No. 03-4097

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States of America,
Plaintiff-Appellant,

v.

Dentsply International, Inc.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CIVIL ACTION NO. 99-005
CHIEF JUDGE SUE L. ROBINSON

BRIEF OF DEFENDANT-APPELLEE DENTSPLY INTERNATIONAL, INC.

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Dated: March 19, 2004

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 03-4097

United States of America

v.

Dentsply International, Inc.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Dentsply International, Inc. (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Margaret M. Zwisler
(Signature of Counsel or Party)

Dated: 3/19/04

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STATEMENT OF RELATED CASES

Dentsply agrees with the government's description of *Howard Hess Dental Laboratories, Inc. v. Dentsply*, No. 99-255 (SLR) and *Jersey Dental Laboratories v. Dentsply*, No. 01-267 (SLR). On February 24, 2004, Dentsply filed its opposition to plaintiffs' petition to this Court to hear their interlocutory appeal. There is a stay of all proceedings in *Lipson v. Dentsply*, No. 01-427 (SLR), a third pending putative class action.

ISSUES PRESENTED

1. Where a plaintiff accepts a finding that challenged conduct does not have the *probable* effect of lessening competition under Clayton Act §3, does Third Circuit law nevertheless permit the plaintiff to challenge the fact finder's determination that the identical conduct did not have an *actual* adverse effect on competition? (Law 18-20).[1]

2. Did the trial court commit clear error in finding that Dentsply's dealer policies were not predatory where: (i) rivals can access the market

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1 The court's Conclusions of Law will be cited as "Law" and Findings of Fact as "FOF," followed by paragraph citations.

through other avenues ("alternative distribution channels"); (ii) these channels are comparable to Dentsply's dealers; (iii) rivals with access to Dentsply's dealers still choose to do substantial business through these channels; (iv) Dentsply's dealers can replace Dentsply teeth with a rival's product; and (v) the arrangements were not contrary to Dentsply's short-term financial self-interest? (Law 12-13, 26, 29, 35; FOF 40-45, 71-74, 110-11, 139-47).

3. Did the trial court commit clear error in finding that Criterion 6 did not have an adverse effect on competition in the market when the evidence proved: (i) that it did not prevent rivals from reaching any share of the relevant market; (ii) no reduction in output or quality; (iii) no reduction in innovation by Dentsply or others in the market; (iv) that Dentsply remained the market leader in promotion and marketing; and (v) no artificially high tooth prices in the market? (Law 11-13, 26, 29; FOF 18-19, 71, 155-68, 224-25, 244-48, 257-68, 270-303).

4. Did the trial court commit clear error in finding that the relevant market lacks substantial entry barriers where: (i) market participants

expanded output in the relevant market and possess the capacity for further expansion; (ii) participants have access to all end users using existing or readily convertible systems; (iii) two firms have entered the market using alternative distribution channels; and (iv) Dentsply reacted competitively to the expansion and entry? (Law 26, 28-29, 35; FOF 27, 31, 46-52, 136-47, 243, 251-52).

5. Did the trial court commit clear error in finding that Dentsply lacks the power to control prices where: (i) the bulk of Dentsply's product line is priced between its two largest rivals; (ii) Dentsply has reacted to price competition; and (iii) Dentsply's gross profit margins were not artificially inflated? (Law 30; FOF 224-25, 233, 243).

STATEMENT OF THE CASE

Trial Court Proceedings

On January 5, 1999, the government filed a complaint against Dentsply challenging Dentsply's policy that dealers who carry Dentsply's "Trubyte" artificial tooth line may not add competing lines of teeth to their product offerings ("Criterion 6" of Dentsply's dealer policy). The government alleged that Criterion

6 constituted illegal exclusive dealing under Sherman Act §1 and Clayton Act §3 and monopolization under Sherman Act §2.

Chief Judge Sue L. Robinson presided over a four-week trial in 2002. The court heard 30 live witnesses and received the deposition testimony of another 45 witnesses. In August 2003, eleven months after closing arguments, the trial court issued a 165-page decision in favor of Dentsply. The court concluded that Criterion 6 did not foreclose competition from a substantial share of the market for artificial teeth and therefore that the government had failed to prove that Dentsply violated either §1 or §3. (Law 11-17). The court also found that Criterion 6 did not violate §2 because the government had failed to prove that Dentsply had monopoly power, that Criterion 6 was predatory or that it had an actual adverse effect on competition. (Law 25-35).

Trial Court Decision

The government's statement of facts fails to present the record facts in the light most favorable to Dentsply as the victor at trial;[2] thus, this Court should disregard that statement. Below, Dentsply summarizes the trial court's decision in

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2 *United States v. Pelullo*, 964 F.2d 193, 197 (3d Cir. 1992).

the light with which this Court must view the extensive trial record. The trial court's analysis, when viewed dispassionately and accurately, embodies a rational evaluation of credible evidence and describes an economically plausible market.

The court found that Dentsply has been a leader and innovator in the United States market for artificial teeth for nearly a century. (FOF 15, 148-168). Dentsply manufactures artificial teeth in the premium, mid-range and economy segments. (FOF 16). Dentsply sells fourteen different tooth lines that encompass 16,000 different SKUs for teeth in approximately 10,000 shade and mould combinations. (FOF 17, 19).[3] The court found that no rivals offer product lines of comparable breadth.

The court also found that, throughout its history, Dentsply introduced major advancements in the artificial tooth market. (FOF 148-53, 166-68). The court relied on the testimony of Dentsply's Chairman John Miles that "product innovation" has been "one of the most important things" that has allowed Dentsply to "initially develop and ultimately maintain" its market share. (FOF 148). One of Dentsply's most significant innovations was the development of the Portrait tooth

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3 By offering such a variety of shades and moulds, Dentsply is better able to match the parameters included on a dentist's denture prescription. (FOF 11).

in 1995. (FOF 155-165). The commercially successful Portrait line offered improved aesthetics and a superior capacity to match the industry standard shade guide. (FOF 163-64).

The court further found that Dentsply undertakes enormous efforts to generate demand and promote its products at all levels of the market - the dental lab, dentist and patient. (FOF 269). The primary method is through its "dedicated sales force," which calls on dental labs, dentists and dental schools. (FOF 270). For years Dentsply has had the market's largest tooth-focused sales force and thus calls on the most denture labs. (FOF 270-71).

The court found that Dentsply's sales force concentrates its efforts at the dental labs in order to "pull[]" volume from the dealers. (FOF 269, 272, 273; Tr. 2166). One strategy is converting a lab from competitive teeth to Trubyte teeth. (FOF 277). Dentsply "make[s] a market" for its teeth through a variety of marketing and promotional activities. (FOF 275, 279-81).

Dentsply encourages dentists to prescribe its teeth (FOF 282), thus pulling sales through the lab and dealer. (FOF 269). Dentsply has several dentist-focused promotional programs. (FOF 282-293). No rivals have a systematic sales

strategy for dentists. (FOF 265, 268). Finally, Dentsply calls on dental schools to ensure that dental students are familiar with Trubyte teeth because "what gets taught gets bought." (FOF 294-299). Dentsply's activity at dental schools represents a "long-time strategic advantage." (FOF 294-95). No rivals have a comparable relationship with dental schools. (FOF 248, 263, 265).

The court found that the U.S. artificial tooth market is populated by well-financed multinational firms, most of which have been selling artificial teeth in the U.S. for decades, well before Dentsply implemented Criterion 6.

The court considered eight manufacturers "particularly relevant" to the U.S. artificial tooth market. (FOF 14). Ivoclar Vivadent AG manufactures and sells artificial tooth lines throughout the world. (FOF 23). In the U.S., it distributes teeth through its wholly-owned subsidiary, Ivoclar Vivadent, Inc. ("Ivoclar"). (FOF 24). Vita Zahnfabrik ("Vita") is a German manufacturer of artificial teeth. (FOF 33). Vita distributes its teeth in the U.S. through Vident, its exclusive national distributor. (FOF 33, 36, 129). Myerson LLC has manufactured and sold teeth in the U.S. since 1917. (FOF 37-38). Universal Dental Company sells teeth from its Pennsylvania facility. (FOF 45). American Tooth Industries ("ATI") manufactures and sells a brand of teeth called Justi. (FOF 42). Two

manufacturers - Heraeus Kulzer GmbH, a German company, and Davis Schottlander of England - are recent entrants into the U.S. tooth market. (FOF 46-52).

Unlike most of its rivals, Dentsply has never sold teeth directly. (Tr. 2178-79, 3441-42). Currently, Dentsply distributes its teeth through 23 dealers. (FOF 109). In February 1993, Dentsply published criteria for dealers carrying its teeth. (FOF 170-71). Dentsply developed the Dealer Criteria to address the "numerous inquiries from companies seeking to become" dealers. (FOF 170). Criterion 6 states that any dealer authorized to carry Trubyte teeth cannot add a competitive tooth line to its product offerings. (FOF 169). Criterion 6 did not preclude dealers from carrying brands of teeth that they carried prior to implementation of Criterion 6 ("grandfathered brands"). (FOF 175). Since its inception, Dentsply has taken steps to enforce its dealer policy. (FOF 187-211).

Criterion 5 requires that companies applying for recognition as a Trubyte dealer must "submit a written plan which indicates that incremental business will be gained by Dentsply." (FOF 171). Primarily, applicants are able to demonstrate incremental sales by their ability to convert existing lab customers from rival brands to Trubyte teeth. (Tr. 2579-80, 1926). Dentsply does not use more dealers

than it needs to distribute effectively. (FOF 179, 141). Otherwise, dealers would lose the value of their investment and wind up dividing the artificial tooth market among themselves rather than growing the market. (Tr. 2580). Dentsply has routinely rejected applications for failure to satisfy this incremental business requirement. (FOF 141; Tr. 1928-30).

