03-4097

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REDACTED--
PUBLIC VERSION UNITED STATES OF AMERICA, **FINAL BRIEF**
Plaintiff-Appellant,

v.

DENTSPLY INTERNATIONAL, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
J. BRUCE McDONALD
Deputy Assistant Attorneys General

MARK J. BOTTI
JON B. JACOBS
Attorneys
U.S. Department of Justice
Antitrust Division

ROBERT B. NICHOLSON
ADAM D. HIRSH
Attorneys
U.S. Department of Justice
Antitrust Division
601 D Street NW, Room 10535
Washington, DC 20530-0001
Tel: 202-305-7420

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Cases: **Page**

Cases: **Page**

Cases: **Page**

FEDERAL STATUTES AND RULES

Page

MISCELLANEOUS

STATEMENT OF JURISDICTION

The district court (Honorable Sue L. Robinson) had jurisdiction under 15 U.S.C. 4 and 28 U.S.C. 1331. The court entered final judgment on August 12, 2003 (A47). The United States filed a timely notice of appeal on October 14, 2003 (A116). This Court's jurisdiction rests on 15 U.S.C. 29(a) and 28 U.S.C. 1291.

STATEMENT OF RELATED CASES OR PROCEEDINGS

Two putative class actions against Dentsply, seeking damages and injunctive relief for the same conduct at issue in this appeal, currently are pending in the District of Delaware (Robinson, C.J.): *Howard Hess Dental Laboratories, Inc. v. Dentsply International, Inc.*, No. 99-CIV-255; *Jersey Dental Laboratories v. Dentsply International, Inc.*, No. 01-CIV-267. In March and December 2001, the district court granted Dentsply summary judgment on the damages claims. On November 26, 2003, the plaintiffs moved to certify that decision for appeal to this Court, under 28 U.S.C. 1292(b); that certification motion remains pending in the district court.

ISSUES PRESENTED

1. Whether, as a matter of law, a dominant firm's exclusive dealing cannot violate Section 2 of the Sherman Act, 15 U.S.C. 2, if it is found not to violate Section 3 of the Clayton Act, 15 U.S.C. 14. Conclusions of Law 19-20 (A112).

2. Whether a monopolist that prevents rivals from distributing through established dealers can be found not to have maintained its monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, even though it acted with predatory intent, had no legitimate business justification, and engaged in conduct making no economic sense but for its tendency to exclude. Conclusions of Law 11-14, 32-38 (A110-A111, A113-A114).

3. Whether a firm that maintained a 75%-80% market share for a decade, established a price umbrella, successfully made repeated aggressive price increases without regard to the prices of its rivals, and was able to exclude rivals from a major channel of distribution, can be found not to possess monopoly power within the meaning of Section 2 of the Sherman Act, 15 U.S.C. 2, on the basis that rivals were not entirely excluded from the market and some rival products were priced higher than some of its products. Conclusions of Law 25-30 (A113).

STATEMENT OF THE CASE

On January 5, 1999, the United States sued Dentsply International, Inc., alleging that Dentsply had a monopoly in prefabricated artificial teeth and that its long-standing practices of prohibiting current dealers from adding competitive lines of teeth, and of requiring prospective dealers to drop most or all competing brands in order to become a dealer of its Trubyte artificial teeth, violated

Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2, and Section 3 of the Clayton Act, 15 U.S.C. 14. After a bench trial, the district court determined that Dentsply had a 75%-80% share of the tooth market, was a "price leader" that "has not reacted with lower prices when others have not followed its price increases," that the "express" and "sole" purpose of its policies of dealer exclusivity "has clearly been anticompetitive," and that Dentsply's proffered non-exclusionary business justifications were "merely pretextual," but nonetheless ruled for the defendant on all counts. *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387 (D. Del. 2003) (Op.) (A48); see Findings of Fact (FF) 226, 229, 238-240, 216-217 (A83-A85, A80); Conclusions of Law (CL) 23, 34, 37 (A112, A114).

STATEMENT OF FACTS

1. a. This case involves the market for "prefabricated artificial teeth in the United States" for use in making dentures. FF 1 (A51). The "relevant" consumers are 7,000 dental laboratories: they, rather than dentists, almost always select the brand of tooth to be used. FF 61, 6, 10, 11, 59 (A57, A51-A52); CL 10 (A110). There are "12-13 known foreign and domestic" manufacturers in this market, although eight are "particularly relevant." FF 14 (A52). Dentsply, through its Trubyte Division in York, Pennsylvania, is by far the largest. For at least the last decade, its market share has been 75%-80% on a revenue basis. FF 238, 240

(A84-A85). Its share of the premium segment is 80%-90%. FF 240(e) (A85). "Dentsply's market share is approximately 15 times larger than its next closest competitor." FF 239 (A84). It produces teeth in the premium, midline, and economy (but not subeconomy) segments. FF 16 (A52). Dentsply's "primary competitors," Ivoclar and Vita, have 5% and 3% market shares, respectively. FF 26, 36, 239 (A53, A54, A84). Smaller firms divide the remaining 12% of the market. FF 239 (A84).[1]

"'As the price leader, Dentsply usually sets the prices in the marketplace and everyone else contributes or competes under that broad umbrella.'" FF 226 (A83) (quoting Turner (Dentsply) Tr. 456 (A445)); see also FF 230 (Dentsply dealers "perceive that Dentsply's prices create a high-price umbrella") (A83). Dentsply has a "reputation for aggressive price increases in the market," FF 230 (A83), and "has not reacted with lower prices when others have not followed its

---

[1]Vita produces only premium teeth, FF 34 (A54); Ivoclar—several lines, including premium, FF 25 (A53); Myerson—premium, midline, economy, FF 37 (A54); Heraeus Kulzer—premium, midline, FF 46 (A55-A56); Schottlander—premium, FF 52 (A56); Unidesa—premium, Nordhauser (Darby) Tr. 4122 (A3318); Dentorium—economy, Turner (Dentsply) Tr. 453 (A442); Kenson—economy, FF 37 (A54).

A glossary of witnesses mentioned in this brief, along with their corporate affiliations at the time of their testimony, is attached for the Court's convenience as an addendum.

price increases," FF 229 (A83). Dentsply also "charges a premium substantially higher than its rivals" on economy teeth. FF 343(b) (A103).

Even though "[f]or many years, the artificial tooth market has been stagnant in terms of unit growth," FF 237 (A84), Dentsply's profit margins on teeth average 80%, on some premium teeth are 90%, and have been "increasing over time," FF 233-234 (A84). By contrast, Vita's margins are [redacted] (Whitehill (Vident) Tr. 372-373 (sealed) (A4835-A4836)), and Myerson's margin is 50% (Swartout (Myerson) Tr. 1320-1321 (A1122-A1123)). The tooth business is Dentsply's "cash cow," the profits from which, at least in part, are "siphoned away . . . and used for other projects within the corporation." FF 235-236 (A84).

Dentsply distributes its teeth exclusively through a network of 23 independent national and regional dental laboratory dealers, which carry "thousands of different products that are made by hundreds of different manufacturers." FF 212, 20, 109 (A79-A80, A53, A64-A65). These dealers collectively service labs from 100 U.S. outlets (known as "tooth stocks" or "tooth counters"), which cover essentially every major metropolitan area and far exceed the number of stocks of any competitor. Jenson (Dentsply) Tr. 2267-2268 (A1931-A1932). "Tooth counters are extremely labor-intensive operations,

requiring the employment of friendly, detail-oriented customer service personnel." FF 57 (A57). Dealer services include delivery; same-day availability; one-stop shopping; handling tooth returns; advice on tooth and mould selection; fostering loyalty; inventory management; and handling accounts receivable. Reitman (expert) Tr. 1484-1506 (A1271-A1293). Dentsply is the only tooth manufacturer that makes no direct sales to labs, and instead relies entirely on distributors. FF 20 (A53).

After unsuccessful efforts to distribute through dealers, Ivoclar now distributes all, and Vita distributes virtually all, their teeth directly to labs. FF 99-108 (A63-A64). Ivoclar has sold directly since 1978, and currently maintains a single distribution center, in Amherst, New York. FF 27-28 (A53). Vita makes [redacted] of its sales directly to labs, through Vita's affiliated importer/distributor, Vident,[2] which maintains a single tooth stock, in Brea, California. FF 33, 131 (A54, A67); Whitehill (Vident) Tr. 246, 249 (sealed) (A4730, A4733). The remaining Vident sales are through [redacted] sub-dealers, which cover very small geographic areas and tend to have sales of [redacted]. Whitehill (Vident) Tr. 249 (sealed), 303, 246 (sealed) (A4733, A4766, A4730). By contrast, in 2001,

[2]Vident is a closely held California corporation owned, in part, by the same family that owns Vita. Whitehill (Vident) Tr. 222 (A278).

Dentsply's top six dealers averaged [redacted] in tooth sales each, and only [redacted] dealers (of 23) had less than [redacted] in tooth sales. DX 1650 at 200046 (far left column) (sealed) (A6787). Due to Dentsply's policies at issue in this case, the remaining manufacturers distribute teeth predominantly via direct distribution, although they also have limited dealer distribution (see n.3, below).

