IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DENTSPLY INTERNATIONAL, INC.,	)	
Plaintiff,	)	Civil Action No. CA 98-693 (MMS)
vs.	)	
ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION
TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Dated: January 5, 1999

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UNITED STATES OF AMERICA

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I. NATURE AND STAGE OF THE PROCEEDING

At issue in this case is whether an intended defendant in a government antitrust case may take advantage of a pre-filing offer to resolve the dispute by filing its own declaratory judgment action, thereby selecting the forum for the action and initially framing the issues for the Court. As explained below, countenancing such an unprecedented action would discourage pre-filing resolution of legal disputes and violate principles of sovereign immunity.

On Thursday, December 10, 1998, attorneys from the Antitrust Division of the Department of Justice notified Dentsply International, Inc. ("Dentsply") of the decision of the Assistant Attorney General to file an antitrust case against the firm at the beginning of the following week. A few hours later, Dentsply filed this action seeking a declaration that certain of its "distribution practices" do not violate Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and that its "business practices" do not violate Section 3 of the Clayton Act, 15 U.S.C. § 14, and requesting that this Court "enjoin the Antitrust Division of the United States Department of Justice from prosecuting an action against Dentsply for violation of any of the antitrust laws of the United States." (D.I. 1; hereinafter "Complaint" at pp. 12-13). Dentsply's Complaint alleges jurisdiction under 28 U.S.C. § 2201, 28 U.S.C. §§ 1331, 1337(a), and 5 U.S.C. §§ 701 et seq.

The United States now moves to dismiss Dentsply's action for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The bulk of Dentsply's Complaint contains allegations about its commercial activities and the charges the United States might make in an antitrust enforcement action. The Complaint avers subject-matter jurisdiction under various statutes, including the Administrative Procedure Act ("APA"). (Complaint at ¶ 3). Although the Complaint does not focus on the APA, it includes some allegations pertinent to an APA action,

such as the statement that the United States has made a "final determination that Dentsply's distribution practices violate the antitrust laws." (Complaint at ¶ 25). Dentsply had to include such allegations, as discussed below, because the APA is the only jurisdictional statute cited by Dentsply that arguably waives the United States' sovereign immunity against this type of suit. The United States now moves for dismissal because the APA's limited waiver of sovereign immunity does not apply to Dentsply's declaratory judgment action.

Concurrently with the filing of this Motion to Dismiss, the United States has filed its own action in this Court, United States v. Dentsply International, Inc., Civil Action No. _____. The United States alleges that Dentsply has for over a decade unlawfully maintained a monopoly in the United States market for artificial teeth and unreasonably restrained trade by denying competing manufacturers of artificial teeth access to independent distributors (known in the industry as "dealers"), thereby impairing the manufacturers' ability to compete and depriving the public of the lower prices and enhanced quality that unrestrained competition would produce.[1] Specifically, the United States alleges that Dentsply has: 1) entered into agreements and taken other actions to induce dealers not to carry brands of teeth that compete closely with Dentsply's premium products; and 2) explicitly agreed with some dealers that the dealers will not carry certain competing lines of teeth. Among other things, Dentsply has threatened to refuse to sell teeth and other merchandise to dealers if they carry certain lines of competing teeth, and on the rare occasions when a dealer has dared to offer the lines in question, has carried out its threat and terminated the dealer. The United States alleges that as a result of this conduct, 80% of the

[1] The United States originally intended to file its suit during the week of December 13, 1998, unless Dentsply entered into consent decree discussions. The United States then deferred its filing to allow it to evaluate Dentsply's preemptive action.

dealer outlets in the United States that carry artificial teeth do not carry brands of teeth that compete closely with Dentsply's premium products. Dentsply has thereby illegally maintained its monopoly market share of over 70% and has unreasonably restrained competition in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14. The United States seeks an injunction to prevent Dentsply from continuing to violate the antitrust laws.

II. SUMMARY OF ARGUMENT

Dentsply's declaratory judgment action against the United States is barred by sovereign immunity. Absent a statutory waiver of sovereign immunity, federal courts lack subject-matter jurisdiction over suits against the United States. While the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., waives sovereign immunity in limited circumstances, to invoke the APA's waiver, a plaintiff bears the burden of establishing that 1) the challenged governmental conduct is "final agency action" within the meaning of the APA; 2) "there is no other adequate remedy in a court;" and 3) the alleged agency action is not committed to agency discretion by law, 5 U.S.C. §§ 551, 701(a)(2), 702, 704. Dentsply has failed to, and cannot, meet this burden.

