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 SUPPORT OF ITS
MOTION FOR ENTRY OF A PROTECTIVE ORDER

Dated: November 8, 1999

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I. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

On January 5, 1999, the United States filed its complaint (D.I. 1) against Defendant, Dentsply International, Inc., seeking to enjoin Defendant's continuing violations of the federal antitrust laws. The Complaint alleges that Defendant has engaged, and continues to engage, in a variety of actions that unlawfully maintain its monopoly power and deny competing manufacturers of artificial teeth access to the independent distributors of most of the artificial teeth sold in the United States. On February 11, 1999, Defendant filed an amended answer (D.I. 14).

Prior to filing its complaint, the United States commissioned a survey of dental laboratories ("the survey") to assess their preferences and determine the effect of allowing Defendant's competitors to fully compete in the market for prefabricated artificial teeth through access to independent distributors (or dealers) of artificial teeth. A survey expert designed, conducted, and analyzed the results of the survey. This survey expert is a likely witness of the United States at the trial of this case, and was assisted by consulting survey experts of the United States. The likely testifying economic expert of the United States also was involved in the design of the survey, as were consulting economic experts of the United States. The United States intends to offer the survey into evidence at trial to show the economic effects of Defendant's exclusive arrangements with dental laboratory dealers.

On October 8, 1999, Defendant served the United States with its Third Request for Documents pursuant to FED. R. CIV. P. 34 ("Third Request"), seeking, through several duplicative requests, "all documents that refer or relate to any survey dealing

with the dental industry, its products, participants, or distribution systems." See Third Request (Appendix A-1- A-6). The Third Request also seeks documents sufficient to identify the names and addresses of the entities that responded to the survey ("the survey respondents"), as well as non-respondents. See Third Request.

On November 1, and November 5, 1999, the parties conferred in an attempt to resolve the issues discussed in this brief, pursuant to D.Del. LR 7.1.1 and the Court's Order of January 25, 1999 (D.I. 7). The conferences did not resolve the issues. In the conferences, Defendant indicated to the United States that it was seeking to obtain the identities of the survey respondents so that it could contact those respondents to challenge the validity of the survey.

II. ARGUMENT

By seeking the survey materials of the United States' experts, Defendant seeks to advance the date for expert disclosure set by the Court its October 12, 1999 Order providing for the schedule stipulated to by the parties ("stipulated Scheduling Order") (D.I. 127). The United States does not object to the ultimate disclosure of these materials, in accordance with the stipulated Scheduling Order, but does object to early disclosure of the materials and to disclosure of the identities of survey respondents, which would undermine the integrity of the survey methodology. Defendant's discovery request for these expert survey materials is premature, and disclosure of the identities of the survey respondents would be harmful, improper, and unjustified in these circumstances. The United States seeks a protective order to prevent disclosure of the survey materials and to confirm the appropriate timing for disclosure of the

expert's survey materials.

A. A Protective Order Is Appropriate

Federal Rule 26(c) states, in pertinent part, that "[u]pon motion by a party . . . for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; . . . [and] (4) that certain matters not be inquired into. . . ." FED. R. CIV. P. 26(c). Because, as described below, Defendant seeks premature discovery of expert survey-related materials and seeks, without a valid purpose, the confidential identities of survey respondents, good cause exists and an appropriate protective order is necessary.

B. Discovery of Survey Expert Materials is Premature

Defendant's attempt to obtain discovery of these expert materials through a document request under FED. R. CIV. P. 34 is premature because the survey was designed and conducted in anticipation of litigation for the United States at the direction of both a survey expert and an economic expert, both of whom are likely to testify for the United States in this case. The reports of these experts are not completed since they are not due until February 29, 2000, the date specified for the exchange of expert materials, by the Court, in the stipulated Scheduling Order. Therefore, while Defendant will eventually be entitled to the survey materials (without the confidential identities of the survey respondents), the proper time for their discovery is the time

specified for expert discovery by the Court.

