

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Civil Action No. 99-005 (SLR)
)
DENTSPLY INTERNATIONAL, INC.,)
)
 Defendant.)

MEMORANDUM ORDER

At Wilmington this 3rd day of April, 2002, having considered the motions in limine submitted by the parties and responses thereto and having heard argument on the matters;

IT IS ORDERED:

1. **Survey.** Defendant seeks to exclude as inadmissible hearsay a survey of dental laboratories commissioned by plaintiff that assessed the role of two marketing variables, distribution means and price, in influencing dental laboratories' choices of artificial tooth brands. (D.I. 354, Tab 1 at 2) The survey's objective was to provide an empirical basis for determining the relative importance of the two variables and for estimating the expected market share of defendant and its competitors under various scenarios. (Id.) The survey was designed and conducted at the direction of Dr. Jerry Wind, whom plaintiff has hired as an economic and survey expert. (Id. at 2, 3) Part A of the survey included questions about the individual

laboratory's characteristics and dealer and tooth brand preferences. (Id. at 6) Part B involved a "tradeoff conjoint study" exercise that was considered the "main part" of the survey. (Id. at 3, 6) Part B presented the respondent with eight cards, each containing a hypothetical market scenario; the respondent was asked to allocate 100 points across all of the tooth brands based on how much of each brand the respondent would purchase in the next three months under that particular scenario. (Id. at 6) Out of a potential 10,000 dental laboratories in the United States, 2520 laboratories were contacted for initial screening by telephone to generate a final sample of 594 eligible laboratories; of the 594 laboratories that were sent the survey, 274 laboratories responded. (Id. at 4; D.I. 364 at 4) An independent survey organization conducted the survey, and neither survey interviewers nor participants knew the purpose of the survey, who sponsored it, or that it was related to litigation. (D.I. 354, Tab 1 at 11) In addition, plaintiff's attorneys or potential testifying economists were not permitted to learn the identities of the dental laboratories surveyed, and survey responses were sealed and marked confidential until they were provided to defendant as part of discovery. (D.I. 364 at 5)

2. Defendant has been aware of the survey and plaintiff's intent to offer the survey as substantive evidence

and as a basis for expert opinion for over two years. (D.I. 251 at *2)

3. Plaintiff has asserted, and continues to assert, that this is a "state of mind" survey admissible under the "state of mind" exception to the hearsay rule. See Fed. R. Evid. 803(3). The court, however, concludes that the survey respondents' hearsay statements are used "to prove the truth of the underlying facts asserted," thereby taking the evidence outside the traditional bounds of the "state of mind" exception. Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267, 1274 (3d Cir. 1995). The survey respondents' predicted purchases under various hypothetical market scenarios are used as substantive input to the experts' models that estimate market share and price. The type of data produced by the survey and the purpose for which the data are used bear little resemblance to the "classic" state of mind surveys in cases cited by plaintiff. See , e.g., Schering Corp. v. Pfizer, Inc., 189 F.3d 218, 227-230 (2d Cir. 1999).

4. Nevertheless, the survey may still be admissible under the residual hearsay exception if it provides "circumstantial guarantees of trustworthiness," is material, has probative importance, is in the interest of justice, and if notice is provided to the opposing party. See Fed. R. Evid. 807; Schering, 189 F.3d at 231. The court concludes that, based on

the circumstances of the survey described above, plaintiff's survey provides "circumstantial guarantees of trustworthiness" because it was conducted in accordance with generally accepted survey principles as set forth in Pittsburgh Press Club v. United States, 579 F.2d 751, 758 (3d Cir. 1978). In addition, the survey is clearly material to plaintiff's case; a scientific survey on the issue is more probative than having a small, nonscientific sampling of witnesses testify as to what they would purchase under hypothetical scenarios; and allowing the survey into evidence serves the interests of justice. The court also finds that defendant had sufficient notice of plaintiff's intent to offer the survey as substantive evidence in support of expert opinions and, at least as of the filing of these motions in limine, had notice that the government sought admission under Rule 807 if its attempt at admission under 803(3) failed. Thus, the court finds the survey to be admissible under Rule 807, so long as plaintiff does not "seek to hold up any individual survey response and say this one says that or that one says this." (D.I. 251 at *9) Nevertheless, the ultimate admission of the survey into evidence, and the use of the survey as a basis for expert opinion, is still subject to Fed. R. Evid. 703, as discussed infra. Based on the above, defendant's motion in limine to exclude the survey (D.I. 348) is denied.