Dentsply's complaint identifies only one action of the United States, namely, the decision of the Assistant Attorney General of the Antitrust Division of the Department of Justice to bring an antitrust enforcement action against it. That decision, however, is not reviewable under the APA:

1. The Assistant Attorney General's decision to prosecute is not a "final agency action" because it does not have the status of law. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242-43 (1980). Indeed, an Antitrust Division enforcement action against Dentsply

could never be a final "agency action" because the Division's decision to sue does not bind the company in any way -- a prerequisite to a finding of agency action. International Tel. & Tel. Corp. v. Local 134, 419 U.S. 428, 443 (1975). No legal sanctions flow from the decision to prosecute unless and until the government prevails in a lawsuit in federal court.

2. The Assistant Attorney General's decision serves instead to initiate a judicial proceeding during which Dentsply has the opportunity to engage in discovery and defend itself. Such an opportunity constitutes an "adequate remedy in a court" and precludes review under the APA.

3. The decision to prosecute is not subject to judicial review because such decisions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). A prosecutor's decision whether to prosecute and what charges to bring constitutes "core executive constitutional function[s]" that rest squarely within the prosecutor's broad discretion, subject only to constitutional constraints. United States v. Armstrong, 517 U.S. 456, 465 (1996). Indeed, because no meaningful standards are available by which this Court may judge how and when the Assistant Attorney General should exercise his discretion to bring an antitrust enforcement action, "the statute in question can be taken to have committed the decision making to the agency's judgment absolutely." Heckler v. Chaney, 470 U.S. 821, 830 (1985).

Public policy considerations further support dismissal of Dentsply's declaratory judgment action. Entertainment of this action would conflict with the strong public interest in pre-litigation resolution of antitrust enforcement actions. Moreover, Dentply has attempted to upset traditional legal processes, arrogating to itself procedural choices that should, absent unusual circumstances, be accorded the party bearing the burden of proof, and it has engaged in forum shopping, a

practice specifically disfavored in this circuit. EEOC v. University of Pennsylvania, 850 F.2d 969 (3d Cir. 1988), aff'd, 493 U.S. 182 (1990).

III. STATEMENT OF STATUTORY FRAMEWORK AND FACTS

The Antitrust Division is charged with the duty to enforce the nation's antitrust laws. But the Antitrust Division is not an adjudicatory agency. It does not have the authority to issue orders at the end of an investigation, even if the Assistant Attorney General determines that a party is violating the antitrust laws. Rather, the Antitrust Division may only file a criminal or civil action in federal district court. 15 U.S.C. §§ 4, 25.

The statutory scheme encourages the settlement of government antitrust claims at the end of an investigation without litigation. For example, the Clayton Act provides that "a final judgment . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws. . . ." 15 U.S.C. § 16(a). Id. This section, however, does not apply "to consent judgments or decrees entered before any testimony has been taken," to encourage settlement of antitrust claims brought by the government. See Simco Sales Service of Pennsylvania, Inc v. Air Reduction Co., 213 F. Supp. 505, 507 (E.D. Pa. 1963); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 374-76 (D. Minn. 1939).

Consistent with this statutory scheme and the long-standing practice of the Antitrust Division, on December 10, 1998, the United States (through the undersigned Antitrust Division counsel) informed Dentsply's outside counsel by telephone that the Assistant Attorney General had authorized suit against the company. Counsel for the parties discussed briefly the possibility

of a consent decree, and Dentsply's counsel said she might not know until the "close of business" the following day whether Dentsply would pursue such discussions. The United States agreed to that schedule but emphasized the imminence of its lawsuit. Within three hours of that conversation, and without further communication with the United States, Dentsply filed this action.