Those Dentsply policies, which have been enforced for at least fifteen years, prohibit existing Trubyte dealers from adding the teeth of competitors and, as a condition of acceptance, require prospective Trubyte dealers to drop most or all competing brands. FF 169, 178 (A73, A74). Dentsply codified the former policy in 1993 as Dentsply Dealer Criterion 6: "In order to effectively promote Dentsply/York products, dealers that are recognized as authorized distributors may not add further tooth lines to their product offering." FF 169, 170 (A73).[3]

Dentsply's reputation among dealers and labs is "'dictatorial and arrogant'" and "nonresponsive" to their concerns. FF 215(a) (A80) (quoting DX 653 at DS005170 (A3963)); FF 215 (A80). Although existing and prospective dealers want to carry competing brands of teeth and "[v]ehement[ly]" and "vigorously

[3]A "grandfather" provision of Dealer Criterion 6 did allow Dentsply dealers to continue carrying competing products they were carrying when that criterion was formally announced. FF 175 (A74). Vita and Ivoclar, however, are "not among the grandfathered brands." FF 349 (A105-A106).

oppose" Dealer Criterion 6 (Op. at 446 (A107); FF 358 (A107)), Dentsply has successfully enforced Dealer Criterion 6 by terminating or threatening to terminate several dealers. FF 186-211 (A75-A79). Dealers distributing Dentsply's teeth have the legal right to end their agreements at any time without contractual penalty, FF 110-111 (A65), but since at least 1992 "no dealer has agreed to walk away from its Trubyte tooth business to take on a competitive line," FF 177 (A74); Clark (Dentsply) Tr. 2631, 2485 (A2237, A2091); Reitman (expert) Tr. 1515 (A1302). The district court documented numerous incidents—involving 12 separate dealers and 12 separate brands of teeth—in which Dentsply coerced a current or prospective dealer not to sell rival brands. FF 174, 179-185, 187-211, 218-223, 47, 136 (A74-A82, A56, A68). Four examples include:

(1) Frink Dental, FF 174, 187-192, 219(a) (A74, A76-A77, A81). In 1988, Trubyte dealer Frink added Ivoclar teeth for their aesthetics, FF 187 (A76), and had received customer requests for them, Cavanagh (Frink) Tr. 724 (A670). After Dentsply's president's personal visit failed to dissuade Frink from adding Ivoclar, Dentsply terminated Frink as a Trubyte tooth dealer and, in order "'to make a strong point,'" also terminated it as a dealer of all Trubyte merchandise.[4] FF 189 (A76) (quoting Brennan (Dentsply) Tr. 1720 (A1504)). Although Frink for a time was able to get Trubyte teeth and merchandise at cost from other dealers, "[o]ver time, Dentsply tracked down all but one of the dealers and threatened to cut them off

[4]The Trubyte Division sells a variety of other lab merchandise products, although teeth represent approximately [redacted] of the Division's revenue. Jenson (Dentsply) Tr. 2255-2256 (sealed) (A5101-A5102).

if they continued to supply Frink and, as a result of these threats, these dealers stopped supplying Frink." FF 191 (A76). Frink then gave up its Ivoclar line and was immediately restored as a Trubyte dealer. FF 192 (A76).

(2) Zahn Dental, FF 193-198 (A76-A77). In 1988, Zahn—Dentsply's "largest dealer," FF 40 (A55)—wanted to begin selling Ivoclar teeth, but Dentsply insisted that this would cost Zahn the Trubyte line, FF 193 (A76). Faced with the choice of jeopardizing its $8 million in annual Trubyte tooth sales in return for projected $1.2 million in Ivoclar sales, Zahn decided not to carry Ivoclar.

Between 1999 and 2002, Heraeus Kulzer and Vident also asked Zahn to carry their teeth. But because doing so would cost Zahn what had grown to $22-23 million annually in Trubyte tooth sales, and bring it at most $2 million annually in new sales, nobody "'in their right mind'" would take on the rivals' teeth. FF 197-198 (A77) (quoting Weinstock (Zahn) Tr. 184 (sealed) (A4699)). Zahn even had to deny Leach & Dillon's request to handle the billing of certain lab customers because Dentsply insisted that this, too, would violate Dealer Criterion 6. FF 195-196 (A77).

(3) Atlanta Dental Supply, FF 199-201 (A77-A78). In response to customer requests, Atlanta Dental made plans to add Vita to its product offering. Dentsply responded by threatening Atlanta Dental with the loss of Trubyte teeth if Atlanta Dental took on Vita. Not wanting to "jeopardize" nearly $1 million in Trubyte tooth sales for unknown levels of Vita sales, Atlanta Dental decided not to add the Vita line.

(4) Dental Laboratory Discount Supply (DLDS), FF 202, 219(b) (A78, A81). In response to customer demand, DLDS sought to add Vita and Universal premium teeth. A week after it introduced the new teeth, however, "Dentsply informed DLDS that if it carried the teeth it would lose the entire Trubyte line of teeth and merchandise. As a result, DLDS did not take on the Universal and Vita teeth." FF 202 (A78).

The district court found that "Dentsply's intent [in adopting and enforcing Dealer Criterion 6] has been exclusionary." Op. at 419 (capitalization altered) (A80); see FF 216-223 (A80-A82). Indeed, it found that the "express" and "sole" purpose of Dealer Criterion 6 is "anti-competitive"—to "block competitive distribution points," "[t]ie up dealers," and "exclude Dentsply's competitors from the dealers." FF 216 (A80) (quoting GX 171 at DPLY-A004360 (A3756)), FF 176, 217, 332 (A74, A80, A107). The district court specifically found that Dentsply terminated Trinity[5] and Frink (FF 218, 219(a) (A80-A81)), threatened to terminate DLDS (FF 219(b) (A81)), and authorized Jan Dental, Darby, and Dental Technicians Supply (DTS) as dealers (FF 185, 220-222 (A75, A81-A82)), all for "exclusionary reasons," FF 220 (A81).[6] Dentsply authorized dealers it had previously rejected or terminated once that dealer expressed serious interest in distributing another supplier's teeth. See FF 221 (Darby) (A81-A82); FF 183-185 (DTS) (A75). Dentsply initially turned down Darby's request to sell Trubyte teeth because Dentsply already had "adequate distribution in Darby's area," but when—

[5]Trinity Dental was a dealer of Trubyte merchandise, but not teeth. When Trinity decided to add the Vita tooth line, however, Dentsply invoked Dealer Criterion 6 and terminated Trinity as a Trubyte merchandise dealer. FF 218 (A80-A81).

[6]Before being cut off, Jan Dental had done a "wonderful job" distributing Vita teeth. Whitehill (Vident) Tr. 263-264 (A319-A320).

just seven months later—Darby became interested in selling Vita teeth, Dentsply executives flew to Darby headquarters and subsequently "authorized Darby as a Trubyte tooth dealer upon Darby's agreement not to add the Vita tooth line." FF 221 (A81-A82); see GX 63 (A3655), GX 82 (A3660). Even Trubyte's General Manager conceded that "Dentsply had more dealers than needed to properly distribute its teeth." FF 223 (A82) (citing Brennan (Dentsply) Tr. 1710 (A1494)).

The district court also rejected Dentsply's proffered non-exclusionary business justifications for Dealer Criterion 6 as "merely pretextual." FF 331-369 (A101-A109); CL 37 (A114). Dealer Criterion 6 was not needed to help "focus" dealers, FF 333-337 (A101-A102); Dentsply "failed to demonstrate" that its expert economist's "free riding theory applies to the artificial tooth market," Op. at 441 (capitalization altered) (A102); see FF 339-355 (A102-A107); there was "no evidence that dealers engage in 'bait and switch' steering of lab customers" (FF 344 (A103-A104); see FF 345-349 (A104-A106)); and Dentsply's justification theory "is inconsistent with the facts in the marketplace," Op. at 446 (capitalization altered) (A107); see FF 356-369 (A107).

b. The district court also found that selling artificial teeth direct from manufacturer to dental lab is a "viable" method of distribution. FF 71 (A59); see FF 71-108 (A59-A64). Tooth manufacturers "do not require a [dealer] network of

tooth stocks to sell teeth to labs" (Op. at 398 (capitalization altered) (A59); see FF 75-91 (A59-A60)) and "have replicated or could replicate the dealer function," Op. at 399 (capitalization altered) (A60); see FF 82-98 (A60-A62). However, the court did not make any findings directly comparing the efficiency of selling direct versus selling through dealers. It did find that labs have requested competitive teeth from their Trubyte dealers, that competitors have made repeated attempts to gain access to an effective dealer distribution network, and that Dentsply has prevented such access (see pp. 7-9, above).

The court also found that "many dealers" outside the Dentsply network are "available" to rival manufacturers (Op. at 408 (capitalization altered) (A69); see FF 140-147 (A69-A70))—specifically naming Lincoln Dental, a "national, full service dental lab supply house," FF 143 (A69), and Jack Silcox, Ltd., a "small statewide" dealer, FF 146 (A70).[7] The court did not compare the likely

[7]Lincoln is primarily a mail-order dealer of subeconomy teeth (80% of sales), which Dentsply and its closest competitors do not make. It has only one full-time sales representative, does not provide some of the services performed by other lab dealers, does not accept returns of broken sets, and has a different customer base than Dentsply or its competitors. See Jenson (Dentsply) Tr. 2250-2251 (A1914-A1915); DiBlasi (Lincoln) Tr. 2769, 2796, 2799, 2801-2803 (A2329, A2356, A2359, A2361-A2363). Silcox is very "small" indeed: it has no employees, no sales force, no customer service department, no catalog, no tooth counter, and no advertisements in trade journals; in 2001, its tooth sales were $88,000. Silcox (Silcox) Tr. 2046, 2049, 2069-2070 (A1728, A1731, A1751-A1752).

effectiveness of these dealers to Dentsply's dealers.

The court further found that the low level of success of Dentsply rivals Ivoclar and Vita is "due to their own business decisions." Op. at 425 (capitalization altered) (A86); FF 244-268 (A86-A90). These firms made teeth in European moulds, "not 'desirous'" to American consumers and more time-consuming for labs to use, FF 249-250, 256 (A87, A88), and marketed them inadequately, FF 244-248, 257-268 (A86-A87, A88-A90). The court did not make any findings on the competitive ability of the several other teeth manufacturers, except to criticize Myerson's promotional efforts. FF 257 (A88).

At the same time, the court found that *all* of Dentsply's rivals would increase their competitively important "levels of promotion and marketing" (e.g., sales forces, laboratory education/training, and advertising) if Dealer Criterion 6 were eliminated, FF 355 (A107), as would Dentsply, FF 344, 353 (A103-A104, A106). See generally FF 269-281 (describing Dentsply's promotional efforts) (A90-A92).

2. The district court concluded that Dentsply's "agreements"[8] with dealers do not violate Section 1 of the Sherman Act or Section 3 of the Clayton Act

[8]See FF 178-186, 213-214 (A74-A76, A80); CL 15 ("Dentsply and its dealers consider Dealer Criterion 6 to be an agreement between them") (A111).

because direct distribution to dental labs is "a viable and, in some ways, advantageous method of distribution" with "the potential ability to deprive Dentsply . . . of significant levels of business." CL 11-12 (A110-A111). And if rival manufacturers need dealers, "[o]ther dealers besides the 23 dealers used by Dentsply are available." CL 13 (A111); see FF 140 (A69). Moreover, Dentsply's dealers—which buy teeth from Dentsply on a purchase-order basis—are "free to leave Dentsply whenever they choose," and it is "not surprising" that none has ever found it financially attractive to leave "given Dentsply's competitors' failure to compete." CL 15 (A111); FF 110-111 (A65).