The court found that Dentsply's rivals are not foreclosed from a substantial share of the laboratories in the U.S. (FOF 71, 61). The court found that rivals can access these customers by distributing teeth to labs through several means other than Dentsply dealers. (FOF 13). One way is direct distribution, which the court found, and the government agreed, is a "viable" method of distribution. (FOF 71). At the time of trial, five of the eight "relevant" manufacturers were selling teeth directly to dental labs. (FOF 27, 40, 43, 45, 47).

Most dental labs prefer to purchase teeth directly from a manufacturer. (FOF 73-74, 81). Many of these labs prefer the "cost savings" attributable to the elimination of a "dealer middleman." (FOF 81, 73). Other labs favor purchasing directly to avoid dealer error and back orders. (FOF 74). Still others appreciate the technical assistance that manufacturers provide. (*Id.*).

The court found that direct-selling manufacturers are just as capable of selling teeth to dental labs as are dealers. (FOF 82-98). For example, because overnight delivery services have made a card of teeth a "very transportable item," tooth manufacturers do not require a network of tooth stocks to sell teeth to labs. (FOF 77). Direct-selling manufacturers, like dealers, can service the tooth needs of labs effectively throughout the U.S. with a limited number of tooth stocks – in many instances, just one. (FOF 28, 78, 143-47). The court said that manufacturers have replicated or could replicate the dealer function. (FOF 81.b). Manufacturers and dealers offer "one-stop-shopping" for all of a lab's crown and bridge and denture needs. (FOF 84). Manufacturers manage the accounts receivable, accept tooth returns (except Vita) and offer accurate and reliable overnight delivery. (FOF 86-87, 97-98).

Ivoclar sells artificial teeth directly to dental laboratories from a single tooth-stocking location in Amherst, N.Y. (FOF 28). Ivoclar has distributed its teeth directly to dental labs since at least 1968 (FOF 27); it does not use dealers to distribute teeth. (FOF 28). Ivoclar has sold teeth directly to 3,700 of the estimated 7,000 denture labs. (FOF 31, 58). Ivoclar acknowledges that selling directly to dental labs is an "effective method of distribution" that provides "some advantages" over dealer distribution. (FOF 99). This explains why Ivoclar

terminated its short-lived experiment in 1989 to sell teeth through a dealer. (FOF 101). One year later, Ivoclar rejected the opportunity to distribute teeth through Darby Dental, after determining that selling directly was "more profitable" and would "guarantee continuity in distribution methods." (FOF 106).

In 1996, Dentsply examined whether it too should sell its Trubyte teeth directly to labs. (FOF 112). Dentsply concluded that the services that dealers provided to labs "certainly [were] replicable." (FOF 118). At the same time, Dentsply recognized that, in switching to a direct-selling distribution system, Dentsply would have to overcome five significant hurdles, including writing-off $15 million in dealer inventory that the dealers would want to return to Dentsply. (*Id.*). Dentsply, which distributes $800 million a year in other products through these same dealers, also faced a significant risk that dealers would retaliate if Dentsply stopped selling teeth to dealers. (*Id.*). This could include dealers converting lab customers to non-Dentsply dental consumable products. (FOF 123). These risks are unique to Dentsply. Dentsply determined that it was not prepared to go direct in 1996. (FOF 125). The risks remain for Dentsply today. (FOF 128).

In addition to selling direct to dental labs, the court found that there are "hundreds" of dental dealers in the U.S. other than Trubyte dealers available to manufacturers. (FOF 140). These dealers have the capability to serve broad geographic areas and want to add artificial teeth as a product line. (FOF 54, 140, 142-47). Indeed, the court noted that all of Dentsply's rivals except Ivoclar and Heraeus Kulzer use their own dealer networks to reach the market. (FOF 33, 40, 43, 45, 52, 129). Vita has distributed its teeth exclusively through a single national dealer since at least 1968. (FOF 33, 129). Schottlander distributes its Enigma teeth through its exclusive national distributor, Leach and Dillon, and Lincoln Dental, a non-Dentsply dealer. (FOF 136-38, 144). Myerson, Universal and ATI currently use non-Dentsply dealers to distribute teeth. (FOF 139).

Even Dentsply's twenty-three dealers are available to its rivals. (Law 15, 29, 35). The trial court found that no contract obligates a dealer to Dentsply. (Law 15; FOF 20, 110). If Dentsply's dealers take on the teeth of a rival, they can either sell their Dentsply tooth inventory or return it to Dentsply for full credit. (FOF 110). Thus, "dealers are free to leave Dentsply whenever they choose" and distribute competitive brands of teeth. (Law 15; FOF 110-11). Half of the eight rival manufacturers - Myerson/Austenal, ATI and Universal – currently distribute

teeth through Dentsply's dealers (in addition to selling direct and through their own dealers), and have done so since 1993. (FOF 40, 43, 139, 170, 175, 367).

The court concluded that no dealer has left the Dentsply dealer network given Dentsply's competitors' failure to compete effectively (Law 15-16), and that the level of success of rivals is the product of their own business decisions. (FOF 244-268). For example, the court found that both Ivoclar and Vita's distributor focus their marketing efforts on crowns and bridges, not teeth (FOF 244-248). Neither manufacturer has ever employed a sufficient number of sales representatives dedicated to selling teeth. (FOF 245, 247-248).

The court also found that Vident and Ivoclar have failed to promote teeth. (FOF 257-68). Despite recognizing the need to drive demand for teeth at the dentist level, Ivoclar's few sales representatives do not call on dentists to promote teeth. (FOF 268). And, from 1992 through late 1995, and 1997 to the present, Vident spent no money to market teeth. (FOF 262). Vident's system of distributing directly to labs and through a network of sub-dealers also has created difficulties in promoting and selling teeth. (FOF 260,134).

Finally, throughout most of the relevant period, Vident and Ivoclar produced teeth that use European moulds, which are different than teeth that use American moulds. (FOF 249-256). Ivoclar's President, Mr. Ganley, conceded that the design of Ivoclar's European moulds posed significant obstacles to Ivoclar increasing its share of the U.S. market. (FOF 249).

For several reasons, the court found that Dentsply lacks the ability to exclude competitors from the dental labs: (i) direct selling to labs is a viable and, in some ways, advantageous method of distribution (FOF 71, 99); (ii) Dentsply's rivals can reach the market through their own dealer networks, as well as non-Dentsply dealers (FOF 129, 136-47); (iii) rivals can "steal" a Dentsply dealer (FOF 110-11); (iv) Dentsply's rivals have failed to gain market share as a result of their own business decisions (FOF 244-68); and (v) Dentsply's conduct did not prevent the entry of two new rivals (FOF 46-52).

The court also found that rivals had actually entered the market despite Criterion 6. Heraeus Kulzer entered the U.S. market in 2000 despite the fact that it was "fully aware" of the functions that tooth dealers perform in the United States, and that it would be unable to obtain distribution through Trubyte dealers. (FOF 47). The court also credited the evidence of Schottlander's entry. (FOF 52, 136).

The court further found that Criterion 6 did not prevent existing rivals from expanding their output. In January 2002, Ivoclar expanded its tooth offering with two new lines of teeth featuring American moulds. (FOF 251). Mr. Swartout of Myerson testified that Myerson's Trinidad plant has "the capability of producing three times as many teeth as we do today, without any additional investments in capital." (Tr. 1320).

Lastly, the court found that the government failed to prove that Dentsply controls prices. (Law 30). The court determined that "Dentsply teeth are generally priced between Vident and Ivoclar teeth." (*Id.*; FOF 224-25). The court further found that the government provided no evidence that Dentsply has established a market of supra-competitive pricing. (Law 30). If anything, Dentsply has reduced the price that laboratories pay for Trubyte teeth in response to the price competition from its competitors. In the early 1990s, Vident and Ivoclar instituted volume discount programs with large laboratory chains and buying groups. (Tr. 2848-50, DX 60). Dentsply reacted with its own Preferred Laboratory Incentive Program, which offered volume rebates to these same customers. (Tr. 2849-50). Dentsply also has increased price rebates in response to the entries of Heraeus Kulzer and Schottlander via Leach and Dillon. (FOF 243).

SUMMARY OF ARGUMENT

The government bore the burden to prove by a preponderance of the evidence that Dentsply possessed monopoly power in the market for artificial teeth that it maintained through the announcement and enforcement of Criterion 6. The government did no such thing. Instead, the trial court found that Dentsply is an established, focused and innovating rival whose Criterion 6, while self-interested, is competitively neutral in that it does not deny any rival the ability to access a single end-user.

The trial court's decision reflects a thoughtful analysis of a voluminous trial record using bedrock antitrust jurisprudence. Its numerous, detailed findings are supported by substantial, credible evidence, and this Court must affirm the judgment below.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT, BY FAILING TO MEET THE ELEMENTS OF CLAYTON ACT §3, THE GOVERNMENT COULD NOT SATISFY THE PROOF REQUIRED UNDER SHERMAN ACT §2

Standard of Review: Dentsply agrees with the government that plenary review is appropriate. (Br. 22).

A. The Trial Court Committed No Error Because It Independently Analyzed The Government's Monopolization Claim Against The Evidence At Trial

The government's first issue on appeal is a curious one. It challenges as "squarely at odds with the law of this Circuit" (*id.*)[4] the trial court's observation that, since "Dentsply is not in violation of §3 of the Clayton Act, Dentsply is not in violation of §2 of the Sherman Act either." (Law 20). It is a curious argument that does not advance the government's position because, contrary to the government's assertion, the trial court separately analyzed Dentsply's conduct under §2. (Law 21-35). Its analysis considered each element of the government's §2 monopolization claim – whether Dentsply had monopoly power, whether

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4 The government's brief will be cited as "Br."; the trial transcript as "Tr."; government exhibits as "GX"; and Dentsply exhibits as "DX."