IV. ARGUMENT

A. DENTSPLY'S ACTION AGAINST THE ANTITRUST DIVISION IS BARRED BY SOVEREIGN IMMUNITY

Dentsply's claim against the Antitrust Division of the Department of Justice is a suit against the United States. In the absence of a waiver of sovereign immunity, a court lacks jurisdiction over claims against the United States or against its officers acting in their official capacities. United States v. Mitchell, 463 U.S. 206, 212 (1983); Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam). The party suing the government has the burden of showing that the government has consented to suit, United States v. Sherwood, 312 U.S. 584, 586 (1941), and in response to a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of demonstrating subject-matter jurisdiction. Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir.), cert. denied, 510 U.S. 964 (1993). [2]

In its Complaint, Dentsply cites a variety of statutes (28 U.S.C. §§ 1331, 1337(a), 2201), in addition to the APA, 5 U.S.C. §§ 701 et seq., that allegedly confer jurisdiction on this Court to

[2] Where there is a factual question about whether a court has jurisdiction, the court may examine facts outside the pleadings. Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997). The discussions among counsel that preceded the filing of this case are thus properly before the Court. On a motion to dismiss for lack of jurisdiction, the plaintiff's allegations are not considered presumptively true, and the existence of disputes as to facts material to the merits of the complaint will not preclude the court from resolving the question of jurisdiction. Id. at 1021.

consider this declaratory judgment action. In fact, however, none of these statutes, except the APA, contains a waiver of the United States' sovereign immunity. See Clinton County Com'rs v. EPA, 116 F.3d 1018, 1021 (3d Cir. 1997), cert. denied, 118 S. Ct. 687 (1998); Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1385 (5th Cir. 1989); Balistrieri v. United States, 303 F.2d 617, 618 (7th Cir. 1962). Accordingly, unless the APA provides a basis for judicial review of the allegations in the Complaint, the Complaint must be dismissed for lack of jurisdiction.

As amended in 1976, the APA waives sovereign immunity as to suits seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable. See 5 U.S.C. § 702. However, before a party may invoke the APA's waiver of sovereign immunity, it must establish that the challenged government action fits within the APA's waiver. The APA permits a person aggrieved by an "agency action" to obtain judicial review so long as the action is a "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is not one "committed to agency discretion by law," 5 U.S.C. §§ 551(13), 701(a)(2), 702. See also Webster v. Doe, 486 U.S. 592, 599 (1988); Heckler v. Chaney, 470 U.S. 821, 828 (1985). The burden is on the party seeking review to set forth "specific facts" showing that its complaint satisfies each of these terms. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884-85 (1990).

Dentsply's Complaint alleges only one act by the United States, the decision of the Assistant Attorney General to bring an antitrust case against the company. Dentsply avers that the notice it received of that action is "a final determination" by the Antitrust Division that has implications for Dentsply's commercial activity. (Complaint at ¶¶ 24-29). Dentsply alleges that this establishes "an actual and justifiable [sic] controversy . . . between Dentsply and the Antitrust

Division . . . ." (Complaint at ¶ 30). In effect, Dentsply seeks to preempt the United States' bringing of an antitrust enforcement action by seeking a judicial declaration that its "distribution practices" and "business practices" do not violate the antitrust laws and a sweeping injunction against any enforcement by the United States of the antitrust laws against the company. (Complaint at pp. 12-13).

1. The Assistant Attorney General's Decision To Prosecute Dentsply Is Not A "Final Agency Action"

Dentsply cannot establish the requisite final agency action necessary to permit judicial review under the APA. 5 U.S.C. § 704. A final agency action must impose an obligation, deny a right, or fix some legal relationship pursuant to the consummation of an administrative process. Hindes v. FDIC, 137 F.3d 148, 162 (3d Cir. 1998). In the case of an enforcement decision, the decision must have legal force and practical effects on the party beyond simply imposing on the party the burden of responding to charges made against it. See FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980).

In Standard Oil, the Federal Trade Commission ("FTC") issued an administrative complaint against Standard Oil and several other major oil companies, alleging that the FTC had reason to believe that the companies were in violation of the Federal Trade Commission Act ("FTCA"). While adjudication of the complaint before an Administrative Law Judge was still pending, Standard Oil sought a federal court order declaring the complaint unlawful and requiring that it be withdrawn. Id. at 236-37. The Supreme Court held that the FTC's filing of the complaint was not a final agency action within the meaning of § 704. Id. at 238-43.

According to the Court, the FTC's issuance of a complaint is merely definitive on the question whether the FTC avers reason to believe that the respondent to the complaint is violating the FTCA. Id. at 241. "But the extent to which [Standard Oil] may challenge the complaint and its charges" proves that the filing of a complaint itself is not "'definitive' in a manner comparable to" other actions previously found to be final agency action. Id. Thus, while Standard Oil may have faced a "substantial burden" in responding to the charges made against it, the Court found the burden to be nothing "other than the disruptions that accompany any major litigation" and "different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." Id. at 242-43. According to the Court, were such enforcement actions reviewable, judicial review would become a means of "turning prosecutor into defendant before adjudication concludes." Id. at 242-43.