The court found no violation of Section 2 because of the same viability of direct distribution, CL 26 (A113), and for two additional reasons. First, it held that "based on the court's finding that Dentsply is not in violation of § 3 of the Clayton Act, Dentsply is not in violation of § 2 of the Sherman Act either." CL 20 (A112).

Second, the court concluded that the government had failed to prove that Dentsply possessed monopoly power or excluded competition. CL 22-25 (A112-A113). The court recognized that Dentsply's "persistently high market share" of 75%-80% is "sufficient for the court to infer monopoly power." CL 23 (A112);

FF 238 (A84).[9] It concluded, however, that Dentsply lacks monopoly power. While acknowledging its earlier finding that, according to Trubyte's former Senior Product Manager, the firm "does not establish its prices in relation to the competition" (CL 30 (A113); see FF 228 (A83); Turner (Dentsply) Tr. 456 (A445)), the district court concluded that the United States "failed to prove that Dentsply controls prices" or that "Dentsply has established a market of supra-competitive pricing," CL 30 (A113). Moreover, Dentsply's profit margin, "while high, was not shown to be high relative to any other tooth manufacturer," and high margins are to be expected "in a market in which significant pre-sale promotion is employed;" and "Dentsply teeth are generally priced between Vident and Ivoclar teeth." CL 30 (A113). The district court excluded the government's survey proffered to demonstrate and quantify the extent to which prices would fall in the absence of Dealer Criterion 6. FF 304-330 (A96-A101); CL 39 (A114-A115). The court did not mention other record evidence from both parties' economic experts that corroborated this price effect, although neither expert quantified that

[9]This percentage is based, as the government urged, "on a revenue basis." FF 238 (A84). Dentsply's share of the market based on unit volume, as Dentsply urged, is 67%. FF 242 (A85). Although the district court appeared to lean in the direction of measuring market share on a revenue basis, *compare* FF 237-241 (A84-A85) *with* FF 242-243 (A85-A86), it did not decide which measure is superior, because either 75%-80% or 67% is "a predominant market share . . . sufficient for the court to infer monopoly power." CL 23 (A112).

effect. See Reitman (expert) Tr. 1463-1464, 1527-1529, 1533-1534, 1692, 3903-3904 (A1250-A1251, A1314-A1316, A1320-A1321, A1479, A3175-A3176); Marvel (expert) Tr. 3648-3650 (A2975-A2977).

In addition, the court concluded that Dentsply is unable to exclude competitors. CL 25 (A113). The court based that conclusion on the reasons it gave for rejecting the government's claim under Clayton § 3—the viability of direct distribution and Vita's and Ivoclar's incompetence, CL 26-27 (A113)—plus the fact that recently two competitors (Heraeus Kulzer and Schottlander) had entered the market and Ivoclar had expanded its product line, CL 28 (A113).

The court did reiterate that Dentsply's intent has "clearly been anticompetitive" and that Dentsply's justifications offered at trial were "pretextual." CL 34, 37 (A114). But it ultimately concluded: "because direct distribution is viable, non-Dentsply dealers are available, and Dentsply dealers may be converted at any time, the DOJ has 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[.]'" CL 35 (A114) (quoting *LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (en banc), *petition for cert. pending*, No. 02-1865 (June 20, 2003)).

SUMMARY OF ARGUMENT

The district court failed to impose liability for monopoly maintenance under Section 2 because it applied the wrong legal standard. Given the court's findings, uncontroverted record evidence, and the proper legal lens, Dentsply's violation is clear. Guided by its erroneous view of the law, the district court depicted an industry in which *all* participants—dental laboratories, dealers, rival manufacturers, and especially Dentsply—are incompetent or irrational.

Under the court's view, Dentsply for fifteen years has prohibited independent dealers from selling almost any competitive teeth—with the intent and expected effect of keeping out rival manufacturers—when such conduct was obviously unnecessary and unworkable, because its rivals were inept and could do just as well by selling directly to labs or using other dealers. Meanwhile, Dentsply dealers—the biggest and best in the industry—fought against Dealer Criterion 6 so that they could add Ivoclar and Vita teeth that nobody wanted. Moreover, the labs asked their dealers to stock rivals' teeth when it would be at least as convenient, and perhaps cheaper, for labs to phone those manufacturers and buy teeth directly.

The district court's view of the market strains credulity and contravenes the tenets of economics and the law of monopoly maintenance under Section 2 of the Sherman Act.

1. The district court's conclusion that its rejection of the exclusive dealing claim under Section 3 of the Clayton Act necessarily exonerated Dentsply under Section 2 of the Sherman Act as well, CL 20 (A112), is contrary to this Court's recent en banc decision in *LePage's*, 324 F.3d at 157 n.10.

2. a. Dentsply's conduct was "exclusionary" within the meaning of Section 2. Conduct is exclusionary if it would make no economic sense for the defendant but for its tendency to harm competition. The court's findings of anticompetitive intent and of Dentsply's lack of any legitimate business justification demonstrate that Dentsply's conduct was exclusionary.

b. The district court nevertheless rejected the government's Section 2 theory on the grounds that rivals did not need any dealer used by Dentsply and that Vita's and Ivoclar's competitive failings were their own fault. Relatedly, the court concluded that, because Dentsply could not prevent its rivals from selling directly to labs, it did not possess monopoly power. CL 26-27 (A113). In so holding, the district court applied an erroneous legal standard of causation and competitive harm.

The court's finding that rivals had "viable" distribution alternatives is legally insufficient to support its conclusion. Although rivals can stay in business by selling teeth directly to labs, the proper legal standard asks whether alternative

channels "pose a real threat" to Dentsply's exercise of monopoly power. *United States v. Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir. 2001) (en banc) (per curiam). The district court failed to apply this legal standard. Had it done so, its findings and undisputed record evidence demonstrate that Dealer Criterion 6's all-or-nothing choice for dealers—sell *only* Dentsply's teeth or *none* of Dentsply's teeth—harms competition by preventing the efficient use of common dealers. The court's opinion could not be read as concluding that Dealer Criterion 6 had no material effect on competition due to the availability of direct distribution, because such a reading would find no support in the findings and uncontroverted evidence. In the absence of Dentsply's exclusivity policies, tooth prices and Dentsply's market share would fall, rivals' promotion and competition would increase, and Dentsply would respond competitively.

c. The supposed ineptitude of Dentsply's primary rivals, Vita and Ivoclar, is a red herring. If Ivoclar and Vita were such obvious incompetents, they could not possibly have posed a competitive threat to Dentsply—let alone a threat sufficient to make worthwhile a fifteen-year campaign of predation against them. Moreover, the proper legal test asks whether Dealer Criterion 6 "'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.'" *Microsoft*, 253 F.3d at 79 (quoting treatise). The government

"need not exhaust all possible alternative sources of injury." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). In addition, the court's findings make clear that dealers and labs wanted to buy rival brands, and that Dentsply's exclusionary conduct is to blame for underinvestment in competitively significant promotion by the rivals.

3. a. Dentsply has monopoly power because it has the power to control prices and exclude competition. Dentsply's persistently high market share of 75%-80%—fifteen times its next-closest competitor—was sufficient to infer monopoly power. In addition, the district court's findings that Dentsply is an aggressive price leader that sets a high price umbrella, fails to lower prices when others do not follow its price increases, and siphons profits from its "cash cow" tooth business to fund other corporate ventures, all demonstrate Dentsply's power to control prices. The court's efforts to avoid the obvious conclusion of monopoly power rest on legal errors and are inconsistent with its findings and undisputed record evidence.

b. Dentsply has the power to exclude competition. Its exclusionary policies kept two brands from the U.S. market entirely, and caused a multi-year delay for another. The district court noted that two rivals entered and one expanded its product line, CL 28 (A113), but it did not examine whether any of

this posed a "real threat" to Dentsply, which is the legal test. Despite years of effort by some, and recent entry by others, no rival has had a significant competitive impact on Dentsply. This lack of *effective* entry or expansion by any competitor confirms that Dentsply's exclusionary conduct is effective and that its monopoly power is durable.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT NON-LIABILITY UNDER § 3 OF THE CLAYTON ACT DOOMS A CLAIM UNDER § 2 OF THE SHERMAN ACT

F.R.A.P. 28(a)(9)(B)/Local Rule 28.1(b) Standard of Review Statement.

This is an issue of the correct legal precept, and appellate review is plenary. *Srein v. Frankford Trust Co.*, 323 F.3d 214, 220 (3d Cir. 2003).

* * *

The district court's first basis for ruling against the government on maintenance of monopoly was its legal conclusion that "based on the court's finding that Dentsply is not in violation of § 3 of the Clayton Act, Dentsply is not in violation of § 2 of the Sherman Act either." CL 20 (A112). The district court's holding that a failure to prove that exclusive dealing violates § 3 necessarily exonerates a defendant under § 2 is squarely at odds with the law of this Circuit. This Court recently rejected a similar argument in its en banc *LePage's* decision:

"The jury's finding against LePage's on its exclusive dealing claim under § 1 of the Sherman Act and § 3 of the Clayton Act does not preclude the application of evidence of 3M's exclusive dealing to support LePage's § 2 claim." *LePage's, Inc. v. 3M*, 324 F.3d 141, 157 n.10 (3d Cir. 2003) (en banc), *petition for cert. pending*, No. 02-1865 (June 20, 2003). See also *United States v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (en banc) (per curiam) (rejecting Microsoft's contention that the district court's finding of no liability for exclusive dealing under § 1 precluded liability for the same conduct under § 2).

II. DENTSPLY HAS UNLAWFULLY MAINTAINED A MONOPOLY IN PREFABRICATED ARTIFICIAL TEETH

F.R.A.P. 28(a)(9)(B)/ Local Rule 28.1(b) Standard of Review Statement.

This is an issue of correct legal precept, and appellate review is plenary. *Srein*, 323 F.3d at 220. To the extent findings of fact are challenged, review is for clear error. FED. R. CIV. P. 52(a). A finding is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Securacomm Consulting, Inc. v. Securacomm Inc.*, 166 F.3d 182, 187 n.2 (3d Cir. 1999). Appellate courts have such a conviction when "'the trial judge's interpretation of the facts is implausible, illogical, internally

inconsistent or contradicted by documentary or other extrinsic evidence.'" *Savic v. United States*, 918 F.2d 696, 700 (7th Cir. 1990) (citation omitted). See also *United States v. Sargent Elec. Co.*, 785 F.2d 1123, 1129-1130 (3d Cir. 1986) (reversing when findings of fact and conclusions of law were implausible in light of undisputed facts).

