

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

GUIDANCE ENDODONTICS, LLC,  
a New Mexico Limited Liability Company,

Plaintiff,

vs.

No. 08-CV-1101 JB/RLP

DENTSPLY INTERNATIONAL, INC.  
a Delaware Business Corporation, and  
TULSA DENTAL PRODUCTS, LLC,

Defendants, et al.

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO  
DENTSPLY/TDP'S MOTION FOR REMITTITUR, OR, IN THE ALTERNATIVE  
FOR NEW TRIAL UNDER RULE 59 (Doc. 549)**

This is the fifth post-trial motion that Defendants, Dentsply International, Inc. (“Dentsply”) and Tulsa Dental Products, LLC (“TDP”) (collectively, “Defendants”) have filed challenging the jury’s verdict in favor of Plaintiff Guidance Endodontics, LLC (“Guidance” or “Plaintiff”). They now attack the jury’s award of punitive and nominal damages as excessive and seek remittitur or a new trial. As they have done from the outset of this case, Defendants trivialize their behavior and argue that “the conduct at issue relates exclusively to Dentsply/TDP’s failure to provide goods under a voluntarily entered contractual arrangement.” Def. Motion for Remittitur, p. 6. This misleading characterization minimizes the import of the evidence the jury heard during the fourteen days of trial, and the results of Defendants’ multi-pronged and multi-year effort against Guidance.

This case is, at its heart, about a company that possesses monopoly power in the endodontic marketplace, and that is engaged in a longstanding pattern and *policy* of anticompetitive behavior, designed to foreclose competition and keep prices artificially high, so that it can maintain its dominant market share and enjoy a 600% markup on the price of endodontic products. When Guidance entered the market with a low-cost business model delivering files and obturators at nearly half the price of Defendants’ comparable or identical products, Defendants sought to destroy Guidance. They have largely succeeded, leaving Guidance without a supplier, with little or no inventory, and with no money in the bank. Based on the egregiousness of Defendants’ conduct, the jury’s punitive award is both appropriate and constitutional.

The Court is permitted to and should uphold a ratio of up to 10 times the compensatory verdict, although the applicable ratio in this case is, at most, 2 to 1 when the *potential harm* of Defendants’ actions, prejudgment interest, and attorneys’ fees are considered. The jury heard

evidence of Guidance's damages as a result of Defendants' conduct, including testimony of expected revenues over the life on the contract in the \$100 to \$200 million range, and pre-litigation "worse case scenario" profits of between \$15 million and \$22.8 million. In addition, Dr. McDonald testified that there were additional unquantified components of damages beyond the damages for lost sales of the V2 file to existing customers that he quantified. *See infra*, § I(B)(1)-(2). The Supreme Court permits the jury and Court to consider this potential harm when assessing the reasonableness of punitive damages.

The jury's \$40 million punitive damages award is also the minimal amount needed to deter Defendants. Defendants have reaped substantial benefits from their improper conduct, spending relatively few dollars to sue and constrain competitors' use of distributors. Although they lost some market share in the last decade, Defendants have been able to maintain a 70-80% market share and unrivaled revenues and profits. In the cost-benefit analysis of a monopolist, a punitive damages award of less than \$40 million would encourage, not deter, Defendants' improper practices and policies. Even with a \$40 million punitive award, Defendants will recoup the jury's award plus their litigation costs by virtue of not having to compete against Guidance. *See infra*, § I(B)(5).

The jury's verdict is fully supported by the evidence in the record and should be accorded the utmost deference by this Court. Defendants' motion should thus be denied.

### **Summary of Facts Proved at Trial**

Over the course of three weeks of trial, the jury saw and heard evidence showing that Defendants have been engaged in a long-running, intentional, and malicious anticompetitive scheme to eliminate competition, maintain market share, and keep the price of endodontic products high, with Guidance as the most recent victim. Defendants' own internal reports –

written by the second highest-ranking executive at Dentsply, James Mosch – show that, for many years, Defendants enjoyed 100% market share in the NiTi rotary file market, ostensibly due to Defendants’ possession of certain intellectual property pertaining to the NiTi file manufacturing process. Trial Exhibit (“TX”) 723B at 21405-06.<sup>1</sup> However, the reports also confirm that Defendants knew that their manufacturing patents were “not strong enough to fully protect [their] market position.” *Id.* at 21406. *See also* TX 723M (recognizing that “the manufacturing patent might be hard to win/prove”). Thus, when other competitors such as Sybron, Brasseler, Tycom, and Moyco began entering the market, Defendants recognized that they would lose market share if they did not take action.

To deal with the “competitive threats” to their market share, Defendants developed a “licensing strategy,” whereby, despite knowing that Defendants’ “patents are not strong enough to fully protect [their] market position,” Defendants sued these emerging competitors for patent infringement in order to force them into license agreements. *See* TX 723B at 21405. Indeed, Bill Newell, TDP’s Vice President and General Manager, admitted that Defendants had sued every endodontic competitor in North America, with the possible exception of “internet based companies” he could not name. 9/25/09 Official Tr. 1130:23-1132:10.<sup>2</sup> Defendants required two key components in all of the resulting license agreements: (1) the competitor was forced to give up the use of distributors and sell directly to customers; and (2) the competitor had to pay a \$1.00 per file royalty to Defendants. TX 723B at 21406. As Defendants admitted in their internal reports, this licensing strategy was successful for three reasons: (1) it “limited the players in the NiTi segment;” (2) it “requir[ed] direct distribution (investment);” and (3) “the file royalty limite[d] price strategies.” *Id.* at 21406-07. In other words, Defendants’ “sue and

---

<sup>1</sup> All Trial Exhibits referenced herein are attached hereto in Appendix A.

<sup>2</sup> All relevant excerpts from the trial transcripts are attached hereto as Appendix B.

license” strategy successfully closed the NiTi file market to new entrants, who feared getting sued for patent infringement by dental giant Dentsply, and artificially raised the price of files by requiring that licensees pay a royalty to Dentsply and give up distribution, thereby incurring high overhead and operating expenses to build and support a direct sales force.

In 2004, Guidance entered the endodontic market with its V-Taper file. As is their usual practice, almost immediately Defendants began discussing “possible actions” against Guidance (TX 60) because, as they recognized, “[i]f we allow these [competitors] to continue without any action, it may open the doors for others to enter the market.” TX 764. However, it was not until 2006, when Guidance signed an exclusive distribution agreement with Patterson Dental, the largest dental distribution company in the United States, that Defendants grew concerned about the competitive threat from Guidance. In particular, the evidence shows that in early 2006, Dentsply’s CEO and Chairman, Bret Wise, sent an email to Bill Newell and Jim Mosch expressing concern about Guidance’s relationship with Patterson Dental. TX 723E. Newell responded by commenting that he had “unfortunately ... heard this news.” *Id.* He further noted that Guidance had “launched their file system last year ... selling direct,” and that “[t]his will get interesting now with Patterson’s association with them.” *Id.*

As they had done with Sybron, Brasseler, Moyco, and Tycom, Defendants immediately began preparing to sue Guidance for patent infringement. However, by this point, despite Defendants’ “sue and license” strategy, their market share had declined from 100% to 80%. TX 723B at 21405. Thus, rather than sue Guidance with the goal of forcing it into a license agreement, Defendants’ plan was to sue Guidance until it ran out of money and went out of business, or force Guidance into a settlement whereby Defendants became Guidance’s exclusive manufacturer. Defendants recognized that, as Guidance’s exclusive manufacturer, they would be

able to control Guidance's supply of product, and have access to information regarding Guidance's inventory, sales, and file design. Bill Newell said it best in an email to Mr. Wise and Mr. Mosch: "[w]e believe we will find out very quickly whether [Guidance] feel[s] [it] can/will fight or whether they'll come to us asking for us to manufacture for them. We'll get with Legal on Monday and make sure we're moving forward as planned." TX 723E. *See also* TX 723H.

Although Defendants were eager to sue Guidance, they also recognized that their existing patents were not strong enough to credibly sue Guidance for patent infringement. *See, e.g.*, TX 723H (Newell writing to Addison apologizing for being "a pest" and stating that he "hope[s] there hasn't been any major change in our position or strategy" with respect to Guidance). Thus, Defendants formed a shell company to covertly purchase the "Wong Patent," which Defendants acknowledge in writing was "substantially the ProTaper IP for the North American market."<sup>3</sup> TX 723B at 21408; 9/24/09 Official Tr. (Addison) 959:9-960:18, 1022:20-1024:11.

The evidence shows that Defendants purchased the Wong patent for the sole purpose of suing Guidance. For example, there were numerous emails in 2006 between Bill Newell, Jim Mosch, and other Dentsply employees discussing topics such as purchasing the Wong patents before "push[ing]" a lawsuit against Guidance" (TX 723L), "work[ing] the deal to get the Wong patents," and "pursu[ing] legal strategy re: Guidance/Patterson." TX 723I. *See also* TX 723M (email with subject "NiTi v. Guidance," and discussing contacting Wong); 723B (internal report noting "[w]e acquired the Wong patent," which "opened the way for us to begin litigation against Guidance and eliminate NiTi distribution by Patterson Dental"). *See also* 9/24/09 Official Tr. (Addison) 1022:20-1024:11. The jury also heard evidence that Dentsply's decision to sue

---

<sup>3</sup> This admission shows that when Defendants were suing other competitors prior to 2006 for supposed patent infringement of the ProTaper, they lacked confidence in their own intellectual property. The jury also heard about the manner in which the Wong patent was acquired, including Defendants' creation of a shell company to shield their identity from the owners of the patent in order to purchase it for the bargain price of \$120,000. 9/24/09 Official Tr. (Addison) 959:6-962:25.

Guidance was not driven by legal or patent issues but by business exigencies. 9/24/09 Official Tr. (Newell) 1067:5-11.

Once Defendants purchased the Wong patent, they filed a patent infringement suit against Guidance before the International Trade Commission, attempting to block importation of Guidance's V-Taper file. Defendants spent eight months litigating this suit before abruptly withdrawing it a mere two months before trial, and while Guidance's counsel was on his way to depose a key witness across the country. *See* 9/21/09 Official Tr. (Ginsberg) 166:5-170:7. Defendants then re-filed the case in federal court in the Middle District of Pennsylvania. In 2007 alone, Guidance spent over \$1 million in legal fees defending itself in the patent infringement cases, in addition to \$1.2 million in other operating expenses, as compared to only \$1.7 million in sales. *See* TX 89B at 24016-17; 9/21/09 Official Tr. (Van Der Geest) 279:18-280:23. In 2008, Guidance spent an additional \$701,000 in legal fees in connection with litigation with Defendants. 9/21/09 Official Tr. (Van Der Geest) 282:7-283:21.

Given the substantial amount of money that Guidance had spent in litigation with Defendants, Guidance could not afford to go to trial in the second lawsuit, and was forced to settle. As a result of the litigation, Guidance also had lost its manufacturer, Micro-Mega, whom Defendants had also sued. Ultimately, the parties entered into the Manufacturing and Supply Agreement (the "Supply Agreement"), pursuant to which Defendants became Guidance's exclusive manufacturer and supplier of endodontic products. TX 367. Specifically, Defendants agreed to initially provide Guidance with four products: (1) obturators, which were repackaged Dentsply obturators; (2) EndoTaper files; (3) V2 files; and (4) ovens. A key term in the settlement, insisted upon by Defendants, was that Guidance give up any relationships with

distributors. *See* 9/22/09 Official Tr. (Rittenberry) 524:25-525:5; (Vanderslice) 539:10-540:19; 9/24/09 Official Tr. (Mosch) 927:13-931:13.

As Guidance's exclusive manufacturer, Defendants were in a position of power, with access to a broad array of useful information concerning Guidance's sales projections and inventory. However, as the evidence showed, Defendants did not anticipate that Guidance would sell its obturators at a 50% discount compared to Defendants' obturator, which was the same product. Indeed, in this action, Defendants counter-sued Guidance for fraud on the theory that Guidance had represented that it would have a large direct sales force – in other words, that Guidance would have high overhead, and thus have to charge higher prices to recoup the cost associated therewith. *See* 10/2/09 Official Tr. (Newell) 2755:12-2757:7.

In fact, the evidence showed that, almost immediately after the Supply Agreement was signed, Newell began receiving emails from Defendants' sales representatives expressing concerns about selling against Guidance's "half price" obturators. *See* TX 427, 463, 500, 547, 583. High-level management was also extremely concerned about the price that Guidance was charging for its products. *See, e.g.*, TX 422 ("A monster is loose. And Guidance Endo is the monster"). Realizing that they could not compete with Guidance under these circumstances, Defendants determined not only to breach the Supply Agreement by pretext, but also to put Guidance out of business. Thus, within weeks, Defendants cut off the supply of obturators, refused to manufacture the V2, conducted secret tests on the EndoTaper file while withholding it from Guidance under false pretenses, disparaged Guidance to its customers, and embarked on a nationwide campaign to take all of Guidance's customers – all for the express purpose of driving Guidance out of business, thereby eliminating a successful competitor.



On September 25, 2008, Newell sent Guidance a letter announcing Defendants' intention to discontinue the supply of obturators to Guidance due to Guidance's purported breaches of the Supply Agreement. TX 729. Specifically, Defendants claimed that certain statements in Guidance's marketing materials violated the Supply Agreement's marketing provisions, and accused Guidance of disclosing that Defendants were manufacturing Guidance's products, in purported violation of the confidentiality provision. TX 367 at §§ 2.4, 9.1. Guidance immediately took steps to cure these alleged violations, as it was contractually entitled to do. *See* TX 367 at § 8.4. For example, Guidance revised its marketing materials to remove each of the allegedly offensive statements. TX 575, 581. Despite these efforts, on October 14, 2008 Defendants discontinued the supply of obturators. TX 738.

Defendants' unwillingness to accept Guidance's curative efforts demonstrated to the jury that Defendants' grievances were insincere. Moreover, the evidence showed that Defendants had no basis to believe that Guidance had engaged in any of the conduct described in the September 25 and October 14 letters. Indeed, the jury saw that it was not until November 24, 2008 – two months after Newell's first letter, and one month after the second – that Newell emailed his sales force asking for evidence to corroborate the claims in his earlier letters. TX 642. The evidence also showed that not a single sales representative responded with any evidence that Guidance had in fact engaged in the conduct described in the letters. *See, e.g.*, TX 623, 630, 633, 640, 642. Moreover, the documentary evidence confirms the spuriousness of Defendants' claims that Guidance had breached the confidentiality provision of the Supply Agreement by disclosing that Dentsply was manufacturing Guidance's products. Numerous emails show that Defendants' own sales team recognized Guidance's products as having been manufactured by Dentsply, and that

Defendants anticipated everyone eventually becoming aware of that fact. *See, e.g.*, TX 392, 454, 463, 471, 490, 542B, 547.

Not content with depriving Guidance of its obturators, Defendants also interfered with Guidance's supply of the V2 file. They falsely claimed to need engineering drawings to manufacture the V2 (TX 737), even though the evidence showed that Defendants had in fact had already created such engineering drawings and had all of the necessary information to manufacture it.<sup>4</sup> TX 508; 9/29/09 Official Tr. (Higgins) 1779:9-1780:22. Defendants then informed Guidance that, even if engineering drawings were submitted, based on a typo in the Supply Agreement they would only supply the V2 in sizes .15, .20, and .25, even though Defendants had made prototypes in a full range of sizes and knew that it is not possible to perform root canals with only these three sizes. TX 6; 9/23/09 Official Tr. (Goodis) 640:16-18.

The evidence also shows that Newell intentionally ignored Guidance's requests that Defendants ship the first order of EndoTaper files in time for an important trade show – despite earlier promises to do so – in order to perform secret tests on them. *See* TX 459. At the time that Newell was authorizing the secret tests, and Dr. Goodis was imploring Defendants to ship the EndoTaper files to Guidance in time for the California Dental Show, Newell disingenuously wrote to Dr. Goodis that “JCity will not be able to meet this ‘special request,’” but assured Dr. Goodis that “JCity is making every effort to meet ... that date.” TX 459. Newell then made sure that “nobody else responds” with different information. *Id.*

Even more egregiously, the evidence also shows that, two days prior to the testing, Newell approved a memo to be sent to the entire Dentsply/TDP sales team containing numerous false statements, such as how dangerous Guidance's files were and how Dr. Goodis was a

---

<sup>4</sup> Of course, the jury also found that the Supply Agreement did not obligate Guidance to provide engineering drawings for the V2 file. *See* Doc. 441.

“desperate, misguided inventor” – all before the EndoTaper was even on the market. TX 481, 482, 487, 505; 9/30/09 Official Tr. (Rooney) 2161:10-23. He also wrote multiple emails to key marketing and sales people in which he described the EndoTaper as “scary like a wood screw,” “too dangerous,” and “aggressive.” TX 481, 487. The evidence also shows that Newell did not have a shred of data to support those claims. *See* TX 505 (Newell approving memo and stating, “let’s get this letter out now and then follow up with testing, quotes, science”). In fact, he first asked for testing to be performed *after* those statements were disseminated to the entire Dentsply sales force. *See* TX 497. In fact, those test results showed that Guidance’s files performed better than Dentsply’s files in two of three categories, and comparably in the third category (10/5/09 Rough Tr. (Littleton) pp. 234-45), but Newell never took any steps to recall or revise the disparaging documents.

Finally, at the same time that Defendants ceased supplying products to Guidance, Defendants’ sales team began telling Guidance customers that Guidance was no longer in business and could no longer sell files, as part of an effort to take Guidance’s customers and further ensure that Guidance went out of business. *See* 9/28/09 Official Tr. (Ferone) 1392:5-1396:25; 9/29/09 Official Tr. (Bettes-Groves) 1918:14-1919:9; 9/30/09 Official Tr. (Ruggles) 1950:8-1957:5; 9/24/09 Official Tr. (Kratchman) 869:6-17; TX 722H (email to entire sales team, proclaiming that “[a]s the result of recent litigation, Guidance files are off the market!!!!”). Defendants then launched a series of promotions, such as the “Godfather” (also known as the “Smack down program”) encouraging their sales team to “pull a gun” and “[u]nleash a massive and overwhelming force” against Guidance, in order to “make Guidance part of endodontic history.” *See* TX 2, 439, 441, 471, 509, 529, 665, 722J, 722K.

The jury heard evidence that all of this was done to Guidance as part of the pattern and policy of anticompetitive behavior described in extensive detail in Trial Exhibits 723B, 723C, and 766 – evidence that Defendants withheld from Guidance until the first week of trial.

The jury also heard evidence that Defendants flourished as a result of these anticompetitive tactics. Defendants continue to maintain their stranglehold over the NiTi rotary file and obturator markets, and continue to be able to charge double the prices that Guidance had charged for the same products. Defendants know the expense and time delays provided by litigation, and, even where they lose big (as here), they continue to file motion after post-trial motion and mire Guidance in litigation. Meanwhile, they have profited substantially from their behavior by virtue of not having to compete against Guidance. Far beyond the pale of a simple breach of contract, Defendants' unfair practices and anticompetitive behavior were characterized by lies, pretext, and bullying from Defendants' highest levels of management implementing Defendants' core business philosophy.

### **Argument**

#### **I. THE PUNITIVE DAMAGES AWARD IS CONSTITUTIONAL**

The United States Supreme Court has instructed courts reviewing punitive damages awards to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil or criminal penalties authorized or imposed in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 583, 116 S.Ct. 1589, 1598, 1603, 134 L.Ed.2d 809 (1996). *See also Applied Capital, Inc. v. Gibson*, No. CIV 05-0098, 2008 WL

4821336 at \*9 (D.N.M. May 28, 2008) (Browning, J.). All three of these factors compel denial of Defendants' motion.<sup>5</sup>

**A. The Jury Had Ample Evidence That Dentsply/TDP's Misconduct Towards Guidance Was Highly Reprehensible**

The Supreme Court has concluded that “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521, quoting *BMW*, 517 U.S. at 575, 116 S.Ct. at 1599. *See also Chavarria v. Fleetwood Retail Corporation*, 2006-NMSC-046, ¶ 37, 140 N.M. 478, 143 P.3d 717. In an economic harm case, the three most important factors for a court to consider in determining the reprehensibility of a defendant’s conduct are (1) whether “the target of the conduct had financial vulnerability;” (2) whether “the conduct involved repeated actions or was an isolated incident;” and (3) whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.”<sup>6</sup> *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521, citing *BMW*, 517 U.S. at 576-77, 116 S.Ct. at 1589. *See also BMW*, 517 U.S. at 576, 116 S.Ct. at 1599 (“infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty”); *Chicago Title Ins. Co. v. Magnuson*, 487 F.3d 985, 999 (6th Cir. 2007) (where harm is “economic, not physical” then “primary considerations” are the victim’s “financial

---

<sup>5</sup> Guidance does not dispute that Delaware state law replicates federal law, and respectfully submits that, whether analyzed under federal or state law, the \$40 million punitive damages award is constitutionally permissible and necessary to deter Defendants.

<sup>6</sup> The Supreme Court has never endorsed Defendants’ view that the questions of whether the defendant’s action caused physical harm or endangered health and safety “typically predominate a court’s analysis of a punitive damages award.” *See* Def. Motion for Remittitur, p. 6 (Doc. 549). Rather, the Supreme Court has stated that “[t]he existence of any one of the[] [five] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521.

vulnerability,” whether the defendant’s “conduct was repeated,” and the “culpability” of the defendant’s actions).

Analysis of these factors demonstrates that Defendants’ conduct was highly reprehensible. The jury heard copious evidence that Defendants inflicted serious economic harm on a financially vulnerable target, and they did so intentionally and maliciously through repeated affirmative acts of misconduct. Under these circumstances, its punitive award, while subject to Constitutional review, is entitled to deference. *See Willow Inn Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 231 (3d Cir. 2005) (where jury’s punitive damage award is free of irrationality, passion and prejudice, trial court should not substitute its own view of the appropriate amount of punitive damages).

**1. Defendants Exploited Guidance’s Financial Vulnerability**

As argued by *Defendants* at trial, Guidance was a fledgling company that had never operated at a profit. *See* 9/21/09 Official Tr. (Van Der Geest) 309:4-7. As repeatedly pointed out by Defendants, Guidance spent more money on legal fees than it ever had on operating costs. *See Id.* at 280:1-284:11. Defendants understandably avoid discussing Guidance’s financial vulnerability, because if they did so, they would also have to credit for it. Instead, they argue that their conduct is not reprehensible because Dr. Goodis purportedly earns a high annual income. While it may be true that Guidance only continues to exist as a result of Dr. Goodis’ dogged determination and national reputation, Dr. Goodis was not the “target” of the conduct proven by Guidance at trial. Defendants’ conduct was aimed at eliminating *Guidance* as a competitor. Dr. Goodis was not obligated to support Guidance with his hard-earned income from his practice. With hindsight, it is clear that the fact that Dr. Goodis invested several million

dollars in Guidance from his own pocket is the only reason that the company was able to make it to trial. *See* 9/21/09 Official Tr. (Goodis) 161:1-9; (Van Der Geest) 281:21-282:6.

Indeed, not only have Defendants at all times been aware of Guidance's financial vulnerability, they expressly used it to their advantage. With total assets of approximately \$2.8 billion, gross profit of over \$1.1 billion, and over \$204 million of cash on hand (TX 704, p. 23), a few million dollars in litigation costs is a drop in the bucket for Dentsply. However, Defendants knew that Guidance would be forced to settle or risk going out of business from the weight of the litigation costs. Similarly, when Defendants breached the Supply Agreement, they knew that Guidance likely could not afford to start over again with another manufacturer, or to litigate again with Defendants to regain its supply of products.<sup>7</sup> *See Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (holding that higher punitive damages award was justified where defendant used its \$1.6 billion net worth to "mount an extremely aggressive defense ... to make litigating against it very costly").