Like the FTC's issuance of a complaint in Standard Oil, the Assistant Attorney General's decision to file suit here reflects, at most, his conclusion that Dentsply has violated the antitrust laws. Indeed, Dentsply's argument is significantly weaker than that presented in the Standard Oil action. Unlike the FTC, the Antitrust Division is not an adjudicatory agency and the Assistant Attorney General's decision to prosecute does not ultimately lead to any "order" reviewable under the APA, much less a final order.[3]

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[3] The APA only permits review of an agency action and defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The only plausible claim Dentsply could make is that the decision to prosecute is an "order." The APA defines an "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . . ." 5 U.S.C.§ 551(6). As discussed above, the decision to file a lawsuit is not an "order" within this statutory definition. The decision to file suit does not even fit within the plain language of the definitions of the other actions that constitute "agency action," namely the announcement of "rules," licenses," "relief," or "sanctions." 5 U.S.C. §§ 551 (5), (8), (10) and (11).

The Supreme Court has explained that under the APA, an "order" must bind the party in some way. Int'l Tel. & Tel. Corp. v. Local 134, 419 U.S. 428 (1975). In so holding, the Court reasoned: "[w]hen Congress defined 'order' in terms of a 'final disposition,' it required that 'final disposition' to have some determinate consequences for the party to the proceedings." Id. at 443 (quoting NLRB v. Plasterers' Local Union, 404 U.S. 116, 126 (1971)). See also Shea v. Office of Thrift Supervision, 934 F.2d 41, 45-46 (3d Cir. 1991) (refusal of the Office of Thrift Supervision to quash or modify subpoenas does not constitute an "order" under the APA because "[t]he subpoenaed party faces actual harm only after a successful enforcement action has been brought and, as a result of such action, the subpoenaed party has been ordered to comply"); 5 B. Mezines, J. Stein & J. Gruff, Administrative Law § 43.01 at p. 43-7-9 (1998) ("Generally, an agency must do something binding on the part[y] before agency action will be found.").[4]

Here, the Assistant Attorney General's decision to file suit has no binding effect on Dentsply; Dentsply will face no legal sanction for its restrictive dealing practices unless and until this Court rules that they violate the antitrust laws and imposes effective relief. Under the Sherman Act and the Clayton Act, only a federal court has the power to determine the legality of Dentsply's conduct and to render an order or a final disposition. See 15 U.S.C. §§ 4, 25. Thus, the decision to prosecute is not a reviewable "order," and therefore not an agency action within the meaning of the APA.[5]

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[4] See also the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, which defines the term "antitrust order" to mean any final order, decree, or judgment of "any court of the United States, duly entered in any case or proceeding arising under any antitrust law." 15 U.S.C. §1311(b).

[5] Cf. , 339 U.S. at 598-99 (action to enjoin enforcement of the Federal Food, Drug, and Cosmetic Act, which permits multiple seizures of misbranded articles on a finding of probable cause, improper because the agency "was merely determining whether a judicial proceeding should be instituted," and like

Indeed, the Court of Appeals for the Third Circuit has expressly held that even where an agency has issued a definitive order accompanied by threats of civil or criminal liabilities, the action still lacks finality if the civil or criminal sanction cannot be imposed without judicial determination. In Solar Turbines, Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989), the Environmental Protection Agency ("EPA") issued an order finding the regulated company in violation of the Clean Air Act and threatened the company with civil and criminal sanctions if the company failed to change its conduct. The Third Circuit Court of Appeals found the issuance of the order not a final agency action, even though the wording of the order was "in the imperative and direct[ed] immediate compliance." Id. at 1081. The Court reasoned that while the EPA's order reflected the agency's definitive position on the question of the company's compliance with the Clean Air Act, it had no "operative effect" on the company and "no civil or criminal liabilities accrue[d] from the violation of the order." Id. at 1081.