* * *

This case involves the application of familiar and fundamental tenets of Section 2 law, which the district court misapplied. The government's legal theory was straightforward. Dentsply, which has maintained a 75%-80% share of the market for artificial teeth for at least a decade, recognized that if its rivals gained access to an adequate dealer distribution network, they would seriously threaten Dentsply's monopoly. And so Dentsply embarked on a 15-year campaign to maintain that monopoly by preventing dealers from selling rivals' teeth—conduct that made no business sense except to prevent competition. The district court, however, reached the strange conclusion that Dentsply irrationally and continuously engaged in anticompetitively motivated conduct that cost it something but gained it nothing.

A. The Offense Of Monopoly Maintenance

Section 2 of the Sherman Act makes it unlawful for any firm to "monopolize." 15 U.S.C. 2. The offense of monopolization is (1) the willful acquisition or maintenance of monopoly power (2) by use of anticompetitive conduct "'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). Such conduct is labeled "exclusionary" or "predatory" (the terms mean the same in this context). *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

This case concerns "maintenance of monopoly power" rather than its "willful acquisition." As Justice Scalia has observed: "Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Kodak*, 504 U.S. at 488 (dissenting opinion); *accord LePage's*, 324 F.3d at 151-152 ("a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take . . ."). Unlawful maintenance of monopoly under Section 2

requires proof "that a defendant has engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 69 (1996));[10] *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.) (citing same standard, but finding no violation). Thus, the question before the district court was whether Dealer Criterion 6 was reasonably capable of causing *any* material anticompetitive effect.

B. Dentsply's Conduct Was "Exclusionary" Within The Meaning Of Section 2

1. "Exclusionary" conduct comprehends "'behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.'" *Aspen*, 472 U.S. at 605 n.32 (quoting 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626b, at 78 (1978)).[11] As Judge Bork has explained,

---

[10]The quoted material is currently found in 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP ¶ 651f, at 83-84 (2d ed. 2002).

[11]The quoted material is currently found in 3 AREEDA & HOVENKAMP, ¶ 651c, at 79 (2d ed. 2002).

exclusionary conduct:

> involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986). If "valid business reasons" do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct is exclusionary. See *Kodak*, 504 U.S. at 483-485; *Aspen*, 472 U.S. at 605.[12] Thus, conduct is exclusionary or predatory if it would make no economic sense for the defendant but for its tendency to harm competition.[13] Indeed, this week's Supreme Court decision in *Trinko* emphasized that *Aspen* involved a defendant "willing[] to forsake short-term profits to achieve

---

[12]See also *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1993) (Breyer, J.); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995); *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1247 (5th Cir. 1985).

[13]See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 524 & n.3 (5th Cir. 1999); *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987).

an anticompetitive end." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 880 (Jan. 13 2004) (rejecting Section 2 liability).

The district court found that, for at least the past 15 years, Dentsply has prohibited its dealers, all independent, from carrying the teeth of its rivals for the "sole purpose" of excluding competition and without any legitimate business justification. FF 217, 216-222, 331-369 (A80-A82, A101-A109); CL 34, 36 (A114). The district court found that Dentsply's policies regarding exclusivity did not improve Dentsply's efficiency in marketing its teeth. For example, Dentsply's recognition of three new dealers in the early-to-mid 1990s made no sense apart from its exclusionary effect because Dentsply already had too many dealers at the time. FF 223 (A82). See *American Tobacco Co. v. United States*, 328 U.S. 781, 803-804 (1946) (defendants violated Section 2 in part by acquiring tobacco they did not need in order to deprive rival manufacturers).

The policies also cost Dentsply significant goodwill with the dealers on which Dentsply relies to sell its teeth. FF 215 (dealers view Dentsply as "'dictatorial and arrogant'" and "nonresponsive" to their concerns) (A80); Op. at 446 (noting dealers' "[v]ehement [o]pposition" to Dealer Criterion 6) (A107); FF 358 ("dealers vigorously oppose the policy") (A107); FF 189-191 (Dentsply cut off Frink as a tooth *and* merchandise dealer and "tracked down all but one of

the dealers [supplying teeth to Frink] and threatened to cut them off if they continued to supply Frink") (A76); FF 357-359 (A107). *Compare Microsoft*, 253 F.3d at 61-62 (Microsoft imposed significant costs on personal computer manufacturers while anticompetitively excluding competition). *Contrast Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 109 (3d Cir. 1992) (conduct not predatory in part because conduct increased defendant's goodwill with buyers). Dentsply's exclusionary policies made no economic sense but for their tendency to harm rivals, and so were predatory. *Contrast Trinko*, 124 S. Ct. at 879-880 (emphasizing that the evidence of defendant's "distinctly anticompetitive bent," found in *Aspen*, was lacking in *Trinko*).

2. The district court nevertheless rejected the government's Section 2 theory on the grounds that rivals did not need to use the same dealers used by Dentsply to distribute teeth and that Vita's and Ivoclar's competitive failings were their own fault. FF 71-108, 140-147, 244-268 (A59-A64, A69-A70, A86-A90); CL 26-27 (A113). In other words, the district court concluded that Dealer Criterion 6 not only did not harm competition, but *could* not harm competition. See, e.g., CL 26 ("Dentsply does not have the power to exclude competitors from the ultimate consumer") (A113). This conclusion—that Dentsply engaged in fifteen years of exclusionary conduct that was intended adversely to affect

competition, but did not or could not have such an effect—is utterly implausible and legally unsound.

Antitrust law rests on the assumption that all business conduct makes economic sense, and although firms—even monopolists—sometimes do act stupidly or irrationally, the law is reluctant to attribute conduct to a firm that has "no rational economic motive" to engage in that conduct. Even less acceptable is the notion that an entire industry is constantly behaving irrationally or foolishly. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986). See also *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 163 (3d Cir. 2003) ("evidence must not be too broadly construed lest such a conclusion 'create an irrational dislocation in the market'") (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

The district court, however, lost sight of these principles, and its findings depict a world that makes no sense, in which *everyone*—dental laboratories, dealers, rival manufacturers, and especially Dentsply—is incompetent or irrational. In the district court's view, Dentsply, an innovative and highly successful company, FF 148-168, 233-235, 238-241 (A70-A73, A84-A85), has persistently engaged in patently exclusionary conduct—over the objections of its

dealers and the labs—to protect its dominant market position from non-existent competitive threats.

More specifically, in the district court's world:

(1) Dentsply diligently enforced its dealer exclusivity policies,[14] with the express intent and expected effect of excluding rivals, when it should have been obvious to Dentsply that these policies were *unnecessary* because its rivals are inept, and were *unworkable* because rivals can successfully sell teeth to labs directly or using other dealers;

(2) Dentsply's rivals were not only inept—producing teeth that Americans dislike[15] and then marketing them poorly[16]—but also mistakenly objected to Dentsply's exclusionary conduct, erroneously believing that they needed the same dealers as Dentsply to distribute their teeth efficiently;

---

[14]As Dentsply construes Dealer Criterion 6, even dealers selling Trubyte teeth at some, but not all, outlets cannot add a rival brand at *any* outlet. Brennan (Dentsply) Tr. 1730-1731 (A1514-A1515).

[15]See, e.g., CL 16 ("Both Vident and Ivoclar . . . employed only European style moulds," which are "not well suited to the United States market") (A111); FF 34 (Vita) (A54); FF 249 (Ivoclar) (A87). Apparently, Dentsply also mistakenly believed that there is domestic demand for such teeth, because it introduced a line of European-style moulds in 1999. See Miles (Dentsply) Tr. 3495 (A2824) (describing Dentsply's Euroline).

[16]See, e.g., FF 257-268 (A88-A90).

(3) the dealers through which Dentsply distributed its teeth mistakenly objected to Dealer Criterion 6,[17] erroneously thinking that the dental labs wanted the rivals' products;[18] and

(4) the dental labs mistakenly asked their dealers to stock rivals' teeth[19] when, according to the court, it would be at least as convenient,[20] and perhaps cheaper,[21] for labs to phone those manufacturers and buy teeth directly.

According to the court, all those participants were operating on a mistaken view of the marketplace, because Dentsply's rivals could just as easily supply the labs directly. Further, under the district court's view, the dental labs and dealers should not even have been interested in the rivals' teeth because those products

---

[17]See, e.g., FF 178-211 (Dentsply preventing dealers from carrying rivals' teeth) (A74-A79); Op. at 446 (noting dealers' "[v]ehement [o]pposition" to Dealer Criterion 6) (A107); FF 358 ("dealers vigorously oppose the policy") (A107); FF 357-359 (A107).

[18]See, e.g., FF 249-250, 255-256 (Vita and Ivoclar teeth are difficult and expensive to use, require extra laboratory grinding, are difficult to set in dentures, and "tend to 'pop' out of denture acrylic") (A87-A88).

[19]See, e.g., FF 199 (Atlanta Dental had lab requests for Vita teeth) (A77-A78); FF 202 (DLDS had lab requests for Vita and Universal teeth) (A78); Frink had lab requests for Ivoclar teeth, Cavanagh (Frink) Tr. 724 (A670).

[20]See, e.g., FF 76, 92, 98 (manufacturers can ship next-day, and "labs generally do not require same day receipt of teeth") (A59, A62).

[21]See, e.g., FF 73, 114 (A59, A65).

were not competitive with Dentsply's superior products. The district court's conclusion that Dentsply persistently, foolishly, and irrationally engaged in futile exclusionary conduct that was intended to, but could not, foreclose competition strains credulity and contravenes the tenets of economics and antitrust law.

3. The district court reached its strange result because it applied an erroneous legal standard of causation and competitive harm: it found Dentsply's predation harmless because rivals had "viable" distribution alternatives to Dentsply's dealer network—principally through direct distribution but also through the use of non-Dentsply dealers. CL 11-14, 26-29 (A52-A54). The proper standard under Section 2, however, asks whether alternative channels "pose a real threat" to Dentsply's exercise of monopoly power. *Microsoft*, 253 F.3d at 71. The government is required to prove merely that defendant's challenged conduct "'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.'" *Id.* at 79 (quoting treatise). Thus, Microsoft unlawfully maintained its monopoly by foreclosing its primary rival browser from the primary channel of distribution, even though consumers could obtain the rival browser for free through other means. *Id.* at 64.

The district court, however, failed to make findings on whether the alternative means of distribution "pose a real threat" to Dentsply's dominance.

