UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

UNITED STATES' BRIEF IN RESPONSE TO DEFENDANT DENTSPLY INTERNATIONAL, INC.'S MOTION TO AMEND THE DISCOVERY PLAN AND ORDER

Dated: September 30, 1999

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UNITED STATES OF AMERICA

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On May 28, 1999, discussing the discovery schedule in this case, the Court admonished the parties that "I don't want that schedule jeopardized." Transcript of May 28, 1999 Motion Hearing (D.I. 72) at 82. The Court advised the parties that any enlargement "above three weeks will be looked at askance." Id. Indeed, Defendant stipulated to the current discovery deadline. Despite having done so, and without regard to the Court's admonition, it now seeks to extend the discovery period by almost one-third, apparently claiming that it did not expect the United States to resist on work product grounds Defendant's request for information obtained in interviews that the United States conducted during its investigation. Yet, Defendant was aware of the United States' position on this issue at the time that it agreed to the discovery deadline. Moreover, Defendant fails to explain its sudden need for an enormous amount of factual discovery, almost none of which, it contends, it can take before the

United States will complete almost all of its currently anticipated discovery. It makes this claim despite having already identified 43 witnesses on whom it intends to rely at trial. The depositions for all of those witnesses have been completed or scheduled.

Granting Defendant's motion would, in essence, reward it for waiting to propose a significant amount of discovery until after the United States will have completed the bulk of its discovery. Defendant claims to have discovered a large group of deponents that it previously could not identify and notice. But Defendant has not even disclosed the potential deponents, leaving the United States at a loss to determine what additional discovery will be needed to respond to the new testimony. Indeed, Defendant's actions could require the United States to depose additional persons or to re-depose individuals who will have already given depositions.

I. ARGUMENT

A. Defendant Has Failed to Show the Need to Extend Discovery

The burden is on Defendant to justify extending discovery. Defendant seeks to do so by claiming that it requires additional time because the United States resisted providing it information obtained by the United States in interviews of non-parties. The United States did assert a work product privilege to Defendant's interrogatory seeking this information. This Court disagreed with the United States, and the information was promptly provided to Defendant.[1] Defendant insinuates that the

[1] Contrary to Defendant's assertion in its brief, it did not ask for rolling production of the interrogatory response. See Defendant Dentsply International, Inc.'s Memorandum of Law in Support of its Motion to Amend the Discovery Plan ("Def. Brief") (D.I. 112) at 4 n.2. Rather, it asked only for early production of relevant portions of the interrogatory response in

United States' position was unexpected, and thus, that the time allotted to fact discovery does not properly account for it. Incredibly, Defendant fails to explain to this Court that the parties fully accounted for their dispute over the United States' claim of work product privilege in originally agreeing that November 15 was an appropriate end date for fact discovery.

On December 10, 1998, Defendant filed a declaratory judgment action concerning the United States' likely lawsuit to prevent Defendant from continuing to violate the antitrust laws. On January 5, 1999, the United States filed its Complaint (D.I. 1) against Defendant, seeking to enjoin those continuing violations. Defendant answered the Complaint in this action and voluntarily dismissed its declaratory judgment action. (D.I. 5).

On January 25, 1999, the Court ordered September 7, 1999, as the date for completion of fact discovery in this matter (D.I. 7). On February 17, 1999, the United States and Defendant filed a joint discovery report ("Report") (D.I. 12) stipulating to a two-month extension of the close of fact discovery. Report at 5. The Report stated:

> Dentsply anticipates that it will need to depose a significant portion of th[e] individuals [listed on the United States' initial disclosures], all of whom are third parties, as well as other persons. . . . Although the United States was prepared to develop a discovery plan meeting the September 7, 1999 deadline, it does not oppose Dentsply's request for a longer period of time to complete fact and expert discovery and file

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the event the United States was going to depose a laboratory as to which there would be information in the interrogatory response. The United States agreed either to make such early production or to defer the depositions of those laboratories. See Appendix B-1-2.

dispositive motions.