Finally, Dentsply's allegations that commercial consequences flow from the likelihood of an antitrust enforcement action do not convert the Department's decision to file suit into a "final agency action." Dentsply alleges it must operate "indefinitely" under the "ever-present threat of prosecution for violation of the antitrust laws." (Complaint at ¶¶ 25, 27). According to Dentsply, it will suffer "significant harm" if it eliminates its restrictive dealing practices, because cessation of those practices will have the significant effect of allowing distributors to "take on new, competitive tooth lines" and return enormous amounts of their Dentsply tooth inventory "to make room for competitors' product lines." (Complaint at ¶ 26). Dentsply contends that at the same

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the return of an indictment which does not determine the accused's guilt, "the finding of probable cause . . . has no effect in and of itself").

time, if it continues its practices, it then will be forced to operate under the threat of "continuing aggregation of any penalties resulting therefrom should [its] practices be found to violate the antitrust laws." (Complaint at ¶ 27).

Dentsply's allegation that it faced the prospect of operating "indefinitely" under "the ever-present threat of prosecution" is groundless. Dentsply did not face such a threat, and knew that it did not face such a threat. To the contrary, Dentsply knew that the United States would file suit within a few days, and Dentsply's precipitous rush to the courthouse, while the United States awaited its response regarding consent decree discussion, demonstrates its belief that it needed to act quickly in order to preempt the United States' filing. There was no prospect of commercial harm during that brief period.

In any event, even if there were a factual basis for all of Dentsply's allegations, they are legally insufficient. The Court of Appeals for the Third Circuit recently has held that even a "severe adverse impact" does not suffice to establish final agency action. Aerosource, Inc. v. Slater, 142 F.3d 572, 581 (3d Cir. 1998). In Aerosource, some customers of the plaintiff (a certified aircraft repair station) had deserted it in response to communications from the Federal Aviation Administration ("FAA") warning that the plaintiff might have maintained aircraft parts inadequately. Id. at 576. The Court held that the notices and other actions of the FAA did not constitute final agency action.[6] Id. at 581-82. Compare Hindes, 137 F.3d at 162-63 (FDIC notification that it immediately would institute proceedings to cancel bank's insurance if bank did

[6]The lack of finality is not cured by the United States' decision to file suit. Dow Chem. v. EPA, 832 F.2d 319, 325 (5th Cir. 1987) ("allegations made in an enforcement lawsuit [in the district court] do not impose the kind of legal obligations with which [the] finality doctrine is concerned") (emphasis in original).

not promptly satisfy certain requirements is not a "final agency action" as the action that had legal effect was the state banking secretary's decision to close the bank) with In re Seidman, 37 F.3d 911 (3d Cir. 1994) (Director of Office of Thrift Supervision's decision reviewable even though any civil penalties were yet to be determined where the Director's order immediately removed the party from his position at the bank and banned him permanently from the banking industry).

2. The APA Does Not Apply Because Dentsply Has An "Adequate Remedy In A Court"

Dentsply cannot establish that it has "no other adequate remedy in a court" as required by the APA. 5 U.S.C. § 704. The antitrust laws and the Federal Rules of Civil Procedure provide Dentsply the opportunity to engage in discovery and defend itself against the government's enforcement action in federal district court. Such opportunity constitutes an adequate remedy in a court.[7] See Georgia v. City of Chattanooga, 264 U.S. 472, 483-84 (1924) (a party's ability to assert its claim as a defense in another proceeding constitutes an adequate remedy at law); see also Travis v. Pennyrile Rural Elec. Co-op., 399 F.2d 726, 729 (6th Cir. 1968) ("[a]n injunction against threatened legal action will not issue if the party will have an adequate opportunity to fully present his defenses and objections in the legal action he seeks to enjoin"); accord United States v. Rural Elec. Convenience Co-op. Co., 922 F.2d 429, 433 (7th Cir. 1991).

In New Jersey Hospital Ass'n v. United States, 23 F. Supp.2d 497 (D.N.J. 1998), a hospital association brought a declaratory judgment action against federal defendants alleging that

[7] Cf. Deaver v. Seymour, 822 F.2d 66, 71 (D.C. Cir.) (suit seeking declaratory and injunctive relief from independent counsel's exercise of prosecutorial authority dismissed in light of the comprehensive set of federal rules that provided "adequate, although limited" opportunities to attack shortcomings in prosecutorial authority; "[p]rospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure"), cert. denied, 484 U.S. 829 (1987).