## **2. Defendants' Conduct Involved Repeated Actions**

The repetitive nature of Defendants' conduct to protect market share and profit margins and to eliminate competition cannot be denied. Defendants have been involved in a plan to constrain third-party competitors for more than a decade, and have targeted guidance since at least 2006. They repeatedly forced litigation with Guidance advocating unsustainable positions, whether by suing Guidance on spurious claims of patent infringement, or by committing

---

<sup>7</sup> Indeed, Defendants continued to exploit Guidance's financial vulnerability throughout this case. As more fully explained in Plaintiffs' Motion for Discovery Sanctions (Doc. 449) and Plaintiff's Motion for an Award of Attorneys' Fees and Expenses (Doc. 551), Defendants forced Guidance to incur significantly greater legal costs than were required by refusing to cooperate during discovery, repeatedly making frivolous objections and arguments, and generally requiring a significant amount of motion practice and other avoidable tasks, threatening Guidance's ability to continue this lawsuit. *See* Doc. 449, 536 (noting that "Defendants did not comply with the letter and spirit of the discovery rules and law," by "over-redact[ing] documents," making unsustainable assertions of privilege, and making discovery difficult "by requiring that everything be done by motions and orders").

egregious breaches for pretextual reasons that forced Guidance to sue them. Similarly, they relentlessly interfered with Guidance's business by, among other things, (1) cutting off the supply of obturators based on false claims that Guidance had breached the Supply Agreement; (2) refusing to manufacture the V2 due to a purported need for engineering drawings, even though Defendants already had such drawings in their possession; (3) delaying shipment of the EndoTaper in order to perform secret tests and deprive Guidance of its product for an important trade show; and (4) making multiple misrepresentations to Guidance's customers about the safety of Guidance's files as well as Guidance's viability as a company and ability to sell files, all while embarking on a promotional campaign to target and take all of Guidance's customers. All of this conduct took place over the course of several years and is a far cry from the kind of "single instance" conduct that weighs against reprehensibility. *Compare Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1020-21 (8th Cir. 2008) (upholding 8 to 1 ratio based, in part, on defendant's "particularly egregious" conduct, "characterized as it was by repeated trickery and deceit") to *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 441 (6th Cir. 2009) (ordering remittitur because, among other things, case concerned a single instance of age discrimination).

Moreover, as shown above, the jury heard evidence demonstrating that Defendants have been involved in substantially similar conduct with other competitors in the endodontic market for years. Defendants have repeatedly sued competitors for patent infringement in order to force those competitors into disadvantageous agreements that allow Defendants to limit the entrants into the market and maintain high prices for endodontic products. Multiple strategic reports written by Jim Mosch himself reflect that it is Defendants' *policy* to engage in such conduct, suggesting that Defendants are likely to continue these practices if not adequately deterred.



**3. Defendants Intentionally And Maliciously, And Through Trickery And Deceit, Caused Harm To Guidance**

The jury concluded that the economic harm in this case was the result of malice, trickery, or deceit, and the Defendants do not deny it. Def. Motion for Remittitur, p. 8. Instead, Defendants established precedent by arguing that a finding of intent and malice is “tautological” (Def. Motion for Remittitur, p. 8), essentially positing that *State Farm’s* intent and malice factor is meaningless. Lest there be any doubt that these are important factors in a court’s consideration of a defendant’s reprehensibility, in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2621-22 (2008) (Souter, J.), the Supreme Court expressly held that higher punitive awards are appropriate for intentional or malicious conduct, as opposed to merely reckless or negligent conduct:

Under the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheeded of it .... *Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure.*

(emphasis added).

Here, there can be no doubt that every lawsuit, every licensing agreement, and all of Defendants’ actions *vis-à-vis* Guidance were part of an intentional, deceitful, and malicious plan to use their market power to protect its sinecure. As described above, Defendants sued Guidance to force it into the Supply Agreement, which rendered Guidance wholly dependent on Defendants. Almost immediately, Defendants conjured duplicitous reasons for repudiating that agreement, not because, as they claimed, they believed that Guidance had violated that agreement, but rather because they learned of Guidance’s low-cost strategy and feared loss of substantial market share. These actions threatened Guidance’s very existence, as well as the jobs of Guidance’s employees – John Ferone, Sharon Bettes-Groves, Debra Ruggles, Delphine

Ruggles, and Amanda Ruggles. It has also cost jobs to the thirty to forty individuals that Dr. Goodis anticipated hiring if Guidance had been allowed to fairly compete. *See* 9/21/09 Official Tr. (Goodis) 158:24-159:1.

Thus, in view of the combination of (a) Defendants' wielding of monopolistic power to cause serious economic harm to Guidance, other competitors, and the endodontic market in general; (b) Guidance's financial vulnerability; (c) the repetitive nature of Defendants' actions; and (d) the intentional, deceitful, and malicious character of Defendants' actions, the jury was entitled to conclude that Defendants' conduct was extremely reprehensible, and, accordingly, the punitive damage award is easily warranted.<sup>8</sup> *See Chavarria*, 2006-NMSC-046, at ¶¶ 37-38 (defendant's "truly reprehensible behavior," including "repeated and deceitful actions" as well as plaintiffs' vulnerability, justified punitive to economic damage ratio of almost 14:1).

**B. The Ratio Of The Punitive Damages Award To The Actual And Potential Damages Resulting To Guidance From The Misconduct Of Dentsply/TDP In Issue Is Not Constitutionally Disproportionate And Is Necessary To Adequately Deter Defendants From Repeating This Behavior**

The second guidepost in a court's evaluation of an award of punitive damages is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 418, 123 S.Ct. at 1520.

On October 9, 2009, the jury awarded Guidance \$40 million in punitive damages, \$4.08 million in actual economic damages, and \$200,000 in nominal damages. *See* Doc. 441. As discussed below, for purposes of the constitutional analysis, the Court must consider the

---

<sup>8</sup> None of cases cited by Defendants supports remittitur, as they are all easily distinguished. For example, in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468-69 (3d Cir. 1999), a case never cited by a reported decision in any of the Tenth Circuit's courts, the Third Circuit remitted \$50 million in punitive damages to \$1 million based its decision on several factors not present here, namely the large compensatory damage award (\$48 million); the fact that the plaintiff was in no way weak or financially vulnerable; and the fact that the damages were easily calculable. *Id.* at 467-69. It should also be noted that the radical remittitur to \$1 million in punitive damages resulted in a ferocious dissenting opinion. *Id.* at 471.

potential harm to Guidance not reflected in the award of actual damages, as well as attorneys' fees and pre-judgment interest that will ultimately be paid as part of the judgment and that are compensatory in nature. The Court must also consider the size of the punitive award necessary to deter Defendants from continuing to do business through unlawful, anticompetitive means.

**1. The Court Should Consider The Potential Harm Of Defendants' Actions**

The Supreme Court has made clear that one of the relevant considerations in the ratio analysis is "the harm likely to result from the defendant's conduct as well as the harm that has actually occurred." *BMW*, 517 U.S. at 581, 116 S.Ct. at 1602. *See also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 113 S.Ct. 2711, 2718, 125 L.Ed.2d 366 (1993) (holding that it is appropriate to consider "the potential harm that [the defendant's] actions could have caused"). Thus, the Supreme Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460-61, 113 S.Ct. at 2721-22 (comparing \$10 million punitive damages award to between \$1 and \$8 million in royalties that plaintiff would have lost had defendant's plan succeeded). *See also Continental*, 101 F.3d at 643; *United Phosphorous, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1231 (10<sup>th</sup> Cir. 2000); *Winkler v. Petersilie*, 124 Fed. Appx. 925, 938 (6<sup>th</sup> Cir. 2005).

The \$4.08 million award was awarded to compensate Guidance for one narrow category of damages that Guidance was permitted to present to the jury – lost sales of the V2 to existing customers of Guidance's V-Taper file. *See* 9/29/09 Official Tr. (McDonald) 1841:23-1842:5. Dr. Brian McDonald, however, made clear at trial that there are other components of economic

damages suffered by Guidance, such as (1) “a loss of profits on the sale of the V2 file to new customers of Guidance;” (2) “lost profits on the sales of the EndoTaper file ... if [the Supply Agreement] were discontinued;” (3) “lost profits on the lost sales of the single-use obturators; and (4) other damages associated with a loss of the market share [Guidance] might have obtained in the endodontic market for the nickel-titanium rotary file and the single-use obturators.” *Id.* at 1842:6-23. Similarly, the \$4.08 million award does not take into account any economic damages for lost EndoTaper sales due to Defendants’ delays in shipping product or false statements about Guidance’s inability to sell files, or lost sales from the remainder of the products that Guidance was entitled to under § 4.5 of the Supply Agreement. Nor does the \$4.08 million award take into account prejudgment interest and attorneys’ fees, both of which are properly considered part of Guidance’s compensatory damage award.

Dr. Goodis testified at trial that his plan was to grow Guidance over the seven years of the Supply Agreement into a company with \$100 to \$200 million in annual sales. 9/21/09 Official Tr. 158:23-159:1. According to Dr. Goodis, he expected to capture approximately 50% of the \$40 million market for thermal filling obturators. Guidance’s price point for obturators is approximately one-half of Defendants’ price point for the identical product. 9/28/09 Official Tr. (Ferone) 1391:1-3. Thus, while 50% of the obturator market is \$20 million in revenue for Defendants, it totals \$10 million per year in obturator sales for Guidance. 9/22/09 Official Tr. 389:24-390:4, 395:8-396:2. Dr. Goodis also expected to capture approximately 5% of the \$100 million market for NiTi rotary files, for a total of \$5 million per year in lost NiTi rotary file sales to Defendants, and between \$2.5 million and \$3.25 million in sales for Guidance, given the price point for Guidance files at between 35% to 50% less than Defendants’ prices for comparable products. 9/23/09 Official Tr. 653:22-655:8.

Similarly, the jury saw evidence that Dr. Goodis and Mr. Ferone, Guidance's National Sales Manager, entered into a profit sharing agreement at the outset of the Supply Agreement, which set sales thresholds at \$3 million in 2009; \$4 million in 2010; \$4.75 million in 2011; \$5.5 million in 2012; \$6.25 million in 2013; \$7 million in 2014; and \$7.5 million in 2015, for a total of \$38 million over the seven-year term of the Supply Agreement. 9/28/09 Official Tr. 1375:13-1378:12. Mr. Ferone further testified that those projections were conservative, because they represented the minimum targets that Guidance had to achieve in order for Mr. Ferone to keep his job. *Id.* at 1379:1-7. Mr. Ferone, Dr. Goodis, and Guidance's accountant all expected the actual revenue for the company to be two to three times greater than the \$38 million in the profit sharing agreement. *Id.* at 1378:13-24. Thus, Mr. Ferone concluded that the expected revenues over the life of the Supply Agreement were, conservatively, approximately \$76 million to \$114 million. *Id.* at 1380:1-20. Deducting general and administrative costs, as well as the cost to purchase finished product from Defendants, Mr. Ferone concluded that Guidance's profit margin was approximately 20% and expected Guidance's profits over the life of the Supply Agreement to have been between \$15 million and \$22.8 million. *Id.* at 1432:14-1433:13.

The jury also heard other testimony about the potential for growth in Guidance's customer base. For example, defense witness Dr. William Henson testified that price is a "very, very important factor" to a dentist in selecting a file; that dentists are "cheap;" and that they will at least "try" a file priced 50% less. 9/28/09 Official Tr. 1576:20-1577:1, 1582:16-1583:5, 1589:1-19. Moreover, Dr. McDonald testified that in his opinion, when faced with a "significantly lower" price for files or obturators, dentists will buy from Guidance at a lower price rather than from another higher-priced competitor. 9/29/09 Official Tr. 1870:22-1871:4.

Finally, consideration of potential harm is consistent with Supreme Court's observations that ratios higher than single digits can be justified where the wrongdoing or the resultant injury are hard to detect. *See Exxon*, 128 S.Ct. at 2622; *BMW*, 517 U.S. at 582, 116 S.Ct. at 1602; *Mathias*, 347 F.3d at 677. Here, the wrongdoing of this monopolist would not have been detected had Guidance not persevered through three expensive lawsuits, and it is likely that Guidance has not discovered the full extent of the wrongdoing perpetrated by Defendants, given Defendants' persistent efforts to disguise their plans and even prevent Guidance from discovering the truth during the litigation, such as by withholding evidence until mid-trial, or not producing it at all. *See generally* Doc. 449. Moreover, Guidance's injuries include profits for the sale of new products to new customers, and are easy to conceptualize but difficult to quantify. *See, e.g.*, Doc. 31 at p. 18-21 (holding that Guidance was likely to suffer irreparable harm if Defendants did not resume supplying obturators due to difficulty in computing damages flowing from, among other things, loss of customer goodwill, loss of opportunity to distribute a unique product, diminished competitive position, and loss of customers); *Chavarria*, 2006-NMSC-046, at ¶¶ 37-38 (upholding ratio of 14:1 in light of "intangible nature of the harm that Plaintiffs suffered"). Indeed, even Dentsply quantified its "goodwill and other intangibles" as being worth over \$1.38 billion in 2008. TX 704, at p. 23.

While the jury was not permitted to award compensatory damages for many of these losses, the Supreme Court's jurisprudence allows consideration of this potential harm for purposes of awarding punitive damages. Thus, taking into account the potential harm to Guidance that Defendants' actions could have caused, which, based on the trial testimony, amounts to *at least* \$15 million to \$22.8 million, the ratio of punitive to economic damages in this case is, at most, between 2.67 to 1, and 1.75 to 1.

**2. The Court Should Consider Attorneys' Fees And Prejudgment Interest As Part Of The Compensatory Damages Award**

Both the case law and the public policy underlying the New Mexico Unfair Practices Act (“UPA”) make clear that an award of attorneys’ fees under the UPA is considered compensatory. The UPA provides that attorneys’ fees and costs shall be awarded to the prevailing party. *See* NMSA 1978, § 57-12-10(C). In *In re Keenan*, No. 13-05-21229, 2010 WL 780098, at \*3 (Bankr. D.N.M. Mar. 2, 2010), the court made clear that, because an award of attorneys’ fees is mandatory under the UPA, and does not depend on the degree of culpability of the defendant, “the attorney fees portion of the judgment represents compensatory damages that should be allowed in full.” The court further observed that this holding comports with the purpose of both the UPA and consumer protection acts in general. *Id.*

Although the Tenth Circuit has not directly addressed the issue of whether a compensatory award of attorneys’ fees should be part of the ratio analysis, the Third and Eleventh Circuits have. *See, e.g., Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) (attorneys’ fees and costs included in ratio analysis); *Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007) (where award of attorney fees is compensatory in nature, amount of fees should be included in the ratio analysis); *Jurinko v. The Medical Protective Co.*, Nos. 06-3519, 06-3666, 305 Fed.Appx. 13, n 16 (3d Cir. 2008) (including attorneys’ fees and costs as part of compensatory damages for purposes of ratio analysis).

Decisional law also makes clear that prejudgment interest is properly considered as part of the prevailing plaintiff’s compensatory award. *See, e.g., Cambio Health Solutions, LLC v. Reardon*, 234 Fed.Appx. 331, 339 (6th Cir. 2007) (calculating ratio with prejudgment interest included in denominator); *James v. Coors Brewing Co.*, 73 F.Supp.2d 1250, 1255 (D.Colo.

1999) (concluding that “prejudgment interest is appropriately calculated into the ‘actual damages’” for purposes of ratio analysis).

Here, Guidance is entitled to \$3,504,078.64 in attorneys’ fees and expenses through March 31, 2010, or such other amount as the Court may approve. Doc. 552, Ex. 1. Guidance will also receive an attorneys’ fee award for professional services rendered beginning April 1, 2010 through the final appeal. Guidance is also entitled to \$41,515.10 in prejudgment interest. *See* Doc. 441. Thus, adding prejudgment interest and attorneys’ fees to the jury’s compensatory award of \$4.08 million, the ratio of punitive to economic damages in this case is approximately 5 to 1. Adding in the potential harm discussed *supra* of between \$15 and \$22.8 million, the ratio is between approximately 2 to 1, and 1.5 to 1.

**3. The Ratio of Punitive To Compensatory Damages Is Well Within Constitutional Limits**

The ratio of punitive to economic damages in this case is between 1.5 to 1, and 2 to 1, when potential harm, prejudgment interest, and attorneys’ fees and expenses are factored in. The Supreme Court has expressly held that a 10 to 1 ratio of punitive to economic damages is constitutional. *See TXO*, 509 U.S. at 472, 113 S.Ct. at 2727 (“a 10-to-1 ratio between punitive damages and the potential harm of petitioner’s conduct passes muster ....”); *BMW*, 517 U.S. at 581, 116 S.Ct. at 1602 (based on precedent, relevant ratio is likely “not more than 10 to 1”); *Continental*, 101 F.3d at 639-40 (stating that, from *BMW*, “we surmise that in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm [both actual and potential] generally cannot exceed a ten to one ratio”); *FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) (explaining that in economic injury cases where damages are not hard to detect, a ratio of 10:1 is appropriate); *Applied Capital*, 2008 WL 4821336 at \*22 (recognizing that the Supreme Court of New Mexico has upheld, in post-*BMW*



decisions, ratios of punitive damages to compensatory damages of 8 to 1, 3½ to 1, and 7.4 to 1). Moreover, the Supreme Court has held that higher ratios may also be justified depending on the particular facts of a case. *See State Farm*, 538 U.S. at 425, 123 S.Ct. at 1524 (noting that Supreme Court has declined to “impose a bright-line ratio which a punitive damages award cannot exceed,” and that “ratios greater than those we have previously upheld may comport with due process where a particular egregious act has resulted in only a small amount of economic damages.”<sup>9</sup>)

#### 4. A 1 to 1 Ratio Is Not Warranted By The Applicable Law Or Facts

Defendants repeatedly argue that because compensatory damages in this case were “substantial,” a 1:1 ratio is appropriate. This argument is meritless. First, while Defendants argue as if *State Farm* had set forth a 1:1 ratio as a firm and unyielding upper limit, *State Farm* itself stresses that “there are no rigid benchmarks that a punitive damages award may not surpass” and it merely recognizes that a 1:1 ratio may be appropriate in *some* cases, but that the ultimate determination is highly fact-specific. 538 U.S. at 425 (while punitive award “perhaps” equal to compensatory damages “can reach the outer limit” in some cases, “[t]he precise award in any case, of course, *must be based upon the facts and circumstances* of the defendant’s conduct and the harm to the plaintiff”) (emphasis added).

Second, while Defendants rely on a variety of cases from other circuits that are easily distinguished,<sup>10</sup> they fail to discuss the only case where the Supreme Court *has* discussed the sort

---

<sup>9</sup> Although Defendants repeatedly cite *Continental*, a post-*BMW* decision of the Tenth Circuit, to emphasize that the Court there remitted the punitive damages award from \$30 million to \$6 million, Defendants fail to disclose that the *Continental* ratio of punitive to compensatory damages was over 20 to 1. *Continental*, 101 F.3d at 643. There, the court concluded that the plaintiff had suffered approximately \$269,999 in compensatory damages, plus an additional \$769,895 in potential damages, for a total of approximately \$1 million in combined actual and potential losses. *Id.* at 640.

<sup>10</sup> *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (no intent or malice); *Jurinko v. Medical Protective Co.*, 305 Fed. App’x 13, \*28-\*29 (3d Cir. 2008) (no intent to harm and compensatory damages easily measured); *Bach v. First Union Nat’l Bank*, 486 F.3d 150, 155 (6th Cir. 2007) (no repeated acts of

of case it had in mind when it posited that a 1:1 ratio could be appropriate in some cases. In *Exxon Shipping*, 128 S.Ct. at 2633, the Court explained that a 1:1 ratio *may* be appropriate in cases “with no earmarks of exceptional blameworthiness” such as cases “without intentional or malicious conduct and without behavior driven primarily by desire for gain,” and cases “without the modest economic harm or odds of detection that have opened the door to higher awards.”

Here, as described above, all of the “earmarks of exceptional blameworthiness” that would justify a ratio greater than 1 to 1 are present. First, Defendants admit that the jury concluded that the economic harm in this case was the result of malice, trickery, or deceit. Def. Motion for Remittitur, p. 8. Second, all of the evidence shows that Defendants’ conduct was driven exclusively by a desire for gain, *i.e.*, to protect their market share and profit margins, and to deny the end user comparable products at significantly lower prices. Third, the true extent of Defendants’ anticompetitive scheme went undetected for many years due to the nature of Defendants’ wrongdoing and their persistent efforts to disguise their behavior. Unlike a case in which the defendant’s negligence caused 10.8 million gallons of crude oil to spill into the ocean (*see Exxon*, 128 S.Ct. at 2612), here, Defendants have been engaged in a long-running anticompetitive scheme that went undetected for many years, and which Defendants went to great lengths to conceal. Indeed, Defendants never disclosed that their contract berach was motivated by Guidance’s price point for files and obturators. They also intentionally withheld clearly relevant evidence – the internal reports outlining their scheme – until the first week of

---

misconduct and no intentional malice); *Thomas v. Istar Financial, Inc.*, 508 F.Supp.2d 252 (S.D.N.Y. 2007) (no intent to harm, and weak evidence of culpability); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 (1st Cir. 2009) (no financial vulnerability, repeated acts, or intentional malice or deceit); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F.Supp.2d 555, 565 (S.D.N.Y. 2008) (no financial vulnerability and comparable penalties were low); *Park v. Mobil Oil Guam, Inc.*, No. CVA03-001, 2004 WL 2595987 (Guam Terr. Nov. 16, 2004) (no financial vulnerability, no repeated acts, and harm easily calculated); *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985 (6th Cir. 2007) (only one reprehensibility factor present).

trial (in spite of multiple Court orders), as part of their plan to conceal their conduct. *See* TX 723B, 723C, 766.

Rejection of a 1 to 1 ratio is further supported by *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004), a case where the Eighth Circuit affirmed a 4.5 to 1 ratio for actions that were substantially less reprehensible than Defendants' actions in this case.<sup>11</sup> In that case, Amana had signed a contract with Eden to make Eden the exclusive distributor of its products in Israel. *Id.* at 826. Unknown to Eden, Amana's intent (as plotted by its highest management) was to get rid of \$2.4 million in inventory that it regarded as "junk," and "evinced an intent to "f\*\*\*" and "kill" the plaintiff. *Id.* at 828. After Eden paid for the inventory, Amana abruptly terminated the distributor agreement with no explanation, only seventy-seven days after signing it. *Id.* at 827.

Here, Defendants' conduct is far more reprehensible than the conduct in *Eden*. For example, Eden owned twenty-five appliance stores throughout Israel and had \$2.4 million in cash on hand to purchase Amana's merchandise, suggesting that Eden was not a financially vulnerable plaintiff. *See Id.* at 826, 828. Moreover, there was no evidence in *Eden* that the defendant had engaged in repeated acts, whether with respect to Eden or other competitors. *See Id.* at 828. Certainly the defendant was not engaged in conduct intended to protect monopoly power.

**5. Any Reduction In The Punitive Damages Award Would Not Deter Defendants From Repeating Their Conduct In The Future**

Another proper consideration in reviewing the ratio of punitive to economic damages is "the penalty necessary to discourage [the defendant] from undertaking such endeavours in the

---

<sup>11</sup> "The Eighth Circuit has rejected the notion that the ratio approved in *Eden Electrical* represents an upper limit on punitive damages awards in a commercial case. *See Craig*, 528 F.3d at 1021 n.9.

future.” *TXO*, 509 U.S. at 453, 113 S.Ct. at 2718. The Supreme Court has made clear that “punitives are aimed ... principally at retribution and deterring harmful conduct.” *Exxon*, 128 S.Ct. at 2621. *See also State Farm*, 538 U.S. at 425, 123 S.Ct. at 1524. *See also BMW*, 517 U.S. at 568, 116 S.Ct. at 1595 (“[p]unitive damages may properly be imposed to further a State’s legitimate interest in punishing unlawful conduct and deterring its repetition”); *Applied Capital*, 2008 WL 4821336 at \*9.

