IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-5 MMS
	)	
DENTSPLY INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	
	)	
	)	

Carl Schnee, Esquire, United States Attorney, and Judith M. Kinney, Esquire, Assistant United States Attorney, United States Department of Justice, Wilmington, Delaware; Of Counsel: Mark J. Botti, Esquire, William E. Berlin, Esquire, Jon B. Jacobs, Esquire, Sanford M. Adler, Esquire, Frederick S. Young, Esquire, Dionne C. Lomax, Esquire, and Eliza T. Platts-Mills, Esquire, United States Department of Justice, Antitrust Division, Washington, D.C.; attorneys for plaintiff.

James P. Hughes, Jr., Esquire, and John W. Shaw, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; Of Counsel: Margaret M. Zwisler, Esquire, Richard A. Ripley, Esquire, Kelly A. Clement, Esquire, and Eric J. McCarthy, Esquire, of Howrey & Simon, Washington, D.C.; attorneys for defendant Dentsply International, Inc.

MEMORANDUM OPINION
ON DEFENDANT'S MOTION FOR SANCTIONS

Argued: February 1, 2000
Dated: May 10, 2000
Wilmington, Delaware

SCHWARTZ, Senior District Judge

I. Introduction

On January 5, 1999, the United States Department of Justice ("United States" or "government") filed its complaint against Dentsply International, Inc., ("Dentsply"), seeking equitable and other relief for Dentsply's alleged continuing violations of §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act, *inter alia* through exclusive dealing arrangements that effectively deny effective distribution outlets to competing manufacturers of prefabricated artificial teeth. Docket Item ("D.I.") 1. Prior to filing the complaint, the United States commissioned a survey of dental laboratories ("the survey") assessing their preferences, including distribution channels, regarding the market for prefabricated artificial teeth. The survey was designed, conducted, and analyzed by government experts.

Dentsply has filed a motion, pursuant to Fed. R. Civ. P. 37(c), seeking an order precluding the United States from using written responses to a dental laboratory survey conducted under the supervision of government experts, or information derived therefrom, in this litigation. As an alternative sanction, Dentsply seeks an order allowing it sixty days for additional discovery of dental laboratory survey respondents, conducted at the government's expense. Dentsply contends that such sanctions are warranted because the United States failed to identify the individuals who provided responses to the

survey and to provide the written survey responses as part of its initial disclosures under Fed. R. Civ. P. 26(a)(1).

For the reasons set forth below, the Court will deny Dentsply's motion for sanctions, including its request to extend discovery.

II. Factual Background

A survey expert retained by the United States, in consultation with other government survey and economic experts, arranged for and supervised a survey of dental laboratories[1] that purchase prefabricated artificial teeth for use in making dentures. The survey assessed, among other things, dental laboratories' preferences for possible means of distributing artificial teeth and their sensitivity to the relative prices of different brands of artificial teeth. D.I. 174, A-56-A-69. There are three separate documents associated with each response to the survey, an initial "screener," form completed by a survey organization interviewer based on a telephone interview and two questionnaires sent to each laboratory respondent, who provided handwritten responses to and mailed the questionnaire back to the survey organization. *Id.* The "screener" identified, *inter alia*,

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[1] The United States' complaint states that almost all artificial teeth sold in this country are used by dental laboratories to make dentures. Although some manufacturers of artificial teeth sell their product directly to dental laboratories, dealers (also referred to in the complaint as "dental laboratory dealers," "independent dealers," and "independent distributors") are the primary channel through which dental laboratories purchase artificial teeth.

each respondent's name, dental laboratory, address and telephone number. *Id.* at A-52-55. The first mailed questionnaire requested information on laboratory characteristics; relationships with dealers; awareness of artificial tooth brands, usage, and purchase history; relative importance of laboratories and dentists in selection of artificial teeth; laboratory preferences with regard to the importance of selected brand or line attributes; and laboratory preferences with regard to the importance of selected dealer attributes. *Id.* at A-56-61. The second questionnaire asked respondents' to indicate how their relative purchase of various brands/lines of artificial teeth would vary based on variations in the price of particular brands/lines and the source from which the teeth are obtained (i.e., local dealer, mail-order dealer, or directly from the manufacturer. *Id.* at A-62-69.