Id. at 4-5. The United States' position on the information learned in its interviews was known to Defendant at this time, and, in fact, the November 15, 1999 fact discovery closure was predicated on the parties' understanding that the United States "contends that the interviews it conducted with the[ ] individuals [identified on its Initial Disclosures] are work product and protected from disclosure." Id. at 4.[2]

B. Defendant Has Failed to Show the Need to Extend Discovery by the Two and One Half Months It Requests

Defendant requests an extension of almost one third of the time allotted for fact discovery. Moreover, it does so with the stated purpose of taking at least 27 additional depositions, more than twice the number of depositions that it has noticed and taken to date. While, as noted above, in February, Defendant maintained the need to depose a significant number of persons identified by the United States in its disclosure, it seemed to back off this quickly. At the March 8, 1999 Discovery Conference, the Court ordered both parties to prioritize their witness lists in the hope that this would "prevent the necessity of having to take the 184 depositions." Transcript of March 8, 1999 Discovery Conference (D.I. 35) at 51. Defendant's counsel quickly offered that "we might be able to reach pretrial stipulations to a large number of [the facts]; that would be my hope. Because *I think what you will find is*

[2] Indeed, on July 6, long after the interrogatory issues had been briefed and argued, Defendant proposed an earlier date for the close of discovery in Howard Hess Dental Laboratories, Inc., et al. v. Dentsply International, Inc. -- December 31, 1999 -- than it now proposes in this case.

the facts are not going to be substantially disputed as to what happened. The economic impact of the facts and the application of the relevant law are what this case is about." Id. at 56 (emphasis added).

On March 15, 1999, the Court entered the Discovery Plan and Order ("Discovery Order") in this matter, establishing November 15, 1999, as the final day for fact discovery (D.I. 30). On March 22, 1999, the United States and Defendant exchanged Preliminary Witness Designations. The United States and Defendant each designated 31 individuals as at least "likely" trial witnesses.

Now, at this late date, Defendant indicates that it needs to extend the discovery deadline to schedule and then take *at least* 27 additional depositions. Thus, Defendant apparently has realized, near the end of fact discovery, the need to schedule depositions of a number of witnesses equal to almost one-half of the "likely" trial witnesses.

To have justified an extension of this magnitude, Defendant should have, at a minimum, identified the at least 27 individual deponents and explained *for each* when it first determined that it should depose that individual and why it could not have earlier identified that individual. Moreover, Defendant should have explained for each potential deponent what efforts it had made to schedule that individual in the time remaining before the discovery deadline. For example, Defendant claimed in its brief that 13 business days remained without a deposition scheduled on them. With even one deposition a day, those days could allow for almost half of Defendant's potential depositions, which could significantly reduce any claimed need for such a large

extension. By conducting more than one deposition a day, and offering non-parties the option of taking the deposition on a weekend to avoid disrupting their workweek, Defendant might even be able to accommodate all 27 plus depositions.[3]

While Defendant has failed to disclose the identity of the potential deponents, it is highly likely that these potential deponents include individuals whom the United States listed as at least "likely" trial witnesses, but whose depositions have not been scheduled. Only eight of those individuals remain. Six of the eight individuals are representatives of artificial tooth manufacturers, and Defendant has recently served subpoenas for documents on those six manufacturers. There is no reasonable basis for Defendant having delayed these depositions.[4]

C. Defendant Has Had Ample Opportunity for Discovery

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[3] While such a schedule may require extra effort, the United States, too, has had to go to great efforts to work within the agreed deadline. For example, just last week, shortly before a deposition of a regional sales manager of Defendant, the attorney for the United States scheduled to take the deposition suffered a death in the family. Since Defendant refused to reschedule the deposition before the discovery deadline, or to allow it to take place after the deadline unless the Court extended discovery, the United States brought in a different attorney to take the deposition.

[4] The dispute over the interrogatory, moreover, cannot reasonably be the basis for delaying the deposition of these manufacturer representatives. The other manufacturers in the artificial tooth industry were known to Defendant at the outset of this case. Indeed, three were identified in the Complaint. Yet, it was not until very late August that Defendant even served document subpoenas -- reflecting no tailoring to the specific manufacturers based on the interrogatory response -- on these entities. See Notice of Command to Produce Evidence (D.I. 108). Having served these subpoenas, Defendant has made no attempt to arrange depositions of the likely witnesses. Rather, Defendant has refused the request of at least one of these manufacturers to suggest even tentative dates for the deposition until it has received and reviewed documents. See Appendix B-3-5. Thus, Defendant bootstraps its own delay in serving document subpoenas into a further delay in scheduling depositions.

Most of the deposition discovery to date has been dedicated to addressing Defendant's case. Defendant has been the party responsible for identifying 43 of the 66 individuals whose depositions have been taken or scheduled: Defendant identified 30 as at least "likely" trial witnesses, and then noticed the depositions of another 13 non-party witnesses, who had not been identified by the United States as at least "likely" trial witnesses.[5] Defendant has not de-prioritized any of the 30 witnesses whom it initially designated as at least "likely" trial witnesses.[6] Indeed, these depositions have been lengthened to accommodate Defendant's desire to provide the class actions' counsel with the opportunity to examine the deponents.

The Advisory Committee notes to Rule 16(b) state that:

the fixing of time limits serves

> to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.