In determining the amount of punitive damages that is appropriate to deter a defendant, courts have taken into account the defendant’s wealth. *See, e.g., TXO*, 509 U.S. at 462, 113 S.Ct. at 2722 (holding that large punitive damages award satisfied due process in light of, among other things, defendant’s wealth”); *Gannett Co., Inc. v. Kanaaga*, 750 A.2d 1174, 1190 (Del. Supr. 2000) (noting that “the defendant’s wealth is an appropriate consideration because the degree of punishment or deterrence is to some extent proportionate to the means of the wrongdoer”) (citation omitted); *Winters v. Union Texas Petroleum Corp.*, 974 F.2d 1346, 1992 WL 208171, at \*3 (10th Cir. 1992) (“financial condition evidence is relevant because punitive damages must be sufficient to alter conduct for the better”); *Mathias*, 347 F.3d at 678 (upholding a punitive-compensatory damage ratio of 37.2-to-1 based in part on defendant’s wealth).

Moreover, it is proper for the court, in determining whether punitive damages award is “reasonably related to the goals of deterrence and retribution,” to consider “the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss.” *Pacific Mut.*, 499 U.S. at 21-22. *See also Mathias*, 347 F.3d at 677 (in considering whether punitive damages award is constitutionally excessive, court considers profitability to defendant of its own misconduct).<sup>12</sup>

---

<sup>12</sup> Given the similarity between the goals of punitive damages and criminal punishment, it is not surprising that removing the profitability of a defendant’s wrongdoing is also a factor in determining the amount of criminal fines.

Here, a punitive damage award of less than \$40 million will do little if anything to deter Defendants from engaging in similar conduct in the future. As described above, in 2008 Dentsply had total assets of approximately \$2.8 billion. TX 704, p. 23. \$40 million is *less than 1%* of that figure. Further, even with a \$40 million punitive damages award, Defendants have profited from their conduct, as this amount is *less* than the profits that they would have lost had Guidance been allowed to fairly compete.

As noted above, Dr. Goodis expected to capture approximately 5% of the at least \$100 million market for NiTi rotary files, resulting in \$5 million per year in lost NiTi rotary file revenues to other competitors. 9/23/09 Official Tr. 653:22-655:8. Because Defendants control approximately 70% of the U.S. nickel-titanium rotary file market (9/24/09 Official Tr. (Mosch) 901:12-15), it is reasonable to assume that they would have lost approximately 70% of the \$5 million that all competitors would have lost each year, amounting to lost revenues from NiTi rotary file sales of approximately \$3.5 million per year, or \$24.5 million over the seven-year term of the Supply Agreement. Given that Defendants' cost to produce files is approximately \$1.00 per file, which they sell for approximately \$6.00 per file (TX 723B at 21407), Defendants' profit margin on files is approximately 83%. Thus, Defendants' lost profits from NiTi rotary file sales would have been at least \$2.9 million per year, or \$20.3 million over the life of the Supply Agreement.

Dr. Goodis also testified that he expected to capture approximately 50% of the \$40 million market for thermal filling obturators, resulting in \$20 million per year in lost obturator revenues to other competitors. 9/22/09 Official Tr. 389:24-390:4, 395:8-396:2. Engaging in a similar analysis based on Defendants' control of approximately 87% of the U.S. carrier-based

---

*See* United States Sentencing Guidelines § 8C2.4(a)(2) (2009) (factor in setting "base fine" for criminal offense is "the pecuniary gain" to the defendant "from the offense").

obturation market (9/24/09 Official Tr. (Mosch) 907:18-908:3), Defendants would have lost approximately \$17.4 million in obturator sales per year, or \$121.8 million over the life of the Supply Agreement. Assuming that Defendants' profit margin for obturators is similar to its profit margin for files, Defendants' lost profits from obturator sales would have been approximately \$14.4 million per year, or \$101 million over the life of the Supply Agreement.

Defendants would not have sued Guidance three times and litigated this case as aggressively as they have, likely spending several million dollars in legal fees along the way, if they did not believe that the threat from Guidance was substantial. As it stands, Defendants have been able to severely handicap a successful competitor for a fraction of what they would have lost had Guidance been allowed to fairly compete. The record supports the inference that, in the two years since Defendants discontinued the obturator supply and refused to manufacture the V2 file, they have avoided lost sales of approximately \$41.8 million (\$3.5 million for files plus \$17.4 million for obturators, per year), and lost profits of approximately \$34.6 million (\$2.9 million for files plus \$14.4 million for obturators, per year). If this litigation continues on appeal until September 2011 (a virtual certainty), and assuming that Defendants pay the full judgment at that time, they will have paid \$44 million in compensatory and punitive damages, while during the same time period avoiding lost profits of approximately \$51.9 million.

Given these numbers, \$40 million in punitive damages is insufficient to sanction Defendants in this case and to deter comparable conduct in the future. Certainly any lesser amount will make cost-effective Defendants' overall strategy of avoiding their contractual and legal obligations and subjecting competitors to back-breaking litigation in order to protect monopoly market share and profit margins.

**C. Comparing The Punitive Damages Award And The Civil Or Criminal Penalties That Could Be Imposed For Comparable Misconduct Supports The Conclusion That The Punitive Damages Award Is Not Excessive**

The third guidepost to evaluate the constitutionality of a punitive damages award is the difference between the punitive damages awarded by the jury and the civil or criminal penalties for comparable misconduct. *See State Farm*, 538 U.S. at 418, 123 S.Ct. at 1520; *BMW*, 517 U.S. at 583, 116 S.Ct. at 1603. *See also Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 25, 132 N.M. 401, 49 P.3d 662 (noting that comparable sanctions factor is least important indicium); *see also United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1231 (10th Cir. 2000) (upholding punitive damages award as not constitutionally excessive where reprehensibility and ratio guideposts weighed in support of substantial award, even though the comparable civil/criminal penalty guidepost leaned in defendant's favor).

**1. There Are Substantial Civil and Criminal Penalties For Comparable Conduct Under the Sherman Act**

The most analogous potential civil or criminal penalties are those available under the Sherman Act, 15 U.S.C. § 1 *et. seq.* Here, the evidence on the record would be sufficient to initiate a criminal investigation for monopolization under § 2 of the Sherman Act. A prosecution would require proof of two elements in addition to criminal intent: (1) possession of monopoly power and (2) "maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Dentsply International, Inc.*, 399 F.3d 181, 186 (3<sup>rd</sup> Cir. 2005),<sup>13</sup> quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 (1992). Monopoly power consists of the ability to control prices and exclude competition, and, such power may be inferred from a predominant

---

<sup>13</sup> Application of Third Circuit law on Section 2 is particularly appropriate as Dentsply is a Delaware corporation headquartered in Pennsylvania, and the Justice Department brought its prior action against Dentsply in the District of Delaware.

share of the market. *Id.* at 187. “Unlawful maintenance of a monopoly is demonstrated by proof that a defendant has engaged in anticompetitive conduct that reasonably appears to be a significant contribution to maintaining monopoly power.”<sup>14</sup> *Id.*

In *Dentsply*, 399 F.3d at 190, the Third Circuit found that Dentsply’s 75% to 80% share of that market was “more than adequate to establish a prima facie case of power,” and ultimately found that Dentsply had violated § 2 of the Sherman Act. Here, the jury heard that Defendants control 87% share of the market for obturators and 70% share of the market for NiTi rotary files – market shares comparable to Dentsply’s share of the artificial teeth market. Additionally, Dentsply has maintained such market shares through a calculated strategy to sue smaller and less financially capable competitors and force them into agreements that allow Defendants to keep the endodontic market closed and to artificially raise the price of endodontic products. Regardless of Defendants’ protestations about the lawfulness of their litigation with pre-Guidance competitors, there can be no doubt that with Guidance they crossed the line.

Defendants’ insistence on distribution as a means to indirectly control prices in the endodontic market also mirrors Dentsply’s policy in the artificial tooth market of excluding dealers of artificial teeth from adding competitors’ teeth to their product lines, which had the dual effect of keeping “sales of competing teeth below the critical level necessary for any rival to pose a real threat to Dentsply’s market share,” and allowing Dentsply to charge higher prices for those products. *See Id.* at 190-91.

A criminal violation of § 2 is a felony and is punishable by up to \$100,000,000 in fines, ten years in prison, or both. 15 U.S.C. § 2. Although the Supreme Court has held that care must

---

<sup>14</sup> The Court then stated that “[p]redatory or exclusionary practices in themselves are not sufficient. There must be proof that competition, not merely competitors, has been harmed. *Dentsply*, 399 F.3d at 187. Here, Dentsply’s anticompetitive practices did not simply hurt Guidance and other competitors, they also harmed competition, preventing competitors from offering lower prices and making inroads on Dentsply’s enormous market share and discouraging others from entering the market.



be taken to avoid use of the civil process to assess criminal penalties, the availability of significant prison terms can justify large punitive damages awards. *See Pacific Mut.*, 499 U.S. at 123-24, 11 S.Ct. at 1046 (punitive damage award not unconstitutional given that imprisonment could be required for similar conduct in criminal context); *Chavarria*, 2006-NMSC-046, at ¶¶ 39 (“[t]he possibility of a jail sentence justifies a substantial punitive damages award”). *Cf. State Farm*, 538 U.S. at 428. Given the severe criminal and civil penalties for comparable behavior, Defendants’ argument that they “lacked any notice” that their conduct could merit a \$40 million punitive damage award must be rejected. *See* Def. Motion for Remittitur, p. 13. Indeed, Defendants’ concern regarding the criminal and civil liability may explain their decision to withhold the strategic reports and other documents until trial.

## **2. Guidance Is Not Limited To \$300 In Statutory Damages**

Defendants also raise the absurd argument that “the only arguable civil penalty for comparable conduct is the claim that Dentsply/TDP violated ... the New Mexico Unfair Practices Act,” and that Defendants were therefore on notice of, at most \$300 in potential damages. Def. Motion for Remittitur, p. 14. However, the jury expressly found that Guidance had been damaged by Defendants’ willful violation of the UPA by failing to provide the quantity and quality of goods under the Supply Agreement. Doc 441, Q. 8, 12. These damages overlap with Guidance’s damages for Defendants’ breach of contract, which stem from Defendants’ failure to supply obturators and files to Guidance. Had this case been a UPA case with no contract claim, Guidance would have minimally recovered \$4.08 million, trebled, for a total of over \$12 million – not \$300.

Moreover, even at \$12 million under the UPA, Defendants’ argument has been expressly rejected by the Sixth Circuit, which directly confronted this issue. In *Cambio Health Solutions*,

*LLC v. Reardon*, 234 Fed. Appx. 331, 339-40 (6<sup>th</sup> Cir. 2007), defendants argued that the court should limit the punitive damages to a 3 to 1 ratio based on the fact that the statutory penalty for inducing breach of contract under Tennessee Law is treble damages. The Sixth Circuit rejected this approach, upholding a 5.65 to 1 ratio, explaining that under Tennessee law the successful plaintiff may choose between treble damages and punitive damages to realize a maximum recovery. New Mexico courts interpreting the UPA similarly recognize that a successful plaintiff may select punitive *or* treble damages. See *Woodmen, Hale v. Basin Motor Co.*, 795 P.2d 1006, 1012 (N.M. 1990); *McLelland v. United Wis. Life Ins. Co.*, 980 P.2d 86, 90 (N.M. Ct. App. 1999).

## **II. THE NOMINAL DAMAGES AWARD IS NOT EXCESSIVE**

Defendants' argument that the nominal damages award is excessive fails for two reasons. First, Defendants' argument is waived because they did not object to Question 21 on the verdict form, which asks the jury to state, "[i]n a lump sum ... the amount of nominal damages you are awarding to Guidance," Doc. 441, ¶ 21, and because they failed to request a jury instruction capping nominal damages at any specified amount. Defendants therefore did not object to leaving the proper amount of nominal damages to the jury's discretion.

Second, nothing in Delaware law caps nominal damages at six cents or one dollar or any particular amount. None of the Delaware cases cited by Defendants contain any binding cap on nominal damages, but merely remark that six cents or one dollar is the "tradition[al]" amount.<sup>15</sup> Plainly, if Delaware courts had wanted to put a firm cap on nominal damages, they could have

---

<sup>15</sup> This is in stark contrast to the Colorado and Pennsylvania cases relied on by Defendants, which do impose a firm and unvarying amount of nominal damages. See *Mollinger-Wilson v. Quizno's Franchise Co.*, 122 Fed. App'x 917, 923 (10th Cir. 2004) ("Colorado law is specific that nominal damages are \$1-not more, not less"); *Nicholas v. Penn State Univ.*, 227 F.3d 133, 146 (3d Cir. 2000) (noting that when nominal damages are awarded under Pennsylvania law, \$1.00 "**shall be** the measure thereof") (emphasis added).

done so, and, absent any firm limit, it should be presumed that the proper determination of the amount is for the jury.

**Conclusion**

Neither remittitur nor a new trial is warranted in this case, for all of the reasons stated above.<sup>16</sup> The jury's award of punitive damages is well within constitutional limits, and even more so when the potential harm that Defendants' actions could have caused, or prejudgment interest and attorneys' fees, are combined with the actual damages award. Thus, neither remittitur nor a new trial is warranted.

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendants' motion for remittitur and/or new trial in its entirety.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

John J. Kelly  
Donald A. DeCandia  
Ryan Flynn  
P.O. Box 2168  
Albuquerque, NM 87103  
(505) 848-1800

OLSHAN GRUNDMAN FROME  
ROSENZWEIG & WOLOSKY, LLP

*Electronically Filed*  
By /s/ Kyle C. Bisceglie  
Kyle C. Bisceglie  
Renee M. Zaytsev  
Park Avenue Tower  
65 East 55<sup>th</sup> Street

---

<sup>16</sup> Apparently not content with the five post-trial motions that they have already filed, Defendants use this motion to repeat the argument that is the subject of Defendants' Motion for New Trial Based on the Punitive Damages Limiting Instruction (*see* Doc. 547), namely that Guidance "impermissibly urged the jury to award punitive damages on the basis of lawful out of state conduct." Def. Motion for Remittitur, p. 16. Rather than burden the Court with repetitive legal arguments, Plaintiff respectfully refers the Court to its Response to Defendants' motion.

New York, NY 10022  
(212) 451-2300

I HEREBY CERTIFY that on the 24th day of May, 2009, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

Thomas P. Gulley (TPG@nmcounsel.com)  
Rebecca Avitia (RLA@nmcounsel.com)  
Brian M. Addison (BAddison@Dentsply.com)  
Howard M. Radzely (HRadzely@morganlewis.com)  
R. Ted Cruz (TCruz@morganlewis.com)  
W. Brad Nes (BNes@morganlewis.com)

OLSHAN GRUNDMAN FROME  
ROSENZWEIG & WOLOSKY LLP

*Electronically Filed*  
By /s/ Kyle C. Bisceglie  
Kyle C. Bisceglie

**Opposition to Motion for Remittitur  
Appendix A**

<b>Trial Exhibit</b>	<b>Page No.</b>
2	APP-A001
6	APP-A005
60	APP-A006
89B	APP-A009
367	Doc. 2, Ex. 1
392	APP-A012
422	APP-A014
427	APP-A016
439	APP-A019
441	APP-A021
454	APP-A022
459	APP-A023
463	APP-A024
471	APP-A025
481	APP-A026
482	APP-A027
487	APP-A028
490	APP-A031
497	APP-A032
500	APP-A033
505	APP-A036
508	APP-A041
509	APP-A044
529	APP-A045
542B	APP-A046
547	APP-A047
575	APP-A048
581	APP-A050

<b>Trial Exhibit</b>	<b>Page No.</b>
583	APP-A052
630	APP-A053
632	APP-A054
633	APP-A057
640	APP-A058
642	APP-A059
665	APP-A060
704	APP-A061
722H	APP-A063
722J	APP-A064
722K	APP-A065
723B	APP-A066
723C	APP-A073
723E	APP-A077
723H	APP-A078
723I	APP-A080
723L	APP-A081
723M	APP-A082
729	APP-A083
737	APP-A084
738	APP-A085
764	APP-A086
766	APP-A087



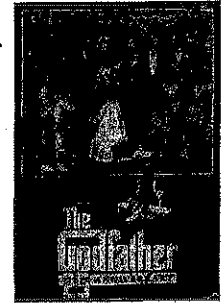
Confidential  
Internal Use Only

ATTORNEY EYES ONLY  
TDP 1998 CONFIDENTIAL



## The Godfather

- 25 Years Ago....A Legacy was created...
- A Vision was Realized
- A Family was formed....



ATTORNEY EYES ONLY TDP 1998 CONFIDENTIAL

## The Godfather

- Today....The Family is under attack
- Well in the spirit of the Godfather...
- It's Time to...

**"Take it to the Mattresses!"**

(for those of you who are not "Godfather" savvy...it simply means... "prepare for war")

"It's strictly business..."

....Nothing personal"

ATTORNEY EYES ONLY  
TDP 1998 CONFIDENTIAL

## Introducing.... "Godfather Offer"

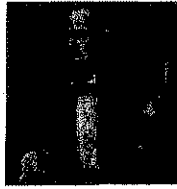
- What's included...?
- A Rep incentive
- Swap pack for pack up to the amount purchased
- Purchase promo
- Future orders through 2008
  - Buy 10 get 2 free
  - Buy 50 get 15 free
  - Buy 100 get 40 free

ATTORNEY EYES ONLY  
TDP 1998 CONFIDENTIAL

### Introducing.... "Godfather Offer"

As "The Don" says...

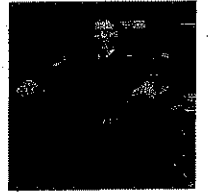
"We'll give them an offer they can't refuse..."



ATTORNEY EYES ONLY  
TDF 1953 CONFIDENTIAL

### Buy 25 get 25 Free

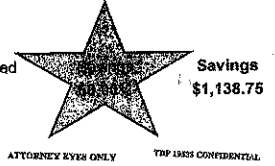
- Bonus to OTM - \$200
- Buy 25 get:
  - 25 packs Free



 Free  
25  
\$1,238.75 \$1,238.75

Total If Purchased  
\$2,377.50

Savings  
\$1,138.75



ATTORNEY EYES ONLY TDF 1953 CONFIDENTIAL

### Buy 50 get 50 Free Get a Free X-Smart Motor

- Bonus to OTM - \$300
- Buy 50 get:
  - 50 packs Free
  - Free X-Smart Motor



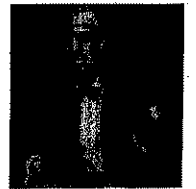
 Free  
50  
\$2,377.50 \$2,377.50

Free Xsmart \$952  
Total If Purchased \$5,407.00  
Savings 56.03% Savings \$3,029.50

TDF 1954 CONFIDENTIAL  
ATTORNEY EYES ONLY

### Buy 100 get 100 Free Get a Free DTC and Hand Piece

- Bonus to OTM - \$500
- Buy 100 get:
  - 100 packs Free
  - Free DTC and Handpiece
  - 20% discount on their next order



 Free  
100  
\$4,255.00 \$4,255.00

Free DTC Motor & HP \$1,800

Total If Purchased \$10,310.00

Savings 58.73% Savings \$6,055.00

20% discount on next order

ATTORNEY EYES ONLY

TDF 1954 CONFIDENTIAL



## Groundrules:

- Month of September only; then return to BrassKicker
- To qualify for payout, doctor must not have purchased TDS rotary files in 6 months.
- However, if you have lost a customer in the last 1 – 5 months, go after them with this promo. We will have to make a manual adjustment at the end of month to ensure you get paid on winning back this account.
- Use Promocodes when purchasing files:
  - PROMOGODFATHER25
  - PROMOGODFATHER50
  - PROMOGODFATHER100
- Use Promocodes when returning files:
  - PROMORETBRA - Brasseler
  - PROMORETSYB - Sybron
  - PROMORETV - Guidance V-Taper
- Welcome to the family.....



ATTORNEY EYES ONLY  
TDP 1036 CONFIDENTIAL

## Talking Points To Customers

- Positioning with Potential customers...
  - This is a New Customer Promotion that will provide an opportunity for you (the customer) to take advantage of an unbelievable buy in order for you to try our files...for virtually free...And to obtain some free equipment as well. TDS has Never given this type of a promotion.
  - We will be more than happy to set up an in-service and/or clinical to demonstrate these files if they are different technique.
  - Same technique? That is great...Then enjoy this unbelievable buy during some tough economic times and take advantage of some free equipment!
  - We are not asking for your 100% loyalty or an exclusive conversion...Just feel free to try these files at an unbelievable buy and if you don't think they are better than your current file, then there is no obligation for future purchases.
  - Why are we doing this? Simple, we are by far the market leader, so our opportunity to gain new customers is limited. So in order to get new customers today, we need to offer aggressive introductory deals to drive trial purchase so that you can decide on your own if we have the best files.

TDP 1037 CONFIDENTIAL ATTORNEY EYES ONLY

## Talking Points To Customers

- What do you say if a current file customer hears about this deal?
  - Simple...this is a "New Customer" promotion in order to drive new volume for our company.
  - Yes, this is a great buy, however, it is a "One-time" new customer buy.
  - Once the new customer burns through their promo buy of files, their future orders will be charged based off of our normal price lists...probably higher than what you pay today.
  - It is very common for companies to conduct new customer promos utilizing aggressive "one-time" incentives to drive trial purchase.
  - We want to provide an opportunity for new customers to enjoy the great speed, quality and efficiency of our file systems so that they can enjoy great patient care utilizing our systems and service like you are providing to your patients today.

TDP 1038 CONFIDENTIAL  
ATTORNEY EYES ONLY

## Why this Aggressive Customer Promotion

- Why are we doing this?
  - To provide an acceleration in our revenue need in order to meet our Balance of Year Forecast ...Remember, if we miss our 2008 forecast, it will be added onto our 2009 Budget.
  - To acquire 500 competitive accounts that will force our competitors into "defensive" positions in order to protect their base.
  - This will pull our competitors off of our base business allowing us to shore-up our vulnerable accounts until we get our expansion in place.
  - This is not a "price & product" strategy. This strategy will allow you to give a "deal that a customer can't refuse"...A No Brainer! An Unprecedented offer! Once you are in, we expect you to get into this customer's account in the coming weeks to show them how these great files work and why they are better than their current files.
  - This special buy will allow you to get back into their office to sell them on the "Unique Value Proposition" that Tulsa has to offer...not price and product.

ATTORNEY EYES ONLY  
TDP 1039 CONFIDENTIAL

## Expectations & Reporting

- Minimum of 4 deals per rep...or approximately \$10,000 per rep
  - 1 – 25pk deal + 2 – 50 pk deal + 1 – 100 pk deal = \$10,250
- This mix of 4 wins would give you: \$1,400 in additional commissions!...On top of your normal commission.
- No Cap on this Incentive Promotion!
- We expect Excellence in Execution across all territories and regions. We need to be presenting this aggressively...Everyday!
- At the end of each day, please provide your RM a voice mail or email on the # of presentations and the number of wins you had for the day...That is all you have to do! No reports, no charts, no spreadsheets ,etc.

TDP 1546 CONFIDENTIAL  
ATTORNEY EYES ONLY

## The Opportunity is there!

- Commission Opportunities...You Bet!
  - Endo Improvement = \$3,000- \$5,000
  - GTX Contest = \$1,000- \$5000
  - Endo Activator = \$1,000
  - Now.... "The Godfather" promo = No Cap!
    - Sell one each = \$1,000
    - Sell three – 100pk deals = \$2,000
    - Sell three of each deal = \$3,000
  - Plus...all your normal commission payouts!
- Big Money on the table.....Time to execute!

TDP 1546 CONFIDENTIAL  
ATTORNEY EYES ONLY

## The Opportunity is there!

- The Clock is ticking....
- Let's go Execute!...and send a message to Sybron, Brasseler & Guidance that they just woke the Giant and we are unleashing our power!
- Any questions, please call.
- Bobby, Greg, your AD, RM and KC are all available over the next month to help you close these deals!
- Let's Have Some Fun...Each and every day!
- Good Selling!