Rather, it canvassed the evidence to determine if alternative means of distribution were "viable" or "available,"[22] and from this jumped to the erroneous legal conclusion that Dealer Criterion 6 was incapable of harming competition. It found ample viability and availability under this standard, but it could hardly have found otherwise. The primary meaning of "viable," after all, is "capable of living." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2548 (1981). The legal meaning of "viable" is the same. BLACK'S LAW DICTIONARY 1559 (7th ed. 1999). The government never disputed that direct distribution and use of other inferior dealers were possible and available for rivals; there was never total foreclosure.[23]

The district court observed that the "DOJ's expert economist, Dr. Reitman, concedes that direct distribution is a 'viable' method of distributing artificial teeth.

---

[22]See FF 71-139 (A59-A68); Op. at 398 ("Selling Direct Is A Viable Method For The Distribution Of Artificial Teeth") (A59); FF 140-147 (A69-A70); Op. at 408 ("There Are Many Dealers Available To Manufacturers") (A69).

[23]Dentsply's foreclosure of dealer outlets, however, has indeed been quite substantial. Dr. Reitman considered three broad definitions of dealer "outlets": any dealer branch office (not just those of Trubyte dealers) currently selling teeth; any branch office of any dealer currently selling any dental laboratory product (not just teeth); and any branch office of any dealer that currently sells teeth at some (even if not all) of its locations. Dr. Reitman calculated without contradiction that Vita and Ivoclar are foreclosed from between approximately 78%-87% of all available dealer outlets, while Austenal/Myerson, Universal, and ATI/Justi were (due to grandfathering) foreclosed from at least 60% of all available dealer outlets. Reitman (expert) Tr. 1518-1519 (A1305-A1306).

Dr. Reitman agreed that Dentsply's rivals are 'not foreclosed completely' from the U.S. market for artificial teeth." FF 71 (A59) (citing Reitman (expert) Tr. 1650, 1573 (A1437, A1360)); CL 11, 26, 35 (A110, A113, A114). Although the district court seized on Dr. Reitman's use of "viable," the court's finding itself indicates that Dr. Reitman used that word in its ordinary, dictionary sense—the availability of direct distribution prevented Dentsply's rivals from being completely foreclosed. Dr. Reitman explained at length why alternative distribution channels do *not* allow competitors to challenge Dentsply's monopoly power and compete effectively.[24] Yet the concepts of viability and availability were the guiding principles of the court's conclusions of law. CL 35 ("In sum, because direct distribution is viable, non-Dentsply dealers are available . . . .") (A114).

A few of the court's conclusions attempt to go beyond notions of viability. For example, CL 26 (A114) states that direct distribution "is a viable and, in some ways, advantageous method of distribution." The phrase "and, in some ways, advantageous" underscores the court's failure to undertake the necessary analysis

[24]See, e.g., Reitman (expert) Tr. 1512-1519 (A1299-A1306) (non-Dentsply dealers, distributing labs, and operatory dealers are ineffective); *id.* at 1526 (Dentsply's policies cause competitive harm) (A1313); *id.* at 1538-1539 (labs will be better off without Dealer Criterion 6) (A1325-A1326); *id.* at 1692 (prices will fall if Dealer Criterion 6 eliminated) (A1479); *id.* at 1694-1695 (direct distribution not effective) (A1481-A1482); *id.* at 3903-3904 (identifying several procompetitive benefits of removing Dealer Criterion 6) (A3175-A3176).

of direct distribution's ability to constrain Dentsply's monopoly power.[25] In some ways, a bicycle is more advantageous than an automobile, but an automobile monopolist would not be threatened by competition from bicycles. As the district court understood the law, so long as rival firms are capable of surviving, all exclusive dealing arrangements by a monopolist are conclusively benign. This cannot be, and is not, the law. *Microsoft*, 253 F.3d at 79.

In CL 12 (A110-A111)—addressing exclusive dealing under Sherman Act § 1 and Clayton Act § 3, not monopoly maintenance under Sherman Act § 2—the district court asserted that "[d]irect distribution has the *potential* ability to deprive Dentsply . . . of significant levels of business" (emphasis added). But by focusing on mere potentiality, the court again failed to ask whether direct distribution poses a "real threat" to Dentsply's monopoly power, namely a substantial likelihood that it will happen—and happen soon. *Compare Microsoft*, 253 F.3d at 71, 57 ("only threats that are likely to materialize in the relatively near future" constrain a

[25]Indeed, the district court made only one finding referring to an "advantage" of direct distribution—Ivoclar's ability to "talk[] to our customers." FF 99 (A63) (citing Ganley (Ivoclar) Tr. 1119-1120 (A953-A954)). Mr. Ganley went on to explain, however, how that "advantage" is outweighed by the distinct disadvantages of direct distribution. See *id.* at 1120 (Ivoclar cannot replicate dealer functions, and that is "the largest problem we have in the market") (A954); *id.* at 1006-1007 (selling through dealers, not directly, is the most effective method of distributing teeth) (A840-A841).

monopolist). The court demonstrated that it was not making this inquiry by adding that "the DOJ's expert [Dr. Reitman] agreed that competing manufacturers are not foreclosed from a substantial share of the dental laboratories." CL 12 (A110-A111). Dr. Reitman, however, made clear that a manufacturer's access to labs (as distinguished from dealers) is not the pertinent inquiry because a rival relying solely on direct distribution will stay in business, but will not compete effectively. See pp. 33-34, above.

Finally, the court's statement that any rival at some indeterminate future time "may 'steal' a Dentsply dealer by offering a superior product at a lower price," CL 29 (A113),[26] misses the mark on two fronts. Once again, virtually anything "may" happen, but the controlling legal standard requires more certainty. Here, there are no findings that any competitor has actually deprived Dentsply of "significant levels of business," or is likely to do so soon.

Moreover, under any interpretation of the word "may," the statement misconstrues the government's theory of the exclusionary effect of Dealer Criterion 6's all-or-nothing choice for dealers. Dentsply's unjustified refusal to allow tooth dealers to sell multiple brands harms competition, not because it

[26]See also FF 110-111 (A65); CL 15, 17 (dealers buy Trubyte teeth on a purchase-order basis and can discontinue their relationship with Dentsply at any time) (A111-A112).

prevents rivals from "stealing" Dentsply's dealers, but because it prevents them from having any access to those dealers. The district court assumed that if a competitor would simply offer a dealer a superior tooth at a lower price, that dealer would give up all of its Trubyte business and start selling the competitor's teeth. But as the court's own findings make clear, no dealer in its "'right mind,'" FF 198 (A77) (quoting Weinstock (Zahn) Tr. 184 (sealed)) (A4699)), would stop selling Dentsply to take on a brand with a market share in the low single digits—no rival manufacturer would generate the volume of sales to make the deal attractive. Dentsply is too large a proportion of any dealer's tooth business to justify entirely "walk[ing] away" from Dentsply to sell a rival brand, FF 177 (A74);[27] see also pp. 7-9, above; *Lorain Journal v. United States*, 342 U.S. 143, 153 (1951) (dominant newspaper's refusal to accept advertisements from companies that advertised on radio was effective because advertisers "could not afford to discontinue their newspaper advertising in order to use the radio");

[27]See Cavanagh (Frink) Tr. 708, 712-713 (Frink turned down Ivoclar) (A662, A666-A667); Weinstock (Zahn) Tr. 152-153, 179-180, 184 (Zahn [redacted]) (sealed) (A236-A237, A4694-A4695, A4699); Harris (Atlanta Dental) Tr. 615-616 (Atlanta Dental turned down Vita) (A586-A587); Kashfian (Pearson) Tr. 1387 (Pearson turned down Vita) (A1177); Nordhauser (Darby) Tr. 4107 (Darby turned down Vita) (A3303); Whitehill (Vident) Tr. 255, 258, 259 (Patterson and Zahn have turned down Vita because of Dealer Criterion 6) (A311, A314, A315).

11 HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1807a, at 117 (1998) (it "is problematic" for "a dominant firm" to force an "all-or-nothing choice"on dealers). Dealer Criterion 6 is exclusionary because it prohibits the efficient use of independent common dealers.[28] The gravamen of the complaint in this case is not that Dentsply refused to share *its* assets with rivals, but rather, that it refused to permit independent dealers to share *their* assets with Dentsply's rivals. *Contrast Trinko*, 124 S. Ct. at 879, 880 (antitrust law does not generally require dominant firm to share *its* own facilities with its rivals).

4. The government's reading of "viable" is the best understanding of the district court's use of that word in its findings of fact and conclusions of law because anything broader—that direct distribution could seriously constrain Dentsply's monopoly power—is contradicted by the court's findings and uncontroverted evidence. The record discloses the real and economically rational explanation for Dentsply's behavior: that the predation could and did produce precisely the anticompetitive results Dentsply expected in the first place. The court's own findings and other, undisputed record evidence show that in the

[28]In addition, Dealers would enhance their efficiency by carrying multiple brands of teeth. Reitman (expert) Tr. 1537-1538 (A1324-A1325).

absence of Dentsply's exclusivity policies, tooth prices and Dentsply's market share would fall, and rivals' promotion and competition would increase.

Although the district court made no findings on what would happen to tooth prices if Dealer Criterion 6 were eliminated, both the government's *and* Dentsply's economic experts testified that in the absence of Dealer Criterion 6, tooth prices would fall. Independent of the government's pricing survey,[29] Dr. Reitman testified that prices would fall absent Dealer Criterion 6. See Reitman (expert) Tr. 1463-1464, 1527-1529, 1533-1534, 1650-1651, 1692, 3903-3904 (A1250-A1251, A1314-A1316, A1320-A1321, A1437-A1438, A1479, A3175-A3176). Dr. Reitman explained—based on the record evidence he examined[30]—that when dealers begin selling multiple brands, laboratory

---

[29]The district court excluded the government's survey proffered to demonstrate and quantify the extent to which prices would fall in the absence of Dealer Criterion 6, as well as Dr. Reitman's testimony "to the extent [his] opinions are based on the survey." CL 39 (A114-A115); FF 304-330 (A96-A101).