Criterion 6 constituted predatory conduct, and whether Criterion 6 caused an actual adverse effect on the tooth market – and, assessing the credibility and weight of the trial evidence, found that the government failed to prove any of these elements. (*Id.*). Thus, even if the trial court's statement on which the government focuses were incorrect, it would be harmless in this case.

B. Where Conduct Has No *Probable* Anticompetitive Effect Under Clayton Act §3, It Cannot Have An *Actual* Anticompetitive Effect Under Sherman Act §2

The government's legal argument would have this Court contradict Supreme Court precedent. In *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961), the Supreme Court held that, if an exclusive dealing policy "does not fall within the broader proscription of §3 of the Clayton Act it follows that it is not forbidden by those of [§1 and §2 of the Sherman Act]."

In *Tampa Electric*, the Supreme Court reviewed a refusal by the lower court to enforce a requirements contract – under which a public utility purchased all its coal needs from a producer for twenty years – because it violated §3. Reversing the lower court's judgment, the Court explained that an exclusive dealing arrangement "does not violate [Clayton Act §3] unless the court believes it *probable* that performance of the contract will foreclose competition in a

substantial share of the line of commerce affected." 365 U.S. at 327 (emphasis added). The Court held that the contract would not foreclose a substantial volume of coal sales. Most notably for purposes of this appeal, the Court stated that "[it] need not discuss respondents' further contention that the contract also violates §1 and §2 of the Sherman Act,[5] for if it does not fall within the broader proscription of §3 of the Clayton Act, it follows that it is not forbidden by those of the former." *Id.* at 335. This is because the Clayton Act requires a showing that the challenged practice "***may***" substantially lessen competition, but Sherman Act offenses require a finding of ***actual*** adverse competitive effect. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922). *Cf. Am. Motor Inns, Inc. v. Holiday Inns*, 521 F.2d 1230, 1250 (3d Cir. 1975) ("[Holiday Inns] would seem to be correct in stating that an exclusive dealing arrangement which satisfies the test of legality set out in the Clayton Act would *a fortiori* be lawful under the less stringent Sherman Act [standards].").

LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc), *petition for cert. pending*, No. 01-1865 (June 20, 2003)), follows *Tampa Electric.* In

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5 At trial, coal suppliers also argued that the contract was illegal under Sherman Act §§1-2. 365 U.S. at 321 n.2. The trial court apparently did not reach those claims in light of its decision on Clayton Act §3.

LePage's, this Court reviewed a jury verdict regarding defendant 3M's exclusive dealing arrangements and bundled rebate programs, where the jury found for defendant on its §3 and §1 exclusive dealing claims, but against defendant on monopolization and attempted monopolization claims under §2. This Court rejected 3M's argument that the favorable §1 verdict precluded consideration of the *conduct* underlying that claim in assessing the sufficiency of the §2 verdict. 324 F.3d at 157. In a footnote – and citing *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98 (3d Cir. 1992) – this Court explained that the jury's finding for 3M under §3 did not preclude the "application of evidence" of exclusive dealing, together with other predatory conduct, to support the §2 verdict. 324 F.3d at 157 n.10.

In *Barr Labs*, this Court summarily dismissed a §1 claim based on alleged exclusive dealing contracts after rejecting a §3 claim based on those same contracts because the record failed to create a genuine issue of fact that the contracts may have had an anticompetitive effect. This Court stated unequivocally that, if defendant's exclusive dealing contracts "do not infringe upon the stiffer standards of anti-competitiveness under the Clayton Act, they will also be lawful under the less restrictive provisions of the Sherman Act." *Barr Labs.*, 978 F.2d at 110. This Court nevertheless considered the contracts in evaluating the §2 claims,

which included alleged predatory conduct beyond the contracts. *Id.* at 101.[6]

The trial court's holding here follows *Tampa Electric*: where evidence fails to show that the effect of the challenged conduct "may be to substantially lessen competition or tend to create a monopoly," 15 U.S.C. §14, it *a fortiori* fails to show an actual adverse effect on competition. Its decision also is consistent with *Barr Labs* and *LePage's*. Unlike both *Barr Labs* and *LePage's*, the only conduct alleged here as predatory is Criterion 6 – the exclusive dealing arrangement – a critical difference that precludes the government from having this Court consider Dentsply's ***conduct*** under §2 notwithstanding the decision with respect to that conduct under §3.

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6 Finally, *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), *cert. denied*, 534 U.S. 952 (2001), provides no support for the government's argument. In *Microsoft*, the §1 and §2 claims involved two separate product markets: Operating Systems ("OS") for the §2 monopoly maintenance claim, and Internet browser software on the §1 exclusive dealing and §2 attempted monopolization claims. 253 F.3d at 51, 70, 81. The Court of Appeals affirmed the judgment that Microsoft had unlawfully maintained a monopoly in the OS market, but reversed the judgment that Microsoft had attempted to monopolize the market for browser software through the use of exclusive contracts. Thus, there the failure to show that the conduct had the necessary anticompetitive effect in the ***browser market*** bore no relevance to whether the same conduct had the requisite effect to support the Section 2 claim in the ***OS market***.

C. By Accepting The §3 Decision, The Government Cannot Challenge The §2 Verdict

The principle announced in *Tampa Electric*, and correctly applied by this Court in *Barr Labs* and by the trial court here, places the government in an inescapable – and ultimately unwinnable – predicament. Having chosen not to attack the trial court's §3 decision in its opening brief, that judgment and the supporting analysis are final and non-appealable.[7] Thus, just as the *Tampa Electric* Court, having found no §3 violation, had no need to discuss the §§1 and 2 claims, this Court – presented with a final judgment that Dentsply did not violate §3 – need not consider the government's contention that Criterion 6 nonetheless violated §2. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269, 288 (4th Cir. 1994) (noting that where plaintiffs did not contest the lower court's finding of no discriminatory intent on appeal, the court "was constrained to hold that the district court's factual findings on the point are not tainted with clear error"), *rev'd on other grounds*, 515 U.S. 819 (1995).

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7 The government cannot attempt to raise the issue in its reply. *See Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994).

II. THE TRIAL COURT CORRECTLY HELD THAT CRITERION 6 WAS NEITHER PREDATORY NOR ANTICOMPETITIVE

Standard of Review: To the extent that the government asserts that the trial court used the wrong legal standard, this Court's review is plenary. *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003). To the extent that the government seeks to displace the trial court's factual findings, the government must demonstrate that those findings are clearly erroneous. *Miller v. Rite Aid Corp.*, 334 F.3d 335, 339 (3d Cir. 2003). Under this standard "'it is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.'" *DiFederico v. Rolm Co.*, 201 F.3d 200, 208 (3d Cir. 2000); *Scully v. US WATS, Inc.*, 238 F.3d 497, 506 (3d Cir. 2001).

A. The Government Misstates Its Burden In A §2 Monopoly Maintenance Claim

The government seriously misstates its burden when it asserts that it proved a §2 monopoly maintenance claim because it demonstrated that Dentsply's

motives for Criterion 6 were, in part, anticompetitive and that Dentsply lacked a pro-competitive justification for Criterion 6. (Br. 18).

The law imposes a tougher, two-fold burden on the government with respect to Criterion 6. First, it had to prove that Dentsply engaged in conduct that was "predatory" or "exclusionary," *i.e.*, that Criterion 6 materially impaired rivals' ability to constrain Dentsply. *LePage's*, 324 F.3d at 152; *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983). Next, it had to prove that this "predatory" conduct had an "anticompetitive effect"; *i.e.*, it must harm competition, not merely impair competitors. *See LePage's*, 324 F.3d at 162; *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 154 (3d Cir. 1981) (reversing decision of lower court on plaintiff's §2 claim in part where defendant's exclusive licensing agreements "had no effect" on competition). Without proof that Criterion 6 both materially impaired rivals ***and*** adversely effected competition, the government could not establish that Dentsply maintained monopoly. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878-79 (2004); *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982).

There is an obvious explanation why the government now seeks to lighten its burden by eliding these two discrete elements. At trial, the government's principal evidence to support its allegation that Criterion 6 had an anticompetitive effect on the market was a survey of dental labs commissioned expressly for this case. (FOF 304-05; Tr. 738). The survey was supposed to establish that rivals' market shares would increase if they had access to Dentsply's dealers. (FOF 304-05). Dr. Reitman used the survey in a regression analysis that, he said, proved that prices would drop without Criterion 6.

The court found that the survey lacked requisite guarantees of trustworthiness and was fraught with methodological defects. (Law 39; FOF 304-330). Consequently, the court excluded the survey from evidence and struck any expert testimony based on that evidence. (Law 39). The court also found that, even if the survey were admissible, it was so error-ridden that it was entitled to no weight. (*Id.*) The government does not appeal these rulings. Instead, it seeks to turn the legal standard governing a §2 monopoly maintenance claim on its head to substitute for the exclusion of the evidence that it tried to use to prove anticompetitive effect.

B. The Trial Court's Conclusion That Criterion 6 Was Not Predatory Was Not Error

The trial court correctly concluded that Criterion 6 did not materially impair rivals because: (i) Dentsply's rivals can reach the market through viable, and in some ways advantageous, alternative channels of distribution and (ii) the government failed to prove that Criterion 6 prevented rivals from using Dentsply dealers. (Law 11-13, 26, 29, 35; FOF 40-43, 71-74, 110-11, 129, 136-47).

The government attacks these trial court findings with three meritless arguments: (1) the trial court failed to determine that the alternative channels of distribution are comparable to the "efficient use of common dealers" (Br. 19); (2) the trial court committed clear error in finding that Criterion 6 did not "tie up" Dentsply dealers (Br. 37-39); and (3) the trial court's finding that Criterion 6 lacked a pro-competitive justification demanded a finding that Criterion 6 was "economically illogical" and, given evidence of anticompetitive intent, predatory. (Br. 18, 27-29).