TDP 1546 CONFIDENTIAL  
ATTORNEY EYES ONLY

**DENTSPLY**  
TULSA DENTAL  
SPECIALTIES

DENTSPLY Tulsa Dental Specialties  
5100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-6546  
(918) 493-6598  
(800) 662-1202  
Fax: (918) 493-6599

Dr. Goodis,

We have recently received 3 drawings from you for the prototype file referred to as "V2". The package included an assembly drawing of the file, and component drawings for what appear to be the file blade and the file handle. Our production and engineering teams have evaluated the drawings received and have identified several areas of concern as it relates to producing the files to specification. The following are the specific areas identified by the team that need further definition and/or clarification:

1. Specifications listed do not allow us to use currently existing stock and material to complete all file sizes listed,
2. Dimensional specifications are incomplete and/or vague,
3. Referenced drawings have not been included in the submission, and
4. Current component dimensioning would require process modification to accommodate.

Given the above issues with the specifications, we would propose a couple of options to move forward with the prototypes.

1. We can use the current specifications provided to complete the prototypes, given appropriate freedom to use our technical judgment on certain areas of the design that are not specified and/or are vague. We do not recommend this option, however, because the completed prototype may not meet your needs; or,
2. You can submit revised drawings and/specifications that address the areas of concern listed above.

Additionally, the specifications reference files in sizes that we did not agree to manufacture under the Agreement. Specifically, you have submitted information regarding sizes; 30/.04, 35/.04, 40/.04, 45/.04 and 50/.04. Exhibit 1 of the Manufacturing and Supply agreement clearly specifies that the .04 taper files will be manufactured in size 15, 20 and 25 only. Once you address the issues mentioned above, please note that we will only be manufacturing prototypes and ultimately final product in these 3 agreed upon sizes. Also, please note that we will provide 1 more prototype at our expense since we previously sent you V2 prototypes and any additional prototypes will be at your expense.

Please advise, at your convenience, how you would like us to proceed relative to the options offered.

Regards,

John P. Voskuil  
Director of Operations, DENTSPLY - Tulsa Dental Specialties



**Wygant, Kim**

---

**From:** Newell, Bill  
**Sent:** Wednesday, August 24, 2005 2:57 PM  
**To:** Vanderslice, Russ  
**Subject:** Fw: Dental Town: cover discusses new rotary: Guidance, V-Taper

Russ; In case you are talking to Jim B or Brian Addison, can you follow up and see where we are with this?? I think we need to get direction on possible actions and make a decision as a team asap. Thanks, Bill  
----- Forwarded by Bill Newell/Tulsa/Dentaply on 08/24/2005 03:58 PM -----

Bill Newell/Tulsa/Dentaply  
08/22/2005 08:34 AM

To Jim Bieber/Dentaply  
cc  
Subject Fw: Dental Town: cover discusses new rotary: Guidance

**REDACTED**

----- Forwarded by Bill Newell/Tulsa/Dentaply on 08/22/2005 08:31 AM -----



TDP 21194 CONFIDENTIAL

Tim Gales/Tulsa/Dentsply

08/19/2005 01:46 PM

To Andrew Haber/Tulsa/Dentsply@Dentsply, Steven R Be  
 Rooney/Tulsa/Dentsply@Dentsply, Brian Vaughn/Tulsa/  
 Hickey/Tulsa/Dentsply@Dentsply, Chad Kolasch/Tulsa/  
 Ralsback/Tulsa/Dentsply@Dentsply, Charline Morris/Ti  
 Contreras/Tulsa/Dentsply@Dentsply, Steven Roth/Tulsa/  
 Mahon/Tulsa/Dentsply@Dentsply, Charlie W Jalle/Tulsa/  
 Roadcap/Tulsa/Dentsply@Dentsply, Kurt H Magnus/Tu  
 Mayer/Tulsa/Dentsply@Dentsply, Erik Bangtson/Tulsa/  
 DeHart/Tulsa/Dentsply@Dentsply, Frank Radtsch/Tulsa/  
 Stanton/Tulsa/Dentsply@Dentsply, Brian McDonough/  
 McFaul/Tulsa/Dentsply@Dentsply, Karyn Bena/Tulsa/  
 Mattscheck/Tulsa/Dentsply@Dentsply, Karen Webber/T  
 Polk/Tulsa/Dentsply@Dentsply, Nathan Roy/Tulsa/Den  
 Parr/Tulsa/Dentsply@Dentsply, Jean-Phillippe Morin/Tu  
 Eng/Tulsa/Dentsply@Dentsply, Bruce Armstrong/Tulsa/  
 MacEachern/Tulsa/Dentsply@Dentsply, Tara Lawlor/T  
 Garland/Tulsa/Dentsply@Dentsply, Gary Marquez/Tulsa/  
 Fee/Tulsa/Dentsply@Dentsply, Alesha Towler/Tulsa/D  
 Redding/Tulsa/Dentsply@Dentsply, Matt Slech/Tulsa/C  
 Cook/Tulsa/Dentsply@Dentsply, David Miller/Tulsa/Den  
 Crimmins/Tulsa/Dentsply@Dentsply, Brian Burghdurf/T  
 Villarroel/Tulsa/Dentsply@Dentsply, Bob Fressola/Tulsa/  
 Masterson/Tulsa/Dentsply@Dentsply, Nicole Shargel/T  
 Redeman/Tulsa/Dentsply@Dentsply, Brian Ametuz/Tu  
 Burgin/Tulsa/Dentsply@Dentsply, Brett Couch/Tulsa/D  
 Prendergast/Tulsa/Dentsply@Dentsply, Jennifer Haner  
 Van Slooten/Tulsa/Dentsply@Dentsply, Jason Patterson  
 Todres/Tulsa/Dentsply@Dentsply, Robert Duncan/Tulsa  
 Ellis/Tulsa/Dentsply@Dentsply, Victor Onwudiwe/Tulsa  
 Warren/Tulsa/Dentsply@Dentsply, Jason Budreau/Tulsa/  
 Baux/Tulsa/Dentsply@Dentsply, Lance Johnson/Tulsa/  
 Gerson/Tulsa/Dentsply@Dentsply  
 cc Bill Newell/Tulsa/Dentsply@Dentsply

Subject Dental Town: cover discusses new rotary: Guidance, \

This is a great way to make yourself very familiar with Guidance in about 15 minutes.

Thanks to Jim for sending this on.

Tim

----- Forwarded by Tim Gales/Tulsa/Dentsply on 08/19/2005 01:44 PM -----

Jim Gerson  
 08/19/2005 11:23 AM

To: Andrew Haber/Tulsa/Dentsply@Dent  
 Duncan/Tulsa/Dentsply@Dentsply, Steven R Berdy/Tulsa/Dentsply@D  
 Jason Patterson/Tulsa/Dentsply@Dentsply, Corey Todres/Tulsa/Dents  
 Gomosky/Tulsa/Dentsply@Dentsply, Christina Clark/Tulsa/Dentsply@I  
 Brian Rooney/Tulsa/Dentsply@Dentsply  
 cc: Tim Gales/Tulsa/Dentsply@Dentep  
 Subject: Dental Town: cover discusses new

Metro,

Please launch the attached web page. The cover on the most recent DentalTown publication highlights the V-Taper file. It's amazing how closely they have imitated the aesthetics of the ProTaper. From a conceptual standpoint, this file is designed to have a variable taper (again, imitating our ProTaper) along different segments of the instrument.

The selling point of their system is that it is a 3 file system. Finally, the file system is being endorsed by some local endos who also offer testimonials:

- Dr. Ira Ehrlich - Valley Stream, NY (Haber)
- Dr. Ira Zohn - Ocean, NJ (Rooney)
- Dr. Ahani - Daly City, CA
- Dr. Lesniak - Kingston, PA

TDP 21195 CONFIDENTIAL

The files themselves cost \$44.95 per pack of six. In addition, they now sell the ATR Vision handpiece for \$1,960 with a contra angle.

These guys do not have a physical presence in the field. We crush them on superior products but most importantly, on your clinical expertise.

This is just an FYI...Make sure to be proactive with those customers who subscribe to DentalTown. This is on their radar.

Good selling, Jim

Jim Gerson  
Regional Sales Manager-Metro Region  
Dentsply/Tulsa Dental  
p: 800-862-1202 ex. 1286  
f: 800-679-2779

TDP 21196 CONFIDENTIAL

**Guidance Endodontics, LLC  
Financial Statements  
For the One Month and  
For the Twelve Months Ended  
December 31, 2006 and 2005**

**PLAINTIFF'S  
EXHIBIT**  
89 B

MACKIE, REID &  
COMPANY, PA

*Certified Public Accountants*



ATTORNEYS EYES ONLY

GUIDANCE-024005

APP-A009

**Guidance Endodontics, LLC**  
**Statements of Revenues and Expenses**  
**Income Tax Basis**  
**For the One Month and**  
**For the Twelve Months Ended December 31, 2007 and 2006**

	Current Period December 31, 2007	Current Period December 31, 2006	Year-to-Date December 31, 2007	Year-to-Date December 31, 2006
<b>INCOME</b>				
Product Sales	\$ 139,761.85	\$ 130,029.27	\$ 1,694,996.63	\$ 1,090,386.51
Shipping	617.14	515.71	7,030.83	7,169.25
<b>Total Sales</b>	<u>140,378.99</u>	<u>130,544.98</u>	<u>1,702,027.46</u>	<u>1,097,555.76</u>
<b>COST OF PRODUCT SOLD</b>				
Cost of inventory sold	78,310.24	70,223.50	911,884.27	584,758.34
Inventory adjustment	(2,306.88)	(4,011.83)	8,579.66	11,574.53
Conversion adjustment	0.00	2,218.62	8,264.63	(3,166.82)
Shipping supplies	0.00	164.79	8,338.74	8,398.41
Freight	2,475.17	2,673.55	26,276.67	31,359.36
<b>Total Cost of Product Sold</b>	<u>78,478.53</u>	<u>71,268.63</u>	<u>963,343.87</u>	<u>632,921.82</u>
<b>Product Margin</b>	61,900.46	59,276.35	738,683.59	464,633.94
<b>OTHER INCOME</b>				
Commissions	0.00	0.00	0.00	24,952.00
<b>OTHER COST OF SALES</b>				
Show presentation	968.24	0.00	9,767.89	14,994.79
Promotion cost of inventory	7,607.32	2,785.62	105,930.20	49,986.81
Promotional user's guide/DVD's	50.00	6,006.34	9,206.19	30,719.05
Seminar costs	0.00	3,153.76	800.00	21,463.60
Sales commissions	0.00	582.29	6,413.75	1,059.23
Trade shows, marketing & demos	15,276.85	18,211.78	225,030.19	289,315.97
<b>Total Other Cost of Sales</b>	<u>23,902.41</u>	<u>30,719.79</u>	<u>357,148.22</u>	<u>407,539.45</u>
<b>GROSS PROFIT</b>	<u>37,998.05</u>	<u>28,556.56</u>	<u>381,535.37</u>	<u>82,046.49</u>
<b>OPERATING EXPENSES</b>				
Accounting	5,188.78	3,994.99	49,860.40	27,079.42
Advertising - general	0.00	0.00	28,958.66	33,647.64
Advertising - print ads	7,616.00	0.00	40,590.45	46,806.94
Advertising - program ads	0.00	1,000.00	33,595.60	7,594.38
Advertising - web site	0.00	0.00	738.00	6,248.19
Amortization	401.07	755.39	4,812.29	4,517.06
Answering service	0.00	178.95	462.90	2,378.35
Automobile	6,839.20	(828.95)	35,337.97	1,927.10
Bad debts	379.72	2,060.90	101.97	2,060.90
Bank charges	0.00	40.95	666.04	303.67
Computer services	818.51	478.88	9,444.77	8,856.09
Contributions	0.00	0.00	150.00	700.00
Credit card fees	710.23	240.39	9,069.34	7,765.86
Depreciation	3,622.24	4,803.40	39,331.58	46,111.43

See Accountants' Compilation Report

ATTORNEYS EYES ONLY

GUIDANCE-024016

APP-A010



**Guidance Endodontics, LLC**  
**Statements of Revenues and Expenses**  
**Income Tax Basis**  
**For the One Month and**  
**For the Twelve Months Ended December 31, 2007 and 2006**

	Current Period December 31, 2007	Current Period December 31, 2006	Year-to-Date December 31, 2007	Year-to-Date December 31, 2006
Dues & subscriptions	477.82	349.75	2,516.15	790.87
Entertainment	813.95	0.00	13,598.59	2,841.32
Insurance - general liability	396.26	310.33	4,243.10	3,700.78
Insurance - life	0.00	0.00	1,809.00	1,809.00
Insurance - product liability	1,431.15	953.64	14,432.20	11,186.09
Insurance - workman's compensation	470.76	0.00	3,118.32	0.00
Insurance - cargo	208.33	208.34	2,499.89	2,506.34
Insurance - group health	1,285.18	0.00	13,530.80	0.00
Interest	244.44	0.00	1,774.39	586.89
Legal	17,095.66	(5,635.51)	1,049,731.47	124,581.50
Meals	3,692.55	159.81	19,021.30	735.09
Office	2,322.62	904.75	15,716.54	8,143.87
Partner salaries	20,000.00	20,002.00	240,000.00	200,006.00
Payroll service fees	128.28	0.00	1,265.16	0.00
Postage	193.35	653.28	2,233.93	1,910.62
Professional fees	16,116.80	0.00	61,958.71	0.00
Rent & storage	1,445.00	0.00	16,695.10	1,086.80
Repairs & maintenance	0.00	0.00	350.54	0.00
Research & development	28,376.21	906.25	45,859.91	21,076.93
Salaries - employees	31,351.00	13,218.60	328,859.73	50,969.73
Salaries - bonuses	5,217.00	0.00	11,303.42	0.00
Salaries - commissions	8,730.30	0.00	38,841.91	0.00
Taxes & licenses	35.00	35.00	870.00	160.00
Taxes - payroll	1,754.61	1,817.50	30,119.03	5,210.61
Telephone	3,575.10	2,275.80	24,553.70	15,692.98
Travel - airfare	8,368.60	0.00	49,260.94	1,000.93
Travel - lodging	8,602.25	0.00	48,387.34	49.30
Travel - miscellaneous costs	0.00	0.00	1,769.97	236.45
<b>Total operating expenses</b>	<u>187,907.84</u>	<u>48,884.44</u>	<u>2,297,442.11</u>	<u>648,259.13</u>
<b>OPERATING INCOME (LOSS)</b>	<u>(149,909.79)</u>	<u>(20,327.88)</u>	<u>(1,915,908.74)</u>	<u>(566,212.64)</u>
<b>OTHER INCOME</b>				
Interest income	<u>0.17</u>	<u>0.34</u>	<u>2.55</u>	<u>4.02</u>
<b>Total other income (loss)</b>	<u>0.17</u>	<u>0.34</u>	<u>2.55</u>	<u>4.02</u>
<b>NET INCOME (LOSS)</b>	<u>\$ (149,909.62)</u>	<u>\$ (20,327.54)</u>	<u>\$ (1,915,904.19)</u>	<u>\$ (566,208.62)</u>

See Accountants' Compilation Report

ATTORNEYS EYES ONLY

GUIDANCE-024017

APP-A011



Wygant, Kim

From: Newell, Bill
Sent: Wednesday, August 13, 2008 3:22 PM
To: Mosch, Jim
Subject: Fw: CONFIDENTIAL; Settlement and new Manuf agreement with Guidance
Attachments: DocLink1.ndl

did a little more digging.
Apparently, Patterson from day 1 of litigation has been leaning pretty hard on Blake and Nancy Conner (Roydent) threatening that, "if Dentsply litigation with Guidance does anything negative to our relationship with Guidance we (Patterson) would have to look at other supply sources for P/L files etc they get from us.
So after s/w Blake, I don't think they know, but rather Blake is raising the risk given the regular threats.
----- Forwarded by Bill Newell/Tulsa/Dentsply on 08/13/2008 04:18 PM -----

Bill Newell/Tulsa/Dentsply
08/13/2008 03:52 PM

To "Mosch, Jim" <Jim.Mosch@dentspi
cc
Subject

Re: CONFIDENTIAL; Settlement a

I don't know. I asked same ?
The only thing I can imagine is;
a) they are just speculating a change would be part of settlement of litigation
b) Guidance has hinted
c) leak from 1 of the dozens who know our secret.....including Ben.

"Mosch, Jim" <Jim.Mosch@dentsply.com>
08/13/2008 03:41 PM

To "Newell, Bill" <BNewell@Dentsply.c
cc
Subject Re: CONFIDENTIAL; Settlement a

How does patterson know?

----- Original Message -----

From: Newell, Bill
To: Mosch, Jim
Sent: Wed Aug 13 15:26:06 2008
Subject: Fw: CONFIDENTIAL; Settlement and new Manuf agreement with Guidance

FYI.
Patterson retaliating this way would not be good.

----- Forwarded by Bill Newell/Tulsa/Dentsply on 08/13/2008 02:15 PM -----

Blake  
Brownell/Tulsa/Dentsply  
ntsply

08/13/2008 02:07  
PM

To  
Bill Newell/Tulsa/Dentsply@Dentsply  
cc

Subject  
Re: CONFIDENTIAL; Settlement and  
new Manuf agreement with Guidance  
(Document link: Bill Newell)

Hi Bill-

I spoke with Russ yesterday and he might have already told you this. But Patterson is sabre rattling about going away from UDM private label business if something were to end the relationship they have with Guidance as a result of our legal action. The Patterson business is worth about \$3,000,000.

It sounds like Guidance is going to let the dist know themselves. Do we know how much this was worth to Patterson? We also have some other distributors that were carrying Guidance that will be angered over this. We need Nancy to be prepared so she can react appropriately. Can we talk for a minute about how we should handle this?

Thanks,

Blake

Wygant, Kim

---

**From:** McMaster, Stephen  
**Sent:** Thursday, August 28, 2008 1:22 PM  
**To:** Newell, Bill  
**Subject:** Guidance

Bill,

We are beginning to hear fallout from TDS Sales and Maillefer Sales about Guidance selling our ovens/obturators with just a different label.

Regarding talking points, do you have thoughts on how to address?

My opinion is that we should not make this an issue and deflect it as a minor short term distraction.

Steve

Stephen McMaster  
Director of Marketing  
Dentsply Tulsa Dental Specialties



Wygant, Kim

---

From: Newell, Bill  
Sent: Thursday, August 28, 2008 6:06 AM  
To: Vanderslice, Russ  
Subject: Re: Guidance

Russ. I haven't gone to site yet.  
When they say "avail at half the price" was she indicating that their cost had been reduced in half by us, OR were they saying that they are going to market/customers at half the price which would be \$15-20/pk ballpark based on \$30-\$40/pack street price before..... I sure hope she meant their cost. Would Chuck be crazy enough to go to market with a low ball NiTi price?

Russ Vanderslice/Tulsa/Dentsply  
08/27/2008 04:21 PM

To: Bill Newell/Tulsa/Dentsply, Jim.Mosch@Dentsply.net  
cc  
Subject: Guidance

Bill/Jim:

[ A monster is loose. And Guidance Endo is the monster. ]

I got a call from Joanne Klempner, who was asking what was going on with Guidance. She was hearing rumors and then so called Guidance. First, she was told that Tony Rittenberry was no longer with them. When asked if their files were still sold by Patterson, the lady said they currently are, but soon will not be. The lady said that they are coming out with a new file and obturator and it will be sold directly by Guidance. She went on to explain that Dentsply is making all of their files and obturators and will be available at "half the price"!

Please go to: [www.guidanceendo.com](http://www.guidanceendo.com) and click on "brochure" and then "endotaper brochure". You will die. I know I did.

Any ideas?

Russ



Wygant, Kim

From: Newell, Bill  
Sent: Friday, August 29, 2008 3:01 PM  
To: McMaster, Stephen  
Subject: Re: Guidance  
  
Attachments: DocLink1.ndl; DocLink2.ndl; DocLink3.ndl; DocLink4.ndl

Steve; pls call me.

Stephen McMaster/Tulsa/Dentsply  
08/29/2008 03:25 PM

To Bill Newell/Tulsa/Dentsply@Dentsply



DocLink1.ndl (370 B)

Bill,

I don't think that Guidance will move the needle much as I indicated in my initial email yesterday.

But it does give Field Sales a platform to draw attention to it; that's my concern.

I heard first from Mallefer Sales since Densfil is their product and then TDS Sales got into the act.

Not a big deal yet.

My hope here, as I said, is to deflect attention away from this nuisance and to keep focus on other things.

Steve

Stephen McMaster  
Director of Marketing  
Dentsply Tulsa Dental Specialties

Bill Newell/Tulsa/Dentsply  
08/29/2008 02:48 PM

To



DocLink2.ndl (423 B)

Stephen McMaster/Tulsa/Dentspl

@L

cc

Subject Re: Guidance

Steve; the info you are sharing with me here is not factual at all.

They are not selling our files. Never have been and never will.

They are selling THEIR GUIDANCE Files .....same design, same Guidance V taper as always, Nothing new here. What are people not understanding and what is confusing about this? They are also not selling our obturators. They have non-vented obturators (nothing new here, think Densfil.....)....clearly not the differentiated TFill that we exclusively sell.

They had another manuf before and now confidentially we make the file for them. It was already in the market, and it was an insignificant competitor with thousands of Patterson reps supporting it.....now they no longer have Patterson and need to go direct like us. I think their sales force right now is about 1-2 people.....same exact file as they've always had. What's the big issue?

So, it sounds like they might be trying to sell an inferior file on price alone. Not supported by a sales force or extensive CE, no real OPL's.....is this a threat?? How is this different than any other of the low priced file systems out there?

Call my cell if you'd like to discuss, but whoever is raising this as an issue needs to take a breath and understand that NOTHING HAS CHANGED FROM GUIDANCE.....other than they no longer have Patterson behind them. Theoretically w/out the dealer margin they will be investing in a direct sales force. Should be a non issue for us. If they decide to sell on price, we should be able to combat as our people need to compete this way every day. We have to talk our people through this and remind them that it's a competitive market and will continue to get more and more competitive. Unless naive, why would any rep/mgr or anyone else not expect a competitor to someday try a price strategy. We should be very comfortable competing in this space and I'm sure Marketing will position our products appropriately.

Sorry for the length, but I'm finding it very hard to understand why a manuf change has any bearing on the market.....If Guidance has decided to change/adjust their pricing strategy/margin strategy we need to deal with it. I'd highly suggest the field treat all Guidance accts just like we always have; as a competitive account that we should win over. The new promotional program should be used to get every Guidance acct converted to us that we can.

Stephen McMaster/Tulsa/Dentsply

To Bill Newell/Tulsa/Dentsply@Dentsply



cc

DocLink3.ndf (370 B)

Subject Re: Guidance

0 /29/2008 02:18 PM

Bill,

Guidance is apparently out selling our files and obturators at rock bottom prices.

This does not seem to make much sense, given their stated investment level and it will likely muddy the market waters.

Although not a big volume risk, this will also bring Field Sales focus to the underlying issue itself which is not ideal.

Just a heads up.

I sent you a vm on this.

Steve

Stephen McMaster  
Director of Marketing



DocLink4.ndf (423 B)

Dentsply Tulsa Denta

Specialties

Bill Newell/Tulsa/Dentsply  
08/29/2008 08:17 AM

To Stephen McMaster/Tulsa/Dentsply@Dentsply  
cc  
Subject Re: Guidance

Let's discuss. I'll be glad to talk you thru it. Not sure we want a talking pts memo/email, but I'll certainly give you some things I think we should say/share.

Stephen McMaster/Tulsa/Dentsply  
08/28/2008 02:21 PM

To Bill Newell/Tulsa/Dentsply@Dentsply  
cc  
Subject Guidance

Bill,  
We are beginning to hear fallout from TDS Sales and Maillefer Sales about Guidance selling our ovens/obturators with just a different label.