[30]Dr. Reitman's opinion was based on his economic analysis of the testimony (both at trial and all of the 100+ depositions), interviews, site visits, documents, and data (not limited to the survey data) on market participants at every level of the dental laboratory product market, as well his review of the relevant economic literature. Reitman (expert) Tr. 1464-1470 (A1251-A1257). In addition to his analysis of the survey data, Dr. Reitman also performed analyses of Dentpsly's zip code sales data, pricing and cost data indicating margins, sales and marketing expenses indicating relative promotional spending, and foreclosure. *Id.* at 1468-1469, 1474, 1518-1520, 3881-3885, 3953-3961 (A1255-A1256, A1261, A1305-A1307, A3153-A3157, A3225-A3233).

customers will be able to compare various brands side-by-side, obtain all brands through their same preferred distribution channel (dealers), and become more price-sensitive, all of which will pressure manufacturers (Dentsply and rivals) to cut their price. *Id.* at 1527-1530, 1533-1534 (A1314-A1317, A1320-A1321). Dr. Reitman used the survey merely to "validate[]" his opinion and to quantify a price effect. *Id.* at 1532, 1692, 3904 (A1319, A1479, A3176). The district court did not discredit this evidence, but rather, ignored it.

Dentsply's expert, Prof. Marvel, testified that "both of the theories offered in this case would say that, in the absence of exclusive dealing, prices would fall." Marvel (expert) Tr. 3648-3649 (A2975-A2976). To be sure, he believed that prices would fall for the very different reason of free riding and, therefore, he thought that falling prices were a *bad* result. *Id.* at 3649-3650 (A2976-A2977). Of course, the district court thoroughly rejected Dentsply's free-riding justification, FF 339-355 (A102-A107); CL 37 (A114), thereby putting to rest Prof. Marvel's contention that falling prices would somehow be undesirable. Moreover, Trubyte's former general manager agreed that dealers and labs are likely to receive lower prices in the absence of Dealer Criterion 6. Clark (Dentsply) Tr. 2584-2585 (A2190-A2191).

In addition, Dentsply executives conceded that Vita and Ivoclar make high-quality teeth[31] and that Dentsply would lose market share without Dealer Criterion 6. See Miles (Dentsply) Tr. 3513 ("[t]hat's true") (A2842); Clark (Dentsply) Tr. 2584 (without Dealer Criterion 6, "[w]e certainly felt that our market share would go down . . .") (A2190); Brennan (Dentsply) Tr. 1718 ("we would lose market share") (A1502).[32] Experience confirms these statements. Before Dentsply stopped DTS from selling competitive teeth, DTS had over $1 million in combined annual sales of Vita and Ivoclar teeth. GX 61 at DS015810 (A3654). DTS greatly increased the sales of Vita teeth in its territories, and Vident's sales there declined when it lost DTS as a dealer. Whitehill (Vident) Tr. 260-261, 263 (A316-A317, A319). Similarly, Vident's tooth sales "increased quite rapidly" when Jan Dental was selling Vita teeth, and declined in Jan's territory when Jan stopped selling them. *Id.* at 264 (A320). And Darby expected

[31]See, e.g., Clark (Dentsply) Tr. 2684 (A2259); Miles (Dentsply) Tr. 3494 (A2823). Others in the industry agree. See, e.g., Ryan (Sonshine) Tr. 1230 (premium teeth of Dentsply, Ivoclar, Vita are all high quality) (A1048); Challoner (Lord's) Tr. 2879 (same) (A2421).

[32]See also Whitehill (Vident) Tr. 285 (Vident would approach dealers if Dentsply's conduct enjoined) (A341); Ganley (Ivoclar) Tr. 1022, 1106 (Ivoclar would negotiate with dealers) (A856, A940); Weinstock (Zahn) Tr. 186-189 (Zahn Dental would [redacted]) (sealed) (A4701-A4704); Harris (Atlanta) Tr. 617-619 (Atlanta Dental would add Vita to meet "customer[] needs in local availability") (A588-A590).

significant sales of Vita teeth, at Dentsply's expense. Nordhauser (Darby) Tr. 4128-4129, 4138 (A3324-A3325, A3334). See *Microsoft*, 253 F.3d at 62 (Microsoft prevented OEMs (effectively, its dealers) "from taking actions that could increase rivals' share of usage").

Thus, in the absence of Dealer Criterion 6, competition by rivals would increase, forcing Dentsply to react competitively. See FF 222 (A82) (Dentsply was "concerned" that it "would have to compete even harder" in the midwest if DTS carried Vita and Ivoclar teeth) (citing GX 86 at DS015805 (A3664)). The district court found that rivals *and* Dentsply would both increase their "levels of promotion and marketing," FF 355, 344, 353 (A107, A103-A104, A106), and thereby introduce important aspects of competition and demand creation to this market. See FF 258 (demand for Vita and Ivoclar teeth low "[a]s a result" in part of their "lack of promotional efforts") (A88-A89); see also FF 257-268 (Vita and Ivoclar failed to promote) (A88-A90). Moreover, in finding that rivals "would increase their promotional expenditures if their teeth were sold through the dental laboratory dealer network," the court relied on testimony that rivals have engaged in "aggressive pricing" when they have had access to a dealer network, with the result that labs paid lower prices to dealers for teeth than labs paid directly to the manufacturer for those teeth. FF 355 (A107) (citing Swartout (Myerson) Tr. 1316-1319 (A1118-A1121)).

Dentsply, faced with an expected market share loss, would [redacted]. Reitman (expert) Tr. 1535 (sealed), 3971-3972 (A4922, A3243-A3244); Miles (Dentsply) Tr. 3513 (Dentsply "certainly" would fight to regain share) (A2842); Jenson (Dentsply) Tr. 2309 (Dentsply "would react . . . to grow [its] business for the future") (A1973). According to its CEO, Dentsply would attempt to regain share by various means, all of which are procompetitive: increasing research and development expenditures; increasing sales and marketing expenditures; and expanding its sales force. Miles (Dentsply) Tr. 3514 (A2843). Thus, even if Dentsply ultimately regained its current market share, consumers would still be better off without Dealer Criterion 6 because Dentsply would compete harder to retain their patronage. See *United States v. Visa USA, Inc.*, 344 F.3d 229, 240-241 (2d Cir. 2003) (benefits from competition include expected procompetitive response by defendants).

Such actions would be consistent with Dentsply's past conduct on those few occasions when Dentsply's dealers have sold Vita or Ivoclar teeth. For example, in 1995 Dentsply reacted competitively to convert labs to Trubyte teeth after DTS was permitted to keep a stock of Vita teeth in its New York branch. Clark (Dentsply) Tr. 2687-2688 (A2262-A2263); Raths (DTS) Tr. 1159 (A993). Dentsply reacted similarly in 1998, when Darby acquired DTS and was permitted to keep the Vita tooth stock in New York for a short while. Clark (Dentsply)

Tr. 2689-2690 (A2264-A2265); GX 130 at 001121Y (Dentsply commits to "work with Darby to spend sales calls converting current Vita users to Dentsply teeth") (A3677).

The corollary to these findings and other evidence of what Dentsply and its rivals would do if Dealer Criterion 6 were enjoined is that Dentsply's exclusionary conduct has prevented these things from happening. To use the Seventh Circuit's phrase, Dealer Criterion 6 "had bite," thereby causing anticompetitive effects. *Toys "R" Us v. FTC*, 221 F.3d 928, 933 (7th Cir. 2000).

5. Dentsply's predatory conduct also cannot be dismissed on the basis of the supposed competitive failings of Vita and Ivoclar. The district court suggested that Dentsply's predation did not harm competition because its two main rivals, Ivoclar and Vita, were incompetent competitors who inadequately marketed badly designed and badly made teeth. CL 27 (A113); FF 244-268 (A86-A90). This view of Vita's and Ivoclar's incompetence is illogical and largely irrelevant, and contradicted by the court's own findings.

If Ivoclar and Vita were such obvious incompetents, they could not possibly have posed a competitive threat to Dentsply—let alone a threat sufficient to make worthwhile a fifteen-year campaign of predation against them. Dentsply's predation could not possibly have accomplished anything worth the cost. Under the court's view, Dentsply's conduct toward Ivoclar and Vita was utterly irrational.

Likewise, the court's view renders the actions of Dentsply's dealers inexplicable. Although these independent dealers must handle Dentsply teeth exclusively, they dislike this limitation and repeatedly have tried to carry Ivoclar and Vita teeth. Dentsply has repeatedly fought and suppressed these efforts—at a cost of time and effort, including use of resources to police recalcitrant dealers and litigation with at least one major dealer, and dealers' increased ill will. FF 181 (Darby sued Dentsply) (A74-A75); FF 178-211 (A74-A79). But if Ivoclar and Vita teeth were as bad as the district court says, Dentsply's dealers must have been utterly irrational to fight Dentsply so hard and so often to be able to carry these rival teeth. Nor would the savvy Dentsply dealers have undertaken these fights with Dentsply had Ivoclar's and Vita's marketing and distribution of their teeth been as lacking as the court thought.

Even if Vita's and Ivoclar's failings were a factor in their lack of success, the district court placed a legally erroneous emphasis on this point. Maintenance of monopoly in violation of Section 2 requires proof "that a defendant has engaged in anticompetitive conduct that '*reasonably appear[s] capable* of making a significant contribution to . . . maintaining monopoly power.'" *Microsoft*, 253 F.3d at 79 (emphasis added) (quoting treatise). Thus, the proper question is whether Dealer Criterion 6 could reasonably cause *any* material anticompetitive

effect, not whether consumers would be yet better off but for the incompetence of other competitors. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) ("the fact of damage" is demonstrated by "proof of *some* damage flowing from the unlawful" conduct); *id.* ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury"); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 791 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1051 (9th Cir. 1981); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 483 (3d Cir. 1998) (reversing district court for failing to apply *Zenith* standard on causation); *United States v. AT&T Co.*, 524 F. Supp. 1336, 1344 (D.D.C. 1981) ("the government's claim is not defeated by the circumstance that some of Bell's competitors may have fallen prey to their own internal difficulties rather than to Bell System activities"). Dentsply did what was necessary to thwart Vita and Ivoclar as effective threats to its monopoly. Dentsply's exclusionary policies ensured that all competitors, "weak and strong companies alike" (*AT&T*, 524 F. Supp. at 1344), posed no threat. Properly viewed, the United States proved that Dentsply's exclusionary conduct unlawfully maintained its monopoly.