The survey was sent to a sample of 594 dental laboratories, and 274 usable responses were received.[2] The survey was designed, conducted, and analyzed by economic and survey experts. These experts will likely be witnesses for the United States at trial in this matter, and the United States has indicated it expects to offer the survey as substantive evidence and as a basis for expert opinion. An independent survey organization conducted the survey, and survey participants did not know the purpose of the survey, who sponsored it, or that it was related in any way to litigation. The United

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[2] Although the Court has no precise numbers regarding the universe of dental laboratories in the country from which the survey was drawn, estimates appear to range from 8,000 to 12,000. D.I. 61, at 18 n. 11; D.I. 205, at 43, 94.

States did not permit its attorneys or potential testifying economists to learn the identities of the specific dental laboratories that were either screened for the survey or which ultimately provided responses. The surveys responses were sealed and marked confidential until compiled for production to Dentsply on December 7, 1999.

Among its written Rule 26(a)(1) disclosures, served on February 17, 1999, the United States listed 184 individuals, of which 85 were associated with dental laboratories, as individuals who may have discoverable information related to disputed facts alleged with particularity in the pleadings. D.I. 174, at A-1, -21-31. As part of its Rule 26(a)(1) initial disclosures, the United States did not identify the dental laboratory survey respondents, nor did it identify any documents associated with a dental laboratory survey when identifying categories of documents in its possession. *Id.*, at A-35-36.

The existence of the survey was made known to Dentsply early in the discovery process. The United States' March 4, 1999 response to Dentsply's First Request for Documents included a general objection to the production of "expert material, including but not limited to survey materials." D.I. 185, B-12 ¶ 7. On February 18, 1999, Dentsply served its Second Request for Documents and First Request for Interrogatories, seeking, among other things, interview notes, memoranda, signed or adopted statements, and verbatim statements of the 184 individuals the United States had identified as individuals

likely to have discoverable information.[3] D.I. 174, at A-45-51. The United States objected to the requested production primarily on the ground of attorney work product, and also objected to production of "documents or answers that include expert material, including but not limited to survey materials," as premature. *Id.*, at A-91 ¶7. In discussions between the parties prior to Dentsply's filing a motion to compel discovery, D.I. 54, the United States explicitly disclosed the existence of its dental laboratory survey, but asserted this information was expert material not subject to disclosure during merits discovery.[4] In briefing on the motion to compel, the United States indicated that dental laboratories were the entities surveyed, that survey respondents had completed questionnaires, and that, although the United States did not know the respondents' identities, it was highly unlikely that the dental laboratory survey respondents included

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[3] Dentsply made the following document requests:

1. All documents reflecting any statement of a third party to the DOJ and signed and/or adopted, formally or informally, by those third parties.
2. All documents reflecting any verbatim statement of a third party.

D.I. 174, at A-49.

[4] The United States contends that during March and April, 1999, it offered Dentsply several opportunities to discuss the survey and object if it disagreed with the United States' categorization of the survey as expert material. D.I. 185, B-21 (Kinney Declaration ¶¶ 3-8); B-1 (Botti Declaration ¶¶ 8-13). Dentsply contests the assertion that the United States invited discussion on the issue. D.I. 193 at C-1-C-6 (Hughes' Declaration). The Court is in no position to settle this factual dispute.

any of the 184 individuals identified and disclosed under Rule 26(a).[5] D.I. 61, at 18 n. 11. The United States further asserted that the completed survey questionnaires did not constitute "'verbatim witness statements.'" *Id.*, at 8. While expressly acknowledging that "[o]ne could stretch Document Request No. 2 significantly and argue that the completion of a questionnaire by a survey respondent is a 'verbatim statement' of the respondent," the United States noted "[Dentsply] has not made that argument." *Id.*, at 18 n.11. In its reply brief in support of the motion to compel, Dentsply did not address the government's statements about "verbatim witness statements" or its assertion that a motion relating to the survey materials. *See* D.I. 64. Based on the United States' assertion in its brief and at argument that the survey responses did not constitute verbatim statements from witnesses, Dentsply informed the Court that its request for verbatim statements was moot. D.I. 72, at 9, 11.