they were threatening suit under the False Claims Act in a coercive manner in order to resolve disputes with the association's members regarding overpayment of benefits. The association asserted that the Department of Justice did not have a viable False Claims Act claim against the member hospitals since the hospitals did not have the requisite scienter. The Court dismissed the complaint for lack of jurisdiction, finding the action unreviewable under the APA, 5 U.S.C. § 704, because an adequate remedy was available to the plaintiff in a court--"the ability and opportunity to raise a defense to [a False Claims Act] action by the DOJ." Id. at 501. See also Ohio Hospital Ass'n v. Shalala, 978 F. Supp. 735, 740 (N.D. Ohio 1997) (appeal pending) (similar facts; court refused to exercise jurisdiction to "declare in advance that a particular hospital's defenses are valid or that the Secretary's False Claims Act threat is empty," finding that the hospitals would have the opportunity to raise any and all defenses if actually faced with a False Claims Act suit by the government).

Dentsply has not established that it has no adequate remedy in a court through its complaints about the burdens and consequences of the United States' investigation, (Complaint at ¶ 23), and of any enforcement action filed by the United States (Complaint at ¶¶ 28, 29). In addition to being legally insufficient, these allegations are groundless. For example, Dentsply alleges that the "uncertainty surrounding the investigation has tainted [its] reputation in the dental products industry." The Department's investigation is at an end, as Dentsply knew when it filed this lawsuit. As to any possible consequences of antitrust litigation with the United States, such consequences would occur whether the litigation is initiated by Dentsply or the United States. Such consequences, however, would not establish that Dentsply has no adequate means of defending its conduct in court.

3. The Assistant Attorney General's Decision To Prosecute Dentsply "Is Committed To Agency Discretion By Law."

The Assistant Attorney General's decision to bring an enforcement action against Dentsply is an unreviewable discretionary action. "[B]efore any review at all may be had, a party must first clear the hurdle of § 701(a)." Heckler, 470 U.S. at 828. That section provides that the judicial review chapter of the APA "applies according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The Assistant Attorney General's decision to prosecute Dentsply for violating the antitrust laws is squarely within his discretion. The Attorney General and her designates retain "broad discretion" to enforce the nation's laws, Wayte v. United States, 470 U.S. 598, 607 (1985), and that discretion includes the responsibility to institute proceedings to prevent and restrain violations of the antitrust laws. 15 U.S.C. §§ 4, 25. "They have this latitude because they are designated by statute as the President's delegate to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting U.S. Const., Art. II, § 3). "In both civil and criminal cases, courts have long acknowledged that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review." Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1480-81 (D.C. Cir. 1995).

Dentsply seeks this Court's assistance in invading the insulated realm of prosecutorial discretion. Its declaratory judgment action seeks only a declaration that the United States may not institute antitrust proceedings against the company: specifically, it requests that this Court broadly "enjoin the Antitrust Division of the United States Department of Justice from

prosecuting an action against Dentsply for violation of any of the antitrust laws of the United States." (Complaint at p. 12). Consideration, much less issuance, of such an injunction by this Court would improperly intrude on the prosecutorial function of the Department of Justice. United States v. Microsoft Corp., 56 F.3d 1448, 1459-60 (D.C. Cir. 1995) (in reviewing a consent decree, the district court improperly intruded on government's prosecutorial role by demanding to be informed of, among other things, the contours of the government's investigation). Because the Assistant Attorney General's decision to prosecute Dentsply belongs to a "special province" of the Executive, Armstrong, 517 U.S. at 464, and is committed to his broad discretion within the meaning of § 701(a)(2), Dentsply cannot seek judicial review of his decision pursuant to the APA.[8]

Dentsply's failure to allege any standard by which this Court may review the Assistant Attorney General's decision to prosecute Dentsply underscores the inappropriateness of judicial review. "[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler, 470 U.S. at 830. In such a case, the statute or law can be taken to have committed the decision making to the agency's judgment absolutely. Id.; Walker v. Reno, 925 F. Supp. 124 (N.D.N.Y. 1995); Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1996). Here, no manageable standards are available to judge how and when the Assistant Attorney General should exercise his discretion to bring an action to enforce the federal antitrust laws. Indeed, Dentsply does not even allege that the Assistant Attorney General acted unlawfully in deciding to file suit.

[8] Significantly, this action does not raise any constitutional challenge but simply contests a decision to prosecute. Armstrong, 517 U.S. at 464; United States v. Batchelder, 442 U.S. 114, 123-24 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

Ultimately, Dentsply's allegations reflect nothing more than its disagreement with the Assistant Attorney General as to whether its practices violate the antitrust laws. Dentsply's assertions about harm to its market position, commercial reputation, or other potential economic interests do not suffice to vest this Court with jurisdiction:

> [I]t has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for hearing and a judicial determination.