Rule 26(a)(2)(B) identifies the items and materials that must be disclosed at the time a testifying expert is designated, requiring the production of "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions . . ." FED. R. CIV. P. 26(a)(2)(B). Here, the expert's survey instrument, the completed responses, the expert's opinions on the methodology used and its import, and the data and other materials related to and produced by the survey are precisely the type of materials to be included in the expert report. Materials generated by a survey are expert materials that fall within the provisions of Rule 26 pertaining to experts. Starter Corp. v. Converse, Inc., 95 Civ. 3678 (CSH),1996 WL 694437 (S.D.N.Y. Dec. 3, 1996) at *1 (Appendix A-7 - A-9); see also Ziemack v. Centel Corp., No. 92 C 3551, 1995 WL 729295 (N.D. Ill. Dec. 7, 1995) at *3 (Appendix A-10 - A-12) ("Such detailed analysis is found chiefly through third-party information, such as research and surveys; hence, the discovery thereof is more appropriately within the experts' domain.").

Rule 26(a)(2)(C), in turn, provides that "[t]hese disclosures [of the testifying expert's identity and accompanying materials] shall be made at the times and in the sequence directed by the court." FED. R. CIV. P. 26(a)(2)(C). In this case, the Court has twice entered scheduling orders to govern the timing and sequence of these disclosures. Indeed, the parties have now twice negotiated and agreed to a defined period and deadlines for expert discovery following the close of fact discovery. See

March 15, 1999 Discovery Plan and Order (D.I. 30) ("March Scheduling Order") and stipulated Scheduling Order. Under the stipulated Scheduling Order, entered by the Court on October 12, 1999 after Defendant successfully moved for modification of the March Scheduling Order and the parties agreed to a new discovery schedule, fact discovery closes on February 1, 2000, expert reports pursuant to FED. R. CIV. P. 26(a)(2)(B) are due on February 29, 2000, rebuttal expert reports pursuant to FED. R. CIV. P. 26(a)(2)(C) are due on March 31, 2000, additional fact discovery of witnesses on FED. R. CIV. P. 26(a)(3)(A) lists that were not deposed during fact discovery is to be conducted from February 15, 2000 to March 31, 2000, and expert depositions are to be completed by April 28, 2000.

Defendant has been aware of the existence of the Unites States' survey since March 1999. The United States referred to the survey in its written responses to Defendant's Second Request for Documents and in discussions and briefing papers concerning that request. Yet, Defendant did not raise this issue in its briefing or oral argument asking the Court for an enlargement of the fact discovery period, or during the subsequent negotiation and stipulating to the time periods and deadlines for fact discovery and expert disclosures set forth above. See Plaintiff's Responses and Objections to Defendant's Second Request for Documents and First Set of Interrogatories, March 22, 1999 (Appendix A-13 - A-29); United States's Brief in Response to Defendant Dentsply International, Inc.'s Motion to Compel Responses to its First Set of Interrogatories and its Second Request for Documents, April 29, 1999 (D.I. 61).

By its silence, Defendant has tacitly conceded that the experts' survey materials are to be produced with the rest of expert discovery. This view of the timing of the discovery of surveys and survey materials underlying those surveys is consistent with the case law. See Karan v. Nabisco, Inc., 82 F.R.D. 683, 686 (W.D. Pa. 1979) ("If and when defense counsel determine that they intend to use this survey at trial, the expert's report will, of course, be required as part of the pretrial statement. Under FED. R. CIV. P. 26(b)(3), defense counsel at this time cannot be required to disclose possible defenses which could occur if they were required to deliver the documents at this time."); Ziemack, 1995 WL 729295, at *2-*3 (noting that, in discovery of research and surveys, "[s]ince experts have not been either retained or deposed, much of the remaining discovery is also premature" and that "this Court does not expect Plaintiffs [in answering the interrogatories at issue] to address the issues that will be more appropriately dealt with by experts, at a later date.")

Certainly, the well-established general procedure is that expert discovery is to be conducted after parties designate testifying experts and conclude fact discovery. See Perry v. United States, CA3:96-CV-2038-T, 1997 WL 53136 (N.D. Tex. Feb. 4, 1997) at *3 (Appendix A-30-32) ("Until the defendant is required to make a final decision regarding expert testimony, therefore, the court finds that plaintiffs' attempt to discover expert information is premature."); In re Shell Oil Refinery, 132 F.R.D. 437, 440 (E.D. La. 1990) clarified by 134 F.R.D. 148 (E.D. La. 1990) (finding that prior to the dates set by the court for disclosure of identity of experts to be called at trial, for exchange of expert reports, and for expert depositions, party was under "no obligation

to decide which experts it will call at trial or to disclose information about any experts expected to be called at trial," and, thus, that "attempt to obtain discovery from experts expected to be called at trial is premature.")