Regarding talking points, do you have thoughts on how to address?

My opinion is that we should not make this an issue and deflect it as a minor short term distraction.

Steve

Stephen McMaster  
Director of Marketing  
Dentsply Tulsa Dental Specialties





ABQ Temp1

From: Newell, Bill
Sent: Thursday, September 04, 2008 11:21 AM
To: Clements, Kelth; Baux, Brent
Subject: Re: One award you DON'T want...
Attachments: DocLink1.ndl

I love it!!! Brent's email actually had me laughing!!!! And I haven't been laughing much lately.

Good selling.
Brent; PIs make sure you and your guys REALLY KNOW where the compet accts are. We want every one of the Brasseler, Guidance and Sybron accts to know that we want them back to the best niti rotary systems in the world and we're willing to make it attractive to them to come back. As it relates to competitive accts, I'd like us to have the mindset of "here today.....gone tomorrow!"

Kelth Clements/Tulsa/Dentsply
09/04/2008 11:58 AM

To Brent Baux/Tulsa/Dentsply@Dentsp
cc Bill Newell/Tulsa/Dentsply@Dentsp
Painter/Ceramed/Dentsply@DENT
Warren/Tulsa/Dentsply@Dentsply,
Boscher/Tulsa/Dentsply@Dentsply
Roadcap/Tulsa/Dentsply@Dentsply
Charbonnet/Tulsa/Dentsply@Dents
Clements/Tulsa/Dentsply@Dentspl
Matt Swenson/Ceramed/Dentsply@
Barnes/Tulsa/Dentsply@Dentsply,
Barbieri/Tulsa/Dentsply@DENTSPL
Onwudwe/Tulsa/Dentsply@Dentsp
Stollard/Tulsa/Dentsply@Dentsply
Subject



DocLink1.ndl (490
B)

Re: ne award you

Brent.....I love it!

Great stuff!....Way to create the environment and sense of urgency while having fun at the same time!

Oh and by the way....."Like the Old Man said...".....Who you calling old????????????????????

Go to the Mattresses!

Ba da Bing....Ba do boom!

KC

TDP 20678 CONFIDENTIAL

Brent Baux/Tulsa/Dentsply

09/04/2008 09:59 AM

To Brian Amstutz/Tulsa/Dentsply@Der  
Jeff Cook/Tulsa/Dentsply@Dentsply  
Francis/Tulsa/Dentsply@DENTSPLY  
cc Kelli Clements/Tulsa/Dentsply@Dt

Subject One award you DON'T want...

Salve TR, come va?,

Now that we know ground rules, expectations, and rewards for the Godfather contest, I expect that our 'crew (TR)' will be leading the family in wins. We have earned the reputation of being consistent producers, making a *carico di soldi* (load of money) for the family. As in every competition, there is a first place and a last place; that's just the way it goes. For example; look at Fredo... "poor Fredo has pneumonia"... maybe that's when it started - back when he was a baby. He was stepped over by Mikey, even though Fredo was the older brother. But I think it was this;

- Fredo had very little understanding of his territory - he didn't know where he was vulnerable to the competition and where they set up shop.
- His **competitiveness** was nonexistent. He would rather party with Johnny Hula in Havana than put in the effort necessary to produce.
- **Sales skills**...let's not even go there. What deals did he ever close for the family?
- Finally, the **drive and will to win**. Fredo never stepped up to the plate. He just rode on the family coattails.

Like the Old Man said, if you don't have a win in your hip pocket by Friday you are falling behind...and at risk of earning;

#### "The Fredo Award"

Don't be a Fredo...you don't want this award. It's not good. However, there is one way everyone can avoid this - exceed the requirement of (4) Godfather deals by the end of September. This will take you out of the running for the award because you have shown the ability to carry out family objectives. Fall short and you stay in the hunt. The family is counting on each and everyone of you...*Buona fortuna!!!*

Ci vediamo...

TDP 10679 CONFIDENTIAL

Wygant, Kim

From: Newell, Bill  
Sent: Friday, September 05, 2008 11:36 AM  
To: Clements, Keith; McCulloch, Kevin  
Subject: Guidance Acct; Special Offer

Guys; Per our conversations re; competitive activity and our current offerings in the market, I'd like to target a special offer for all current Guidance users.

We need some intel from the field re; the Guidance customers in their territories. We'd also like to know what form of obturation they use with their Guidance files. My guess is that most are doing cold lateral, very economically which presents a potential barrier to us.

What if we coupled the aggressive file swap/GodFather deal and swapped the free Motor option with Free Thermafil option. Depending on size/volume we could potentially offer customer a better file system with advanced wire AND could potentially offer them time savings and easier to place "carrier based" obt technique with Thermafil at No Charge for a period of time. Again, just thinking of ways to attract these users to our systems. Replacing the motor/handpiece portion of the GodFather deal with Thermafil might actually be a much better strategy. It costs us much less in terms of margin impact on the original deal and assuming the customer likes the ease and quality of Thermafil obturation, we may build incremental Thermafil business into the future along with getting new file business.

Your thoughts?

PS. I do think we need a specific Guidance Target List to go along with our Brasseler and Sybron lists so we can AGGRESSIVELY target these accounts with Max fire power. We may also want to consider a direct mail offer/campaign to these customers assuming we can get good lists from the field. Keith, per our conversations yesterday, I would not want to be a rep or an RSM who doesn't know EXACTLY where the competition is in their own territories or regions. My expectation is that we already have comprehensive lists of competitive accounts or will have them over the next few days.

Thanks



Larranaga, Nicole



**From:** McMaster, Stephen  
**Sent:** Tuesday, September 09, 2008 12:11 PM  
**To:** Newell, Bill  
**Subject:** Guidance

Bill,

Just an FYI.

I spoke to Greg and the truth came out that this question was really from Cliff and not from Field Sales.

Greg was questioned by Cliff in Fla and I'm sure that this request for a statement came from Cliff.

I explained to Greg that Cliff is a paid industry partner first and a personal friend a distant second.

Without being unkind, one could make the argument that KOLs don't really need to know the inner workings of Dentsply Legal.

He was not receptive to this logic and indicated that "everyone" knows about the suit and we are sticking our heads in the proverbial sand by not issuing a statement.

I suggested that "everyone" does not know or even care about Guidance, that their impact is minimal and that this was not his domain and that he should not get into discussions with KOLs about matters not strictly relevant to our business relationship.

He reluctantly agreed to handle future questions in this way.

You can easily see what happened here; Greg is a young, energetic guy who is learning as he goes, as we all do.

Hopefully, it has now been addressed.

Steve

Stephen McMaster  
Director of Marketing  
Dentsply Tulsa Dental Specialties



ABQ Temp1

From: Newell, Bill  
Sent: Wednesday, September 10, 2008 8:03 AM  
To: Voskuil, John  
Subject: Fw: radio silence

Attachments: DocLink1.ndl

can you pls call JCity.  
Make sure they know/see this email from me and that nobody else responds. ]

Thanks

----- Forwarded by Bill Newell/Tulsa/Dentsply on 09/10/2008 09:02 AM -----

Bill Newell/Tulsa/Dentsply  
09/10/2008 09:02 AM

To drcjgoodls@aol.com  
cc MLittleton@Dentsply.com, RVanderslica@Dentsply.co



DocLink1.ndl (490 B)

Chuck;  
JCity will not be able to meet this "special request" timeline despite their efforts.  
It is my understanding that final labelling was rec'd on 8/18.  
JCity is making every effort to meet the 6 week lead time from that date which I believe is 9/29.  
Unfortunately, we have no other details that we can share at this point. ]

drcjgoodls@aol.com  
09/10/2008 08:57 AM

To MLittleton@Dentsply.com, TGunter@dentsply.com, RV  
BNewell@Dentsply.com  
cc  
Subject radio silence

Hello Everyone,

We were suppose to get 50 6-packs in 25 mm of the EndoTaper yesterday but we did not. We have also sent a number of emails and phone calls but not getting any replies... any body out there?

We need to get them by tomorrow. It is very important for the California meeting this weekend where I am lecturing and giving a hands-on as it is a little hard to give a hands-on without product. I guess I could lecture on ProTapers?

Thank you  
Chuck



Wygant, Kim

From: Painter, David  
Sent: Wednesday, September 10, 2008 8:00 AM  
To: Clements, Keith  
Subject: Fw: Guidance One Fill - What is this about? It looks familiar. Is there any patent infringement?

Attachments: DocLink1.ndl; DocLink2.ndl

FYI...

----- Forwarded by David Painter/Ceramed/Dentsply on 09/10/2008 08:59 AM -----

David Boschert/Tulsa/Dentsply  
09/10/2008 07:38 AM

To: David  
cc: Jason  
Smail  
Subject

Re: C

How can they sell it at half the price then? With Dentsfil, we charge the distributors such a high price for it that they can't sell it cheaper than Thermanfil. How is Guidance able to do it? ]

Dave Boschert  
Regional Sales Manager  
Dentsply Tulsa Dental Specialties  
800-662-1202 ext. 51209

David Painter/Ceramed/Dentsply  
09/10/2008 08:36 AM

To: Jason  
cc: David  
Willie  
Subject

Re: C

It is basically Dentsfil and we manufacture it for them..



Wygant, Kim

From: Newell, Bill  
 Sent: Friday, September 12, 2008 8:14 AM  
 To: Morrow, Bobby  
 Cc: Phillips, Greg; McMaster, Stephen  
 Subject: Re: Guidance Rotary Brochure

Attachments: GUI8121%20EndoTaper%20Brochure%2008.14.08.pdf



GUI8121%20EndoTaper%20Brochure...

They are clearly taking a low price strategy to the market, hoping that direct mktg, internet, and word of mouth works. Not a smart strategy, however one that any competitor can choose....they've just chosen to take this approach now.

We should aggressively target all Guidance accts with our current promotion. We have 150 reps in field plus inside sales plus mktg team.....Guidance has 1 rep I think on West coast and 1 or 2 people to answer phones. We should know exactly where these accts are and if we don't, I'd suggest we find out with help of our sales organization. We might also want to do some testing to see how their file compares to ours and others on key perf criteria (cycl fatigue, torque, efficiency, etc).

If price alone is what clinicians want it would be very important for us, as the market leaders to know that. I don't think that's the case and I don't think their file can compare to PT or GTX with M Wire in performance. Let's remember that probably 90% of their current customers were probably old GT users who at some point converted. We should target every Guidance acct with our new promo offer and do what makes sense to win these accts to our systems. Use current incentives and pricing flexibility, along with our follow up and customer support to our advantage.

Bobby Morrow/Tulsa/Dentsply  
 09/12/2008 08:28 AM

To Greg Phillips/Tulsa/Tulsa/Dentsply@Dentsply  
 Newell/Tulsa/Dentsply@Dentsply  
 cc

Subject Guidance Rotary Brochure

Enclosed is the new Guidance brochure. Resembles ProTaper's, but claims to be 1/2 the price.....

Bobby Morrow  
 Brand Manager - PTU, GTX, GT, Profile & Lexicon  
 Dentsply Tulsa Dental Specialties  
 Office: 918-878-0187  
 Cell: 918-261-4068

EXHIBIT #	150
DATE	5-14-09
DEPONENT	Newell
PROFESSIONAL REPORTERS	800.378.1008

TDF 02237  
CONFIDENTIAL

PLAINTIFF'S  
EXHIBIT  
481

Wygant, Kim

From: Newell, Bill  
Sent: Monday, September 15, 2008 1:31 PM  
To: McCulloch, Kevin; McMaster, Stephen; Phillips, Greg; Morrow, Bobby  
Cc: Clements, Keith  
Subject: Fw: OneFill Feedback from Field

I provided some counter detail selling info last week and I know Bobby and Greg are working on more of a position statement to share with field.

Pretty alarming that so many of our reps and mgrs don't appear to know to gather facts first....if they did, they'd understand quickly that it's a K file w/ constant taper.....NOTHING LIKE A PROTAPER or GTX.....scary like a wood screw in terms of the way the file grabs and screws into canal IN THE DIRECTION IT WANTS TO GO, not direction of the canal.....as we all know this leads to zipping and transportation. A thick, inflexible K file is inferior to anything we sell.....

So, our reps/RSM's need to sell against/counter detail with facts and use their training and knowledge. Right now, the reps and mgrs are getting caught in propaganda that should be very easy to sell against

----- Forwarded by Bill Newell/Tulsa/Dentsply on 09/15/2008 02:25 PM -----

Kevin McCulloch/Tulsa/Dentsply

09/15/2008 02:24 PM

To Stephen McMaster/Tulsa/Dentsply@Dentsply, Bill New

cc

Subject OneFill Feedback from Field

Bill/Steve:

Just a few items to keep you in the loop. I received a call last week from Joe Werner that Guidance was making a big show of selling the OneFill obturators at the CDA North tradeshow. Dr Bill Henson was also there and could provide some feedback most likely if you were curious how exactly there were promoting it.

I also just received a call from John Charbonnet saying that this is becoming an issue for his reps. He said that the price gap is so wide - about \$100.00 cheaper per pack - that they are being challenged on their credibility for having sold obturators to customers at our higher price for so many years.

I told him that we are aware of the situation and are pursuing it from all angles.

Thank you,

Kevin McCulloch  
Brand Manager, Obturation  
DENTSPLY Tulsa Dental Specialties  
1-800-662-1202 x51174  
918-493-6599 fax  
918-527-0467 cell  
kmcculloch@dentsply.com  
www.tulsadentalspecialties.com

EXHIBIT # 151  
DATE 5-14-09  
DEPONENT Newell  
PROFESSIONAL REPORTERS 800.376.1008

TDP 02208  
CONFIDENTIAL



**DENSPLY**  
**TULSA DENTAL**  
**SPECIALTIES**

Bobby Morrow  
Brand Manager  
5100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-6546  
(918) 878-0187 - Office  
(918) 261-4068 - Cell  
Fax: (918) 493-6599

September 15, 2008

TO: Sales and Marketing  
FROM: Bobby Morrow  
PURPOSE: Guidance Update



Let's start the week with a riddle:

What do you get when you mix...a desperate...misguided inventor....and a constant tapered, poorly designed, triangular shaped (cross-section) rotary file?

Answer: "ENDO TAPER" by Guidance

Guidance is taking a price strategy directly aimed at Tulsa Dental Specialties (TDS). An affordably priced product without solving a market need will not succeed. Guidance is going to have a tough time and we have a great opportunity to serve Guidance customers.

The new Endo Taper file is replacing the "Variable Taper" (V-Taper) by Guidance. If you had the copycat V-Taper as a competitor in your territory, you should have a hay day going forward! If you haven't identified these accounts, be sure to do this immediately as competitors also know of this development.

The Endo Taper is the most basic of designs with the most potential risk. A triangular cross section is an antiquated, aggressive file without R&D into the design. This file has a thick, inflexible core that acts like a wood screw. This design has the potential to cause transportation, perforations and can destroy the original morphology of the tooth.

Guidance claims that that the Endo Taper "can be used like ProTaper Universal, ProFile, or GT". You are experienced, well trained Endo Specialists (not a catalogue sales rep) ..... is this possible? I think our clients will laugh at this statement as we are laughing at "Endo Taper".

You should feel confident in what TDS is providing to the marketplace. Our rotary products are well designed, consumer centric, long term offerings that are protected by patents.

Another riddle:

What do you get when you combine a "non-vented" obturator and the same desperate inventor?

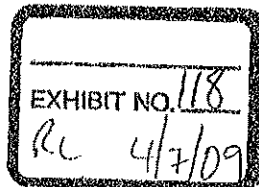
Answer: "ONE FILL" by Guidance

Non-vented obturators do not allow the gutta percha to flow as smoothly as vented obturators.

This too is old technology that doesn't solve a market need of a complete 3-D fill.

This is an excellent opportunity for us to help V-Taper customers transition from Guidance. These doctors may find it difficult to order products, find support or to get the results claimed by Guidance. This is our time to show our Unique Value Proposition and win.

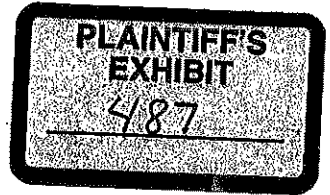
Good Selling!



TDP 02207  
CONFIDENTIAL

Wygant, Kim

From: Newell, Bill  
Sent: Monday, September 15, 2008 1:55 PM  
To: Morrow, Bobby  
Cc: Phillips, Greg; McMaster, Stephen  
Subject: Re: Guidance  
  
Attachments: Endo Taper Letter to the field.doc; DocLink1.ndl



Endo Taper Letter to the field...

good start. thanks.

I'd offer some suggestions;  
I think we need this to be more direct; Pro's /Con's comparison of F&B's.  
I think we need to clealy, almost in bullet pt fashion rip apart the Guidance design and explain clearly the pitfalls, DANGERS of the K file/wood screw. Maybe even get some comments from engineers, and respected clinicians....ask Ben, Ruddle, Tinnen others..... What is their experience with an aggresle cutting K file?  
Need to remind them that yrs ago we wouldn't even make K files in these sizes....too dangerous... (M. Littleton and Ben could probably add color commentary).  
Need to remind them of all the benefits of ProTape design, GTX design, M wire, etc.

real direct, factual compare and contrast.

It will end up at Guidance and all of our competitors. Direct and accurate is key.

We need to give the sales team 3 or 4 major points to counter detail with.....make price a non-issue.

Bobby Morrow/Tulsa/Dentsply  
09/15/2008 11:01 AM

To Stephen McMaster/Tulsa/Dentsply@Dentsply, Bill New  
cc



DocLink1.ndl (418 B)

Greg Phillips/Tulsa/Tulsa/Dentsply@Dentsply  
Subject Re: Guidance

Enclosed is the first draft of the ENDO TAPER letter to the field:

How should we address mfg questions? Reps know we've made competitive files in the past, so I anticipate this question coming up.

Thanks,  
Bobby Morrow  
Brand Manager - PTU, GTX, GT, Profile & Lexicon  
Dentsply Tulsa Dental Specialties  
Office: 918-878-0187  
Cell: 918-261-4068

Stephen McMaster/Tulsa/Dentsply  
09/12/2008 05:13 PM

To Bobby Morrow/Tulsa/Dentsply@Dentsply  
cc Greg Phillips/Tulsa/Tulsa/Dentsply@Dentsply  
Subject Guidance

Guys,

Given the sensitivity of this issue, please forward any communication with the field to Bill and me first.

TX

Steve

Stephen McMaster  
Director of Marketing  
Dentsply Tulsa Dental Specialties

**DENTSPLY**  
**TULSA DENTAL**  
**SPECIALTIES**

Bobby Morrow  
Brand Manager  
5100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-6546  
(918) 878-0187 - Office  
(918) 261-4068 - Cell  
Fax: (918) 493-6599

September 15, 2008

TO: Sales and Marketing  
FROM: Bobby Morrow  
PURPOSE: Guidance Update

Let's start the week with a riddle:

What do you get when you mix....a desperate...misguided inventor....and a constant tapered, poorly designed, triangular shaped (cross-section) rotary file?

Answer: "ENDO TAPER" by Guidance

Guidance is taking a price strategy directly aimed at Tulsa Dental Specialties (TDS). An affordably priced product without solving a market need will not succeed. Guidance is going to have a tough time and we have a great opportunity to serve Guidance customers.

The new Endo Taper file is replacing the "Variable Taper" (V-Taper) by Guidance. If you had the copycat V-Taper as a competitor in your territory, you should have a hay day going forward! If you haven't identified these accounts, be sure to do this immediately as competitors also know of this development.

The Endo Taper is the most basic of designs with the most potential risk. A triangular cross section is an antiquated, aggressive file without R&D into the design. This file has a thick, inflexible core that acts like a wood screw. This design has the potential to cause transportation, perforations and can destroy the original morphology of the tooth.

Guidance claims that that the Endo Taper "can be used like ProTaper Universal, ProFile, or GT". You are experienced, well trained Endo Specialists (not a catalogue sales rep) ..... is this possible? I think our clients will laugh at this statement as we are laughing at "Endo Taper".

You should feel confident in what TDS is providing to the marketplace. Our rotary products are well designed, consumer centric, long term offerings that are protected by patents.

Another riddle:

What do you get when you combine a "non-vented" obturator and the same desperate inventor?

Answer: "ONE FILL" by Guidance

Non-vented obturators do not allow the gutta percha to flow as smoothly as vented obturators.

This too is old technology that doesn't solve a market need of a complete 3-D fill.

This is an excellent opportunity for us to help V-Taper customers transition from Guidance. These doctors may find it difficult to order products, find support or to get the results claimed by Guidance. This is our time to show our Unique Value Proposition and win.

Good Selling!

TDP 02207  
CONFIDENTIAL

APP-A030

**ABQ Temp1**



**From:** Phillips, Greg  
**Sent:** Monday, September 15, 2008 2:05 PM  
**To:** Newell, Bill  
**Subject:** Re: Fw: Can you pls proactively contact Gary Higley.

Just talked to V and Gary. Gary is relieved to learn that the ProTaper files being are not being sold to Guidance. It is likely, however, that Guidance will continue to tell folks on the street this story. From what Gary told me, the Guidance rep probably believed the story he was spinning. Gary is an experienced and intelligent rep, once he truly understood the situation from the lies he was ready to go out after the old "V-Taper" customers.

I realize It wasnt a popular suggestion last week when I recommended we put a communication to the field regarding the settlement. Nonetheless, between you and I, please consider the volume of communication from the field with questions/concerns and verocity of the Guidance attack. (Its obvious from pictures on brochures that our oven and obturators are being sold). I will follow suit with whatever you recommend, but you know I will always give you my heartfelt suggestion for consideration in the decision.

Thanks,  
Greg

Greg Phillips  
Senior Category Mgr  
Tulsa Dental Specialties  
(918) 878-0184  
gphillips@dentsply.com

Bill Newell/Tulsa/Dentsply  
09/15/2008 01:57 PM

To Bobby Morrow/Tulsa/Dentsply@Dentsply, Greg Phillips/Tu  
cc  
Subject Fw: Can you pls proactively contact Gary Higley.

also, pls explain difference between Thermafil and Densfil.....Again, Gary thinks it's the same thing....  
----- Forwarded by Bill Newell/Tulsa/Dentsply on 09/15/2008 01:57 PM -----

Bill Newell/Tulsa/Dentsply  
09/15/2008 01:55 PM

To Bobby Morrow/Tulsa/Dentsply, Greg Phillips/Tulsa/Tulsa/D  
cc  
Subject Can you pls proactively contact Gary Higley.

Guys; gary sent email to NW team and Vanessa.  
He apparently doesn't know the difference between a K file and our ProTapers.....  
Can you pls explain in detail to him why the Guidance files are not "exactly like ProTapers" as he shared with the entire NW team.  
Someone should also coach him on how not to believe everything he hears at a trade show.

Thanks  
You might call Vanessa too, if you can.  
Thanks

TDP 20804 CONFIDENTIAL

**Wygant, Kim**

---

**From:** Newell, Bill  
**Sent:** Wednesday, September 17, 2008 9:25 AM  
**To:** Littleton, Marcie  
**Cc:** Voskuil, John; Armstrong, Scott  
**Subject:** Guidance file comparative testing

Marcie/John;

Can you tell me if there is a quick/easy way that we can do some key side by side comparative tests; Guidance file vs GTX and ProTaper.

Would be very helpful to arm the field with some key differences in terms of;  
Flexibility  
Cyclic fatigue  
File "memory"  
anything else that would point out key differences

Pls let me know. The field needs some very basic info, but info they can use to share with customers as to why these Guidance files are nowhere near ours in terms of acceptable performance and safety.