On October 7, 1999, during unsuccessful settlement negotiations between counsel for the parties, discussion of the survey resurfaced when the United States asserted that the survey was a more reliable basis than depositions on which to evaluate dental lab preferences. The next day, Dentsply served on the United States its Third Request for Documents, seeking *inter alia,* "[a]ll documents that refer or relate to any survey dealing with the dental industry, its products, participants, or distribution systems," as well as the

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[5] However, it turned out one of the 184 individuals identified by the United States under Rule 26(a), Rand Jaslow, had also responded to the survey. A-25, A-52.

names and addresses of entities that responded to the survey as well as survey non-respondents. B-25-31. The United States objected to the request on the ground that it called for premature discovery of expert materials under Rule 26 and the Court's Scheduling Order, and also objected to the discovery of the survey respondents' identities as improper and unjustified at any time. B-32-45. The United States also filed for a Protective Order from the Court seeking guidance regarding the appropriate timing for disclosure of expert materials. D.I. 139. After a telephone conference with the Court, in which the Court expressed concern that if the United States were correct the scheduling deadlines would not be able to be met, the United States withdrew its motion for a protective order and produced the survey materials to Dentsply on December 7, 1999.[6] D.I. 185, at B-46.

On December 23, 1999, Dentsply informed the United States that it intended to move to exclude the survey evidence as a sanction for the United States' failure to produce the survey identities and responses pursuant to Rule 26(a)(1). Dentsply filed the instant motion and supporting brief on December 27, 1999. D.I. 172, 173.

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[6] The United States produced the 274 completed survey responses, as well as copies of 320 incomplete questionnaires, and also provided Dentsply with the survey data in electronic format.

III. Discussion

Rule 26(a)(1) requires that, without awaiting a discovery request, each party "shall" provide "the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information." Fed. R. Civ. P. 26(a)(1)(A). Additionally, parties must exchange "a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings." Fed. R. Civ. P. 26(a)(1)(B).[7]

With limited exceptions, a party that fails to make required disclosures under Rule 26(a)(1) forfeits the use the witnesses or documents at issue. Fed. R. Civ. P. 37(c)(1) states, in pertinent part:

> A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

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[7] Different, additional disclosures related to expert testimony are required under Rule 26(a)(2). The parties are required to disclose the identity of any expert witness and expert report and "a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions." Fed. R. Civ. P. 26(a)(2)(B). Such expert disclosures are required to be made "at the times and in the sequence directed by the court," Fed. R. Civ. P. 26(a)(2)(C), in this case, by February 29, 2000. *See* D.I. 127.

Fed. R. Civ. P. 37(c)(1). "Rule 37 is written in mandatory terms, and is designed to provide a strong inducement for disclosure of Rule 26(a) material." *Newman v. GHA Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995) (quotation marks and citation omitted); *see also* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2289.1 at 704 (1994). However, Rule 37(c)(1) leaves courts with discretion not to impose the sanction of automatic exclusion if the party had substantial justification for the failure to disclose or if such failure is harmless. *See Newman*, 60 F.3d at 156; Fed. R. Civ. P. 37(c)(1). Moreover, a trial court may be found to have abused its discretion "if its exclusion of testimony results in fundamental unfairness in the trial of the case." *Newman*, 60 F.3d at 156 (internal quotation marks, citations, and emphasis omitted).

