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 SUPPORT OF ITS MOTION FOR ENTRY OF ITS PROPOSED PROTECTIVE ORDER AND IN RESPONSE TO THE MOTION OF HENRY SCHEIN, INC. TO INTERVENE FOR THE SOLE PURPOSE OF SECURING ENTRY OF A PROTECTIVE ORDER

Dated: March 18, 1999

COUNSEL FOR PLAINTIFF
UNITED STATES OF AMERICA

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Statutes and Rules:

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 equitable and other relief for Defendant's continuing violations of Section 2 of the Sherman Act, Section 3 of the Clayton Act and Section 1 of the Sherman Act. 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 independent distributors. On February 11, 1999, Defendant filed an amended answer (D.I. 11).

In February 1999, the United States and Defendant discussed a proposed stipulated protective order that was based on previous protective orders to which the Antitrust Division and other defendants have stipulated. The proposed stipulated protective order would have established protection for highly confidential information, that is, information, that, if disclosed, would result in a clearly defined and serious injury. On February 11, 1999, Defendant returned a redlined version of the proposed stipulated protective order. Ultimately, after a number of discussions and revisions, Defendant identified only one issue that divided the parties: Defendant demanded the right to disclose nonparty confidential information to an in-house business attorney, Mr. Brian Addison, who is Defendant's Vice President, Secretary and General Counsel.

Orally and by letter dated March 3, 1999, the United States offered to stipulate to the majority of the terms of a protective order but allowing each party to reserve the right to litigate the issue of in-house counsel's access to confidential information, or any other issue on which the parties could not reach agreement.[1] Defendant refused this proposal.

[1] Letter from Michael S. Spector (counsel for Plaintiff) to Kelly A. Clement (counsel for Defendant) (March 3, 1999) (Appendix A-1-2).

On March 4, 1999, after discussions with both parties, Henry Schein, Inc., a nonparty interested in preserving the confidentiality of certain of its information, filed its Motion to Intervene for the Sole Purpose of Securing Entry of a Protective Order ("Motion to Intervene") (D.I. 19) and a Memorandum of Law in Support of the Motion (D.I. 20).[2] The protective order proposed by Henry Schein ("Schein Protective Order") mirrors in nearly all material respects the protective order now proposed by the United States. The Schein Protective Order, however, includes a limitation on the future representation of Defendant by outside counsel who receive access to nonparty confidential information. That additional protection creates a potential conflict between the protection that Henry Schein seeks for its confidential information and the interim protection afforded by D. Del. LR 26.2.

On March 5, 1999, Defendant delivered to the Court a letter stating its opposition to Henry Schein's Motion to Intervene and the provisions in the Schein Protective Order that would impose limitations on outside counsel. Defendant argued, among other things, that there "is no authority supporting" the relief requested by Henry Schein and that there was no factual basis for the relief because "Dentsply's outside counsel does not advise Dentsply on competitive business decisions."

At the status conference on March 8, 1999, the Court established the terms under which the United States could produce documents to Defendant pursuant to D. Del. LR 26.2 during the pendency of Henry Schein's Motion. Accordingly, on March 9, 1999, the United States produced to Defendant, pursuant to D. Del. LR 26.2, documents produced by nonparties to this matter that might contain confidential information.

---

[2] The United States supports Henry Schein's right to intervene for the sole purpose of securing entry of a protective order. Permissive intervention is appropriately used for this purpose under Rule 24(b) of the Federal Rules of Civil Procedure. See Pansy v. Borough of Stroudsburg, 23 F.3d 772, 778 (3d Cir. 1994).

The United States now moves for entry of its proposed protective order ("the United States' Protective Order") and files this brief in support of that Motion and in response to the Motion of Henry Schein. The United States' Protective Order is, in most respects, identical to the last version of a protective order that was sent to Defendant, as to which Defendant objected on the ground just described.[3] This Brief sets forth the arguments for not permitting disclosure to Defendant's inside, business counsel and discusses non-party Henry Schein's proposal to limit the future representation of Defendant by Defendant's outside counsel in this action.

II. SUMMARY OF ARGUMENT

The United States' Protective Order appropriately limits pretrial disclosure of information that a producing party or nonparty to this case designates as confidential, that is, information which, if disclosed, "would result in a clearly defined and serious injury." It affords Defendant's outside counsel, counsel for the United States, and testifying and consulting experts full access to confidential information and establishes a procedure for disclosure of confidential information to potential and actual trial witnesses. Nonparty discovery in this matter, as has discovery in other civil antitrust enforcement actions, will likely involve the most sensitive business information of Defendant's competitors and customers.