Thanks



TDP 00104  
CONFIDENTIAL



**Larranaga, Nicole**

---

**From:** Baux, Brent  
**Sent:** Wednesday, September 17, 2008 9:26 AM  
**To:** Jaite, Charlie  
**Cc:** Amstutz, Brian; Moore, Jed; Cook, Jeff; Francis, Jim; Weis, Kevin; Weber, Mark; Siech, Matt  
**Subject:** Re: Fw: Guidance

**Attachments:** DocLink1.ndl

Guidance's files are closer to a K-file blank then our ProTaper design - that's what I'm talking about. They are not progressively tapered, they are a fixed taper - all of us should know the differences...  
...and as we know, Dentsply has been fighting Guidance on this for a while now and there has been some significant developments...nobody is trying to hide anything.

**In order to address this situation, we will have a conference call tomorrow at 11am.**

As soon as you get this, call me on my cell or let me know via email if you have a conflict. Otherwise, I expect all to attend. Same numbers as our monthly conferences.

Charlie W Jaite/Tulsa/Dentsply  
09/17/2008 11:12 AM

To Brent Baux/Tulsa/Dentsply@Dentsply  
cc Brian Amstutz/Tulsa/Dentsply@Dentsply  
Cook/Tulsa/Dentsply@Dentsply, Jim Fra

Mark Weber/Dentsply@Dentsply, Matt S  
Subject Re: Fw: Guidance

These are rotary files not K files. We want a response from TDS on what is going on. This directly undercuts all of our efforts. TDS should be able to get a temporary injunction on this company for this , unless there is something that we are not being told. We have been waiting patiently for a week. The silence is deafening.

Charlie Jaite  
Senior Endodontic and Implantology Account Specialist Dentsply / Tulsa Dental Specialties  
Three Rivers Region  
1 800 662 1202 Ext. 1344  
Cell (440) 670 9422  
Fax ( 440) 356 3312  
cjaite@dentsply.com



Brent Baux/Tulsa/Dentsply  
09/17/2008 08:24 AM

To Brian Amstutz/Tulsa/Dentsply@Dentsply  
Moore/Tulsa/Dentsply@Dentsply, Jeff Cc  
Mark Weber/Dentsply@DENTSPLY, Jim  
Jaite/Tulsa/Dentsply@Dentsply

cc

Subject Fw: Guidance

Guys,  
You have to check this out - they are trying to pimp an .06 tapered K-file design as a ProTaper...

BB  
----- Forwarded by Brent Baux/Tulsa/Dentsply on 09/17/2008 09:23 AM -----

Charlie W Jaite/Tulsa/Dentsply  
09/14/2008 06:50 PM

To Brent Baux/Tulsa/Dentsply@Dentsply  
cc Tim Gales/Tulsa/Dentsply@Dentsply, Ke

Subject Guidance

TDS,

One of my doctors asked me about Guidance on Friday. He mentioned it is the same as Tulsa Dental but cheaper. I took some time and investigated the situation. It seems that these products are duplicating are products in appearance and performance. They claim that their price is about half of TDS. How do you suggest I respond to this in the field? Please check out the following website. I pasted some of the products below. They seem real familiar don't they?

<http://www.guidanceendo.com>

**OneFill Obturation System**

OneFill can be used to obturate any 04, 06, 08, & 10 tapered canals size 20 to 50 that are shaped by your current NiTi rotary system or hand filing technique.

OneFill can be used like your current Thermal Filling Obturator. OneFill is extremely radiopaque and easy to use Thermal Filling Obturator on the market at nearly half the price!

Please download our brochure for additional information.



**Endotaper NiTi Rotary Files**

The EndoTaper NiTi System is so advanced; it can be used like ProTaper® or in a Crown-Down technique, like ProFile®, GT®, Endo Sequence, or K3. With EndoTaper keep using your same technique, at nearly half the cost!

Please download our brochure for more information.

Charlie Jaite  
Senior Endodontic and Implantology Account Specialist Dentsply / Tulsa Dental Specialties  
Three Rivers Region  
1 800 662 1202 Ext. 1344  
Cell (440) 570 9422  
Fax ( 440) 356 3312  
cjaite@dentsply.com

**Wygant, Kim**

**From:** Morrow, Bobby  
**Sent:** Wednesday, September 17, 2008 10:18 AM  
**To:** Newell, Bill  
**Cc:** Phillips, Greg  
**Subject:** Re: Guidence letter

**Attachments:** Endo Taper Letter to the field Sep08.doc; Endo Taper Letter to the field Sep08-2.doc; DocLink1.ndf



Endo Taper Letter to the field...



Endo Taper Letter to the field...

Here's the latest version of the EndoTaper communication.

Please let me know your thoughts.

Thanks,  
Bobby Morrow  
Brand Manager - PTU, GTX, GT, Profile & Lexicon  
Dentsply Tulsa Dental Specialties  
Office: 918-878-0187  
Cell: 918-261-4068



Bill Newell/Tulsa/Dentsply  
09/16/2008 08:08 PM

To Greg Phillips/Tulsa/Tulsa/Dentsply@Dentsply



DocLink1.ndf (419 B)

Overall, looks good to me.

I'd only suggest maybe adding a little more "counter selling" info for reps to use perhaps at bullet #4.

ie; when you explain triangle shape/ K file; explain more of the cons such as; stiff; more mass of metal==> less flexible  
ie; aggressive "wood screw type of design; no "waist" to keep some of file away and not engaged with canal along entire length.....perhaps explaining why this "old style" design can engage along entire file lenth.....leading to more potential friction, more stress, perhaps more breakage.....

ie; also the aggressive wood screw type of action combined with a stiff/inflexible file, may cause file to want to take its own path and screw in and want to straighen out rather than follow original canal path...

Also, maybe give the reps some PSS, sample probing questions and examples of how to address.

They need to know exactly how this is not a ProTaper and Not a GTX..... and why Dr's should not be putting them to use.....you get what you pay for.....in this case it's like buying "couple day old bread".....really cheap but not very good.

Overall, I think you're closer, but I think field needs a little more

Greg Phillips/Tulsa/Tulsa/Dentsply  
09/16/2008 05:56 PM

To Bill Newell/Tulsa/Dentsply@Dentsply  
cc Bobby Morrow/Tulsa/Dentsply@Dentsply  
Subject Guidance letter

Bill,

Take a look at the attached. We've shortened up the message to allow for the chance it could post outside of TDS personnel.

I would recommend we send this letter out now to quell the craziness thats flying around. We can follow up soon with more information (testing, quotes, science). Please give us your direction and we will follow suit accordingly.

Greg Phillips  
Senior Category Mgr  
Tulsa Dental Specialties  
(918) 878-0184  
gphillips@dentsply.com



**Specialties**

Bobby Morrow  
Brand Manager  
5100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-6546  
(918) 878-0187 - Office  
(918) 261-4068 - Cell  
Fax: (918) 492-4599

September 15, 2008

TO: Sales and Marketing  
FROM: Bobby Morrow  
PURPOSE: Guidance Update

Guidance has introduced a new file and made some interesting claims at a recent show. The points below are facts about the file and its relation to Tulsa Products.

The new Endo Taper file is a new file that will be replacing the "Variable Taper" (V-Taper) by Guidance.

Facts on the EndoTaper:

- Uses an age old and simple design, a triangular cross section, think of a K-File in niti rotary motion.
- The EndoTaper is a constant taper file, like ProFile or GT files.
- ProTaper is the unique and patented file on the market with variable tapers. The color system of the ProTaper product was copied by Guidance, but the variable taper of ProTaper is the key to making the sequence work. Coronal shaping can only be achieved on the shapers with progressive taper at the top of the file, likewise apically for the finishing files.
- The EndoTaper design has the potential to cause transportation, perforations and can destroy the original morphology of the tooth.

More information will be forthcoming as we keep abreast of the activities of Guidance in the field. Please feel free to contact Greg Phillips or myself if you have any questions or hear new information.

Best regards,

Bobby Morrow

Confidential – Internal Tulsa Dental Specialties Only

TDP 02182  
CONFIDENTIAL

APP-A038



**DENTSPLY Tulsa Dental  
Specialties**  
Bobby Morrow  
Brand Manager  
5100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-6546  
(918) 878-0187 - Office  
(918) 261-4068 - Cell  
Fax: (918) 499-4500

September 17, 2008

TO: Sales and Marketing  
FROM: Bobby Morrow  
PURPOSE: Guidance Update

Guidance has introduced a new file and made some interesting claims at a recent show. The points below are facts about the file and its relation to Tulsa Products.

The new Endo Taper file is a new file that will be replacing the "Variable Taper" (V-Taper) by Guidance.

Facts on the Guidance EndoTaper:

- Uses an age old and simple design, a triangular cross section, think of a stiff K-File used in niti rotary motion.
- The EndoTaper is a constant taper file. ProTaper's variable taper is engaged along specific sections of the canal wall reducing torsional stress. An aggressive constant taper design is engaged along the entire wall creating stress and perhaps more breakage.
- The EndoTaper design has the potential to cause transportation, perforations and destroy the original morphology of the tooth. The combination of stiffness and aggressiveness may cause the file to take its own path, similar to a wood screw, and straighten out rather than follow the original canal path.
- ProTaper is a unique and patented file on the market with variable tapers. The color system of the ProTaper product was copied by Guidance, but the variable taper of ProTaper is the key to making the sequence work. Coronal shaping can only be achieved on the shapers with progressive taper at the top of the file, likewise apically for the finishing files.

FAQs:

1. ProTaper Universals has a variable taper and EndoTaper has a fixed taper. How does decreasing the percentage of taper over a portion of the file's cutting blades serve to improve flexibility? If you build a file with a fixed taper over length, it will be much larger, more stiff and less flexible - plus it will indiscriminately continue to enlarge the coronal two-thirds of the canal that has already been optimally prepared. In other words, the smaller the percentage taper, the more flexible the file. Strategically varying the taper allows maximum flexibility.
2. If the EndoTaper files are constant taper, how can Guidance claim that their "C1, C2, C3..." Can be used like ProTaper's finishing files? Every EndoTaper file is constant tapered, so the file gets larger as you move coronally from the tip of the file. ProTaper Universals finishing file have fixed tapers from D0 to D3, then decreasing tapers between D4-D14. When used as directed, the Finishers only work towards their terminal extent and will not engage or further enlarge the

TDP 02183  
CONFIDENTIAL

coronal one-half of a canal. ProTaper Shapers and Finishers have multiple different tapers over their blades to increase efficiency, safety and flexibility.

3. Similar question, how can EndoTaper claim their G1, G2 or GX be used like ProTaper's S1, S2, and SX files? The S1 and S2 have increasingly larger tapers over the length of their cutting blades allowing each instrument to engage, cut and prepare a specific area of the canal. S1 is designed to prepare the coronal one-third of the canal; whereas S2 enlarges and prepares the middle one-third. Although both instruments optimally prepare the coronal two-thirds of the canal, they do progressively enlarge the apical one-third. This is due to the patented variable taper. The EndoTaper's files are constant taper and will not perform like ProTaper Universal.

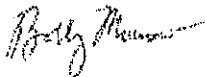
**PSS QUESTIONS:**

1. What technique do you currently use to clean and shape the canal?
2. Have you used a rotary K-File before? Why or why not?
3. What difficulties could you encounter?
4. How effective are these files in tight, curved canals?

**Key takeaways:** The Guidance EndoTaper is not a ProTaper, ProFile, GT, etc. The EndoTaper is a constant tapered, triangular bladed file. Don't lose a sale to Guidance because they say their files are like Tulsa's.

More information will be forthcoming as we keep abreast of the activities of Guidance in the field. Please feel free to contact Greg Phillips or myself if you have any questions or hear new information.

Best regards,



Bobby Morrow

Confidential – Internal Tulsa Dental Specialties Only

TDP 02184  
CONFIDENTIAL

APP-A040

ABQ Temp1

From: Littleton, Marcie  
Sent: Wednesday, September 17, 2008 10:42 AM  
To: Newell, Bill  
Subject: Fw: revision: Labels for Size, Taper, and Length  
Attachments: SP-PGID0005-V-TAPER BLADE.pdf; SP-PGID0003 ENDO TAPER.pdf



SP-PGID0005-V-TAPER BLADE.pdf ... SP-PGID0003 ENDO TAPER.pdf (75...  
Bill,

I assure you he is getting a constant taper file for both the VTaper, it is a 04 taper all the way down and Constant taper is a 06 taper all the way down regardless of what they are telling anyone. They all have a triangle cross section and are 3 fluted just like a K-File. Below your e-mail is an e-mail I sent to Dr. Goodis questioning him on why he was calling his 10's and 15's G files. And I don't have a clue what an SX File is. His answer is below that. It is truly false advertising of his file if he or anyone else in his group is telling the public what they told Nathan Roy. But we do not have the capability currently in house to manufacture PTU's. If that helps ease your concerns. I will send you a PDF drawing of the Constant and VTaper files we are manufacturing as a visual for you to review. This may help.

Bill Newell/Tulsa/Dentsply  
09/17/2008 10:57 AM

To: Marcie Littleton/Tulsa/Dentsply@Dentsply  
cc  
Subject: From a technical standpoint, this isn't true, is it??

Hi Marcie; guidance customer service supposedly said this (see below). Is this true in any way?? Pls explain to me so I can understand. Thanks, Bill

More interesting info from the field.

Nathan Roy called Guidance inquired about the files. The operator told him that Tulsa was making the files and obturators for them.

She said the G1, G2, and SX are *variable tapered* PTU files with EndoTaper labeling. The Finishers are *constant tapered* .06 Profile files with EndoTaper labeling.



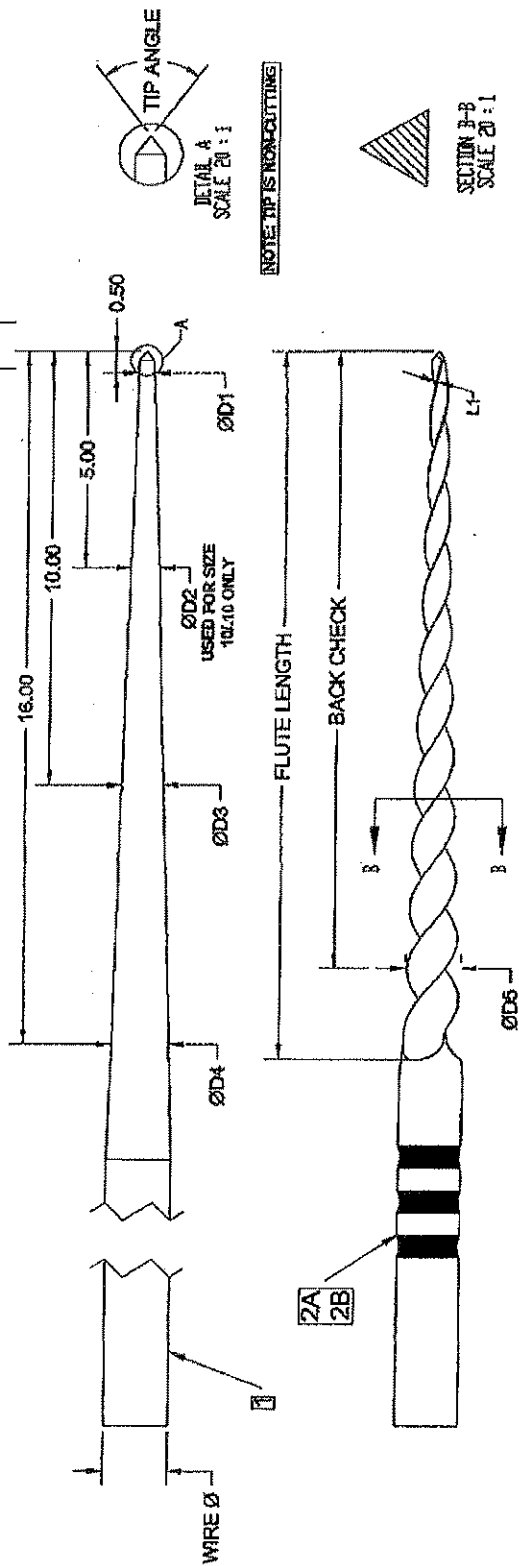
TDP 20797 CONFIDENTIAL





TDP 20803 CONFIDENTIAL

ITEM	DESCRIPTION
1	ROCKET TAPERED BLANK, REF. DIMS. SP. 02010001
2A	RELIEVED FLUTE INFL. REF. DIMS. SP. 02010001
2B	CHROMIUM AND COLORED LINE OPTICAL REF. DIMS. SP. 02010001



SIZE	ØD1	ØD2	ØD3	ØD4	WIRE Ø	SPIRALS	TIP ANGLE	FLUTE LENGTH	BACK CHECK	ØD5	1:1
10/08	1.154±.005	N/A	.914±.005	1.384±.005	.048 / 1.22mm	9.5 ± 1	75° ± 5°	16.25 ± 0.25	13mm	1.195±.010	
10/06	1.45±.005	N/A	.71±.005	1.075±.005	.055 / 1.40mm	14 ± 1	70° ± 5°	12.25 ± 0.25	15mm	0.855±.010	
10/10	1.62±.005	.612±.005	1.12±.005	N/A	.055 / 1.40mm	9.5 ± 1	75° ± 5°	16.25 ± 0.25	10mm	1.062±.010	
15/08	1.93±.005	N/A	.763±.005	1.123±.005	.048 / 1.22mm	14 ± 1	70° ± 5°	16.25 ± 0.25	15mm	1.043±.010	
20/06	2.41±.005	N/A	.811±.005	1.171±.005	1.20mm	15 ± 1	50° ± 5°	16.25 ± 0.25	15mm	1.091±.010	.020-.070
25/06	2.88±.005	N/A	.859±.005	1.219±.005	1.20mm	15 ± 1	50° ± 5°	16.25 ± 0.25	15mm	1.139±.010	
30/06	3.37±.005	N/A	.907±.005	1.267±.005	.055 / 1.40mm	12 ± 1	75° ± 5°	16.25 ± 0.25	15mm	1.177±.010	
35/06	3.86±.005	N/A	.956±.005	1.316±.005	1.40mm	9.5 ± 1	75° ± 5°	16.25 ± 0.25	15mm	1.236±.010	
40/06	4.34±.005	N/A	1.004±.005	1.364±.005	1.40mm	10 ± 1	75° ± 5°	16.25 ± 0.25	15mm	1.284±.010	
45/06	4.82±.005	N/A	1.052±.005	1.412±.005	.067 / 1.71mm	10 ± 1	75° ± 5°	16.25 ± 0.25	15mm	1.332±.010	
50/06	5.30±.005	N/A	1.100±.005	1.460±.005	1.57mm	9.5 ± 1	75° ± 5°	16.25 ± 0.25	15mm	1.380±.010	

METRIC

**DENSITY ENDODONTICS**  
 TITLE: GUIDANCE ENDO TAPER BLADE SPECS  
 DR. BT E. HISSONS  
 DATE: 08/27/08  
 SCALE: 20:1

REV	DATE	BY	DESCRIPTION
1			AWKED FLUTING CHECKED
2			REV DIMENSIONS

DRG. DEPT.	
DOC. NO.	SP-PG000003
ISSUE DATE	

Wygant, Kim

From: Roadcap, Harvey  
Sent: Wednesday, September 17, 2008 4:38 PM  
To: Eagan, Michael; Allinson, Matt; Lesser, Ro; Kohli, Marc; Townsend, Adam; Humphrey, Chad;  
Federspiel, Luke  
Subject: One more thing...

Team,

One more item for Fridays AM call.

As some of you may know, there are a lot of rumors flying around right now about Guidance. I know we are in intense litigation regarding patent infringement, and have been for some time. I also am hearing that the files will no longer be available soon from most sources.

Since as a company, we are seeing some good gains from the Godfather promo, it only stands to reason that we should use this promo to deliver a Knockout Punch to Guidance as well! We also want to be the company that fills the void in these Guidance accounts rather than Brasseler or Sybron.

Please look CLOSELY at your account base, and have a list ready with ANY account you even *suspect* are using Guidance. Please give this a lot of thought. The message I am getting is that based on the sales data we have, the Guidance accounts are out there. All of you should have at least one....

I know of two,

Dr. Elizabeth Perry- Endodontist in Tims territory \$40K in sales  
Dr. Colin Ress-GP in Chads territory \$1-\$2K in sales.

Who do you guys have? Please bring names to the call. We want to knock them out while we have this promo!

Thanks,

Harvey

Harvey E. Roadcap II  
Northeast Regional Manager

DENTSPLY Tulsa Dental Specialties  
5100 E. Skelly Drive, Suite 300  
Tulsa, Oklahoma 74135-6546  
(800) 662-1202 - Office  
(800) 597-2779 - Fax  
Email: [broadcap@dentsply.com](mailto:broadcap@dentsply.com)@dentsply.com

NASDAQ: XRAY  
[www.dentsply.com](http://www.dentsply.com)



Wygant, Kim

From: Warren, Amy  
Sent: Monday, September 22, 2008 5:16 PM  
Cc: Newell, Bill; Clements, Keith; Gales, Tim  
Subject: Re: Guidance Accounts in the MAR

Attachments: Guidance Targets.xlsx-MAR.xlsxUpdated Sept 08.xlsx



Guidance  
rgets.xlsx-MAR.xlsx

Sorry for the delay- I saved the wrong document! Here is my target list for the MAR. Have a good Monday night!

Amy

Amy Warren-Kimbro  
Dentsply Tulsa Dental Specialties  
Mid Atlantic Regional Sales Manager  
1-800-682-1202, Ext. 51216  
919-601-3001 cell  
919-834-9898 fax  
awarren@dentsply.com



Amy Warren/Tulsa/Dentsply  
09/22/2008 06:15 PM

To: Bill Newell/Tulsa/Dentsply  
cc: Tim Gales/Tulsa/Dentsply  
Subject: Guidance Accounts in the MAR

Hello Bill-  
Hope you had a great weekend and you are ready to take all of the Guidance accounts and call it "The Smack down program"! We are ready to gain our business back and win these back over to TDS.

As it relates to the business lost in the MAR- I am finding the Guidance accts fall within the Tier 4 and Tier 5 range with less than \$800-\$3000 in total business. Of the accounts on my list- a few have been at the Tier 1 or 3 level in previous sales history. This week alone, my team has set up 3 apts with their targeted hit list and realize the importance at gaining not only business back, but also showing the accounts just how blatant Guidance has been at copying our brochures and just how low they will go to get any business they can from us. The account target list had relationships with us in the past, unfortunately, due to the level of the account- we don't touch them as often as we should (again- Tier 4 and 5).

I have gathered numerous competitive lists over the past year- mainly from Brassler and Sybron, but Guidance is the smallest amount on a competitive level- all GP's on this list. I don't have any endo's that have switched, and many have updated me when they have made an attempt to get in the office- ex: Joe Camps office in Charlotte.

From the list gathered- the potential is over \$39k in total business potential with 2 accounts totaling \$20k. Chris O'Neill has been working on the Mountain Area Health Education today, Cindy has an apt with Dr. Mike Mango on Tuesday 9/23



Wygant, Kim

**From:** Newell, Bill  
**Sent:** Wednesday, August 13, 2008 9:53 AM  
**To:** Bracken, Jeannie; Voskuil, John; Quinn, Kelley; Gaines, Vicki; Newell, Bill; Clements, Keith; McMaster, Stephen; Armstrong, Scott; Kiser, Rick  
**Cc:** Brownell, Blake  
**Subject:** CONFIDENTIAL; Settlement and new Manuf agreement with Guidance

**CONFIDENTIAL**

FYI.

We have reached a confidential settlement agreement with Guidance. As you may recall we were in litigation surrounding a dispute over their files and our patents. The settlement is confidential and it's important that all of us keep it as such.

1 outcome of the agreement is a manuf agreement with Guidance, whereby we will be manuf files and obturators for them. They will no longer be selling through distribution but rather will be re-establishing a direct sales model.

A couple of things I'd ask the Director team to understand.

First, these are unusual situations and fortunately don't exist often.