A. Whether Survey Respondent Identities and Completed Questionnaires Must be Disclosed Under Rule 26(a)(1)

Dentsply argues the United States failed to fulfill its Rule 26(a)(1) obligations to provide the identities of survey respondents and the written survey responses in its initial disclosures. Therefore, Dentsply maintains, the Court should exclude from evidence the survey and any evidence derived therefrom as sanction pursuant to Rule 37(c)(1). Finally, as an alternative sanction, Dentsply requests the Court to extend fact discovery for 60 days to enable it to take discovery of the survey respondents, and to require the United States to pay Dentsply's costs of conducting this additional discovery.

The United States responds, first, that it was not required to disclose survey materials and responses or the identity of individual respondents as part of its initial disclosures pursuant to Rule 26(a)(1). Second, the United States maintains that, even if the Court determines it was required to disclose the survey materials in its Rule 26(a)(1) initial disclosures, or in response to Dentsply' interrogatories or requests for documents, the Court should not impose sanctions under Rule 37(c)(1) because its failure to disclose was substantially justified and/or harmless. Finally, the United States argues the Court should not grant Dentsply an extension of discovery because Dentsply knew early in discovery of the existence of the survey and the United States' position that survey materials were expert materials and had ample opportunity to question the United States further as to the nature of the dental laboratory survey and its position that such materials were expert materials.

Dentsply contends that dental laboratory respondents to the survey conducted by the government's expert in anticipation of litigation are "individuals likely to have discoverable information" under Rule 26(a)(1)(A) and that their written survey responses are documents in the government's possession, custody, or control relevant to disputed issues of fact under Rule 26(a)(1)(B). The United States counters survey materials are expert materials, required to be disclosed, if at all,[8] at the time the Scheduling Order

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[8] Although the government disclosed to Dentsply the identities of the survey respondents on December 7, 1999, it has maintained a continuing objection that survey respondent identities are not discoverable at any time. *See* D.I. 140, D.I. 184, at 9 n.3.

specifies for such disclosure, February 29, 2000. *See* D.I. 127. Dentsply has not pointed to any authority that holds disclosure of the identity of survey respondents and survey responses constitutes material that is required to be initially disclosed under Rule 26(a)(1), asserting this conclusion can be found in a plain reading of the rule. However, the Court concludes Dentsply's position is not readily apparent from plain text of Rule 26(a)(1) and that the government's position is the better-reasoned approach.

To the extent the parties and the Court have uncovered cases that deal with the issue of discovery of survey materials and the identities of survey respondents, those cases arise in the context of expert discovery. *See, e.g., United States Surgical Corp. v. Orris, Inc.*, 983 F. Supp. 963, 965-66, 969 (D. Kan. 1997) (requiring disclosure of survey data underlying expert report); *Starter Corp v. Converse, Inc.*, No. 95 Civ. 3678, 1996 WL 693347 (S.D.N.Y. Dec. 3, 1996) (analyzing request for production of survey documents under Fed. R. Civ. P. 26(b)); *Karan v. Nabisco, Inc.*, 82 F.R.D. 683, 685-6 (W.D. Pa. 1979) (refusing to compel production of survey materials before party determined whether it would use the survey at trial, noting that "final aspects of the theories of Defendant's experts . . . would be revealed" if survey questionnaires and other materials were required to be produced at that time).[9] Moreover, the Advisory Committee

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[9] Dentsply cites *United States Surgical Corp., supra*, and *Comm-Tract v. Northern Telecom, Inc.*, 143 F.R.D. 20 (D. Mass. 1992), in support of its position. These cases do not address the Rule 26(a)(1) issue raised in the instant case. Instead, they indicate that survey data underlying expert opinions and survey respondent identities must, under certain circumstances, ultimately be disclosed to the adverse party, that is, they address

Notes to the Federal Rules of Evidence support the notion of survey evidence as expert material, suggesting that the best framework for determining the admission of survey evidence is as a basis of expert testimony pursuant to Federal Rule of Evidence 703. *See* Fed. R. Evid. 703 advisory committee note ("[Rule 703] offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved.").