---

[3] The United States' Protective Order varies from the proposed protective order last sent to Defendant in only three significant ways. First, as directed by the Court at the March 8, 1999 conference, the United States' Protective Order does not restrict the use of information at trial. Second, the Order does not cover information produced by Defendant prior to this action. Third, the Order permits the United States to disclose confidential information in legal proceedings to which it is a party and for law enforcement purposes, (¶ 13). The United States' proposed Protective Order also adds various procedural protections that are included in the Henry Schein Protective Order but were not included in the last proposal sent to Defendant. The United States has modified those additional procedures to protect the United States' ability to use confidential information pursuant to paragraph 13 of the proposed Protective Order.

Disclosure of such information to Defendant will, by definition and by necessity, cause economic harm. Defendant would gain an unfair advantage over its competitors and customers through access to this information. Moreover, allowing Defendant's in-house business counsel to have access to confidential information will likely cause the very harm to nonparties that a protective order is intended to prevent. The United States is not questioning the good faith of Defendant's in-house counsel. Rather, the concern arises from the risk "of inadvertant disclosure. House counsel are employed full-time to advance the interests of their employer. They regularly meet with personnel of the corporation on day-to-day matters, wholly apart from this litigation." United States v. International Business Machines, Corp., 72 Civ. 344, 3 (S.D.N.Y. April 10, 1996) ("IBM") (Appendix A-3-24), quoting, SCM v. Xerox Corp., Civil No. 15,807 (D. Conn. May 25, 1977) , aff'd sub nom, In re Xerox Corp., 573 F.2d 1300 (2d Cir. 1977).

Allowing Defendant's in-house business counsel to have access to the confidential information of nonparties is likely to impede discovery and the preparation of this action for trial. Knowledge that Defendant's in-house business counsel will have access to their confidential information will chill nonparties' cooperation during discovery.[4] Similar concerns warrant closely guarding the confidential information obtained by the United States during its civil investigation. The disclosure of such information to a defendant's employees, including business counsel such as in this matter, will chill nonparties' cooperation with the United States during investigations of potential antitrust violations.

Withholding from Defendant the narrow category of highly confidential information subject to the Protective Order will not impair Defendant's ability to defend this suit. This

[4] The vast majority, if not all, of those nonparties reside outside of the District of Delaware, and the parties will have to seek their confidential business information and other material through subpoenas issued from other federal district courts under Rule 45. Additionally, the parties may seek international discovery from non-parties.

type of protective order has routinely been stipulated to by defendants in antitrust cases brought by the United States and has been entered by courts hearing such cases. Under the United States' Protective Order, Dentsply's in-house counsel will have access to a wide range of documents and information that should allow inside counsel to make informed decisions about, and assist in, the defense of this action.

Finally, the United States does not object to the Court's inclusion of additional protection similar to what Henry Schein is seeking in the form of limitations on Dentsply's outside counsel. With some modification, the Court may be able to provide this type of additional protection to nonparties' confidential information without impinging on any significant interest of Defendant.

III. STATEMENT OF FACTS

The United States anticipates seeking additional information in discovery from various nonparties that likely will include confidential information, that is, information that, if disclosed, would result in a "clearly defined and serious injury." Some of those nonparties, but far less than the majority of them, have already provided testimony and documents to the United States during its investigation that probably contain confidential information. These nonparties, both those who have produced and those who are likely to produce information, include competitors of Defendant, potential competitors of Defendant, distributors of dental products, and others.[5]

Information designated as confidential by these nonparties will likely include

[5] Nonparties who did not produce documents or provide testimony during the investigation have had no notice of the proceedings related to the proposed Protective Order. The United States is giving notice of these proceedings to those parties that provided documents or testimony during the investigation by serving them with copies of this brief, Henry Schein's Motion and related papers, and Dentsply's March 5, 1999 correspondence to the Court.

sensitive business information such as sales and marketing plans, strategic plans, financial forecasts and margin information, customer information, pricing information, and information relating to nonparties' agreements with other entities in various industries related to dental products and dentures. The Affidavit of Norman Weinstock, the President of Henry Schein's dental laboratory dealer subsidiary, describes such highly confidential information and how "[a]llowing access to these confidential materials would give Dentsply an unfair advantage in future business dealings with Henry Schein." Affidavit of Norman Weinstock in Support of Henry Schein's Motion to Intervene for the Sole Purpose of Entry of Protective Order ("Weinstock Affidavit") (D.I. 22) at ¶ 14. For example, Weinstock's Affidavit identifies "highly confidential and proprietary information" such as its customer contacts, including its customer lists, and explains the harm disclosure of such information would cause:

> In the artificial tooth area, dissemination of Henry Schein's customer information also would prove detrimental. The artificial tooth business is one in which maintaining customer relationships takes substantial effort and investment; Henry Schein worked hard to develop a list of clientele and contacts at many dental laboratories and with various dental practices. While Dentsply may have a partial picture of Henry Schein's customer base and contacts, providing unlimited customer information to Dentsply would enable it to go directly to many customers and obtain more comprehensive margin information, for example, which could be used by Dentsply in subsequent negotiations with Henry Schein.

Id. at ¶ 17. Weinstock's Affidavit provides other examples, as well, of the types of harm that are likely to result from disclosure to Defendant. During the investigation of this matter, the United States obtained information similar to that described in Weinstock's Affidavit from Dentsply's competitors and from other dealers of artificial teeth.

IV. ARGUMENT

"Under Fed. R. Civ. P. 26(c)(7), the district court, for good cause shown, may grant a protective order requiring that 'a trade secret or other confidential . . . commercial

information not be disclosed or be disclosed only in a designated way.' " Leucadia, Inc. v. Applied Extrusion Technologies, 998 F.2d 157, 166 (3d Cir. 1993).

" 'Umbrella' protective orders, carefully drafted to suit the circumstances of the case, greatly expedite the flow of discovery material while affording protection against unwarranted disclosures." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1123 n.19 (3d Cir. 1986) (citation omitted), cert. denied, 484 U.S. 976 (1987); accord, Standard Chlorine of Delaware, Inc. v. Sinibaldi, 821 F. Supp. 232, 256 (D. Del. 1992).

Under the terms of the United States' Protective Order, and as defined by the Third Circuit Court of Appeals, "confidential information" is defined as "any trade secret or other confidential research, development, or commercial information, as such terms are used in Fed. R. Civ. P. 26(c)(7), produced by or in the possession of any protected person . . . , *the disclosure, or further disclosure, of which would result in a clearly defined and serious injury*." Protective Order ¶ 1(a) (emphasis supplied); see Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994).

Discovery in antitrust cases filed by the United States is often extensive, primarily because the United States, in bringing and litigating an antitrust action, must collect and analyze a large amount of "economic data and other information." United States v. International Business Machines Corp., 62 F.R.D. 526, 528-29 (S.D.N.Y. 1974). The United States, in this and other antitrust actions, undertakes discovery not as a private litigant, but as a litigant suing "on behalf of all the people." Id. at 528-29. In this action, like in other antitrust enforcement actions, the United States and Defendant will seek information, including confidential information, from a wide range of nonparties.

In determining the extent to which confidential information will be disclosed in litigation, this Court must balance the competing goals of "full disclosure of relevant information and reasonable protection against economic injury." Safe Flight Instrument

Corp. v. Sundstrand Data Control, Inc., 682 F. Supp. 20, 23 (D. Del. 1988). Here, the twin goals of protecting against economic injury and assuring full disclosure of relevant information are best achieved by a protective order that strictly protects nonparties' confidential information.

A. Economic Injury Is Likely to Result from Dentsply's In-House Business Counsel's Review of Nonparties' Confidential Information

By definition, disclosure of information designated "confidential" in this matter "would result in a clearly defined and serious injury." United States' Protective Order ¶ 1(a). As to the confidential information of nonparties that compete with Defendant, disclosure of their confidential information is likely to cause economic injury in two ways. First, disclosure to Defendant will undermine fair competition between Defendant and its competitors. This would be an ironic result in an action wherein the United States has alleged that the Defendant has acted to maintain its monopoly power by denying these same competitors access to independent distributors. Nonparties should be entitled "to a great degree of protection where their confidential information will be disclosed to a direct competitor." IBM at 3, quoting United States v. CBS, Inc., 103 F.R.D. 365, 368 (C.D. Cal. 1984); Carpenter Technology v. Armco, Inc., 132 F.R.D. 24, 26 (E.D. Pa. 1990) (noting the irreparable harm that can be suffered when a party is forced to disclose confidential information to a competitor). Second, the disclosure of confidential information among competitors, such as current and projected price information, can itself give rise to anticompetitive results that harm consumers. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 457 (1978) ("most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices"); In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation, 906 F.2d 432, 448 (9th Cir. 1990) (competitors' dissemination of pricing information "served little purpose other than to

facilitate interdependent or collusive price coordination"), cert. denied, 500 U.S. 959 (1991)

.