Finally, even if the rivals' failure to invest vigorously in the tooth market was a factor in their lack of success, the district court found that Dentsply's exclusionary conduct is to blame for rivals' underinvestment in competitively significant promotion. FF 355 (A107). When determining "how to allocate resources, [competitors] evaluate how effective the promotional resource will be at increasing sales." *Id.* Once Dentsply kept rivals out of the critical dealer distribution channel, it was perfectly rational for those competitors to invest less in teeth and to redeploy their resources into other lines of business, see FF 257-268 (A88-A90). Take away the impediment of Dealer Criterion 6, and all rivals would invest more in their tooth businesses. FF 355 (A107). The district court, however, turned logic upside down by concluding that when a dominant firm's grip on the market is so strong that competitors have rationally decided to focus their competitive energies elsewhere, it is a sign of a *lack* of monopoly power or anticompetitive effects.

C. Dentsply Has Monopoly Power

Monopoly power is the "'power to control prices or exclude competition.'" *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 481 (1992) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). "[T]he material consideration in determining whether a monopoly exists is not that

prices are raised and that competition is excluded, but that *power* exists to raise prices or to exclude competition when it is desired to do so." *Conwood*, 290 F.3d at 783 n.2 (emphasis added) (internal quotation marks omitted).

Monopoly power ordinarily "may be inferred from the predominant share of the market." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Weiss v. York Hosp.*, 745 F.2d 786, 827 & n.72 (3d Cir. 1984). An 80% share of the market is more than sufficient to infer monopoly power. *Id.*; CL 23 (A112). When other factors reinforce the predominant market share—such as persistence of that share and barriers to effective, new entry—monopoly power is established. *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 202 (3d Cir. 1992); *Crossroads Cogeneration v. Orange & Rockland Utils, Inc.*, 159 F.3d 129, 141 (3d Cir. 1998); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 968 (10th Cir. 1990) ("market power, to be meaningful for antitrust purposes, must be durable").

The district court ruled that Dentsply's "predominant," "persistently high market share" of 75%-80% was sufficient to infer monopoly power, CL 23 (A112); FF 238 (A84),[33] yet ultimately concluded that Dentsply lacks monopoly

[33]See also Marvel (expert) Tr. 3714-3726 (conceding that Dentsply possesses "substantial market power," but asserting that it stops short of monopoly power) (A3039-A3051).

power because it could not control prices or exclude competitors, CL 24-31 (A112-A113). To be sure, "courts consider more than just the percentage of the market share in determining monopoly power." *Weiss*, 745 F.2d at 827 n.72; *Crossroads*, 159 F.3d at 141; *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 112 (3d Cir. 1992). There was "more" here, and the district court's conclusions to the contrary rest on legal errors or ignore its findings and other uncontroverted facts.

1. The district court's findings demonstrate that Dentsply has the power to control prices.

The district court found that Dentsply has a "reputation for aggressive price increases in the market" and "has not reacted with lower prices when others have not followed its price increases." FF 230, 229, 226 (A83). Thus, like a monopolist, Dentsply raises prices "when it is desired to do so." *Conwood*, 290 F.3d at 783 n.2. The court also found that "Dentsply has not set its own prices by referencing the prices of competitors," FF 228 (A83)—again "something a firm without a monopoly would have been unable to do," *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam). Moreover, Dentsply's tooth business is the corporation's "cash cow," the profits from which, at least in part, are "siphoned away . . . and used for other projects within the corporation." FF 235-236 (A84-A85). That means that Dentsply's tooth business generates revenues far in excess of current total costs. Dentsply's profit margins

on teeth average 80%, on some premium teeth are 90%, and have been "increasing over time," even though "[f]or many years, the artificial tooth market has been stagnant in terms of unit growth." FF 235, 233-234, 237 (A84). Combined with the court's findings that Dentsply's market share has averaged 75%-80% for a decade and dwarfs—by a factor of 15—its next-closest competitor, FF 238-240 (A84-A85), these findings establish that Dentsply has monopoly power. See, e.g, *Fineman*, 980 F.2d at 202 (noting that defendant's market share was three times its next-closest rival).

The district court nonetheless held that Dentsply cannot control prices because:

> [1] The evidence shows that Dentsply teeth are generally priced between Vident and Ivoclar teeth. [2] Although one former Dentsply employee testified that Dentsply does not establish its prices in relation to the competition, this is insufficient to establish that Dentsply controls price. [3] The DOJ has provided no evidence that Dentsply has established a market of supra-competitive pricing. [4] Dentsply's profit margin, while high, was not shown to be high relative to any other tooth manufacturer.

CL 30 (A113). All four reasons are unsound.

First, the district court's conclusion that "Dentsply teeth are generally priced between Vita and Ivoclar teeth" is legally and economically irrelevant in assessing monopoly power. It is perfectly plausible that a monopolist's rivals price higher than it does. Consequently, Microsoft was not permitted to take

refuge in the fact that its rivals priced even higher than it did. *Microsoft*, 253 F.3d at 57. Small rivals may be at a cost disadvantage and therefore compelled to price high. Moreover, by raising prices above the competitive level, a monopolist allows rivals to raise their prices under its umbrella. *Cf. MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1117 (7th Cir. 1983); *Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 87 (2d Cir. 1981). Thus, the critical issue is not whether Dentsply's prices currently are higher than those of its competitors; rather, it is how market-wide prices would be affected if Dentsply's exclusive dealing policies were enjoined. As explained above, pp. 39-40, prices would fall if Dealer Criterion 6 were enjoined. See also Swartout (Myerson) Tr. 1316-1318 (Myerson has lower prices where it has better dealer distribution) (A1118-A1120); Obst (DSG) Tr. 2752-2753 (Zahn's prices to DSG lab on Myerson teeth are cheaper than Myerson's direct sales price to DSG) (A2312-A2313); Whitehill (Vident) Tr. 284-285 ([redacted]) (sealed) (A4747-4748).

Moreover, the court's price comparison is incomplete and insufficient. CL 30 (A113) is likely, though not expressly, based on FF 224-225 (A82-A83), which provide pricing information on Trubyte, Vita, and Ivoclar premium teeth, drawn from exhibits DX 511, DX 512, DX 513 (A3952, A3957, A3958). But the price comparisons of FF 224-225 do not compare like sales. Dentsply sells only to

dealers; Ivoclar sells solely—and Vita sells primarily—directly to labs. Dentsply's expert testified that those price comparisons are only "remotely useful," in part because the exhibits provide merely the manufacturer's suggested prices, not actual trade prices. Marvel (expert) Tr. 3576 (A2903). Further, those same Dentsply exhibits show that when prices *to dealers* are compared on the lines of teeth and years mentioned in FF 224, Dentsply's prices are actually higher than Ivoclar's *and* Vita's.[34] And, in the sole "apples-to-apples" finding, the court found that Dentsply's prices for premium teeth were higher. See FF 343(c) ("[b]oth Universal and Meyerson sold premium teeth through dealers at prices lower than Dentsply's" to those same dealers) (A103).[35]

---

[34]In FF 224, the district court relied on the data in last two columns in the table below (from DX 511, DX 512, DX 513 (A3952, A3957, A3958)) and found that Vita's prices were higher. The first two columns, however, show that Vita's prices *to dealers* (see p. 6, above) are lower than Dentsply's prices to dealers.

Year	Dentsply's Price to Dealers	Vita's Price to Dealers	Dentsply's MSRP to Laboratories	Vita's Price to Laboratories
1996	$19.30	$17.41	$26.95	$29.85
1997	$19.90	$17.76	$27.75	$30.45
1998	$20.40	not reported	$28.45	$31.65
1999	$20.90	$19.20	$29.15	$32.91

[35]Universal and Myerson sell teeth to some Trubyte dealers under Dealer Criterion 6's "grandfather" clause; Vita and Ivoclar, however, are not grandfathered. See p. 7 n.3, above.

The court also found that Dentsply is a price leader, creating an "umbrella" for the market, even on premium teeth. FF 226, 230 (A83). According to William Turner, the Trubyte Division's Senior Product Manager from 1993-2002,[36] Dentsply's prices on premium teeth are 10%-15% higher than Vita's or Ivoclar's, and probably at least that much above Myerson's. Turner (Dentsply) Tr. 453-454 (A442-A443). Finally, on economy teeth (which FF 224-225 do not address), the district court found that Dentsply "charges a premium substantially higher than its rivals," FF 343(b) (A103), yet ignored that finding in CL 30.

Second, the district court, without citing any authority, labeled "insufficient," CL 30 (A113), Mr. Turner's unrebutted testimony that Dentsply set prices without "referencing the prices of competitors," FF 228 (A83) (citing Turner (Dentsply) Tr. 456 (A445)). Yet, as noted above, the en banc D.C. Circuit recently held that this is "something a firm without a monopoly would have been unable to do," *Microsoft*, 253 F.3d at 58.

Third, the district court's conclusion, without citation or explanation, that the government "provided no evidence that Dentsply has established a market of

---

[36]Turner (Dentsply) Tr. 402-403 (A435-A436). He had overall responsibility for the strategic direction for tooth products, consulted with division management on annual price increases and pricing adjustments, and supervised market research related to teeth. *Id.* at 403-404, 430 (A436-A437, A439).

supra-competitive pricing," CL 30 (A113), is easily refuted by the uncontroverted evidence, discussed above at pp. 38-44, that in the absence of Dealer Criterion 6, competition would increase and prices would fall.

Finally, the district court concluded that Dentsply lacks control over prices because "Dentsply's profit margin, while high, was not shown to be high relative to any other tooth manufacturer." CL 30 (A113). The district court made detailed findings regarding Dentsply's lofty profit margins, but made no findings regarding the profit margins of any rival. See FF 231-236 (A83-A84). Dentsply's profit margins on its "cash cow" tooth business, FF 235 (A84), average 80%, are 90% on some premium teeth, and have been "increasing over time" despite "stagnant" unit growth in the market, FF 233-234, 237 (A84). Because the evidence shows that Dentsply's profit margins are [redacted] (see p. 5, above), CL 30's statement about profit margins is unsupportable.

2. Dentsply's monopoly is protected by entry barriers.

"Notwithstanding the extent of an antitrust defendant's market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power—the power to raise prices." *Allen-Myland v. IBM Corp.*, 33 F.3d 194, 209 (3d Cir. 1994). The monopolist's high prices will attract entry and expansion by rivals unless

competitors are somehow prevented from challenging the defendant's dominance. *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1200 (3d Cir. 1995). See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986).

The district court ruled that there are no significant entry barriers because Dentsply's rivals have "viable" alternatives to the Dentsply dealer network and so Dentsply "does not have the power to exclude competitors from the ultimate consumer." CL 26 (A113). It pointed out that two firms had entered the market and that Ivoclar had added a line of teeth in American-style moulds. CL 28 (A113). In so ruling, however, the court ignored its own findings of excluded rivals and took an erroneous view of the law.