In addition, requiring initial disclosure of survey responses would undermine the rule that parties are not compelled to disclose materials related to surveys commissioned in anticipation of litigation but not anticipated for use during trial. *See, e.g., Starter Corp.*, 1996 WL 693347 at *1 (denying plaintiff's request for production of documents generated by a survey that defendant commenced but did not intend to offer into evidence at trial); *Locite Corp. v. National Starch & Chemical Corp.*, 516 F. Supp. 190, 205 n. 24 (S.D.N.Y. 1981) ("One should not discourage surveys for use in litigation, nor should one compel a party who has commissioned such a survey to introduce it at trial if it does not advance his case, particularly where his adversary 'equally . . . [can] commission and offer such a survey.'" (citing *Procter & Gamble Co. v. Johnson & Johnson, Inc.*, 485 F. Supp. 1185, 1201 n.6 (S.D.N.Y. 1979)); *Karan*, 82 F.R.D. at 685-86 (party not required to

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whether disclosure is required. However, they do not address *when* such disclosures must be made and, in both cases, the issue arose after the production of expert reports.

disclose survey materials at time when it had not yet decided whether it would use survey at trial). *See also* Shari S. Diamond, *Reference Guide on Survey Research, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 221, 264 (Fed. Jud. Ctr. 1994).[10] Similar to *Karan,* the survey at issue here was conducted in anticipation of litigation and reflects the design, oversight, and analysis of the government's survey expert and economic expert. To require production of the completed survey questionnaires as part of the government's initial Rule 26(a)(1) disclosures would in this case require disclosure of "aspects of the theories of [the government's] experts." *Karan*, 82 F.R.D. at 685. To construe Rule 26(a)(1) to require parties to make initial disclosures of the survey materials and the identities of survey respondents of surveys commissioned in anticipation of litigation would potentially compel parties to disclose the work of non-testifying experts and surveys that a party does not intend to introduce at trial by requiring disclosure of such information prior to the party's decision. The Court cannot imagine Rule 26(a)(1) was intended to achieve this absurd result. Therefore, disclosure of such materials would not

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[10] Dentsply's counsel does not disagree. *See* D.I. 205, at 48 ("Under Rule 26, you are not entitled to nontestifying expert material."). However, the Court cannot agree with Dentsply's position that *Starter Corp., supra*, is irrelevant to this case because nondisclosure of nontestifying expert testimony was the basis for that decision. To the contrary, if the court in that case accepted Dentsply's position that production of respondents identities and survey responses were required as part of a party's initial disclosure obligations under Rule 26(a)(1), the fact that the survey was not going to be offered into evidence and that the expert would not testify would be irrelevant to the decision.

be required until and if the government determined it intended to use the survey at trial. *See Karan,* 82 F.R.D. at 685-86.

Moreover, during argument, Dentsply contended that Rule 26(a)(1)(A) would require initial disclosure of survey respondents only "[i]f the survey respondents have provided *factual* information to the proponent of the survey." D.I. 205, at 41 (emphasis added). Dentsply elaborated that the contents of a survey are "factual" if they are intended to be offered for the truth of the matter asserted, as opposed to consumer perceptions or other surveys whose content would qualify as hearsay exceptions. For example, Dentsply asserts that survey respondent identities and completed survey questionnaires should have been included in initial disclosures in this case because the survey sought to obtain factual information, such as "how far is the nearest local dealer?" and "[h]ow may people do you have working in you lab?" D.I. 205, at 41. However, Dentsply would not read Rule 26(a)(1) to require initial disclosures in consumer surveys of trademark confusion because such surveys gather information on consumer perceptions, rather than "factual" information that would be offered to prove the truth of the matter asserted.[11] *Id.*, at 41-42.

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[11] Dentsply appears to be advocating a distinction in the requirements of Rule 26(a)(1) regarding disclosure of survey materials and respondent identities based upon a difference of whether the content of individual responses constitute hearsay exceptions, a distinction more relevant to the issue of whether, or under what rule of evidence, a survey is ultimately admissible at trial.