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950) (citation omitted).[9]

B. FAILURE TO DISMISS THE DECLARATORY JUDGMENT ACTION WOULD DISCOURAGE PRE-FILING RESOLUTION OF FUTURE DISPUTES

The public interest would be served by the dismissal of this declaratory judgment action. The Department gave Dentsply notice of its intention to file suit in order to encourage pre-filing

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[9] Dentsply may claim that Greenbrier Cinemas, Inc. v. Bell, 1984-1 Trade Cas. (CCH) ¶ 65,972, 1978 WL 1525 (W.D. Va. January 19, 1978) (Attachment A), supports a different result. Greenbrier Cinemas sought to enjoin the Attorney General from suing it after he announced in a press release that the use of certain agreements by motion picture exhibitors violated the antitrust laws and might in some circumstances result in criminal prosecution. Id. at *1. The district court found that the Attorney General's determination that these agreements were illegal was not an action committed to agency discretion by law and that the Attorney General's statement of his enforcement intention constituted a "final agency action" within the meaning of the APA. Id. at *4.

The Greenbrier decision is not good law. It is inconsistent with later Supreme Court decisions in Standard Oil, Armstrong and Heckler, and the other cases cited in the text. The United States is not aware of any court that has cited or relied on the Greenbrier decision.

Moreover, Greenbrier Cinemas had ceased the conduct the Department criticized, although it considered the practice legal and advantageous for its business. Absent a declaratory judgment proceeding, its only means of obtaining judicial evaluation of its conduct would have put it at risk of a criminal prosecution. Denstply has not ceased its allegedly illegal conduct and has an alternative means of obtaining a judicial evaluation of its conduct in a civil proceeding.

resolution. Parties often are understandably reluctant to engage in meaningful consent decree discussions until they learn that the Department has finally decided to sue them. At the same time, many parties are more willing to resolve matters prior to filing rather than afterwards, when they have already endured the negative publicity accorded a defendant upon the filing of a contested government antitrust suit. Thus, the Antitrust Division routinely advises prospective defendants of its intention to sue a few days before filing its case. Dentsply's filing of a declaratory judgment action in these circumstances, and before the filing of the Department's action, is unprecedented. If allowed to stand, it will discourage the Department from giving prior notice to antitrust defendants and will reduce the number of government antitrust matters resolved by consent.

For these reasons, the tactic of rushing to the courthouse in the face of an impending enforcement action, and before conclusion of initial discussions about a consent decree, has been condemned by the federal courts. For example, in EEOC v. University of Pennsylvania, 850 F.2d 969, 977 (3d Cir. 1988), the Third Circuit Court of Appeals repudiated the filing of an action by a private party in response to the EEOC's threat to institute a subpoena enforcement proceeding. The Court reasoned that the private party's action could lead to the undesirable result of the EEOC engaging "in pro forma discussions with an eye toward winning the race to the courthouse in the most favorable forum," instead of attempting to resolve a dispute in good faith. Id. 978-79. See also, Tempco Electric Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987); Nat'l Union Fire Ins. Co. of Pittsburgh v. Freeport-McMoRan, Inc., 767 F. Supp. 568, 573 (D. Del. 1991).

The reasoning of the Third Circuit Court of Appeals applies with equal force here. Indeed, the antitrust laws are carefully structured in a manner to foster pre-litigation resolution of

antitrust enforcement actions. Simco Sales Service of Pennsylvania, Inc v. Air Reduction Co., 213 F. Supp. 505, 507 (E.D. Pa. 1963); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 374-76 (D. Minn. 1939). The Antitrust Division's long-standing practice, employed here, of giving parties the opportunity to discuss a possible consent decree after the Assistant Attorney General has decided to prosecute but before the enforcement action is filed, promotes such a beneficial result. The possibility of pre-litigation resolution, however, is reduced significantly if the United States must try to win a race to the courthouse.

V. CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over this action under the doctrine of sovereign immunity. The APA's limited waiver of that immunity does not apply. Strong policy reasons also favor dismissal of this lawsuit. Accordingly, the United States respectfully requests that this Court dismiss Dentsply's action for lack of subject-matter jurisdiction.

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