Dentsply's exclusionary policies kept two brands from the U.S. market entirely, and caused a multi-year delay for another. When Dentsply recognized Darby as a tooth dealer in 1994, it required Darby to "cancel its plans to sell, and its initial order for, the Odipal [premium] line of teeth." FF 182 (A75).[37] Darby had initially ordered 100,000 sets of these teeth and expected annual Odipal sales of "at least a million dollars" per year. Nordhauser (Darby) Tr. 4141 (A3337).

[37]Odipal is made by Unidesa (a Spanish company). Nordhauser (Darby) Tr. 4122, 4141 (A3318, A3337).

Today, Odipal is sold "all over the world" . . . but not in the U.S. *Id.* at 4123 (A3319). At the same time, Dentsply also required Darby to drop the Ortholux line, FF 182 (A75), another Unidesa brand. This was a "big thing" for Darby, which had exclusive U.S. Ortholux rights and annual sales of at least $500,000. Nordhauser (Darby) Tr. 4121, 4140-4141 (A3317, A3336-A3337). The Ortholux teeth are now "gone" from the U.S. market, even though they are sold in other parts of the world. *Id.* at 4124 (A3320). And, although the district court emphasizes Heraeus Kulzer's entry into the U.S. market in 2000, CL 28 (A113), it ignores its earlier finding that prior to entry, Heraeus sought but was "unable to obtain distribution through Trubyte dealers," FF 47 (A56), and the uncontroverted evidence that as a result, Heraeus's entry was delayed 5-6 years. See Weinstock (Zahn) Tr. 177-178 ([redacted]) (sealed) (A4692-A4693); Reitman (expert) Tr. 1536 (A1323).

The district court also applied the wrong legal standard. Section 2 prohibits a monopolist from shutting competitors out of a major channel of distribution unless there are distribution alternatives that permit a rival "to pose a real threat to [defendant's] monopoly." *Microsoft*, 253 F.3d at 71; see also *Conwood*, 290 F.3d at 787-788 (defendant maintained monopoly through conduct aimed at the best channel of distribution). The district court noted that two rivals have entered,

CL 28 (A113), but did not examine whether any of this would pose a "real threat" to Dentsply's flexing of its monopolistic muscle.[38] "The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995); see also *Microsoft*, 253 F.3d at 57 ("only threats that are likely to materialize in the relatively near future" constrain a monopolist). Because one of the new entrants has a 1% market share and the other has only a fraction of that,[39] their entry is not competitively significant. *Compare Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 366, 367 (9th Cir. 1988) (defendant found to possess monopoly power despite entry by *two* rivals that collectively gained a 32% market share); *Rebel Oil*, 51 F.3d at 1440-1441 (entry of "two small rivals" did not preclude a finding of high entry barriers). And in *Reazin*, there was

[38]Thus, Dentsply's expert agreed that it is the effectiveness of entry, not the mere fact of entry, that determines the chance that monopoly power will be eroded. See Marvel (expert) Tr. 3724-3725 (A3049-A3050).

[39]Heraeus Kulzer's share is 1%, FF 239 (A84), and its combined U.S. and Canadian sales of $744,000 in 2001 was only 37% of its projected $2 million volume. Becker (Heraeus Kulzer) Tr. 1825 (A1551). Schottlander's Enigma tooth has less than $50,000 in annual sales, Dillon (Leach & Dillon) Tr. 4083 (A3281); DiBlasi (Lincoln) Tr. 2794-2795 (A2354-A2355).

monopoly power despite *200* rivals and theoretically low barriers (only capital and licensing required). *Reazin*, 899 F.2d at 971.[40]

The same is true in the tooth market. The existence of rivals (including two recent entrants) does not threaten Dentsply. As Prof. Marvel said: firms can profitably sell on the fringe, under Dentsply's umbrella; entry in a market with supracompetitive pricing does not indicate absence of monopoly power; and Ivoclar and Vita "have not been cutting into Dentsply's Trubyte position." Marvel (expert) Tr. 3722-3725, 3765, 3796-3797, 3629 (A3047-A3050, A3090, A3121-A3122, A2956). Dentsply still has 75%-80% of the market. FF 238 (A84). Its nearest rivals—Ivoclar, Vita, and Myerson—still have shares of 5%, 3%, and 3%, FF 239 (A84), and even if Ivoclar meets its sales goals for its new American-style moulds, FF 252 (A87); CL 28 (A113), its overall market share would increase to only 5.5%, FF 239, 252 (A84, A87). Dentsply remains the price leader for the tooth market, FF 226-230 (A83), and Trubyte's top executive testified that it has

---

[40]The district court cited *Barr Laboratories*, 978 F.2d at 114 (see CL 28 (A113)), but that case addressed whether the defendant's conduct posed a dangerous probability of obtaining monopoly power in the future, to satisfy a claim of *attempted* monopolization, *id.* at 112-113, rather than, as here, whether an existing monopoly has been unlawfully maintained. The market in *Barr* was characterized by low foreclosure (15%), strong competitors, and entry by six firms. *Id.* at 110-111, 114. The court determined that, "[t]aken as a whole, this evidence reflects a competitive market and establishes the absence of any dangerous probability" that the defendant could obtain monopoly power. *Id.*

not reduced prices in response to the entry of Heraeus Kulzer or Schottlander, or to Ivoclar's expansion. Jenson (Dentsply) Tr. 2302, 2306 (A1966, A1970).[41]

This lack of *effective* entry or expansion by any of Dentsply's competitors (or would-be competitors) confirms that Dentsply's exclusionary conduct has been effective and that Dentsply's monopoly power is secure. *LePage's*, 324 F.3d at 163 (entry barriers indicated when "there has never been a competitor that has genuinely challenged 3M's monopoly and it never lost a significant transparent tape account to a foreign competitor"); *Microsoft*, 253 F.3d at 54-55; *Fineman*, 980 F.2d at 202; *Reazin*, 899 F.2d at 971-972; *Oahu*, 838 F.2d at 367. The district court's presumption that any entry or any expansion signifies the absence of monopoly power would allow a firm, no matter how dominant, to engage in any kind of anticompetitive conduct, no matter how exclusionary, so long as rivals maintain even a trivial presence.

Finally, the district court's conclusion that Dentsply lacks monopoly power because competitors could "steal" a Dentsply dealer with a better offer, CL 29 (A113), both misapprehends the nature of the case (see pp. 36-38, above) and ignores the finding critical for determining monopoly power—that no dealer has

---

[41]See also Reitman (expert) Tr. 1688 (A1475); Weinstock (Zahn) Tr. 176, 180 (Zahn has not observed any effect that Schottlander's or Heraeus's entry has had on Dentsply's conduct) (A260, A264).

been willing to walk away from its dominant Trubyte business in order to take on competitive teeth. FF 177 (A74); see *United States v. Visa USA, Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (fact that no bank willing to give up membership in Visa or MasterCard to issue American Express cards indicative of Visa and MasterCard's market power).

CONCLUSION

The judgment of the district court should be reversed and remanded with instructions to enter judgment for the United States.

Respectfully submitted.

May 14, 2004 (Final Version)
January 16, 2004 (Proof Version)

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
J. BRUCE McDONALD
Deputy Assistant Attorneys General

MARK J. BOTTI
JON B. JACOBS
Attorneys
U.S. Department of Justice
Antitrust Division

ROBERT B. NICHOLSON
ADAM D. HIRSH
Attorneys
U.S. Department of Justice
Antitrust Division
601 D Street NW, Room 10535
Washington, DC 20530-0001
Tel: 202-305-7420

ADDENDUM

WITNESSES AND DEPONENTS NAMED IN THIS BRIEF

NOTE: All affiliations and positions are as of time of trial or date of deposition, as appropriate.

Name	**Title or Position**
Becker, Horst	CEO, Heraeus Kulzer North America.
Brennan, Robert	Former Vice President and General Manager, Trubyte Division.
Cavanagh, Tom	Former President, Frink Dental.
Challoner, Reynolds	Former Owner, Lord's Dental Studio.
Clark, Christopher	Former General Manager, Director of Sales and Marketing, Trubyte Division.
DiBlasi, Jeffrey	Vice President and Sales Manager, Lincoln Dental Supply.
Dillon, Kevin	Former President, Ivoclar; President, The Dillon Company, Inc.
Ganley, Robert	President, Ivoclar Vivadent, USA Inc.
Harris, Betsy	Customer Service Representative; former Manager of Tooth Department, Atlanta Dental Supply Company.
Jenson, Steven	Vice President and General Manager, Trubyte Division.
Kashfian, Keyhan	President, Pearson Dental Supply.

Mariacher, Richard	Vice President of Technical Services, National Dentex Corp.
Marvel, Howard	Dentsply's economic expert.
Miles, John	CEO, Dentsply International.
Nordhauser, Sidney	General Manager, Darby Dental.
Obst, George	Chairman and CEO, Dental Services Group (DSG).
Raths, Robert	President, Dental Technicians Supply (DTS).
Reitman, David	Government's economic expert.
Ryan, John	President, Sonshine Dental Laboratories.
Silcox, Jack	Founder, Jack C. Silcox Ltd.
Swartout, James	President, Myerson, LLC.
Turner, William	Former Senior Product Manager, Trubyte Division.
Weinstock, Norman	Chairman, Zahn Dental.
Whitehill, Wayne	President, Vident, Inc.

CERTIFICATE OF BAR MEMBERSHIP

Counsel for appellant United States of America are attorneys with the U.S. Department of Justice, Antitrust Division. Our understanding of this Court's longstanding practice is that, as federal government attorneys, we are not required to be specially admitted to practice before the bar of this Court.

_____

Adam D. Hirsh

CERTIFICATION CONCERNING LENGTH LIMITATIONS

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 13,915 words, excluding the addendum and the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Times New Roman.

Dated: May 14, 2004

Adam D. Hirsh
U.S. Department of Justice
Antitrust Division
601 D Street NW, #10535
Washington, DC 20530-0001

CERTIFICATE OF SERVICE

I certify that on May 14, 2004, two true and correct copies of the Brief For The United States (Final Version) were served by hand on:

Margaret M. Zwisler, Esq.
Richard A. Ripley, Esq.
Howrey Simon Arnold & White LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004-2420

Attorneys for Appellee Dentsply International, Inc.

_____
Adam D. Hirsh