Nothing supporting this tortured logic can be found in the language of Rule 26(a)(1) or the advisory committee notes to the 1993 amendments that would support such a distinction. For example, if the phrase "each individual likely to have discoverable information relevant to disputed facts," Fed. R. Civ. P. 26(a)(1)(A),[12] is read to cover survey respondents as Dentsply advocates, there is no basis for distinguishing between dental laboratory survey respondents in this case, and consumer respondents to a trademark confusion survey. Both have "information relevant to disputed facts" in the respective cases. While the consumer survey respondents' statements may not be used to prove the truth of the matter asserted, for example, whether a shoe shown to consumers actually is a particular shoe brand, they are used as information relevant to a factual dispute over whether there is actual trademark confusion. There is little or no difference from the government's proposed use of information on dental laboratory consumer

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[12] The advisory committee notes to the 1993 amendments to Rule 26(a)(1) have similar language and state in relevant part:

> Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. . . . [C]ounsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as witnesses by any of the other parties.

Fed. R. Civ. P. 26, 1993 advisory committee notes, at 147.

preferences, based on respondents' states of mind regarding the prefabricated artificial teeth market.

Dentsply further stresses that the 274 survey respondents' identities and their written survey responses should have been part of the United States' 26(a)(1) initial disclosures because the subject matter of the survey is largely identical to the type of information known to the 85 dental laboratory witnesses identified by the United States' 26(a)(1) disclosures. Not just the 274 dental laboratory respondents, but potentially any of the more than 8,000 dental laboratories in the country could have been selected to be surveyed and would be likely to have relevant information with regard to the items on the survey questionnaires. Theoretically, there is no difference between the dental laboratories that were not surveyed and those who responded to the survey in the potential to have relevant information on dental laboratory preferences regarding the prefabricated artificial tooth market. Dentsply's position overlooks the fundamental nature of a survey, which is not a mere compilation of individual responses but involves expert methodology including identification of survey respondents, development of the questionnaires, and analysis of the results including inferences about the broader population of dental laboratories from the survey data. Assuming the survey was properly conducted, the respondents would theoretically be representative of the universe of dental laboratories.

Based on the foregoing discussion, the identities of individual survey respondents and their completed survey questionnaires relating to a survey conducted by a party's

expert are not required to be produced as initial disclosures under Fed. R. Civ. P. 26(a)(1).[13]

B. Rule 37(c)(1) Sanctions

Because there was no violation of Rule 26(a)(1), it follows that a sanction excluding the survey evidence under Rule 37(c)(1) is not warranted. However, even if the government should have produced the identities of the survey respondents and their completed written questionnaires as part of their Rule 26(a)(1) initial disclosures, exclusion of the survey evidence would not be warranted.

Under Fed. R. Civ. P. 37(c)(1), exclusion of evidence is not automatic if the failure to disclose was substantially justified or harmless. *See Newman*, 60 F.3d at 156. "Substantial justification" has been defined as:

> justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. The proponent's position must have a reasonable basis in law and fact. The test is satisfied if there exists a genuine dispute concerning compliance.

Fitz, Inc. v. Ralph Wilson Plastics Co., 174 F.R.D. 587, 591 (D.N.J. 1997) (internal quotations and citations omitted). Here, any failure of the government to comply with

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[13] As a practical matter, if Court were to adopt Dentsply's position, in the future, survey experts would merely postpone conducting surveys until the close of discovery approaches to postpone having to initially disclose respondent identities and survey responses to the opposing party.

Rule 26(a)(1)'s initial disclosure requirements, based on its consistent position that the survey materials are expert materials subject to the disclosure requirements of Rule 26(a)(2), was substantially justified. As set forth *supra*, survey materials are typically considered to be expert materials and there is no case law on point regarding the discoverability of survey materials generated by an expert under Rule 26(a)(1). Based on the dearth of case law on this subject and the absence of an earlier challenge to its position that survey materials were expert materials, the government's understanding of what it was required to disclose under Rule 26(a)(1) was reasonable and therefore substantially justified. *See Fitz*, 174 F.R.D. at 591 (holding that, because "[t]here is relatively little case law in existence, particularly in the Third Circuit, interpreting the precise requirements of Rules 26(a) and 26(e)," the plaintiffs' violation of Rule 26 was based on a "reasonable" misunderstanding of the requirements of Rules and was therefore substantially justified.).