1. Dentsply's Rivals Have Viable Alternative Methods of Distribution

It is well-settled that exclusive dealing arrangements with distributors cannot be considered predatory "[i]f competitors can reach the ultimate consumers

of the product by employing existing or potential alternative channels of distribution." *Omega Envtl. v. Gilbarco Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997). In such a situation, the arrangements lack the requisite predatory character because there is no impairment of those rivals. *E.g., id.* at 1163, 1165. The trial court, applying this bedrock principle, found that rivals can and do utilize viable alternative channels of distribution in the form of direct sales to laboratories and non-Dentsply dealers, (Law 11-13, 26, 29, 35; FOF 27-28, 33, 40, 43, 45, 47, 71-74, 129-47), and that the government had failed to provide any evidence that dental labs "feel precluded from dealing with other manufacturers." (Law 12, citing *LePage's*).

The government accuses the trial court of using an erroneous legal standard. (Br. 19, 32-33). Armed with a dictionary and a parlor-game approach, the government belittles the trial court's factual finding that these alternative channels are "viable." (Br. 33-35). Instead, it argues that the alternative channels of distribution must be at least as effective as the "efficient use of common dealers" (Br. 19, 38) and faults the trial court for supposedly failing to compare the relative efficiencies of the available distribution channels. (Br. 12-13).

First, the government has no legal support for this standard. The law does not require that the alternative means to market be comparable or better. *See CDC Techs. v. IDEXX Labs.*, 186 F.3d 74, 80-81 (2d Cir. 1999); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1383 (5th Cir. 1994); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 394-95 (7th Cir. 1984). For example, in *Gilbarco*, the plaintiffs complained that direct sales, or potential distributors not yet carrying the equipment at issue, were "inadequate substitutes" for the defendant's existing distributors. *Gilbarco,* 127 F.3d at 1163. The plaintiffs argued that "[a]lmost all of the 500 existing distributors" with "proven finances, abilities and customer relationships" were restricted by the defendant's arrangements. *Id.* (citation omitted). The court held that "[t]he short answer is that the antitrust laws were not designed to equip [Gilbarco's rivals] with Gilbarco's legitimate competitive advantage." *Id. See also Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1572-73 (11th Cir. 1991) (fact that defendant's distributor was the best available and provided defendant with a "competitive advantage" not shared by plaintiff was irrelevant).

Next, the government never presented for the trial court's consideration the argument that the "efficient use of common dealers" would be more effective than direct distribution or the use of non-Dentsply dealers. As a result, the government

has waived this argument on appeal. *Cf. Raymond v. Marks*, 116 F.3d 466, 1997 WL 345984, at *1 (2d Cir. June 24, 1997) (holding that argument waived where appellants failed to raise issue below since "this Court cannot make new findings based on evidence the trial court did not hear or consider").

Conversely, Dentsply presented substantial evidence, and the court found, that the attributes of direct-selling manufacturers and other dealers are equivalent to the attributes of Dentsply's dealers. (FOF 28, 76-78, 84, 97-98, 143-47). The evidence also demonstrated that these channels are effective. For example, through direct sales, Ivoclar accesses 3,000 of 6,000 dental labs nationwide (FOF 31). The court found that Ivoclar could "readily compete" for the tooth business of the remaining labs by adapting its direct sales efforts with these labs for crown and bridge products and precious metals. (FOF 27, 31; DX 25). *Compare Gilbarco*, 127 F.3d at 1163. Moreover, the president of Ivoclar, a government witness, admitted that direct sales are an effective method of distribution that provides Ivoclar with "some advantages" over dealer distribution. (FOF 99).[8] Though Ivoclar twice considered selling through dealers over the last twenty

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8 Contrary to the government's characterization of the evidence (Br. 35 n.25), Mr. Ganley attributed Ivoclar's difficulties in selling teeth principally to their design. (Tr.1119-1120).

years, the trial court found that the advantages of direct distribution have caused Ivoclar to remain a direct seller. (FOF 99, 101, 106; DX 25).

Contemporaneous internal Dentsply business documents confirm the existence of the advantages of selling direct, including an analysis of whether Dentsply should take its tooth business direct and disassemble its dealer network. (FOF 112-25).[9] That analysis concluded that Dentsply was currently not in a position to abandon this channel because of circumstances that its rivals did not face. (FOF 118, 123, 128; GX 101 at DPLY-A 037309-10). The trial court credited this evidence, finding that direct sales are "in some ways, [an] advantageous method of distribution." (Law 26, 35; FOF 71-74).[10] This finding is confirmed by the court's recognition that all but one lab witness who testified at trial or by deposition preferred to buy teeth directly from a manufacturer (FOF 73), and the government offered no proof to the contrary. Indeed, the government's expert, Dr. Reitman, concurred that this evidence revealed that direct distribution is a "viable" method of distributing artificial teeth that allows "any artificial teeth

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9 Those business documents also recognized that Dentsply needed to offer price concessions to labs to counter those advantages. (GX 101, DX 460-A).

10 The government's effort to have this Court re-weigh this evidence (Br. 35-39) is improper. *Scully*, 238 F.3d at 506.

manufacturer [to] sell its teeth to any dental laboratory [] in the United States that it wants to." (FOF 71, Tr. 1687).

Similarly, the trial court found that non-Dentsply dealers represented an effective alternative to Dentsply's dealers. "Hundreds" of non-Dentsply dental dealers in the United States are available to and capable of selling rivals' artificial teeth, and many of these dealers "want to add artificial teeth as a product line." (FOF 54, 140). Rivals also use their own dealer networks. (FOF 129, 136, 139). Most significantly, Vita has distributed its teeth exclusively through a national dealer since at least 1968, twenty-five years before the announcement of Criterion 6. (FOF 33, 129). Its current national distributor, Vident, sells and distributes artificial teeth directly to dental labs from a single location in California and through a network of sub-dealers. (FOF 131, 133). Three of the grandfathered brands currently use non-Dentsply dealers to supplement their tooth offering through Dentsply dealers. (FOF 139). Although the law does not require this level of proof, the trial court also made findings that demonstrate that these other dealers were comparable to Dentsply's dealers. (FOF 129-47). For example, the presidents of Vident and Zahn Dental (Dentsply's biggest dealer) agree that their companies are in many ways very similar to each other. (FOF 135).

Finally, the government claims that the trial court applied an overly lenient and erroneous standard in assessing whether the rivals' use of alternative channels of distribution impaired their opportunities. Relying on the D.C. Circuit's *Microsoft* opinion, the government espouses that the proper standard under §2 asks whether alternative channels "'pose a real threat'" to Dentsply's maintenance of its alleged monopoly. (Br. 33, 57, citing *Microsoft*). According to the government, the alternative means of distribution do not permit Dentsply's rivals to "pose a real threat" to Dentsply, and the trial court would have reached that conclusion had it applied this standard. The government is wrong on both counts.

First, there is no such standard; the government materially misreads *Microsoft*. The D.C. Circuit considered the trial decision in *Microsoft* against the following factual backdrop. The Operating Systems market faced a significant entry barrier called the "application barrier" which the court concluded gave Microsoft monopoly power in that market. Plaintiffs argued that Netscape's Internet browser, if it reached a critical mass of users, could erode that barrier even though browser software was not part of the OS market. *Id.* at 53.

The D.C. Circuit held that trial evidence supported the trial court's finding that Microsoft's conduct with respect to browsers helped "keep usage of Navigator

[the browser] below the critical level necessary for Navigator or any other rival to *pose a real threat* to Microsoft's monopoly" in the OS market. 253 F.3d at 71 (emphasis added). The court simply observed that, since the evidence proved that Microsoft's conduct with *respect to browsers* prevented rivals from mounting a "real threat" in the OS market, that evidence certainly was sufficient to support a finding that the conduct harmed competition in the OS market. Integral to this conclusion is that Netscape's browser share needed to reach a minimum level in order to erode the application barrier. *Id.* at 55, 71. That unique theory of recovery is not present here.

Microsoft's holding on the attempted monopolization claim confirms this interpretation. Although agreeing that the exclusive contracts caused the requisite effect in ***the OS market*** to support the §2 monopoly maintenance claim, the court found that that same conduct was insufficient as a matter of law to impair rivals in ***the browser market*** in a manner that provided Microsoft a dangerous probability of acquiring a monopoly in that market. *Id.* at 80-83. Consequently, the standard that the government posits here is not legally cognizable.

Moreover, although this phrase from *Microsoft* is not the applicable standard, the trial court made findings here that alternative channels of distribution

in fact possessed that capability, stating, for example, that "direct distribution has the potential ability to deprive Dentsply (or any manufacturer employing dealers) of significant levels of business." (Law 12; FOF 71, 73, 81, 99-100, 243). The trial court also found that non-Dentsply dealers have the potential to deprive Dentsply of business. (FOF 129, 133, 136-39, 145-47). To argue that this does not equate with rivals using these channels being able to "pose a real threat" to Dentsply is wordplay. The trial court's findings satisfy even the incorrect legal standard that the government urges.

2. The Trial Court Correctly Found That Criterion 6 Does Not Tie Up Dentsply Dealers

The trial court found that Dentsply dealers are available to Dentsply's rivals notwithstanding Criterion 6, and thus Criterion 6 is not predatory for this independent reason. (Law 15, 29, 35). No contract obligates a dealer to continue distributing Dentsply teeth. (Law 15; FOF 20, 110). Thus, "dealers are free to leave Dentsply whenever they choose" and distribute competitive brands of teeth. (Law 15; FOF 110-11).