There are several reasons for not permitting discovery of experts and expert materials prematurely. First, parties should be free to make and revise decisions about experts prior to the time set by the Court for expert discovery, just as those experts should be free to work on, revise, and complete their expert analyses to be embodied in their reports during that time. Second, prohibiting premature disclosure of expert reports and materials can avoid the need for unnecessary supplementation of expert disclosures. Third, the policy allows parties to protect, until the time for expert discovery, their work product in litigation as carried out by their experts. In this case, the survey reflects the design, oversight and analysis of a survey expert and an economic expert, both of whom likely will testify at trial, and of consulting survey experts and economic experts. This work, in anticipation of litigation, is protected until the time for designation of experts and expert discovery. Finally, the policy, as explained in the Advisory Committee Notes to Rule 26:

> reflect[s] the fear that one side will benefit unduly from the other's better preparation…. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time for he can hardly hope to build his case out of his opponent's experts.

FED. R. CIV. P. 26 advisory committee notes. See Shields v. Sturm, Ruger & Company, 864 F.2d 379, 382 (5th Cir. 1989); In re Shell Oil Refinery, 132 F.R.D. at

440-41 (E.D. La. 1990); United States v. 215.7 Acres of Land, 719 F. Supp. 273, 278-80 (D. Del. 1989); Karan, 82 F.R.D. at 685-86; Perry, 1997 WL 53136, at *3; Vitronics Corp. v. Conceptronic, Inc., No. C-91-696-L, 1994 WL 253687 (D.N.H. 1994) (Appendix A-33 - A-34).

Here, Defendant will have ample time to obtain expert materials and prepare its cross-examination of the United States' experts during the time period for expert discovery to which it agreed (with full knowledge of the survey's existence) and as set forth by the Court in its Order. In Perry, the court noted, "In the event [a party] designates [an individual] as a testifying expert, the rules permit [the other party] to discover his opinions and supporting grounds. FED. R. CIV. P. 26(b)(4)(A). Thus, the [other party] will have an opportunity to prepare an effective cross-examination of the [party's] testifying expert" after the expert designations. Perry, 1997 WL 53136, at *3; see also Hoover v. United States Department of the Interior, 611 F.2d 1132, 1142 (5th Cir. 1980) ("The primary purpose of [expert disclosures] is to permit the opposing party to prepare an effective cross-examination."); In re Shell Oil Refinery, 132 F.R.D. at 440; FED. R. CIV. P. 26 advisory committee notes (stating that FED. R. CIV. P. 26(a)(2) imposes a "duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses").

The parties have already agreed to the time at which expert discovery should be conducted, and the Court has entered an Order based on those stipulations. Requiring

the United States to produce the survey materials prior to that time would unfairly provide Defendant with early expert discovery, and would create an incentive for parties to delay expert preparation until the last minute for fear of discovery. The expert discovery relating to the survey, like the rest of expert discovery in this matter, and consistent with the cases discussed above, should be conducted during the time for expert disclosure and discovery set forth by the Court.

C. The Identities of Survey Respondents Should be Protected

The identity of the respondents to the survey conducted by the United States' survey expert should not be discovered at any time. There are significant policy reasons for not disclosing survey respondents' identities, and Defendant has no genuine need for this information. Surveys, such as the one conducted by the United States here, are more properly tested by evaluating whether they were done in accordance with generally accepted survey principles which would provide circumstantial guarantees of trustworthiness.

Maintaining the confidentiality of survey respondents ensures the reliability and effectiveness of surveys. Potential survey respondents are less candid or even less sincere in participating in surveys or studies where they know that their participation, and even their particular beliefs and intentions revealed under the anonymity of a survey or study, become known to the public, to others in the industry, or, as in this case, to the dominant company in the industry. Additionally, many persons simply refuse to participate in such non-confidential surveys or studies, eliminating research that serves society generally, and, in the context of litigation, provides scientific and

cost-effective methods of examining issues that would otherwise be prohibitively difficult or expensive. Social science research tools, whether done in the context of litigation or otherwise, serve important public purposes that would be undermined if participants' or respondents' identities were revealed or such respondents were subjected to interrogation or litigation.