For those nonparties that are customers, rather than competitors, of Defendant, such as Henry Schein in parts of its business, disclosure of their confidential information is also likely to give rise to economic harm. Norman Weinstock's Affidavit describes how such information could be used by Defendant to the economic loss of such nonparties.[6] Because of such concerns, the Seventh Circuit Court of Appeals in Ball Memorial Hosp., Inc. v. Mutual Hospital Insurance Co., 784 F.2d 1325 (7th Cir. 1986), affirmed the entry of a protective order restricting the plaintiff hospitals' access to their customer's, a health insurance company's, confidential price data. Id. at 1345-46. The court recognized that the plaintiff could "use [the price data] to advantage in the next round of negotiations." Id. at 1346.

Allowing disclosure of nonparties' confidential information to Dentsply's in-house business counsel would permit these harms to occur. Like many companies' in-house counsel, Defendant's in-house counsel's duties are unavoidably intertwined with the day-to-day business operations of the company. Recognizing this fact, one court recently refused to allow an antitrust defendant's in-house litigation counsel access to third parties' confidential information. IBM at 2-3. As employees, "in-house counsel stand in a unique relationship to the corporation in which they are employed. Although in-house counsel serve as legal advocates and advisors for their client, their continuing employment often

[6] See Weinstock Affidavit, at ¶15 ("Henry Schein would not provide its confidential information to any party with which it negotiates, because it would reveal sensitive information such as (a) the extent to which Henry Schein may rely on Dentsply products in a particular area, (b) the price parameters established by Henry Schein, and (c) Henry Schein's mark up of Dentsply's products, all of which would negate Henry Schein's ability to negotiate favorable programs and agreements.").

intimately involves them in the management and operations of the corporation of which they are part." IBM at 3, quoting F.T.C. v. Exxon Corp., 636 F.2d 1336, 1350 (D.C. Cir. 1980).

Recognizing the risk that an in-house counsel's access to nonparties' confidential information will result in economic harm to third parties does not necessarily assume that an in-house counsel will act in bad faith in contravention of a protective order. Rather, "[t]he issue concerns not good faith but risk of inadvertent disclosure. House counsel are employed full-time to advance the interests of their employer. They regularly meet with personnel of the corporation on day-to-day matters, wholly apart from this litigation." IBM at 3, quoting, SCM v. Xerox Corp., Civil No. 15,807 (D. Conn. May 25, 1977), aff'd sub nom, In re Xerox Corp., 573 F.2d 1300 (2d Cir. 1977).

The risk of inadvertent disclosure is even more acute where, as here, the in-house counsel is not segregated from business matters, such as where the in-house counsel has responsibility only for litigation matters. Indeed, here, Dentsply's counsel is not only a business attorney but also is an officer of the company. This Court has recognized that an officer of a company may have difficulty compartmentalizing information learned in litigation from use in future decision making on behalf of the company. In Safe Flight, this Court denied plaintiff corporation's president access to defendant's confidential information, reasoning that "accepting that [the president] is a man of great moral fiber, we nonetheless question his human ability during future years of research to separate the applications he has extrapolated from [defendant's] documents from those he develops from his own ideas." 682 F. Supp. at 22; see also Phillips Petroleum Co. v. Rexene Products Co, 158 F.R.D. 43, 46 (D. Del. 1994) ("The clear concern in Safe Flight was the potential for the unconscious, but improper use of technical information by a party in the future, in spite of any protective order.").

In this case, Defendant's in-house business counsel similarly will not be able to

disregard confidential information learned in this action in his future involvement in Defendant's day-to-day operations. If Defendant's in-house counsel, who, in the course of performing his ordinary business duties reviews actual or potential agreements and other programs, policies and practices relating to distributors, has access to these distributors' confidential information -- including such things as the distributors' strategic plans and pricing and margin information, then those distributors will inevitably be disadvantaged in their future negotiations and other dealings with Defendant.