There is no merit to the government's attacks on these findings. First, the government claims that Criterion 6 is improper conduct notwithstanding the

potential for rivals to "steal" the dealers away because it prevents ***unfettered*** access to the dealers. (Br. 37). This is not the law. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1063 (8th Cir. 2000) (rejecting plaintiffs' theory that defendant's discounts in exchange for exclusivity created "golden handcuffs" in light of evidence that dealers were free to walk away from Brunswick's discounts at any time); *Roland Mach.*, 749 F.2d at 394-95.[11] As the trial court correctly concluded: "[t]he important point for purposes of this case is that a dealer could leave at any time if an attractive alternative became available." (Law 17, 29). Moreover, half of the eight rival manufacturers – the "grandfathered brands" – already distribute teeth through Dentsply's dealers. (FOF 40, 43, 367).

Second, the government erroneously argues that, given Dentsply's strong market position, Criterion 6 forces dealers to remain Dentsply dealers. (Br. 37-38). On this record, there is no basis for the government's assertion. The evidence established that, because Dentsply's dealers engage in vigorous intrabrand competition (FOF 67-70), many of Dentsply's dealers have only single digit shares of Trubyte tooth sales in the proximate area of their dealer location, so

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11 *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) is inapposite. (Br.38). *Lorain Journal* involved the exclusion of rivals from end-user customers.

that, if a dealer dropped Dentsply teeth for the teeth of a rival, it would actually *increase* its share of tooth sales in its local area. (DX 1674; FOF 82).[12] The government tries to rebut this evidence by arguing that no dealer has left Dentsply since it announced Criterion 6. But the trial court found that no dealer had done so because Dentsply's rivals have failed to offer a more attractive tooth at a better profit margin, as was the trial court's right and role as the fact finder. (Law 15-16, 31; FOF 70). Finally, the government did not introduce any evidence of a structural impediment that could serve to prevent a dealer from leaving Dentsply. In fact, Dentsply's generous return policy would facilitate a dealer's decision to eliminate its Dentsply inventory and replace it with the teeth of a rival. (Tr. 1941-42, 2167-68).

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12 For example, JB Dental located in California accounts for only 3.1% of all Trubyte sales in that state. (DX 1674). Consequently, JB could increase tooth sales by dropping Trubyte teeth for Vita and Ivoclar teeth: JB would trade 3.1% of Trubyte sales in California for approximately a collective 8% share of all artificial teeth sold in California (a level that equates to Vident and Ivoclar's combined market shares). (FOF 239; Tr. 3620-22).

3. The Government Failed To Prove That Criterion 6 Reflects Short-Term Economic Sacrifice By Dentsply

The record also contradicts the government's argument that the trial court was required to infer that Criterion 6 was "exclusionary." (Br. 29). Such an inference is not even permissible – much less required – unless the conduct reflects a short-term sacrifice that makes no economic sense for the defendant. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985); *LePage's*, 324 F.3d at 162.

The government's protestations to the contrary, this is a different inquiry than whether Dentsply had a procompetitive justification for Criterion 6 that would outweigh any demonstrated adverse effect on competition. (Br. 11-12, 27-28). The question whether a defendant's conduct has a procompetitive justification arises only after a plaintiff has made the *prima facie* case of monopoly power, exclusion and anticompetitive effect. *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993). Only if the plaintiff makes that proof does the burden shift to the defendant to show that its restraint brings procompetitive benefits to the market. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 (1993); *Brown Univ.*, 5 F.3d at 669. On the other hand, the question whether the

court should infer that conduct is predatory is part of the plaintiff's prima facie burden; it focuses on whether Criterion 6 was profit-maximizing for ***any*** reason besides the expectation that it would either drive competitors out of the market or prevent/delay market entry. *See Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986). Since the evidence at trial showed that Criterion 6 was in Dentsply's short-term and long-term economic interest, the inference that the government urges is not permitted and it certainly is not compelled by the trial court's findings that Dentsply had not proved a procompetitive justification for its conduct.

The genesis of Criterion 6 was profit maximization. Dentsply implemented Criteria 5 and 6 after Ivoclar recruited Frink Dental as a dealer in 1987. Frink agreed to help Ivoclar to convert dental labs from Dentsply teeth to Ivoclar teeth. (DX 10 at 4, Tr. 1034-36). Dentsply had been effective in converting labs itself and replacing their inventory of competitive teeth with Trubyte teeth. (Tr. 2573-75; DX 1580-C at DPLY 001884-92). As a result, Dentsply recognized that it was vulnerable to such conversions without a policy that precluded them. Dentsply's generous return policy, large dealer inventories, market position and complete reliance on dealer distribution made it uniquely susceptible to the possibility of conversion. Criterion 6 addressed all these vulnerabilities.

The government offered no proof that Criterion 6 represented a short-term sacrifice by Dentsply in any way. There was no evidence that administering the Dealer Criteria imposed a financial or manpower burden on Dentsply.[13] There was no evidence that Criterion 6 compelled Dentsply to forfeit profits or sales in the short- or long-term.[14] To the contrary, Criterion 6 was decidedly in Dentsply's short-term interest. Further, it was not unnecessarily restrictive; dealers were free to leave whenever they found an attractive alternative, and Dentsply permitted dealers to retain all brands that they carried at the time that it announced Criterion 6. (FOF 110-11, 175).

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13 The government points to the appointment of three dealers in the 1990s (Jan, Darby and DTS) as "proof" that Dentsply had more dealers than it needed. (Br. 11). The trial court, however, found that Dentsply did not keep more dealers than it needed (FOF 141), and the evidence shows that Dentsply required each of these dealers to demonstrate the ability to bring incremental business, as Criterion 5 required. (FOF 179 (Jan); Tr. 4120-22, 4144 (Darby); Tr. 1914-18 (DTS)).

14 In light of the substantial record favoring Dentsply, evidence that some dealers did not like Criterion 6 does not establish that the policy made no economic sense for Dentsply. There was no evidence that this reaction from some dealers translated to dental labs' dissatisfaction with Dentsply; thus it had no demonstrable economic impact on Dentsply.

C. The Trial Court Correctly Found That Criterion 6 Did Not Have An Actual Adverse Effect On Competition

It is well-settled that an exclusive dealing arrangement cannot cause an anticompetitive effect unless it forecloses rivals from a substantial share of end-users in the relevant market.[15] Thus, where the exclusive arrangement does not impair the rivals' ability to reach end-users, it can have no anticompetitive effect. *Tampa Elec.*, 365 U.S. at 327.

The trial court made numerous factual findings that the viability of alternative channels meant that there was ***no*** foreclosure. Again, Dr. Reitman concurred, stating Dentsply's rivals are "not foreclosed from a substantial share of [] labs." (FOF 71). Notwithstanding, the government wrongly argues that it need only prove that Criterion 6 had the ***tendency*** to "harm competition." (Br. 19, 33-35). This is simply wrong on the law. *E.g.*, *Tampa Elec.*, 365 U.S. at 327; *United States v. Visa, U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) ("competition is not

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15 Thus, a quantitative study of the number of outlets covered by the challenged arrangement, such as Dr. Reitman's, (Br. 34 n.23), is immaterial, without proof that a substantial share of the end-users is unreachable because of the conduct. Moreover, the evidence revealed Dr. Reitman's calculation as inaccurate (Tr. 1685), and the trial court justifiably accorded it no weight. Dentsply introduced evidence that established that the so-called "foreclosure rate" was zero, which the trial court credited. (FOF 71; Tr. 3628-29).

adversely affected if, despite an exclusive dealership agreement, 'competitors can reach the ultimate consumer of the product by employing existing or potential channels of distribution'") (citations omitted); *CDC Techs.,* 186 F.3d at 80 (holding that "outlet foreclosure" cannot establish adverse effect in the face of undisputed evidence of direct sales and alternative distributors); *Gilbarco*, 127 F.3d at 1163 (holding there was no adverse effect as a matter of law where "[c]ompetitors are free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors"); *U.S. Healthcare,* 986 F.2d at 596 (holding that the number of doctors tied to the defendant HMO by the exclusive agreement was "significant," but that there was no anticompetitive effect since the rivals could easily bid for them, or attract new doctors to its new HMO); *Seagood*, 924 F.2d at 1572-73 (no anticompetitive effect provable where plaintiff could attract potential alternative distributors); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1233 (8th Cir. 1987) (anticompetitive effect "neither substantial nor even apparent" in light of the evidence of direct sales and potential alternative distributors).

The trial court also made numerous factual findings supporting the conclusion that the government failed to prove that Criterion 6 adversely affected competition in the artificial tooth market. The trial court found that, during the

pendency of Criterion 6 there was: (i) no reduction in intrabrand competition for Trubyte teeth among Dentsply dealers (FOF 67, 69); (ii) no reduction in the quality of artificial teeth that Dentsply manufactured (FOF 155-68); (iii) no reduction in output (FOF 18-19); (iv) Dentsply did not limit its innovation in the market (FOF 155-68); (v) a drop in Dentsply's market share (FOF 243); (vi) no reduction in consumer choice (FOF 70, 85); (vii) no blocked or delayed entry into the market (FOF 47, 52, 136, 243); (viii) no artificial suppression in rivals' promotional efforts (FOF 244-48, 257-68); and (ix) no artificial increase in the price of teeth. (FOF 224-25). These findings provide substantial support for the trial court's conclusions that Criterion 6 does not adversely affect competition. (Law 11, 35).

On appeal, the government presents a two-pronged argument attacking the trial court's finding that Criterion 6 was competitively neutral. First, the government attacks findings (vii) through (ix) above as being clearly erroneous.[16] Next, it asserts that the trial court applied too strict a causation standard in its effects analysis. (Br. 32-39). Both arguments are meritless.

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16 The government does not challenge the validity of findings (i) through (vi).

