinions, and legal theories of the Government personnel attending the interviews. All such information, prepared in anticipation of litigation and not disclosed or otherwise maintained in a way that is inconsistent with the purpose of the privilege, is protected by the work product doctrine.

Attendance at such interviews was limited to, at most, the interviewee, Antitrust Division attorneys and staff, counsel for the interviewee (in some interviews), and a potential testifying expert economist (in some interviews). The interviews were memorialized by notes and/or memoranda written by Antitrust Division attorneys and staff. Such notes and/or memoranda of interviews have not been reviewed by or considered by the potential testifying expert economist. Nor have such notes and/or memoranda of interviews been seen by anyone other than the case staff and other attorneys and staff of Plaintiff assisting with or reviewing the investigation. Thus, these materials were created and maintained in a manner consistent with maintaining the protections afforded work product.

To the extent this request calls for notes and/or memoranda prepared by the potential testifying expert economist, Plaintiff objects to the request as premature and expressly reserves the right to supplement, clarify, revise, or correct any or all responses to the request, and to assert additional objections or privileges, in one or more subsequent supplemental response(s) in accordance with the time period for exchanging expert reports set by the Court.

Plaintiff objects to this document request to the extent that it calls for production of a privilege log for internal documents of Plaintiff. A request for such a log is unreasonable and unduly burdensome in light of the work product doctrine and other privileges protecting such

internal documents from discovery. As noted above, such a log would include virtually every internal document created by Plaintiff over the course of Plaintiff's civil investigation of Dentsply's distribution and marketing of artificial teeth.

Plaintiff further objects to this request to the extent that it relies upon the terms "statement" and "third parties." See Objections 3-4 to Instructions and Definitions ("Objections 3-4"). Plaintiff will use the definitions of these terms found in Objections 3-4 in responding to this request.

Subject to and without waiver of the foregoing objections, Plaintiff will produce the documents responsive to this request that have not already been produced and are not protected by the privileges listed above.

INTERROGATORY NO. 1:

With regard to the 184 individuals and entities who were interviewed by the DOJ pursuant to its CID investigation of Dentsply and subsequently identified in Plaintiff's Rule 26(a)(1) Initial Disclosures, please identify in detail all facts known to these individuals and entities that are relevant to the DOJ's claims against Dentsply in this matter.

OBJECTIONS TO INTERROGATORY NO. 1:

Plaintiff objects to this request as vague and ambiguous because it relies on the undefined term "CID investigation." While "CID" is defined in Definition No. 3 to refer to "Civil Investigative Demand No. 13009 issued to Dentsply by the DOJ in connection with its antitrust investigation of Dentsply prior to the filing of its complaint on January 5, 1999," that definition gives no greater meaning to the phrase "CID investigation," unless it is intended to limit the interrogatory to those individuals and entities interviewed by Plaintiff pursuant to

Civil Investigative Demand Number 13009. In the course of its civil investigation of Dentsply's distribution and marketing of artificial teeth, Plaintiff interviewed a number of individuals, but interviewed none pursuant to Civil Investigative Demand Number 13009, a document request issued to Dentsply. Consequently, there are no individuals and entities who were interviewed by the DOJ pursuant to its "CID" investigation of Dentsply.

Plaintiff further objects to this interrogatory as vague, ambiguous, overbroad, and unduly burdensome to the extent it asks Plaintiff to identify in detail "all facts known to these individuals and entities that are relevant to the DOJ's claims against Dentsply in this matter." Plaintiff does not and cannot know "all facts known" (emphasis supplied) to such individuals and entities that are relevant to the claims at issue here. Plaintiff can only know those facts, of which it is aware, that are known to such individuals and entities.

Plaintiff further objects to this interrogatory as overbroad and unduly burdensome to the extent it seeks information that is readily or more accessible to Defendant from Defendant's own files, including, but not limited to, interrogatory answers that Defendant produced to Plaintiff, transcripts of depositions of current or former directors, officers, and employees of Defendant, documents that Defendant produced to Plaintiff, and correspondence and other communications from Defendant to Plaintiff. Providing such information in answering this interrogatory would be oppressive, unduly burdensome and unnecessarily expensive, and the burden of providing such information in answering this interrogatory is substantially the same or less for Defendant as for Plaintiff. See Federal Rule of Civil Procedure 33(d).