5. Plaintiff seeks to exclude the testimony of individual survey respondents and any expert testimony regarding the respondents' declarations about the survey. The court concludes that defendant shall not be permitted to test the validity and conclusions of the survey through testimony about the survey by individual survey respondents, as the testimony "may suffer more from some of the concerns underlying the hearsay rule than the original survey responses." (See D.I. 251 at *8-*9) For the same reason, defendant's experts shall not be permitted to testify about the respondents' declarations. Thus, plaintiff's motion to exclude declarations or testimony by laboratory survey respondents and any expert testimony regarding the declarations (D.I. 343) is granted.

6. Defendant challenges the admissibility of the expert opinions of Dr. Wind and Dr. Reitman so far as they are based on the laboratory survey results. See Fed. R. Evid. 702 and 703. The court reserves judgment on the reliability, and ultimately the admissibility, of the expert opinions under Rules 702 and 703 and the principles of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), until the experts' opinions have been tested at trial. Therefore, defendant's motion in limine to exclude expert testimony (D.I. 346) is denied.

7. Plaintiff seeks to exclude certain expert testimony of Professor Howard Marvel and Peter E. Rossi as unreliable under Fed. R. Evid. 702 and 703 and the principles of Daubert. The court reserves judgment on the reliability of the experts' testimony until their opinions have been tested at trial. Therefore, the motion in limine to exclude certain testimony of Howard Marvel (D.I. 337) and the motion in limine to exclude certain testimony of Peter E. Rossi (D.I. 340) are denied.

8. **Foreign market evidence.** Defendant seeks to exclude evidence concerning foreign artificial tooth markets. The court concludes that the numerous variables inherent in market activity prevent a comparison between the United States and foreign markets from being probative of the issues at bar. Thus, defendant's motion in limine to exclude certain information concerning the distribution practices and sale of artificial teeth outside the United States (D.I. 350) is granted.

IT IS FURTHER ORDERED that the parties shall try this case consistent with the following schedule:

1. Monday, April 15, 2002 through Thursday, April 18, 2002 from 9:30 am to 4:30 pm; Friday, April 19, 2002 from 9:30 am to 3:00 pm.

2. Monday, April 22, 2002 through Thursday, April 25, 2002 from 9:30 am to 4:30 pm; Friday, April 26, 2002 from 9:30 am to 3:30 pm.

3. Monday, May 20, 2002 through Thursday, May 23, 2002 from 9:30 am to 4:30 pm.

4. Tuesday, May 28, 2002 through Thursday, May 30, 2002 from 9:30 am to 4:30 pm.

5. Plaintiff shall have 50 hours in which to try its case, as the party with the burden of proof. Defendant shall have 46 hours in which to try its case.

6. Absent agreement between the parties, no document shall be admitted without the testimony of a live witness. No deposition shall be admitted unless the deponent is unavailable for trial. Defendant's employees are deemed available for trial without subpoena.

7. Each party shall give opposing counsel two (2) business days' notice of the witnesses, documents and demonstrative exhibits to be presented.

8. Confidential information shall be received into evidence consistent with the procedure described in the March 28, 2002 letter from Martha E. Gifford, Esquire. (D.I. 392) The court notes, however, that no confidentiality agreement is binding on the court in terms of its ultimate findings of fact and conclusions of law; i.e., although the actual evidence may

remain under seal, no portion of the court's written opinion shall be deemed sealed.

Sue L. Robinson
United States District Judge