C. Dentsply's Request for Additional Fact Discovery

Because the Court has determined that the United States did not violate Rule 26(a)(1), no sanction, including an alternative sanction of additional discovery, is warranted. Moreover, the sanction of additional discovery would not be granted in any event. When Dentsply received the survey materials and respondent identities on December 7, 1999, Dentsply was left with two months to conduct follow-up with a select

number of respondents before the close of fact discovery on February 1, 2000 and had until March 30, 2000 to conduct informal discovery and work with its experts to attack the validity of the survey. While Dentsply was engaged in a full deposition schedule during the period up to the close of fact discovery, it also apparently had informal contacts with a large number of survey respondents between December 7 and February 1.

Moreover, Dentsply should not be entitled to an extension of fact discovery because Dentsply knew about the survey and the United States' position that it was expert material for at least six months before it sought production of such material and for eight months prior to asserting it was actually Rule 26(a) material. The United States disclosed to Dentsply on several occasions during March and April of 1999 the existence of the survey and has consistently maintained a position that survey materials constituted expert materials not subject to disclosure until the time set forth in the scheduling order for expert discovery. *See* D.I. 185, at B-9-20; D.I. 174, at A-91; D.I. 61, at 8, 18. Dentsply did not challenge the government's position in this regard until after the October 1999 conference.

Dentsply asserts that the reason it did not object earlier to the government's characterization of the survey material as expert materials was that it was unaware, prior to the October 1999 discussions with the government, that the survey "constituted factual evidence" or, apparently, that it might be offered as substantive evidence at trial. D.I. 173, at 6. A cursory review of the case law indicates that surveys are typically offered as

substantive evidence when adequate foundation has been laid by an expert. *See, e.g., Pittsburgh Press Club v. United States*, 579 F.2d 751, 757-60 (3d Cir. 1978), and cases cited therein. While Dentsply references consumer surveys used in the trademark context to demonstrate confusion as an example of surveys that are not used to demonstrate the truth of the matter asserted, in the antitrust context, most surveys gather "factual" information. *See* Benjamin F. King, *Statistics in Antitrust Litigation, in* STATISTICS AND THE LAW 49, 64 (Morris H. DeGroot, et al., eds. 1986) (stating it is likely "that most surveys in antitrust litigation are designed to obtain facts"); *see also, e.g., Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.*, 773 F.2d 1506 (9th Cir. 1985) (involving survey of tourists' as to which tour they would prefer under various tour provider and price scenarios, similar to the customer preference-type questions in the survey at issue in this case). Accordingly, it is hard to fathom that, when the government disclosed by April 1999 that it had conducted a survey of dental laboratories, Dentsply did not consider that such a survey might be offered as factual, substantive evidence at trial.

Finally, the Court is skeptical of Dentsply's need to contact and depose the survey respondents in order to undermine the validity of the survey. The primary way to evaluate the reliability of a survey is to test its methodology,[14] not to re-interview survey respondents. *See Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 237 (2d Cir. 1999)

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[14] The Court has no doubt that Dentsply has retained very capable experts to attack the survey's methodology.

(voicing skepticism that a small sample of individuals brought into court and subject to cross-examination would provide more reliable evidence than a properly conducted survey); *In re Airline Ticket Comm'n Antitrust Litig.*, 918 F. Supp. 283, 288 (D. Minn. 1996) (stating that "[p]roper statistical methodology should provide the material needed to minimize the time-consuming, and repetitious inquiry [of follow-up depositions of survey respondents].").