FED. R. CIV. P. 16 advisory committee notes (quoting *Report of the National Commission for the Review of Antitrust Laws and Procedures* 28 (1979)). Defendant's

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[5] A forty-fourth person whose deposition was taken was identified by both the United States and Defendant as being an at least "likely" trial witness.

[6] In contrast, the United States has made the choices required by the discovery process and its deadlines and has informed Defendant that seven of the individuals that the United States initially classified as at least "likely" trial witnesses are, in fact, "unlikely" or "will not call" (see Appendix B-6-9), leaving only 24 individuals designated as at least "likely" trial witnesses by the United States.

actions are just what caused the Committee concern about not holding to time limits.[7]

D. Enlargement of the Discovery Schedule is Unreasonable

As discussed in the briefing of the motion to consolidate, 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. Congress exempted government antitrust suits from consolidation under multi-district litigation because of the public policy against delaying government suits. H.R. REP. NO. 90-1130, at 5 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902-03 ("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."). Each day that this case is delayed results in additional harm to competition.[8]

As demonstrated above, Defendant has not proffered an adequate explanation for enlarging the discovery period of this case generally and certainly has not

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[7] Defendant asserts that its "diligence in undertaking discovery is beyond question." Def. Brief at 3. The United States, however, does question the reasonableness of Defendant's efforts, not only in scheduling depositions but also in producing documents requested by the United States. Defendant did not even begin to search for responsive documents until the United States gave Defendant a deadline and prepared to file a motion to compel. Similarly, in a recent dispute with a non-party over the scheduling of the depositions, Defendant refused to even call the counsel of the nonparty with which it had the dispute, again engendering potential delay. (See Appendix B-10-11). Finally, Defendant has yet to provide the United States with a privilege log.

[8] Ironically, Defendant asserts that the outcome of this matter affects a "fundamental business practice" that it utilizes. Def. Brief at 7. The United States agrees that eliminating Defendant's practice of preventing dealers from adding new lines of artificial teeth will have a significant effect on the market for those teeth.

proffered an adequate explanation in light of the ongoing harm and the public policy in favor of redressing it. It is no answer to this public policy to argue, as Defendant does, that the United States has not sought a preliminary injunction. A preliminary injunction would have potentially limited value in these circumstances. If the Court entered a preliminary injunction, and consequently a dealer were enabled to add a non-Dentsply line of artificial teeth without penalty, Defendant would be prohibited from terminating that dealer only during the preliminary injunction. The dealer would have to run the risk that the Court might eventually rule in Defendant's favor, at which time the Defendant could terminate the dealer. Similarly, competing manufacturers would make arrangements with those dealers to carry their teeth, with the risk that the Court would not grant permanent relief, thus jeopardizing those business plans.

The delay occasioned by granting Defendant's motion, moreover, would not be easily limited to the time requested. First, Defendant has apparently not begun the process necessary to take depositions of the additional, unnamed non-parties. With the exception of the manufacturers, Defendant has not yet served any document subpoenas on these parties. Further, the United States will be entitled to seek, prior to the depositions, documents from the new witnesses that Defendant identifies. The process of producing documents can delay the scheduling of depositions, and thus Defendant's delay in identifying, and seeking documents from, its unnamed witnesses, could potentially lead to the need for further extensions.

Second, granting this enlargement opens up additional discovery not only for Defendant but for the United States as well. The United States structured the scope

and substance of its discovery based on the Discovery Order entered by the Court. Now, seven months into the nine-month fact discovery set forth in that Order, Defendant seeks an unfettered right to add additional witnesses. An extension of discovery, however, should not reward Defendant for delay and a last minute addition of numerous unnamed potential deponents, with whom Defendant intends to raise as yet unknown issues. It would be manifestly unfair to allow Defendant to take as many depositions as it now wishes, while depriving the United States of similar opportunity. There are additional witnesses whose depositions the United States chose not to pursue in light of the Discovery Order. Should the Discovery Order change as radically as Defendant requests, the United States would have to evaluate whether to take additional depositions.[9]

II. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court deny Defendant's Motion.

[9] The United States notes the details of the discovery discussions to correct Defendant's inaccurate statement that the United States had not offered any compromise on the discovery schedule. Defendant first approached the United States about an enlargement on Friday, September 10. Although the United States at first indicated it was not inclined to agree to an enlargement, on Wednesday, September 15 before Defendant filed its Motion to Amend the Discovery Plan, and in spite of Defendant's failure to make reasonable choices during discovery, the United States offered to extend the discovery deadline by approximately one month but requested that Defendant agree to various conditions for that extension. Discussions continued between the parties until Tuesday, September 28, when Defendant rejected the United States' proposal.

Respectfully submitted,

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