On one hand we're a supplier/manuf for Guidance and Operations/Manuf team will be making their product per their spec. In the field, they are a competitor and we should compete as normal. Guidance business/Guidance customers are targets for us just ilkey they've always been.

No communication of any type is needed but I wanted you all to be aware.

As Guidance makes their changes (leaving Patterson and going direct) there may be rumors in the market, speculation and direct questions coming your way.

Any "external" (non Dentsply) questions we should simply avoid and direct that person back to ask Guidance. If really pushed, say it's confidential and move on.

If "internal" (Dentsply EE's) questions come your way, pls carefully guard the confidentiality of the agreement and assess how much info you need to share ("the less the better"). At some point many if not most people will know that we're manuf product for Guidance, but we need to delay that info transfer as much as we can.

Blake, you'll get questions in the dealer world and short term you really need to avoid as best you can, letting them figure it out on their own. While we hope there won't be any real aggressive retaliation from dealers back towards us, please keep your eyes/ears open.

Our direct sales reps may someday wonder why we're making product for a competitor in the market place and we should be prepared to answer. The real answer is that competitors will always exist and in some cases we'd rather manuf their product and make some profit off of their sales than have that manuf profit go elsewhere. But again, we can't be volunteering that info.

Any questions, pls call me and THANKS for your help

Bill

TDP 00824  
CONFIDENTIAL

Wygant, Kim

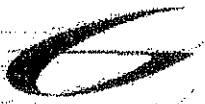
---

From: Thompson, Kari  
Sent: Tuesday, September 23, 2008 12:29 PM  
To: McCulloch, Kevin  
Subject: one fill by guidance

Hey Kevin,  
What do you know about one fill by Guidance.  
I found the oven on-line, looks just like our oven.  
Patterson reps are telling Drs. that we manufacture the product.  
One of my offices just called wants to return their Tfil and buy one fill \$109.50 for a 30 pack.  
Thanks for your help.

Kari Thompson  
Inside Territory Manager  
Tulsa Dental  
1-800-662-1202 ext 51463





**GUIDANCE ENDO**

7510 Montgomery Blvd NE, Suite 205  
Albuquerque, NM U.S.A. 87109

October 1, 2008

Via Facsimile (918) 493-6599

Mr. William Newell  
DENTSPLY Tulsa Dental Specialties  
5100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-6546

Re: Lannett Company, Inc. v. KV Pharmaceutical Company, et al.,  
Civ. Action No. 08-338-JJF

**PLAINTIFF'S  
EXHIBIT**  
575

Dear Bill:

This responds to your letter of September 25, 2008. Your unilateral decision to discontinue supplying obturator product is improper and in breach of the Manufacturing and Supply Agreement recently entered into between Guidance and Tulsa Dental. Further, I dispute your allegation that I am default of the Agreement. That said, I have investigated the allegations in your letter. I have reaffirmed that Guidance's sales representatives are not to promote the Guidance obturators for use with any system offered for sale by Tulsa Dental and are not to promote the Guidance obturators for use with any system offered for sale by Tulsa Dental. In an abundance of caution, Guidance will also be revising its current advertising materials.

Please immediately confirm that Tulsa Dental will continue supplying Guidance with obturators and fulfill all outstanding orders, including PO Dent100108 for OneFill dated October 1, 2008, which is to be delivered within 90 days (that is, by December 30, 2008). Note, the \$100,000 credit is to be applied to this order. If at least \$100,000 in product is not shipped and invoiced by December 30, 2008, then the remainder of this \$100,000 credit is to be applied to product shipped after this date.

On a related matter, I have heard reports from the field that Tulsa Dental representatives are informing dentists that Guidance is going out of business and that OneFill is an inferior product or not as good as ThernaFil. One claim in particular is that the "vent" in the ThernaFil product allows back-flow to prevent extrusion of sealer and gutta percha which the OneFill does not. This is an unsubstantiated claim. This overall conduct is improper and we request that you immediately inform your representatives to cease making all such comments. I, of course, reserve all rights and remedies to take appropriate action.

www.guidanceendo.com • 1.866.844.3636



**GUIDANCE ENDO**

7510 Montgomery Blvd NE, Suite 205  
Albuquerque, NM U.S.A. 87109

Finally, the OneFill labels that have been placed on the product we have received vary from the agreed-to-label set forth in Exhibit 1 of the Agreement. Please confirm that, in the future, correct labels will be placed on the OneFill product.

Sincerely,

Charles J. Goodis

[www.guidanceendo.com](http://www.guidanceendo.com) • 1.866.844.3636



Jeffrey S. Ginsberg  
Direct 212.908.6407  
jginsberg@kenyon.com

One Broadway  
New York, NY 10004-1007  
212.425.7200  
Fax 212.425.5288

October 7, 2008

By facsimile (717) 849-4753  
Confirmation by first class mail

Brian M. Addison, Esq.  
Vice President, Secretary and General Counsel  
Dentsply International  
Susquehanna Commerce Center  
221 West Philadelphia Street  
York, PA 17405-0872



Re: **Manufacturing and Supply Agreement**

Dear Brian:

I write in response to your letter of September 25, 2008 to Dr. Charles Goodis and in partial response Mr. Newell's letter to Dr. Goodis of the same date. In your letter, you state that certain statements allegedly made in Guidance Endodontic's brochures and by sales representatives "are false and/or misleading and therefore actionable under the Lanham Act." However, the statements that you allege are false and/or misleading, to the extent made, are non-actionable puffery and/or are otherwise neither false nor misleading. Further, as you are aware, the products at issue are sold to sophisticated customers (e.g., dentists and endodontists) who are not easily misled. *See Sandoz Pharms. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229-230 (3d Cir. 1990); *Labware v. Thermo Labsystems*, 2005 U.S. Dist. LEXIS 12993, \*30-32 (E.D. Pa. June 28, 2005). Accordingly, we disagree that the alleged statements you cite are actionable under the Lanham Act.

Notwithstanding the foregoing, and in the spirit of cooperation that led to the Manufacturing and Supply Agreement entered into between Dentsply/Tulsa Dental and Guidance (the "Agreement"), please be advised that Guidance will be revising its current advertising materials to address certain of the statements cited in your letter. However, Guidance feels strongly that it should not be precluded from making statements along the lines of "EndoTaper can be used in techniques similar to ProTaper or ProFile GT." Such statements are unquestionably true and there is no provision in the Agreement that would prohibit such statements.

New York Washington, DC Silicon Valley www.Kenyon.com



Brian M. Addison, Esq.  
October 7, 2008  
Page 2



Further, as set forth in Dr. Goodis' response to Mr. Newell's September 25, 2008 letter (a copy of which is enclosed), Tulsa Dental's unilateral decision to discontinue supplying "obturator product" is a breach of the Agreement. Please confirm that Tulsa Dental will immediately resume supplying Guidance with obturators and fulfill all outstanding orders.

Very truly yours,

Jeffrey S. Ginsberg

Enclosure

cc: Dr. Charles Goodis

**Wygant, Kim**

**From:** Higley, Gary  
**Sent:** Wednesday, October 08, 2008 10:44 AM  
**To:** Phillips, Greg  
**Subject:** Fw: Guidance

**Attachments:** DocLink1.ndl

Greg,

Here is the letter I sent to Bill explaining my conversation with John from Guidance. Since then I have learned that the Guidance numbers are in our BPCS and they are shipped out of Johnson City. I also understand that we produce the new shaping files for them (and apparently Guidance is telling customers these are ProTaper files). Their finishing files, obturation and oven are from our existing stock. My question is, why would Dentsply-Tulsa Dental do anything that would take volume and business away from the Tulsa OTM's (sales force)? Making quota is tough this year already, and now our customers can buy cheaper through the Dentsply back door.

Let me tell you what I experienced yesterday. - By the way, you may not realize that since I have come on with Tulsa, every endodontist in Montana uses Tulsa files. I am currently in Kalispel and Whitefish, Montana. I went in to one of my best endodontist's offices. We visited and I then asked him for an order. He informed me he would not be placing an order since he had, in his possession, a collection of Guidance files. He very directly informed me that these are Tulsa files and he can get them for half the price. Now I know there is an active study club here in this area. I was sitting at dinner picturing this endodontist, at the next study club meeting, informing everyone that Guidance will supply Tulsa files for half the price. What a disaster.

Gary Higley  
Executive Endodontic & Implant Specialist  
Northwest Region  
Spokane Territory, E. WA, N. ID, W. MT  
V-Mail 1-800-662-1202 Ext. 51324  
E-Mail ghigley@dentsply.com  
Cell 509-209-6115

----- Forwarded by Gary Higley/Tulsa/Dentsply on 10/08/2008 09:10 AM -----

138



TDP 03231  
CONFIDENTIAL



Wygant, Kim

From: Boschert, David  
Sent: Monday, November 24, 2008 4:03 PM  
To: Newell, Bill; Clements, Keith  
Cc: Painter, David  
Subject: Guidance Claims

Gentlemen,

I wanted to follow-up with you regarding the questions you had about Guidance and some of the claims they may be making. After talking with all of the Central RSM's, there have been no specific instances of accounts telling us that they were told by Guidance that their files and obturators were the same as ProTapers or were manufactured by TDS or Dentsply. There have been reports of some accounts trying the new Guidance file, but nothing as specific as what you were asking about. I'm sure you have looked at the website, but they do mention ProTapers by name and basically state that their files are a replacement for PTU.

On that note, Shane Devericks did convert a Guidance user today in Arlington (Dr. Whitmore) with a 50 pack Godfather deal.

Let me know if you have any questions.

Dave Boschert  
Regional Sales Manager  
Dentsply Tulsa Dental Specialties  
800-662-1202 ext. 51209

TDP 01961  
CONFIDENTIAL

#143



Wygant, Kim

From: Newell, Bill
Sent: Tuesday, November 25, 2008 8:31 AM
To: Boscherf, David; Clements, Keith
Subject: RE: Guidance flw up - MSR

Thanks. Guys, as we've discussed...it's a jungle out there. Very competitive and it always will be. We have a complete bag of tools to address every competitive situation to include very aggressive pricing as needed. Guidance is a low price/cheap file, cheap obturator competitor. No service, no after sale support, no comprehensive CE or other product offerings. Don't lose a single account to these guys. Customers can buy files over the internet and direct mail for very low prices and Guidance is now just another low priced option out there. Use creative bundling to add value and get as aggressive as needed and as makes sense to make sure we address any/all competitive threats that come our way. Let me and Mktg know how we can help. I know Greg Phillips will NEVER let a deal get away from us as long as we know about it.

-----Original Message-----

From: Boschert, David
Sent: Tuesday, November 25, 2008 7:21 AM
To: Clements, Keith; Newell, Bill
Subject: Fw: Guidance flw up - MSR

Below is some additional follow-up from Rob Felts. No specific instances of what you were referring to, but their marketing material is pretty blatant...

Dave Boschert
Regional Sales Manager
Dentsply Tulsa Dental Specialties
800-662-1202 ext. 51209

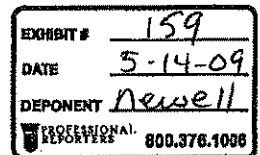
----- Forwarded by David Boschert/Tulsa/Dentsply on 11/25/2008 07:18 AM -----

Rob
Felts/Tulsa/Dents
ply

11/24/2008 07:26
PM

To
David
Boscherf/Tulsa/Dentsply@Dentsply cc
Rob Felts/Tulsa/Dentsply@Dentsply Subject
Fw: Guidance flw up - MSR

- 1. Their files are same as ours - No acct has claimed that this was said by any rep. However, the files look like the same as PT, and their Endo Taper brochure uses the ProTaper brand name and same technique as proscribed by ProTaper. Also, ProTaper customers note that the literature dropped off by the Guidance rep looks similar to ProTaper literature we market ProTaper.
2. Their obturators are same as ours or Densfil - same as above
3. That we're manufacturing either or both. - same as above - also would be interesting to call the Endo Taper toll free customer svc line from the brochure to see how they portray the file to



TDP 01750
CONFIDENTIAL

customers

I am getting list of accts contacted by Guidance, for our records, in St. Louis. Those are the only area, where we have noted an outside rep dropping off information to Drs, in the Mid South region, so far.

In the Endo Taper brochure - ProTaper is used 13 times, Profile GT is used 8 times and their filling technique - Thermal Filling (sounds kind of like Thermafil ???) is used 12 times.

(See attached file: Endo Taper Guidance.pdf)  
ProTaper\_Brochurepdf.pdf)

(See attached file:

Rob Felts  
Mid South Region  
Regional Sales Manager  
DENTSPLY Tulsa Dental Specialties  
800.662.1202 x 50825  
502.228.3751 (fax)  
502.439.5990 (mobile)

----- Forwarded by Rob Felts/Tulsa/Dentsply on 11/24/2008 08:03 PM -----

"Painter, David"  
<David.Painter@dentsply.com>

11/24/2008 01:00 PM

To  
"Budreau, Jason"  
<JBudreau@dentsply.com>, "Boschert, David" <DBoschert@dentsply.com>, "Braun, Mike" <MBraun@dentsply.com>, "Smalley, William D" <WSmalley@dentsply.com>, "Charbonnet, John" <JCharbonnet@dentsply.com>, "Felts, Rob" <RFelts@dentsply.com>

cc

Subject

FW: Guidance

RM team see below an urgent request from Bill. Please send your responses to Dave Boschert and he can compile and submit to KC and Newell. The key is the specifics..

Thanks,  
dp

From: Newell, Bill  
Sent: Monday, November 24, 2008 11:58 AM  
To: Clements, Keith; Gales, Tim; Andregg, Steve; Painter, David  
Subject: Guidance

Need to know today the following;

Any and all Dr's who have been told by Guidance (inside customer service, and/or outside

reps, and/or other members of the company/Guidance) that;

1. Their files are same as ours
2. Their obturators are same as ours or Densfil
3. That we're manufacturing either or both.

Need to know what exactly was said and to what clinicians. (name of acct, who from Guidance said what, and date are aprox date of this info exchange). Specific info is very important so pls ask your teams to pass along details as outlined above.

Thanks very much

Larranaga, Nicole

From: Slanicka, Karen  
Sent: Tuesday, November 25, 2008 5:25 PM  
To: Barbieri, Tom  
Subject: Re: Guidance Information needed... URGENT!!!

Haven't heard anything ]

Karen Slanicka  
Territory Manager  
Dentsply Tulsa Dental Specialties  
917.207.6906  
kslanicka@dentsply.com

Tom Barbieri/Tulsa/Dentsply  
11/25/2008 08:19 AM

To Steven R Berdy/Tulsa/Dents  
Thomas/Tulsa/Dentsply@Dr  
talaydi@dentsply.com, Cliffc  
cc Tim.Gales@Dentsply.net  
Subject Guidance informantion need

All-

Please let me know if any of your customers told you that they heard any of the following from Guidance...

Any and all Dr's who have been told by Guidance (inside customer service, and/or outside reps, and/or other members of the company/Guidance) that;

1. Their files are same as ours
2. Their obturators are same as ours or Densfil
3. That we're manufacturing either or both.

Need to know what exactly was said and to what clinicians. (name of acct, who from Guidance said what, and date are aprox date of this info exchange). Specific info is very important so pls ask your teams to pass along details as outlined above.

I need to know this by Wednesday morning... it is for a report for Bill Newell

**I need to hear from you even if you don't have info to add!**

**Call with questions...**



Tom Barbieri

Wygant, Kim

From: Barbieri, Tom  
Sent: Wednesday, November 26, 2008 11:07 AM  
To: Newell, Bill  
Cc: Gales, Tim  
Subject: Guidance Info...



Greetings Bill-

Sorry it's take a while to get back to with the information requested regarding Guidance, but I wanted to be sure our feedback was accurate.

Currently, we don't have any confirmation for the questions you posed...

No one has specifically said that "Guidance files are the same as ours" or "their Obturators are the same as ours or Densfil" or "that Dentsply is manufacturing either or both".

We do have on Endodontist who recently took a "deal" from Guidance. The office has several doc's who use TDS and we hoped to get Dr. Gupta back on board with a lucrative Partnership agreement. He did place an order and intended to switch back to us, but eventually went back to Guidance . Dr. Gupta at Shore Endo, acct number 31584, told Jay Halsey that he switched back to Guidance based on price alone. Jay has tried to see Dr. Gupta but hasn't had success yet... but he will. When he does, we will report back what, exactly, John Ferrone, the Guidance rep is saying.

Have a great Thanksgiving. We hope to see you at the Greater NY Show!

Regards,

Tom Barbieri  
Metro Regional Manager  
609 634-0910



Page 1 of 1

**Wygant, Kim**

---

**From:** Andregg, Steve  
**Sent:** Wednesday, November 26, 2008 9:50 AM  
**To:** Newell, Bill  
**Cc:** Bourgeois, Vanessa; Barnes, Stephen; Hines, Chris D; Lorimer, Matt  
**Subject:** RE: Guidance

Bill, hopefully you have received feedback from my team, as well as Kevin McCullough. I spoke directly to him about the Mountain region, which has had an Open RSM position, and I told him that there have NOT been any customers/accts that have communicated any feedback about Guidance like this in the region. We will continue to explore this.

**Steve Andregg**  
**West Area Sales Director**  
**Cell: 623-399-3610**  
**Fax: 623-325-5502**

---

**From:** Newell, Bill  
**Sent:** Monday, November 24, 2008 10:58 AM  
**To:** Clements, Keith; Gales, Tim; Andregg, Steve; Painter, David  
**Subject:** Guidance

Need to know today the following;

Any and all Dr's who have been told by Guidance (inside customer service, and/or outside reps, and/or other members of the company/Guidance) that;

1. Their files are same as ours
2. Their obturators are same as ours or Densfil
3. That we're manufacturing either or both.

Need to know what exactly was said and to what clinicians. (name of acct, who from Guidance said what, and date are aprox date of this info exchange). Specific info is very important so pls ask your teams to pass along details as outlined above.

Thanks very much



3/10/2009

TDP 01756  
CONFIDENTIAL

APP-A059

Page 1 of 4

**Wygant, Kim**

---

**From:** Bernauer, Joe  
**Sent:** Friday, January 30, 2009 12:37 PM  
**To:** Baux, Brent  
**Subject:** RE: Manager Guidance Contest & GTX Contest Payouts

☺

Joseph W. Bernauer Jr.  
Dentsply Tulsa Dental Specialties  
Atlantic Coast Regional Sales Manager  
Cell 215 317 1002

---

**From:** Baux, Brent  
**Sent:** Friday, January 30, 2009 2:35 PM  
**To:** Bernauer, Joe; Barbieri, Tom; Gales, Tim  
**Subject:** RE: Manager Guidance Contest & GTX Contest Payouts

I know that term all too well...my little Pain In The Ass is getting married next month. That was our affectionate term for my daughter.

---

**From:** Bernauer, Joe  
**Sent:** Friday, January 30, 2009 2:33 PM  
**To:** Barbieri, Tom; Gales, Tim; Baux, Brent  
**Subject:** RE: Manager Guidance Contest & GTX Contest Payouts

Question: what is PITA????? ( I do not recall that term being used at the Seminary ☺

Joseph W. Bernauer Jr.  
Dentsply Tulsa Dental Specialties  
Atlantic Coast Regional Sales Manager  
Cell 215 317 1002

---

**From:** Barbieri, Tom  
**Sent:** Friday, January 30, 2009 2:20 PM  
**To:** Gales, Tim; Baux, Brent; Bernauer, Joe  
**Subject:** RE: Manager Guidance Contest & GTX Contest Payouts

Any time!

---

**From:** Gales, Tim  
**Sent:** Friday, January 30, 2009 2:19 PM  
**To:** Baux, Brent; Barbieri, Tom; Bernauer, Joe  
**Subject:** RE: Manager Guidance Contest & GTX Contest Payouts

No doubt Ferrone has been a PITA but if I had to guess Guidance will be a part of endodontic history within the next six months. ]

Nice job Boys....Tommy's buying the cigars

Timothy Gales  
East Area Sales Director  
Tulsa Dental Specialties  
tjgales@dentsply.com  
724-249-3958 Direct Dial

3/12/2009

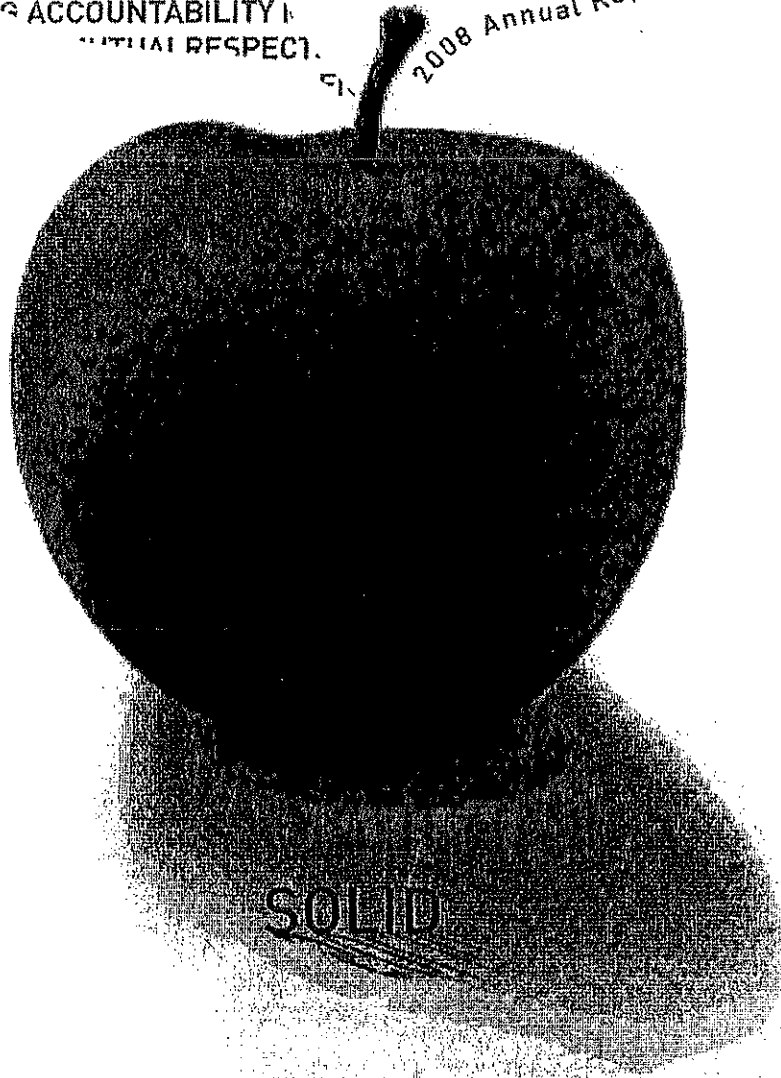


TDP 03468  
CONFIDENTIAL

APP-A060

PLAINTIFF'S  
EXHIBIT  
104

OF INTEGRITY COM.  
ILITY ENGAGEMENT UN  
NKING ACCOUNTABILITY  
TUTIAL RESPECT.  
2008 Annual Report



**DENSPLY**  
INTERNATIONAL

SEC 000001

APP-A061

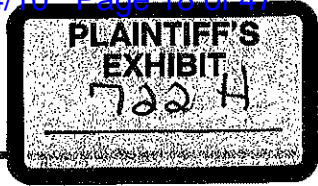
**Dentsply International Inc. and Subsidiaries**  
**Selected Financial Data**

	Year Ended December 31,				
	2008	2007	2006	2005	2004
<i>[in thousands, except per share amounts]</i>					
<b>Statement of Income Data:</b>					
Net sales	\$2,193,723	\$2,009,893	\$1,810,496	\$1,715,135	\$1,694,232
Net sales, excluding precious metal content	1,993,800	1,819,899	1,623,074	1,542,711	1,481,083
Gross profit	1,151,944	1,040,783	929,011	869,018	846,518
Restructuring, impairment and other costs (income)	32,355	10,527	7,807	232,755 <sup>(a)</sup>	7,124
Operating income	380,421	354,891	314,794	72,922	295,130
Income before income taxes	355,472	358,135	314,837	71,038	274,155
Net income from continuing operations	\$ 283,869	\$ 259,654	\$ 223,718	\$ 45,413	\$ 210,286
Net income from discontinued operations <sup>(b)</sup>	-	-	-	-	42,879
Total net income	\$ 283,869	\$ 259,654	\$ 223,718	\$ 45,413	\$ 253,165
<b>Earnings per common share:</b>					
Basic	\$ 1.90	\$ 1.71	\$ 1.44	\$ 0.29	\$ 1.31
Discontinued operations	-	-	-	-	0.27
Total earnings per common share — basic	\$ 1.90	\$ 1.71	\$ 1.44	\$ 0.29	\$ 1.58
<b>Earnings per common share — diluted:</b>					
Diluted	\$ 1.87	\$ 1.68	\$ 1.41	\$ 0.28	\$ 1.28
Discontinued operations	-	-	-	-	0.26
Total earnings per common share — diluted	\$ 1.87	\$ 1.68	\$ 1.41	\$ 0.28	\$ 1.54
Cash dividends declared per common share	\$ 0.18500	\$ 0.16500	\$ 0.14500	\$ 0.12500	\$ 0.10875
<b>Weighted Average Common Shares Outstanding:</b>					
Basic	149,069	151,707	155,229	159,191	160,775
Diluted	151,679	154,721	158,271	162,017	164,028
<b>Balance Sheet Data:</b>					
Cash, cash equivalents and short-term investments	\$ 204,249	\$ 316,323	\$ 65,143	\$ 434,525	\$ 506,369
Property, plant and equipment, net	432,276	371,409	329,616	316,218	399,880
Goodwill and other intangibles, net	1,380,744	1,203,587	1,063,030	1,001,827	1,261,993
Total assets	2,880,400	2,675,569	2,181,350	2,410,373	2,798,146
Total debt and notes payable	449,474	483,307	370,156	682,316	852,819
Stockholders' equity	1,587,722	1,516,106	1,273,836	1,246,596	1,443,973
Return on average stockholders' equity	18.8%	18.6%	17.8%	8.4%	19.7%
Long-term debt to total capitalization	21.2%	24.1%	22.4%	35.3%	37.1%
<b>Other Data:</b>					
Depreciation and amortization	\$ 56,929	\$ 50,289	\$ 47,434	\$ 50,560	\$ 49,296
Cash flows from operating activities	335,981	387,697	271,855	232,769	306,259
Capital expenditures	76,440	64,163	50,616	45,293	52,036
Interest expense (income), net	15,438	(2,645)	(1,683)	8,768	19,829
Inventory days	100	95	96	90	92
Receivable days	54	51	57	53	47
Operational tax rate <sup>(c)</sup>	25.9%	30.4%	30.6%	29.4%	30.0%

(a) The Company recorded \$230.8 million of impairment and restructuring charges related to the closing of the pharmaceutical manufacturing facility outside of Chicago.