There is not much utility in deposing survey respondents to test the survey's validity and conclusions. Although Dentsply's position that it needs to interview survey respondents appears to rest on professed need to test the reliability of hearsay contained in the survey, the interviews may suffer more from some of the concerns underlying the hearsay rule than the original survey responses. *See Schering Corp.*, 189 F. 3d at 232-36 (discussing, in the context of admissibility of survey evidence, the relationship between the types of risks inherent in hearsay evidence, including insincerity and faulty memory, and the ability of various types of surveys to mitigate these risks, in some cases better than recognized individual hearsay exceptions). For example, the results of interviews with the survey respondents will be more likely to be biased or not fully candid than the original survey because the respondents will be aware, as they were not during the initial survey, of the purpose for which the questions are being asked and the entities asking them. *See id.* at 233 & n.4 (stating that "the risk of insincerity can ordinarily be reduced if the interviewers and those questioned lack knowledge of the purpose of the survey" and

that anonymous surveying can help minimize the risk that interviewees will lie); *Pittsburgh Press Club*, 579 F.2d at 758 (stating that survey respondents should be unaware of the purposes of the survey or the litigation). Additionally, close to two years has elapsed since completion of the survey questionnaires.[15] It does not seem possible that survey respondents, if interviewed, are going to provide more accurate information based on memory about the relevant facts and their preferences regarding the market at the time they completed the survey questionnaire than they provided contemporaneously on the questionnaire itself. *Cf. Pittsburgh Press Club*, 579 F.2d at 759 (rejecting survey in part because of risk of respondents' faulty memories because "respondents were not being asked about a present impression; rather they were being asked for details about [events] which had taken place many years before").

Dentsply cites *Comm-Tract Corp. v. Northern Telecom Inc.*, in support of its argument that it needs to take discovery of survey respondents in order to effectively counter the survey evidence at trial. *See* 143 F.R.D. at 23 (holding the only way for defendant to counter verbatim responses to open-ended survey question was "by being able to test the specific individual responses of the survey participants"). *Comm-Tract* is distinguishable. As stated *supra*, the survey questions at issue in this case focus on dental laboratories' market perceptions and preferences. In contrast to the question that

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[15] The questionnaires appear to have been completed during the summer of 1998. D.I. 174, at A-52, A-70.

appeared to be of most concern to the *Comm-Tract* court, the survey questions did not seek open-ended verbatim statements from respondents,[16] e.g., requesting comments on their satisfaction with Dentsply's products, distribution methods, etc. There is no more need for Dentsply to test the individual responses of survey participants in this case than in other customer perception or preference surveys.[17]

For the foregoing reasons, the Court concludes that an extension of discovery in this case to permit Dentsply to take discovery of individual survey respondents is not warranted.

IV. Conclusion

For the reasons stated above, the United States did not violate Fed. R. Civ. P. 26(a)(1)'s initial disclosure requirements when it did not produce the identities and completed survey questionnaire of respondents to a survey conducted by a government expert. Thus, the Court will issue an order denying Dentsply's request to exclude the

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[16] In *Comm-Tract*, the court noted the following question as meriting special concern: "Are there any additional comments you may have about either the hardware or software service and support relating to your installed bases of [defendant's] systems?" 143 F.R.D. at 23.

[17] The United States has represented that it does not intend to introduce individual survey responses into evidence other than as part of a survey "package" underlying expert analysis of the data; that is, it does "not intend to hold up any individual survey response and say this one says that or that one says this." D.I. 205, at 82. The Court will hold the United States to this representation. The Court will not address at this time whether the individual responses are ultimately admissible as part of the survey "package."

survey evidence at trial. The Court will also decline Dentsply's request to reopen and extend factual discovery to take discovery of the 274 survey respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-5 MMS
	)	
DENTSPLY INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	

ORDER

At Wilmington this 10th day of May, 2000, for the reasons set forth in the Memorandum Opinion on Defendant's Motion for Sanctions issued this date,

IT IS ORDERED that Defendant's Motion for Sanctions is DENIED.

Murray M. Schumacher

United States District Judge