Undoubtedly, Defendant will point to cases that have allowed in-house counsel access to confidential information. Those cases, however, have permitted that access in circumstances significantly different from those presented by this matter. For example, in Safe Flight, this Court allowed defendant's in-house counsel access to plaintiff's confidential information. The plaintiff represented to the Court that its in-house counsel was not involved in its business affairs in such a way as to give rise to intentional or inadvertant disclosure of the confidential information. Id. The Court thus observed that "[t]hese attorneys simply do not face [the company president's] prospect of having to distill one's own thoughts from a competitor's thoughts during the course of future aeronautic work." See also Boehringer Ingenlhieim Pharmaceuticals, Inc. v. Hercon Labs, Corp., 1990 WL 160666, at *1-2 (D. Del. 1990) (Appendix A-25-27) (In-house counsel were each in a position to "exclude himself or herself from conflicting work" which "avoid[ed] the possibility of conscious or unconscious abuse of confidential information."); United States Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (court must inquire whether the in-house counsel is involved in the company's "competitive decisionmaking"); Carpenter Tech. Corp. v. Armco, Inc., 132 F.R.D. 24, 27 (E.D. Pa. 1990) (same). In this case, Defendant has not, and indeed cannot, declare that its in-house business counsel will not be involved in the day-to-day operations of the company and consequently will not be in

a position to consciously or unconsciously misuse confidential information learned in this litigation.

B. Denial of Access to Defendant's In-House Counsel Will Facilitate the Full Disclosure of Relevant Information by Nonparties

The concerns that have led the courts to deny confidential information to in-house counsel will chill the willingness of nonparties to cooperate during discovery of this action and in future antitrust investigations. As the Henry Schein Motion demonstrates, nonparties are likely to recognize and share the concern that Defendant's in-house, business counsel will make use of their confidential information to the nonparties' disadvantage. Indeed, a number of nonparties have expressed such a concern orally to counsel for the United States.

As such, there is a substantial risk that review by Defendant's in-house, business counsel of nonparties' confidential information will impede discovery in this action. A nonparty concerned about such access may refuse to produce information and apply for additional protection from this Court or for a protective order from the court in the jurisdiction in which it is located. See IBM at 4. Nonparties who have not intervened will not be precluded by the Court's decision here from seeking additional protection at a later time. Greater Rockford Energy and Technology Corp. v. Shell Oil Co., 138 F.R.D. 530, 536-37 (C.D. Ill. 1991). Denying Defendant's in-house counsel access to nonparties' confidential information will reduce the likelihood of peripheral discovery litigation and thus will expedite discovery in this case.[7]

[7] Procedurally, some nonparties could move for additional protection pursuant to ¶ 3(b-c) of the United States' proposed Protective Order. That paragraph provides that non-party information produced during the investigation to the United States shall be treated as confidential for twenty days following notice of the terms of a protective order entered by the Court and shall not be disseminated beyond the dissemination allowed for by D. Del. LR 26.2 for thirty days following such notice. These time periods will allow the non-parties to designate their confidential information, and, if they have concerns about the protective order, to seek

Similarly, many companies not being investigated themselves produce confidential information to the United States over the course of an antitrust investigation with the expectation that the information will not fall into the hands of a competitor, purchaser, supplier, or other entity that would be in a position to misuse the information. Indeed, a number of nonparties in this action have done just that over the course of the United States' investigation of Defendant.

Allowing Defendant's in-house, business counsel to have access to confidential information produced by nonparties in this action would create a very real risk that, in future antitrust investigations, companies will be more reluctant to produce confidential information because of a fear that the information would be divulged in litigation. See Safe Flight, 682 F. Supp. at 23 (stating that "the International Trade Commission is especially conservative regarding the divulgence of confidential materials because it 'is heavily dependent on the voluntary submission of confidential information' by parties") (citations omitted).

C. Nondisclosure to Defendant's In-House Counsel Will Have No Effect on Defendant's Ability to Defend This Case

At the hearing on March 8, 1999, Defendant argued that its in-house, business counsel needed to review nonparties' confidential information in order to defend itself in

---

additional protection from the Court. The United States will undertake to provide prompt notice to these non-parties upon entry of the United States' Protective Order or of a protective order containing a similar provision.

This procedural device does not apply to future nonparty discovery, which is likely to generate the majority of confidential information. Rather, nonparties for future discovery will have the opportunity to designate their confidential information at the time subpoenas are served by the parties to this action and to seek then additional protections before their confidential information is disclosed to Defendant. Accordingly, the potential review by Defendant's in-house counsel of nonparties' confidential information could generate a series of separate discovery disputes.

this action. Under the United States' proposed Protective Order, however, Defendant's in-house counsel will have ample access to the information necessary to strategize and otherwise assist outside counsel; he just will not be able to review the confidential information of Defendant's competitors and other nonparties. It bears emphasis that information designated as "confidential" under the proposed order must be so designated by a good faith representation to this Court by nonparties that disclosure of the designated information "would result in a clearly defined and serious injury." Designations under this definition will likely protect from disclosure only a small percentage of the overall amount of information produced by nonparties. Defendant's in-house counsel would be free to review all other information produced by nonparties in order to assist in the preparation of Dentsply's defense.