These concerns are reflected in the long-standing confidentiality requirements adhered to by survey professionals that are contained in ethical codes and guidelines of professional organizations such as the Research Industry Coalition and Council of American Survey Research Organizations ("CASRO"). The CASRO Code of Standards and Ethics provides that survey research organizations are responsible for protecting individual respondents' identities from disclosure to third parties, and that the use of a survey in litigation does not relieve the research organization of this ethical obligation. See CASRO Code of Standards and Ethics for survey Research at pp. 5 & 7 (Appendix A-35 - A-47).

In addition, many courts have recognized that there are important reasons not to allow the discovery of persons participating in surveys, studies, or other research. See Mount Sinai Sch. of Medicine v. American Tobacco Co., 880 F.2d 1520 (2d Cir. 1989) (upholding protective order which provided for redaction of names, addresses, towns or villages, social security numbers, employers, and union registration numbers of study participants, as well as prohibiting the identification or attempted identification of the subjects of the studies); Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556 (7th Cir. 1984) (holding that identifying information of persons in study should not be

produced); Summit Technology, Inc. v. Healthcare Capital Group, Inc., 141 F.R.D. 381 (D. Mass. 1992) (protecting agreement to provide confidentiality, in part, because of the "public interest in the free flow of information"); Times Journal Co. v. Department of the Air Force, 793 F.Supp. 1, 4-5 (D.D.C. 1991) (providing against disclosures of survey respondents that could "deny confidentiality," even when such information is in aggregated form); Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Cal. 1976) (motion to compel discovery about identity of research interviewees denied).

In contrast to this well-founded policy, Defendant has no genuine need for this information. In Comm-Tract Corp. v. Northern Telecom, Inc., 143 F.R.D. 20 (D. Mass. 1992) the Court distinguished the type of survey to be offered by the United States here -- a survey to be utilized as evidence of respondents' state of mind or present sense impressions -- from a survey that is offered, at least in part, to prove "the truth of the matters asserted." Id. at 22-23. The court noted,

> [t]o the extent that the survey would be utilized as evidence of respondents' state of mind, present sense impressions, or subjective mental associations, [the other party's] need to know the identity of the participants and to tie the respondents is de minimus. In such circumstances, the defendant can challenge the evidence by implicating the "circumstantial guarantees of trustworthiness," i.e., the methodology employed, the survey design, the forms of questionnaires, the sampling techniques, etc.

Id. at 22 (emphasis added). There, because the survey at issue was offered, at least in part, to prove the truth of the matters asserted, the court did order the disclosure of the

identity of survey respondents.[1]

The survey to be offered by the United States in this case, however, is precisely this "state of mind" type of survey, concerning the presently-existing preferences of dental laboratories, not their recollection or memory statements of past facts.[2] In state of mind surveys, the respondents are sources of statistical data, not witnesses, and the need to know the identity of the survey respondents is de minimis. Comm-Tract, 143 F.R.D. at 22.

Instead, as numerous courts have recognized the proper way to test such a survey is by evaluating its methodology. Schering Corp., 189 F.3d. at 227-28; Comm-Tract, 143 F.R.D. at 22.[3] Defendant can currently retain its own expert and

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[1] Another district court also has upheld a magistrate judge's order that a party reveal the identities of individuals who participated in a survey. United States Surgical Corp. v. Orris, Inc., 983 F.Supp. 963 (D. Kan. 1997). It is not apparent, however, whether the magistrate or court there was presented with the issues and concerns the United States is raising in the present case regarding the reasons for not disclosing respondents' identities. There, the only argument advanced by the proponent of the survey that is mentioned in that case was that the participants had been promised confidentiality, not the underlying rationale for that confidentiality. Id. at 970. The court's opinion describes the balance engaged in by the magistrate judge as the need to evaluate and rebut the survey against the survey proponent's "interest in shielding the survey participants" suggests that the larger policy issues of preserving the use of surveys and studies, both in litigation and outside of it, were not addressed. Id. In any event, the court there ruled only that the magistrate's order was not clearly erroneous.