1. The Trial Court's Rejection Of Predictions Of Effect In Favor Of Contradictory Real World Evidence Was Not Clear Error

Unable to demonstrate that Criterion 6 actually prevented Dentsply's rivals from competing for tooth sales, the government speculates that, without Criterion 6, tooth prices *would* drop, rivals' promotion and competition *would* increase and Dentsply's market share *would* fall. (Br. 20, 39). But, after losing a trial on the merits, the government must show this Court that no credible evidence supports the trial court's finding that Criterion 6 did not produce an adverse effect on competition; simply pointing to evidence to the contrary is insufficient. *See Scully*, 238 F.3d at 506. The government sidesteps this obligation by mischaracterizing its evidence of what the world would be like without Criterion 6 as uncontroverted and by complaining that the trial court ignored it.[17] (Br. 16,

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17 The government contends that the trial court ignored this "evidence" because the court did not expressly reject some of these predictions. (Br. 16, 40). The law imposes no such obligation. *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 55 (1st Cir. 1998) (trial court "was not required to respond individually to each evidentiary or factual contention made by the losing side."); *W. Pac. Fisheries v. S.S. President Grant*, 730 F.2d 1280, 1285 (9th Cir. 1984) ("A judge is not required, in making findings, to mention every item of evidence and either adopt it or reject it. We presume that the judge considers all of the evidence, and relies on so much of it as supports the finding and rejects what does not support the finding, unless the judge states otherwise."). Even a cursory view of the trial court's decision reveals that the court reviewed and considered Dr. Reitman's testimony. (FOF 55, 71, 76, 237-39, 305, 337, 344-63).

39-48). However, what the government describes was neither uncontroverted nor ignored by the trial court. Most of it was not even evidence.

Foremost is the government expert's opinion that "prices will be lower in the marketplace if Dealer Criterion 6 is removed." (Tr. 1528-29). But this statement is governed by this Court's directive that an expert opinion on any issue, let alone an ultimate one, not founded on evidence is inadmissible. *See generally Fedorczyk v. Caribbean Cruise Lines,* 82 F.3d 69, 75 (3d Cir. 1996) (expert's opinion not based on any direct or circumstantial evidence is speculative, without foundation and inadmissible); *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1275 (3d Cir. 1995) (finding that expert's opinions "standing alone ... are insufficient to support the finding of actual damage"); *Dobrowlsky v. Califano*, 606 F.2d 403, 410 (3d Cir. 1979) (administrative law judge's finding, when based on an expert's "bare conclusions on th[e] ultimate issue," is "not founded on substantial evidence" and may not be affirmed by a reviewing court).

At trial, when the government asked Dr. Reitman the basis for this prediction, he did not refer to any evidence; he merely stated "the answer is economic analysis . . . . [B]ecause the brands are available through the same network, consumers become more price sensitive in response. And the firms have

an *incentive* to give up prices." (Tr. 1692 (emphasis added)). Although the government alludes to factual material that Dr. Reitman reviewed, Dr. Reitman never identified the evidence that served as the basis for this prediction.[18] That Dr. Reitman says prices would drop does not make it so. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *In re TMI Litig.*, 193 F.3d 613, 682-83 (3d Cir. 1999). Because Dr. Reitman's guesswork lacked an identifiable factual basis, it was entitled to no weight. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (holding that expert testimony could not sustain a jury verdict since the opinion was "not supported by sufficient facts to validate it in the eyes of the law," and noting that "[e]xpert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.").

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18 Dr. Reitman did rely on the inadmissible and untrustworthy lab survey. *See supra* at 25. On appeal, the government points to testimony from Dr. Marvel as confirmation. (Br. 40-41). The trial court considered, but did not rely on Dr. Marvel's opinion. Instead, it chose to afford more weight to contradictory "real world" evidence, which is its right as the fact finder. *See Nordhoff Invs., Inc. v. Zenith Elec. Corp.*, 258 F.3d 180, 191 (3d Cir. 2001) ("[C]ourts have broad discretion not only to admit expert witnesses, but also to weigh their testimony"); *United States Steel Corp. v. Occupational Safety & Health Review Comm'n*, 537

Moreover, this prediction did not account for substantial contradictory record evidence. When Ivoclar recruited Frink Dental to become an Ivoclar tooth dealer, Ivoclar instituted price increases across all of its tooth lines: Ivoclar recognized that "it would need to share its profit margin with Frink, and thus, in order to maintain profitability Ivoclar needed to increase its prices." (FOF 101a). In 1997, Vident analyzed the feasibility of adding a large Dentsply dealer as a sub-dealer for Vita teeth. (FOF 107). Vident expected its profit margin to decrease because of the necessity of giving the dealer a profit margin and volume discounts to provide the necessary support. (FOF 107-08). As a result, Vident could not decrease the suggested prices on Vita teeth if it added a national sub-dealer. (FOF 108).

As the trial court observed, Dentsply's internal analysis also bears this out. Dentsply calculated that the removal of dental dealers from the distribution chain would generate a significant cost savings that Dentsply could share with dental labs in the form of lower prices. (FOF 121; GX 101). Similarly, one of the principal reasons that virtually all lab witnesses gave for their preference to

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F.2d 780, 783 (3d Cir. 1976) ("Expert testimony need not be accepted even if uncontradicted").

purchase teeth directly from Dentsply was the expectation that they would receive lower prices. (FOF 81).

Dr. Reitman's prediction is also at odds with the pricing conduct of the grandfathered rival brands sold by Dentsply dealers. (FOF 40, 43, 139). For these brands, a world without Criterion 6 does exist; they have access to the allegedly "preferred" Dentsply dealer network. (FOF 367). Thus, this is the precise competitive model that the government posits: dealers that sell both Dentsply and rival teeth. Yet the government presented no evidence that price competition between Dentsply and the grandfathered brands differed materially from the competition among Dentsply and its remaining rivals. Austenal raised the suggested lab price of its premium artificial teeth 25% from January 1995 to January 1999. (Tr. 1358). The episodic price competition by Myerson in Connecticut and Southern California that the government references is countered by the fact that Dentsply's biggest national dealer, Zahn (FOF 78), carries Myerson's teeth nationwide. The government did not prove that Myerson competed on price with Dentsply with respect in its sales to Zahn, either in the prices that Myerson charged Zahn or the lab prices that it suggested to Zahn.

Real-world evidence likewise contradicts the government's predictions that rivals' promotion and competition would increase and Dentsply would lose market

share without Criterion 6. Again, there is no proof that the grandfathered brands compete any more vigorously with Dentsply. For example, these rivals have not invested in the promotion of teeth. Between 1990-93, Myerson/Austenal used no outside sales representatives to promote teeth, and in 1994 Austenal used only one or two representatives to sell all products, including teeth. (FOF 41, 257). As of 2002, Myerson utilizes only five sales representatives to sell its products. (FOF41). Second, these rivals have not invested in the marketing of artificial teeth. (FOF 257).

Dr. Reitman's economic theory does not account for these realities, which contradict his opinion. This failure presents an independent basis for the trial court rejecting his prediction. *See, e.g., Concord Boat*, 207 F.3d at 1056-57; *In re TMI Litig.*, 193 F.3d at 683 (rejecting expert's ultimate conclusions "because they fly in the face of reality").

Finally, the government's attack on the trial evidence that, without Criterion 6, Dentsply's market share would not fall (FOF 122) is not correct. (Br. 41-42). The government claims that two Dentsply executives predicted that Dentsply

would lose market share without Criterion 6.[19] But both witnesses spoke of a loss of market share only at the *dealer* level. (Tr. 3513 ("between the manufacturer and the dealer, yes, I believe some sales of those competitive teeth would occur and that would impact my market position"); Tr. 1718 (believing "dealers would have added rival lines of teeth" if Dentsply did not enforce Criterion 6)). But as the trial court recognized, the relevant inquiry in this case is whether Dentsply would lose market share at the lab level, and Dentsply expected to gain share with laboratories by selling teeth directly to them. (FOF 122). The government's sole proof that rivals' shares would increase without Criterion 6 was, again, the inadmissible survey. The real world facts, however, established that, even with Criterion 6, Dentsply's unit share of the tooth market has declined due to competition. (FOF 243).

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19 The government argues that Christopher Clark made the same prediction. (Br. 41). But Mr. Clark's prediction flowed from his belief that, if Dentsply dealers carried rival teeth, they would fill lab orders that Dentsply's promotions generated with competitive teeth. (Tr. 2584). The trial court found, however, that dealers do not engage in such conduct and therefore implicitly rejected the belief underlying this prediction. (FOF 345).

2. The Trial Court Did Not Commit Clear Error When It Found That Criterion 6 Was Not Responsible For Rivals' Market Shares

There is no merit to the government's criticism that the trial court's finding that Criterion 6 was not responsible for its rivals' market shares is "illogical and largely irrelevant." (Br. 45). The finding is grounded in the evidence and effectively undercuts the government's *prima facie* case.

First, the government asserts that the trial court placed too much emphasis on these findings. (Br. 44-48). But at trial the government argued, relying once again on the inadmissible survey, that Criterion 6 adversely affected competition because Vita and Ivoclar would have larger market shares without Criterion 6. (Br. 39, 41-42). Lacking any direct, admissible evidence to support this claim, the government instead inferred a causal link between Criterion 6 and those rivals' shares by attempting to depict Vita and Ivoclar as efficient market participants. When the evidence proved otherwise, the trial court rejected the inference that Criterion 6 had any role in those rivals' shares. (Law 16, 27; FOF 244-68).