Moreover, under the United States' Protective Order, Defendant's outside counsel, who has represented Defendant in this and related matters for a number of years, would have access to all of the information designated as confidential. Outside counsel will be able to utilize its extensive experience in handling Defendant's antitrust litigation in the dental products industries, which should eliminate any possible need for Defendant's in-house counsel to review the confidential information of nonparties.

IBM at 4. Finally, Defendant has provided no support for its assertion that its in-house, business counsel must have access to nonparties' highly confidential information in order to defend this case. In fact, in the United States' experience in recent civil antitrust enforcement actions, defendants do not need access to highly confidential information in order to defend themselves. Perhaps recognizing the reasonableness of restricting their in-house counsel's access to nonparty confidential information, recent antitrust defendants in litigation with the United States have stipulated to protective orders that allow nonparties to protect their highly confidential information from disclosure to defendants' personnel,

including in-house counsel. See United States v. Lockheed Martin, 1998 WL 306755 (D.D.C. May 29, 1998) (Appendix A-28-35); United States v. Citicorp, CA No. 98-436JJF, (D. Del. Oct. 21, 1998) (Appendix A-36-49); United States v. Long Island Jewish Medical Center, CV 97-3412 (E.D.N.Y. July 18, 1997) (Appendix A-50-58); United States v. Visa, U.S.A., Inc., 98 Civ. 7076 (BSJ) (S.D.N.Y. Dec. 11, 1998) (Appendix A-59-72).

D. The Goals of Protecting Against Economic Injury and Facilitating Discovery Could Also Be Served By Restrictions on Defendant's Outside Counsel Similar to Those That Henry Schein Has Proposed

The protective order proposed by Henry Schein allows Defendant's outside counsel and employees of such outside counsel to have access to confidential information provided that these attorneys "have not been, are not, and for the earlier of four (4) years from the date of this order or two (2) years from the conclusion of trial in this action, will not be, without prior approval of the Court, involved in any other matters on behalf of defendant relating to its competitors, distributors, or customers, with the exception of matters related to this action." Schein Protective Order at ¶ 10. The Order allows access to "outside counsel working as an attorney for the Department of Justice in connection with this action and employees of such outside counsel" subject to a similar restriction. Id.

The United States' proposed Protective Order does not include a similar provision, in part, because Henry Schein's proposal might force a choice on Dentsply to replace counsel on this matter or on some other pending matters. Forcing withdrawal from this action or some other action may implicate significant interests of this Court, the other courts in which those matters are pending, and Defendant. On the other hand, contrary to Dentsply's claim that "no authority" supports such a provision, at least one court has entered a similar order. See Ball Memorial Hosp., 784 F.2d at 1345 (affirming entry of an order that restricted disclosure to "trial counsel to this lawsuit who are engaged in the preparation for trial . . . and who have neither represented nor [will] represent for 18 months any

hospital, the Indiana Hospital Association, or any other entity in connection with [defendant] on any matter other than the trial of the case."); see also Boehringer, 1990 WL 160666, at *1, quoting U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984) ("[T]he factual circumstances surrounding each individual counsel's activities, association, and relationship with a party, whether counsel be in-house or retained, must govern any concern for inadvertent or accidental disclosure.").

Such a provision would appear to be most appropriate where there is a danger of inadvertant disclosure, such as where outside counsel provides legal advice on nonlitigation matters to Defendant. According to Defendant, however, that particular risk of disclosure is not presented in this matter because, as stated in Defendant's March 5, 1999 letter to the Court, its outside counsel "does not advise Dentsply on competitive business decisions." Accordingly, inclusion of language in a protective order that restricts Defendant's outside counsel who has access to confidential information from providing legal advice on nonlitigation matters, including counseling on negotiations, to Defendant for the period of time in Henry Schein's order could advance the legitimate purposes of the Protective Order without impairing any substantial interest of Defendant.

V. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court grant its motion and enter the proposed Protective Order.

Respectfully submitted,

/s/

COUNSEL FOR PLAINTIFF
UNITED STATES OF AMERICA

CARL SCHNEE
UNITED STATES ATTORNEY

/s/

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

/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