[2] To the extent there were certain specific factual inquiries in the survey, these were standard background universe questions, typical to all surveys, and not part of the substance of the survey evidence. See Schering Corp. v. Pfizer Inc., 189 F.3d 218, 234 n.5 (2d Cir. 1999) (stating that Harold Stores v. Dillard Dep't Stores Inc., 82 F.3d 1533, 1545-46 (10th cir. 1996) is a state-of-mind survey notwithstanding questions designed to establish the universe of the survey).

[3] Even for "memory" surveys that ask truth of the matter questions, the primary method of testing the survey's reliability is to evaluate its methodology, not to reinterview the respondents. Pittsburgh Press Club v. United States, 579 F.2d 751, 758 (3d Cir. 1978);

obtain its own sample of laboratory respondents to conduct an independent survey, or after receiving the United States' survey materials at the appropriate time, retain an expert to critique the United States' survey methodology based upon recognized bases for such critiques or depose the Untied States' survey expert or the researchers who conducted the survey. See Pittsburgh Press Club, 579 F.2d at 759.

Defendant has indicated that it wants the identities of the survey respondents in order to contact each to test the truthfulness of their answers and verify the accuracy of the recorded responses. Re-interviewing or cross-examining the survey respondents months after the original survey about what they said in the past is unreliable for the same reasons that courts express concern regarding the reliability of "truth of the matter" surveys about past occurrences — faulty memory. See Pittsburgh Press Club, 579 F.2d at 759. In seeking to contact the survey respondents to ask them questions, and then presumably to present some selection of the results of those interviews to the Court, Defendant would be doing nothing more than conducting its own unscientific survey, with no methodological guarantees of trustworthiness in the selection of interviews or the questions asked. Indeed, the reason the United States conducted this survey was to be able to draw reliable and valid conclusions regarding the varied preferences of the many thousands of dental laboratories using prefabricated artificial teeth, due to the inability to interview or depose any meaningful number of those laboraties. It is not possible to draw such conclusions from a biased selection of

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Schering Corp., 189 F.3d at 233.

particular laboratories, whether through depositions or recontacting survey respondents, as Defendant proposes to do.[4]

Such re-interviewing would be unreliable for other reasons as well -- the respondents will no longer be unaware of the purpose of the questions being asked or the entities asking them and, therefore, the answers they provide when reinterviewed or deposed may be biased or skewed. See Schering Corp., 189 F.3d at 233 n.4 ("In cases where interviewees are likely to lie for personal reasons, anonymous surveying can help minimize this risk."); Pittsburgh Press Club, 579 F.2d at 759. The same reasons that courts have recognized for maintaining the confidentiality of a survey's purpose and its proponent from the respondent and interviewer, apply here to maintain the confidentiality of the survey respondents. See Schering Corp., 189 F.3d at 233 ("In particular, the risk of insincerity can ordinarily be reduced if the interviewers and those questioned lack knowledge of the litigation and the purpose of the survey.")[5]; Pittsburgh Press Club, 579 F.2d at 758.

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[4] See Schering Corp., 189 F.3d at 237 (expressing skepticism that a sample that could reasonably be summoned to court could provide more reliable evidence than a survey); In re Airline Ticket Comm'n Antitrust Litig., 918 F.Supp. 283, 288 (D. Minn. 1996) (noting that "proper statistical methodology [in a survey] should provide the material needed and minimize the time-consuming, and repetitious inquiry [of follow-up depositions of survey respondents.]")

[5] In Schering, the court commented in dicta that it would have been helpful to present some of the respondents for cross-examination in court to determine what weight to give the survey, however, disclosure of respondents' identities was not at issue in that decision. In fact, this statement is inconsistent with the court's reasoning elsewhere in the opinion, cited above, that the risk of insincerity is reduced if the respondents lack knowledge of the litigation and purpose of the survey. Obviously, if respondents are presented in court to testify they would then become aware of both the litigation and the purpose of the survey, with a corresponding reduction in confidence of their sincerity. See Schering Corp., 189 F.3d at 233 & n.4.

Accordingly, when balanced against the strong societal and legal interest in preserving the use and integrity of surveys -- both of means as gathering information for use outside of litigation and as a means of increasing the accuracy, while reducing the cost, of evidence in complex matters -- Defendant's minimal need for the identity of the respondents is outweighed and it should be denied access to the survey respondents' identities.

III. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court grant its Motion for Entry of a Protective Order.

Respectfully submitted,

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