Further, contrary to the government's characterization, the trial court did not find these rivals "incompetent." (Br. 31, 44-45). Incompetence presumes that a rival was ***attempting*** to compete but persistently failed. The trial court found that

these rivals made deliberate business decisions to focus their respective energies on other product lines to the detriment of their tooth lines. (Law 15-16, 27, 31; FOF 244-48, 257-68). Conveniently, the government now argues that, without access to Dentsply's dealers, it was "perfectly rational" for Dentsply's main rivals "to focus their competitive energies elsewhere." (Br. 47-48). The government called the senior executives of both Vident and Ivoclar as witnesses. Both had run their respective companies since long before Dentsply implemented Criterion 6. The government did not ask them whether their decisions to emphasize products other than teeth were caused by Criterion 6, and therefore is precluded from engaging in speculation as to that supposed causal relationship. Indeed, as Ivoclar's new tooth line illustrates, when Dentsply's rivals participated in the market, those efforts bore fruit, notwithstanding the existence of Criterion 6.

Finally, there is no merit to the government's skewed view that the trial court's conclusion regarding Criterion 6 is "ultimately implausible and legally unsound." (Br. 29-32). The key to this hyperbole is the government's erroneous assertion that Dentsply's sole purpose for Criterion 6 was to "foreclose competition." (Br. 32). The trial court found that the purpose of Criterion 6 was to block competitive distribution points. (FOF 216). The court did not find that

the purpose was to prevent rivals from competing in the market. (FOF 216-18).[20] Unlike the government's mischaracterization, these findings are consistent with the voluminous evidence that Dentsply was aware that direct-selling rivals offered labs a service that they desired and that Dentsply – being structurally unable to provide that service – had to compensate in other competitive ways. (FOF 279). Further, as explained above, this desire was in Dentsply's short-term economic self-interest.

Once this evidence is put in the proper perspective, the rest of the government's argument cannot be credited. Dentsply's rivals did not mistakenly believe that they needed the same dealers (Br. 31): Ivoclar professed a preference for direct sales (FOF 99-106); Vita chose, 24 years before the existence of Criterion 6, to deal exclusively through a single nationwide dealer (currently Vident) (FOF 129); and most of the remaining rivals are grandfathered brands (FOF 139); no lab testified that it would not buy the rivals' teeth because Dentsply's dealers did not carry them; and most labs preferred to buy direct because of the observable cost savings. (FOF 72-73, 81).

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20 Notwithstanding, evidence of intent is insufficient in and of itself. *See Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1199 (3d Cir. 1995). As the trial court observed, however, quoting the government: "'bad' intent alone does not establish that conduct is anticompetitive where the conduct ***appears objectively incapable of harming competition.***" (Law 35 (emphasis added)).

Thus, a dispassionate perspective of the court's conclusions presents the following world:

1. a declining market with annual sales of less than $50 million, representing a small fraction of the market participants' respective total annual business;

2. where selling direct to the end-user is comparable to, and in some ways better than, distributing through dealers;

3. where Dentsply uses less than 10% of the available dental products dealers to distribute its teeth;

4. where Criterion 6 involved no short-term sacrifice by Dentsply;

5. where Dentsply continued to be the market leader in innovation and promotion through the application of Criterion 6;

6. where participants' respective product lines each had advantages and disadvantages over the other;

7. where rivals made deliberate decisions regarding their sales, promotion and design strategies that prevented them from fully exploiting their respective distribution systems; and

8. where no evidence exists that Criterion 6 artificially raised prices, reduced output, delayed entry or restricted consumer choice.

It is this world upon which the trial court's reasoned decision is founded.

III. DENTSPLY DOES NOT HAVE MONOPOLY POWER

Standard of Review: This Court must review the trial court's finding that Dentsply lacks monopoly power in the market for artificial teeth for clear error. (Law 25-31; FOF 71-74, 110-11, 224-25). *Miller,* 334 F.3d at 339; *Weiss v. York Hosp.*, 745 F.2d 786, 827 (3d Cir. 1984).

A. The Trial Court Applied The Correct Legal Standard

The threshold to any §2 monopolization claim is proof that the defendant possesses monopoly power, which "is the power to control prices or exclude competition." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). As the trial court correctly held, and the government concedes on appeal (Br. 49), the "inquiry does not end with proof of high market share. The DOJ must also prove Dentsply has the power to control price or exclude competition." (Law 24). *See, e.g., Handicomp, Inc. v. United States Golf Ass'n*, 2000-1 Trade Cas. (CCH) ¶72,879, at 87,539 (3d Cir. 2000) (evidence of 75% of the market

"alone is not enough to provide monopoly power, because we must determine whether [the defendant] excluded competition"); *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129, 141 (3d Cir. 1998).

Applying this unquestioned legal standard, the trial court correctly determined that the government "ha[d] failed to prove that Dentsply's actions have been or could be successful in preventing "new or potential competitors from gaining a foothold in the market." (Law 35, *quoting LePage's*). The court also found that the government provided no evidence that Dentsply has established a market of supra-competitive pricing. (Law 30; *see supra* at 15 and *infra* at 61-65). These findings enjoy substantial support from credible evidence.

B. Dentsply Lacks The Power To Exclude Competition From Dental Laboratories

In order to demonstrate the ability to exclude competition, "[t]he plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output." *Handicomp*, 2000-1 Trade Cas. at 87,539 (citations omitted). In *Handicomp*, this Court concluded that there were no barriers to entry in the handicap data processing market. *Id.* at 87,540. "Absent this *sine qua non*," this Court held, "there is no

violation of the Sherman Act." *Id.*; *e.g., Barr Labs.*, 978 F.2d at 113-14 (no §2 violation as a matter of law where record lacked evidence of any significant entry barriers).

Here, like the plaintiffs in *Handicomp* and *Barr Labs*, the government failed to establish that there are any significant entry barriers to the artificial tooth market. (Law 28-29; FOF 46-52, 136-38, 243). The government also failed to prove that Dentsply's existing rivals lack the capacity to expand their output. (FOF 31, 251-52, 254).

1. The Trial Court's Finding That Criterion 6 Is Not An Entry Barrier To The Artificial Tooth Market Was Not Clear Error

At trial, the government argued that Criterion 6 blocked the entry of competitors into the artificial tooth market.[21] The court disagreed, finding that Criterion 6 itself does not constitute a barrier to entry because viable, alternative means to access the U.S. tooth market exist. (Law 29). Rivals can reach the laboratories through several distribution channels. (*See supra* at 9-12, 26-31). In

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21 The government did not argue that the market had structural barriers that prevented entry.

addition, Dentsply's rivals have the potential to "steal" a Dentsply dealer by offering a superior product at a lower price. (*See supra* at 12, 34-36).

The record here is similar to the record that this Court faced in *Barr Labs*. There, defendant Abbott had exclusive dealing arrangements with reputedly the "most powerful and most price-sensitive buyers in the market." 978 F.2d at 103. But these arrangements left rival drug manufacturers with two other channels through which to distribute their products: (1) direct sales to independent pharmacies; and (2) sales to wholesalers who resell to pharmacies. Although Abbott's contracts tied up, in some fashion, ten of the largest warehouse chain drugstores, this Court found that undisputed evidence that six new manufacturers entered the market through these alternative channels precluded a finding that significant barriers barred entry to the market; this obviously included Abbott's arrangements. *Id.* at 103-04, 114-15. Similarly, in *Microsoft*, Microsoft had "tied-up" the two "most efficient channels" for distributing browser software. Notwithstanding, the court found no evidence of barriers to entry in the browser market and reversed the trial court's attempted monopolization verdict. 253 F.3d at 70, 82-84. In this case, given the availability of alternative channels of distribution, Criterion 6 cannot, as matter of law, constitute an entry barrier.

The trial court's finding that Criterion 6 is not a significant barrier to the market is grounded on two recent entrants. (FOF 46-52). Heraeus Kulzer has manufactured and sold teeth in Europe since the 1960s. (FOF 46). However, European tooth moulds and shades differ materially from those preferred in America. (FOF 4, 249, 251). Heraeus Kulzer thus developed a tooth line based on U.S. preferences and entered the U.S. in 2000. (FOF 46). In just two years, Heraeus Kulzer has achieved $1.2 million in sales, placed over 100 tooth consignments with dental laboratories, and now has approximately 800 different lab customers for its JelDent teeth. (FOF 49-51). Heraeus Kulzer continues to expand its tooth offerings, introducing a new line of teeth in February 2002. (FOF 46). Another manufacturer, Schottlander, began to sell Enigma teeth in the U.S. in January 2001. (FOF 52, 136). In 2002, Leach & Dillon anticipated growing sales of Enigma teeth by at least seven-fold by the end of the year. (Tr. 4094-96). And Lincoln's sales of Enigma teeth have doubled in two years. (FOF 138).

The government asserts that these entries are immaterial because, in the government's opinion, they are not "competitively significant." (Br. 48, 57-58, 59). The government's dismissal of these entries is wrong on the law and the evidence. The absolute size of an entry is not dispositive, particularly where the entry affects the defendant. *Barr Labs.*, 978 F.2d at 114 ("continued entry of

competition, albeit with small initial market share shown on this record, indicates that Abbott's position is subject to significant potential erosion.").[22] As the trial court found, relying on *LePage's*, the government failed to prove that Dentsply's actions have been or could be successful in preventing new or potential competitors from gaining a foothold in the market. 324 F.3d at 159.