Plaintiff further objects to this interrogatory as overbroad and unduly burdensome to

the extent it calls for Plaintiff to reproduce, in narrative answer format, material from third parties that has already been produced to defendant. All of the depositions taken of individuals listed in Plaintiff's Rule 26(a)(1) Initial Disclosures, all documents produced by the individuals and entities listed in these Disclosures, and all of the correspondence from such individuals and entities listed in such Disclosures have already been, or are being, produced to the Defendant. See Federal Rule of Civil Procedure 33(d).

Finally, Plaintiff objects to this interrogatory, in its entirety, pursuant to the work product doctrine. Plaintiff obtained any responsive information, other than the information that Defendant may derive from the materials described in the preceding paragraphs, from interviews of individuals by attorneys and staff of Plaintiff. This request, in essence, then, asks for the recollections of the attorneys representing the United States, or of the staff working under their direction, or for information contained in memoranda and notes prepared by those attorneys and their staff.

At the March 8, 1999 conference with the Court, Defendant's counsel suggested that interview memoranda were discoverable. Interview memoranda of the Antitrust Division, however, notes of such interviews, and attorney and staff recollections of such interviews are protected from discovery by the work product doctrine. See Federal Rule of Civil Procedure 26(b)(3); Hickman v. Taylor 329 U.S. 495 (1947). These interviews were conducted by attorneys and staff of Plaintiff. Such materials contain the mental impressions, conclusions, opinions, and legal theories of the Government's attorneys in summarizing the Government's understanding of information obtained in the interview, for instance by the emphasis in memoranda of the specific issues of interest to the Division's legal analysis. In addition, such

materials often summarize the reasons the Division conducted the interview, characterize the importance of the information learned in the interview, draw inferences based on that information, describe the author's impressions concerning the cooperativeness, credibility, or knowledge of the interviewee, and/or identify potential areas of further inquiry. The materials thus provide at least a snapshot of the mental impressions, conclusions, opinions, and legal theories of the Government personnel attending the interviews. All such information, prepared in anticipation of litigation and not disclosed or otherwise maintained in a way that is inconsistent with the purpose of the privilege, is protected by the work product doctrine.

Attendance at such interviews was limited to, at most, the interviewee, Antitrust Division attorneys and staff, counsel for the interviewee (in some interviews), and a potential testifying expert economist (in some interviews). The interviews were memorialized by notes and/or memoranda written by Antitrust Division attorneys and staff. Such notes and/or memoranda of interviews have not been reviewed by or considered by the potential testifying expert economist. Nor have such notes and/or memoranda of interviews been seen by anyone other than case staff and other attorneys and staff of Plaintiff assisting with or reviewing the investigation. Thus, these materials were created and maintained in a manner consistent with maintaining the protections afforded work product.

To the extent this request calls for notes and/or memoranda prepared by the potential testifying expert economist, Plaintiff objects to the request as premature and expressly reserves the right to supplement, clarify, revise, or correct any or all responses to the request, and to assert additional objections or privileges, in one or more subsequent supplemental response(s) in accordance with the time period for exchanging expert reports set by the Court.

Furthermore, Defendant has access to the addresses and/or telephone numbers of those persons listed on Plaintiff's Rule 26(a)(1) Initial Disclosures and can seek information by addressing formal or informal discovery directly from those entities. Indeed, the Court has ordered the parties to disclose the likelihood that they will call those persons as witnesses, and Plaintiff has done so, reducing the list of 184 individuals and entities to 31 individuals whose testimony Plaintiff is very likely or likely to present at trial, either by live testimony or deposition. This disclosure will allow Defendant to identify those individuals from whom it needs detailed information.

Dated: March 22, 1999

COUNSEL FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/
Mark J. Botti
William E. Berlin
Michael S. Spector
Michael D. Farber
United States Department of Justice

Antitrust Division
325 Seventh Street, N.W., Suite 400
Washington, DC 20530
(202) 307-0827

Carl Schnee
UNITED STATES ATTORNEY

Judith M. Kinney (DSB # 3643)
Assistant United States Attorney
1201 Market Street, Suite 1100
Wilmington, DE 19801
(302) 573-6277