Here, the evidence demonstrated significant growth of these entrants in the past two years. Dr. Reitman estimated Heraeus Kulzer's market share to be almost half of Vita's share, and Vita has been in the market for over 30 years. (FOF 129, 239). Additionally, between 2000 and 2001, Dentsply's unit share of the market declined 4.2% in part due to the entries of Heraeus Kulzer and Schottlander. (FOF 243). The uncontroverted evidence shows that Dentsply offered price concessions

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22 The cases that the government cites are all procedurally distinct and thus inapposite. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1442 (9th Cir. 1995) (viewing the evidence in the light most favorable to plaintiff, expert's affidavit regarding "significant" entry barriers was sufficient to create a genuine issue for trial on issue of market power, despite evidence of entry of "two small rivals"); *Oahu Gas Serv., Inc. v. Pac. Res. Inc.*, 838 F.2d 360, 367 (9th Cir. 1988) (viewing the evidence in the light most favorable to plaintiff, a trier-of-fact reasonably could find that the evidence of two entrants did not negate the inference of high entry barriers); *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 969-71 (10th Cir. 1990) (upholding jury's verdict on plaintiff's §2 claim based in part on testimony that defendant's only real competition would come from alternative delivery systems, a channel the defendant had inhibited hospitals from pursuing and which gave defendant control over pricing).

to laboratory customers in response to its lost sales to these new rivals. (FOF 243; *compare* DX 1213 *with* DX 101). The court's reliance on this evidence to support a finding that Criterion 6 did not bar entry was not clear error.[23]

2. Dentsply's Rivals Have The Capacity To Expand Output

Existing tooth rivals also have expanded their positions in the tooth market, or have the capacity to do so. Ivoclar, despite having a direct-sales only distribution system, has invested substantial sums in new tooth lines. In January 2002, Ivoclar expanded its tooth offering with two new lines of teeth that feature American moulds. (FOF 251). These new lines compete directly with Dentsply's premium teeth and dental laboratories have received them well. (FOF 251-52). In the first year alone, Ivoclar projected that its sales of these two lines would increase its market share by 10%. (FOF 252). Ivoclar has plans for further, immediate expansion; it intends to introduce a line of "Dentsply Knock-off" teeth into the U.S. market and a line of teeth that better match the industry standard

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23 Thus, the government's mischaracterizations of Odipal and "Ortholux" teeth (Br. 56-57) amounts to no more than an effort to re-argue the evidence. The government did not produce any evidence that dental labs cannot purchase these teeth. To the contrary, Uhler Dental Supply, Inc. sells Odilux and Ortolux teeth. http://www.uhlerdental.com. In addition, Unidesa Odi exports dental pieces to the

shade guide. (FOF 254). Dr. Reitman agreed that Criterion 6 has not restrained Ivoclar's efforts to expand its product line. (Tr. 1594).

Mr. Swartout of Myerson testified that Myerson's Trinidad plant has "the capability of producing three times as many teeth as we do today, without any additional investments in capital." (Tr. 1320). There is no evidence that Myerson could not expand output to accommodate an increase in demand if Dentsply charged supra-competitive prices.

The government is silent on this evidence, which forms an independent basis to defeat a claim of monopoly power. *See Int'l Distribution Ctrs. v. Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir. 1987) (entry into market by one new competitor and expansion into market by several existing competitors sufficient to find lack of barrier to entry) (*cited approvingly in Barr Labs.*, 978 F.2d at 113).

C. Dentsply Lacks The Power To Control Prices

The trial court determined that the government "failed to prove that Dentsply controls prices" because "Dentsply teeth are generally priced between Vident and Ivoclar teeth." (Law 30; FOF 224). The evidence showed that since

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United States. http://www.unidesa-udi.com. Ortholux is a curing light

its introduction in 1996, Dentsply has priced its Portrait line midway between Vita's and Ivoclar's premium tooth lines. (FOF 224). Since 1992, Dentsply has priced its Bioform tooth line at or below Vita's and Ivoclar's hardened plastic teeth. (FOF 225). The evidence established that Vita, not Dentsply, had the highest tooth prices. (DX 399 at 26).[24]

Dentsply also has effectively reduced the price that laboratories pay for Trubyte teeth in response to the price competition from its competitors, thus refuting the government's representation to the contrary. (Br. 59). In the early 1990s, Vident and Ivoclar instituted discount programs with large lab customers. (Tr. 2848-50, DX 60). Dentsply reacted with its own program, which offered volume rebates to these same customers. (Tr. 2849-50). As described above, Dentsply also has increased price rebates in response to the entries of Heraeus Kulzer and Schottlander in 2000. (FOF 243).

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manufactured by 3M, not a brand of teeth.

24 The government introduced no evidence at trial comparing the prices in the market's economy segment. It relies entirely on the testimony of Dr. Marvel to argue that "Dentsply charges a premium substantially higher than its rivals" on economy teeth. (Br. 5, citing FOF 343(b)). But Dr. Marvel merely stated that he "believe[s] [Dentsply has] somewhat of a premium for the economy teeth, but it's difficult to get the direct price information" from rivals in this case. (Tr. 3734-35).

The government challenges the court's finding on Dentsply's lack of price control in four ways. Each attack requires reassessing credibility and reassigning weight, a task that the standard of review forbids. The first attack employs selective recall: the government argues that Dentsply has created a "price umbrella" under which rivals set their prices. (Br. 53). This argument relies completely on the recollection of a former Dentsply Product Manager. (*Id.*). Mr. Turner's recollection is refuted by contemporaneous price lists. (DX 511-13).[25] Significantly, the government did not establish through any of the rivals that it presented as witnesses that those rivals price under Dentsply's purported price umbrella. The government also did not establish a downward demand curve that is indicative of an umbrella, *i.e.*, that the rivals could not generate an incremental sale by reducing their prices. In fact, the evidence established the opposite. (FOF 224-25; Tr. 3575).

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25 The government also relies on Mr. Turner to prove that "Dentsply has not set its own prices by referencing the prices of competitors." (Br. 50, citing to FOF 226). The court made no such finding. (FOF 228). In actuality, Mr. Turner stated that Dentsply "looked at everyone's prices . . . to be aware what the marketplace was doing." (FOF 228). Dentsply also consulted the consumer price index for medical and dental materials. (FOF 227). This evidence is materially different than that in the *Microsoft* case. *Compare Microsoft*, 253 F.3d at 58.

Next, the government attempts some sleight of hand, claiming that the pricing comparison is "incomplete and insufficient." (Br. 52). As the plaintiff, the government bore the burden of proof on Dentsply's ability to control prices, and any incompleteness inures to its detriment. *See, e.g., Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 749-50 (3d Cir. 1996); *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1391 n.3 (7th Cir. 1993). Second, the government focuses on prices to dealers, but the only relevant pricing is what the end-user labs paid for the teeth. Dentsply's suggested prices to labs were lower than those of it rivals throughout the relevant time period.[26] The government's price chart (Br. 53, n.34) is meaningless. The relevant price is the lab price, not what the dealer pays. Further, the government's complaint about Dentsply using its MSRP inures to the government's benefit; there was no evidence that teeth are sold over MSRP, although there was evidence that labs paid less than MSRP. (FOF 67, 70). Any Dentsply sale below MSRP would widen the gap between Vita's lab prices and Dentsply's lab prices.

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26 Dr. Marvel did not testify, as the government represents, that the pricing charts are "remotely useful." (Br. 52). Rather, he testified that the "only prices that we have that are even remotely useful" are the various retail prices. (Tr. 3576). The government ignores Dr. Marvel's testimony that the prices of Ivoclar and Vident teeth "have marched up above the equivalent Dentsply prices time and time again" and have "popped holes" in the alleged Dentsply price umbrella. (Tr. 3575).

Third, the government asserts that the trial court committed clear error in finding that the government did not show Dentsply's margins "to be high relative to any other tooth manufacturer." (Law 30). But the government did not introduce evidence of the gross profit margins of any manufacturer except Myerson.[27] As a manufacturer with access to Dentsply's dealers, that margin could not have been affected by Criterion 6, but could well be the result of Myerson's under-utilized plant. Finally, the government offers nothing to rebut the evidence supporting the trial court's finding that high margins "are expected in a market with substantial pre-sale promotion" such as the artificial tooth market. (FOF 233). In short, the trial court's finding that the government did not show Dentsply's margins to be higher than its rivals' margins is brutally accurate.

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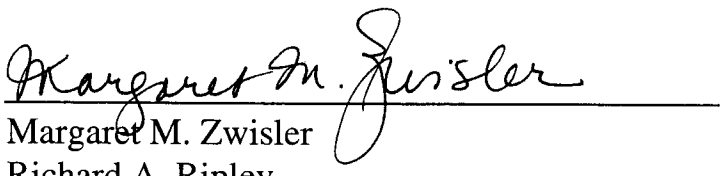
27 Vident's margin is immaterial since it is a reseller, not a manufacturer.

CONCLUSION

No matter how the government seeks to spin it, its appeal asks this Court to abandon a thoughtful, 165-page decision and substitute that judgment with this Court's own assessment of a four-week trial record. That offends the deference that this Circuit affords to finders of fact. Each of the factual findings enjoys the support of substantial, credible evidence, and the trial court's legal analysis is flawless. As a consequence, the judgment of the trial court should be affirmed.

Dated: March 19, 2004

Respectfully submitted,



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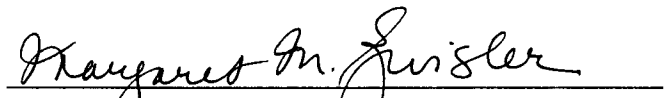
CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: March 19, 2004



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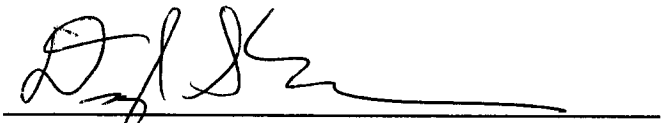

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing *Brief of Defendant-Appellee Dentsply International, Inc.* were served this 19th day of March, 2004 via courier and electronic mail upon:

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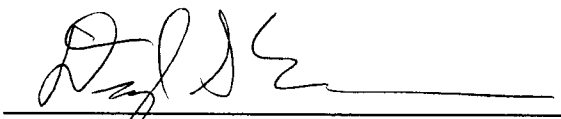
I also hereby certify that a true and correct copy of the foregoing *Brief of Defendant-Appellee Dentsply International, Inc.* was mailed this 19th day of March, 2004 via Federal Express to the clerk of this Court.



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