(b) The Company sold the assets and related liabilities of the Gendex business.

(c) Operational tax rate is considered a non-GAAP measure, refer to reconciliation in the Management's Discussion and Analysis of Financial Condition and Results of Operations section of this Form 10-K.



Wygant, Kim

From: Bryant, Sammie  
Sent: Wednesday, September 10, 2008 7:37 AM  
To: Bernauer, Joe; Fisher, Ryan; Smith, Belinda; Barbieri, Alan; Amoralls, Steve; Rooney, Brian; Pawlowski, Joe; Jeff Schmidt  
Subject: Fw: Guidance

FYI

----- Forwarded by Sammie Bryant/Tulsa/Dentsply on 09/10/2008 08:35 AM -----

Brandon Miller/Tulsa/Dentsply  
09/10/2008 08:30 AM

To Amanda G Donnell/Tulsa/Dentsply@Dentsply, Amy Str  
Angela Watkins/Tulsa/Dentsply@Dentsply, Anne McC  
Ketchum/Tulsa/Dentsply@Dentsply, Brad Duffel/Tulsa/  
Byrd/Tulsa/Dentsply@Dentsply, Brenda Faurot/Tulsa/  
Keeton/Tulsa/Dentsply@Dentsply, Carri Grubbs/Tulsa/  
Collins/Tulsa/Dentsply@Dentsply, Claire Petty/Tulsa/D  
Merritt/Tulsa/Dentsply@Dentsply, David Crider/Tulsa/C  
Green/Tulsa/Dentsply@Dentsply, Glenda Carr/Tulsa/D  
Hill/Tulsa/Dentsply@Dentsply, Jami Stell/Tulsa/Dentsp  
Sparks/Tulsa/Dentsply@Dentsply, Jennifer Gomosky/T  
Strawn/Tulsa/Dentsply@Dentsply, Jennifer Vollmer/Tul  
Vuskull/Tulsa/Dentsply@Dentsply, Kari Thompson/Tul  
Redden/Tulsa/Dentsply@Dentsply, Katia Elizondo/Tul  
Cooper/Tulsa/Dentsply@Dentsply, Kimberly Cain/Tulsa  
Graves/Tulsa/Dentsply@Dentsply, Kyle Poor/Tulsa/D  
Aragon/Tulsa/Dentsply@Dentsply, Linda Fusiller/Tulsa  
Thomas/Tulsa/Dentsply@Dentsply, Luke Stone/Tulsa/  
Shemeluk/Tulsa/Dentsply@Dentsply, Mary Luton/Tulsa  
Fowler/Tulsa/Dentsply@Dentsply, Mike Wales/Tulsa/D  
King/Tulsa/Dentsply@Dentsply, Nathalie Gilbreath/Tul  
Villalobos/Tulsa/Dentsply@Dentsply, Sammie Bryant/T  
Hill/Tulsa/Dentsply@Dentsply, Sheryl Fenton/Tulsa/D  
Sierer/Tulsa/Dentsply@Dentsply, Tammy Goad/Tulsa/  
Brown/Tulsa/Dentsply@Dentsply, Tom Evans/Tulsa/D  
Chambers/Tulsa/Dentsply@Dentsply, Tamara Carrott/  
Douglas/Tulsa/Dentsply@Dentsply, Beckie Hughes/Tu  
Miller/Tulsa/Dentsply@Dentsply, Krystal Tipton/Tulsa/  
Benarrous/Tulsa/Dentsply@Dentsply, Robert A. Johns  
Starr/Tulsa/Dentsply@Dentsply, Chelsea Witherington  
Nelson/Tulsa/Dentsply@Dentsply, Leslie Anderson/Tul  
Shields/Tulsa/Dentsply@Dentsply, Lauren Hanna/Tulsa  
Arnold/Tulsa/Dentsply@Dentsply

cc

Subject Guidance

This is something I recieved from my region. Not sure if everyone knows, so just FYI.

Team,

As the result of recent litigation, Guidance files are off the market!!!! They will sell through their remaining VTaper inventory, and then start selling the new EndoTaper files. These will be sold direct only, and they have a very small sales force.

I would encourage you - get in every Guidance account that you know of this week and convert them using Godfather!!!!

Wygant, Kim

From: Newell, Bill  
Sent: Monday, September 29, 2008 8:01 AM  
To: Brown, Tara  
Cc: Clements, Keith  
Subject: Fw: Vtaper info

Attachments: COMP summary Vtaper SW.xlsx



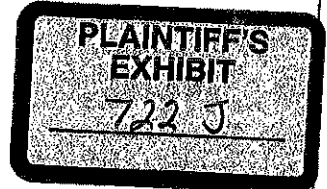
COMP summary  
Vtaper SW.xlsx (1...

Tara; pls fwd to inside sales group. Let's work these targets hard.  
----- Forwarded by Bill Newell/Tulsa/Dentsply on 09/29/2008 09:00 AM -----

Stephen Barnea/Tulsa/Dentsply  
09/22/2008 11:35 PM

To Bill Newell/Tulsa/Dentsply@Dentsp  
Clements/Tulsa/Dentsply@Dentsply  
cc

Subject Vtaper Info



Bill,  
Please find the 10 targets with status as per your request. We had a regional meeting in AZ today and I wanted to get final input. After 4 years of selling in the trenches in Orange County (Sybron HQ) I share your passion for knowing what is going on with the competition and going after them with vigor. It is how I survived during my early years here selling against 2 sybron reps. It takes passion, effort and visibility.

Obviously, a bulk of my competitive scenarios are with K3 and Brassler. I have line of site on where we are getting hurt. The Hymovitch Group in AZ and the San Fernando Valley are heavily K3 and or Brassler due to rep turnover and other circumstances (UCLA etc). We are moving actively to change these situations. Hymovitch has 13 endos. Most of them use non Tulsa products. We have identified the 2 most likely conversions (Clark and Tonnioli). We are attacking here first. Last week we had a massive win in APEX endo (mostly K3) with our rep Aaron Mitchell. We have a commitment to get Steve Buchanan over here to work ONE ON ONE with these K3 endos if need be. We are not laying by idle. I have pulled out all stops in regards to taking back what is ours with endos and challenge my team monthly to "own the endos". Please know that it irks me that we were displaced from our own backyard by half truths, infringements and even out and out lies like "they are the same thing as profiles".

Even though VTaper was in the Patterson catalog I have rarely run into it during my years here. Four of my team members are under a year of tenure so having full visibility of the competition is just not there as with a more seasoned rep. I still am able to submit good, real data to you.

The one most obvious one to me is not even in my region! An endo in La Jolla Dr Jeff Javelet. Losing an endo would hurt them and we want to hurt them. I have been working with Matt Lorimer on this one as I called on him for a few years. I saw the Doctor in San Francisco and we can get him back.

You have my continued commitment that the SW region will attack and take back any guidance accounts with special regional programs going forward. I have instructions to surface ALL VTAPER accounts to me instantly going forward. We will do what it takes to get it out of there.

Regards,

SB

TDP 02037  
CONFIDENTIAL



Wygant, Kim

From: Bernauer, Joe  
Sent: Monday, September 29, 2008 4:33 PM  
To: Rooney, Brian; Pawlowski, Joe; Fisher, Ryan; Jeff Schmidt; Amoralis, Steve; Byrd, Brandy; Barbieri, Alan; Smith, Belinda; Bryant, Sammie; Miller, Earl; Arnold, AJ; Anderson, Leslie  
Subject: Fw: Godfather Guidance Conversions (Time Sensitive!)  
Importance: High  
Attachments: DocLink1.ndl

Team: Per my previous email, please let me know by Wednesday, October 1st, all September GUIDANCE accounts that were converted to Dentsply via the Godfather. The top RSM earns \$5k, 4k or 3k

Joseph W. Bernauer Jr.  
Regional Manager, Atlantic Coast  
Dentsply-Tulsa Dental Specialists  
Cell 215 317 1002  
Voice Mail 800 662 1202 X51343

----- Forwarded by Joseph Bernauer/Tulsa/Dentsply on 09/29/2008 05:28 PM -----

Jeff Schmidt/Tulsa/Dentsply  
09/29/2008 05:19 PM

To Leslie Anderson/Tulsa/Dentsply  
cc Larry Beals/Tulsa/Dentsply@Dents



DocLink1.ndl (422 B)

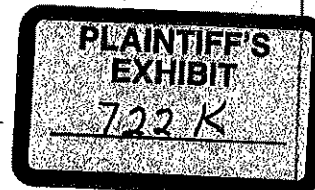
Joe & Larry,

Leslie called this customer about a Tier 4 promotion (I think that is right) - while discussing that she was able to uncover they switched to Guidance - per her e-mail below the Godfather was thrown out and warmly received (why wouldn't it be)...

Thus ending a guidance relationship...

Thanks Leslie - You rock.

Jeff Schmidt  
VoiceMail - x 51234  
Cell Phone - 484-951-5851



Leslie Anderson/Tulsa/Dentsply  
09/29/2008 04:18 PM

To Jeff Schmidt/Tulsa/Dentsply@Dent  
cc  
Subject cust # 39079



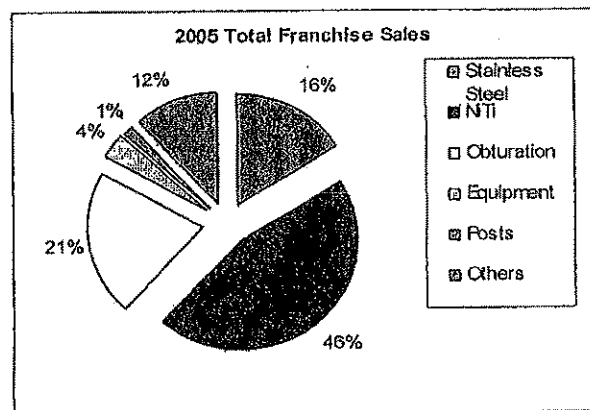
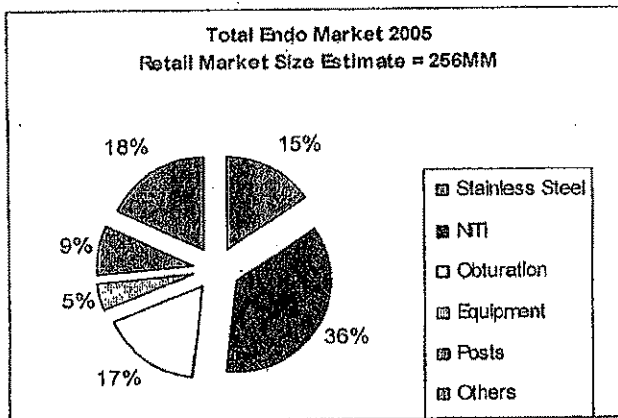
TDP 01341  
CONFIDENTIAL



## North American NiTi Strategic Assessment

### Market Overview

The following information is sourced from the Endo Strat Plan which identifies the product breakdown of the North American market. In an endo procedure, endo files are the principal product utilized and are generally disposable. Three to four files are generally used per procedure, and while re-use is an issue, it is a stable to declining issue. The 5 to 1 average sell price difference for nickel titanium versus stainless steel, drives the overall value of NiTi as a percent of the total market. Likewise, Tulsa's 75% to 80% share represents a significant amount of the division's revenue. Blended gross margins for ProTaper and GT files are in the range of 80%. Over the last three years, overall pricing in the market has maintained at a high level between \$5.50 and \$6.50 per file at retail. There is some discounting, promotional activities, etc., but in general, pricing has been maintained, no doubt driven by the \$1.00 per file royalty that is paid by the licensees.



**REDACTED**

### Competitive Overview

The competitive threats to Tulsa's, NiTi market position continues to be challenging. For many years, Tulsa Dental Specialties (TDS) enjoyed 100% market share due to IP protection through the NiTi file manufacturing process. In order to maintain the integrity of our IP position, licensing agreements were created with Sybron, Miltex and Brasseler, and over the period of 3 years, market share dropped from 100% to 80%. As a result competitors offered an alternative, but not clinically superior NiTi file, and with limited opinion leader support achieved growth. It is important to know that 2004 and 2005 were very difficult periods for the Tulsa organization. Declining sales growth diminished the success euphoria, significant turnover occurred due to recruitment from medical competitors, leadership among the sales organization and division were not fully engaged, and general weaknesses existed in the Marketing and R&D area. This is not to say that the competitors were not successful, but to some degree, Tulsa's share loss was self-inflicted. In 2006 as these issues were substantially resolved Tulsa saw NiTi growth above market and regained share.



The following table outlines the dynamics of competitive growth and share over the last three years.

		2003	2004	2005	2006
Total Tulsa	Sales \$	61,786	66,974	67,149	73,998
	Share	87.8%	81.3%	76.4%	77.9%
	Growth vs PY		8.4%	0.3%	10.2%

**REDACTED**

#### IP Status

Dentsply holds 6 NiTi patents which were acquired with the TDS business.

Two of these patents

covering the manufacture of NiTi files

patents primary brands ( ProTaper, GT and Profile)

In addition we have several design

Overtime we have recognized that the NiTi manufacturing patents are not strong enough to fully protect our market position. Early litigation with Sybron (acquired Tycom IP) and Moyco ended in license agreements as we recognized that losing the litigation would eliminate our patent protection and thus open the market. Fortunately, the other parties recognized this as well and were willing to pay a \$1.00 per file to gain access to the US NiTi market. Brasseler US entered the market defiantly in 2004 by launching a NiTi file and waiting for us to react. Brasseler then entered into the same license agreement to avoid litigation costs and gain access to a protected market. The \$1.00 per file is significant as it represents a royalty in the 15% to 20% range.

Overall we can say that our licensing strategy has been successful as we have limited the players in the NiTi segment and in 2006 generated \$3.1 million in royalties. Also important is that the agreements require the licensees to sell direct versus through distribution. More recently, another competitor, Guidance, has entered the market without a license and we have also been contacted by two other parties requesting a license, which is described below. We need to realistic that given our need to license in the past we will likely face further incursion into our NiTi business before patent expiration.

TDP 21406 CONFIDENTIAL

APP-A067

### Competitive and Technological Threats

Our licensing strategy has been successful by protecting the market for licensee's, requiring direct distribution (investment) and the file royalty limited price strategies. At the same time we recognize the potential of competitive and technological threats pre-patent expiration and certainly in the 2011 Time frame. In 2006, Guidance signed an exclusive distribution agreement with Patterson Dental to sell NiTi files. Previously, Guidance was a small company making a NiTi file with the support of its founder, an endodontic opinion leader. In Patterson's hands, this became problematic, and we have since taken legal action to block the importation of this product manufactured by Micro Mega in France. Discus Dental acquired Lightspeed a low tech NiTi file system which we produced on an OEM basis in Johnson City. While insignificant from a sales and shares perspective, Discus went to great lengths to try to disguise their acquisition of Lightspeed.

As Brasseler

Germany has entered the US market to compete with Brasseler US; they have requested a license from us to market NiTi files to be able to compete in similar categories.

We have also heard rumors that Hu Friedy hopes to enter the endodontic market. DENTSPLY has had its battles with Hu Friedy over the years. Hu Friedy has a reputation for entering share dominated segments and producing a product at a good quality at a competitive price. We believe they will pursue the NiTi file category in a similar manner. Clearly, all of our competitors would like to participate in a large and profitable endodontic NiTi file segment. Nowhere is this more true than with Henry Schein. NiTi is an area of particular focus for CEO, Stan Bergman, and while he is lobbying DENTSPLY to provide a means for Schein to enter the NiTi segment, I believe he is focused on entering the segment one way or another.

We are aware through our opinion leader network that Sybron will be launching a twisted NiTi file in Q4 '07 or Q1 '08. Twisted NiTi cutting flutes are created by twisting a square of triangle shaped NiTi wire versus ground flutes.

Recently, we were contacted by an Israeli company (Redent Nova)

Essentially, they have designed a nickel titanium mesh sheath

Early results look promising and, if successful, could significantly change the endodontic market.

**REDACTED**

While these competitive and technological threats are concerning, Tulsa holds a strong and dominate position in the North American endo market. New competitors and technologies must be able to produce a root canal treatment system that is *safe, effective, efficient (time), cost effective, clinically executable, clinically proven, and supported by opinion leaders*. Today, Tulsa Dental and the endo franchise are successful in dominating all these parameters. These requirements are particularly relevant and represent a significant barrier to new technologies and competitors. The one area that does concern us is in the area of pricing. Currently, we sell files for roughly \$6.00 and through our volume cost is approximately \$1.00. Our volume may create a 60%-80% cost

advantage, but this still leaves a lot of margin for our competitors. We believe that the most likely scenario regarding patent expiration is a good file at a competitive or low price.

## Competitive Response

**REDACTED**

### *Near Term*

In early 2006, we identified several competitive challenges to our North American NiTi situation and began to take actions to eliminate or mitigate. We acquired the Wong patent, which is substantially the ProTaper IP for the North American market. This put us in a strong long-term design patent position and opened the way for us to begin litigation against Guidance and eliminate NiTi distribution by Patterson Dental.

We were greatly concerned about the status of Dr. Ben Johnson and his company Sportswire, who is our exclusive supplier of NiTi wire for Johnson City manufacturing. While Sportswire was problematic we were more concerned about Ben's ability to launch competitive systems, access to new inventions and his impact to the opinion leader network. We were able to acquire Sportswire and secure a long-term consulting agreement with Ben.

As a result sales force turnover has been significantly reduced and NiTi sales are growing above market. Overall TDS is well positioned in the NAM market.

### *Mid-Term*

The focus of our mid-term strategy has been to bolster our R&D and technology efforts and re-establish ourselves as the innovators within the endodontic marketplace. This would cover a broad array of product segments, including new file designs, new types of obturation, canal cleaning and irrigation as well as the development and manufacturer of endodontic equipment. Overall, to date we have not been successful in this endeavor. We have been able to add incrementally to our development resources and have been more active in assessing new technologies. We do have new products, but they are primarily within the range of our current strengths which is NiTi file design. In November of 2005, a strategy was proposed that would develop a Center of Excellence within existing DENTSPLY divisions to support the Endodontic Franchise development initiatives.

This situation has severely undermined the Endo Franchise and its ability to be the market innovator which with our other strengths would be key to a brick wall strategy.

Also, in our mid-term strategy is our effort to continue to stabilize and improve our sales, marketing and CE resources. While the changes to the management team have made an impact in these areas it is fact that project Hercules reduced our competitiveness in the endo segment. Project Hercules by design reduced Endo sales resources by 25%.

### *Long Term*

TDP 21408 CONFIDENTIAL

APP-A069

The long-term strategy is truly the point of the North American NiTi strategy. It is a response to the competitive and technological threats and the ability of Tulsa Dental and the Franchise to retain and protect current market shares.

**REDACTED**

### North American NiTi Strategy

it is clear that the North American NiTi market will open on or before the expiration of our IP in November of 2012.

there is no question that new files and new file designs will enter the market place and we will see a new level of competition for the substantial market share that DENTSPLY has built over the last ten years.

1. **Fight the Fight.** It is reasonable to assume that if we have the best products, opinion leader support, CE, sales force, and customer service that we can maintain a substantial portion of our market share.

There are many products within the dental industry and within DENTSPLY that have similar share/pricing situations and due to strong brand and customer loyalty have been able to maintain share.

In order to "fight the fight", we are making a commitment to the necessary investments that would allow us to act and execute like the market leader. This would mean an adoption of our mid-term strategy and ensuring that we are the market innovator and that our sales and market position is strong.

- a. We would need to believe and be committed to the strength of our brands and the ability of TDS to execute.
- b. In order to be the innovator in the marketplace, we would need to invest approximately \$1.5mm per year in associated R&D people and resources to execute the center of excellence strategy.
  - i. This would require the implementation of two-to-three person R&D teams in
- c. We would need to continue to add sales resources (10 Reps per year) to offset the time allocation associated with the implant business such that Endo and Implants could grow.
- d. The innovation agenda would need to be significant and aggressive. This would require projects in the area of file development, obturation and new equipment technologies.
- e. The Clinical Education curriculum has been significantly overhauled to focus on better endodontics versus teaching clinicians how to use rotary NiTi.
- f.

2. **Full Distribution.** In this scenario, we can accept that the NiTi terrain will get complex and crowded, in particular with the threat of distributors aggressively entering the market, and due to frequency in reach, substantially impact our current market share. We would accept the philosophy that something is better than nothing, and we would essentially put our existing endodontic portfolio through distribution. It is reasonable to assume that given the size of this portfolio we could negotiate a lower margin rate that may transition upward over time. The benefit of this strategy would be the reallocation of our sales resources to other products

In this scenario all endo products would go through distribution. NiTi alone would not be successful as we would otherwise compete directly in the other endo products. Given that the entire portfolio will be put through distribution even with the stepped margin approach, the margin impact would be significant.

- a. We need to accept that that the distributors would grow the market at or below market rate.
- b. In an endo distribution model, the sales resources reallocated to implants would need to more than cover the associated sales and margin reduction due to distribution.
- c. We would need an agreement on the magnitude of the strategic partnership to ensure the commitment of the endo distributors.
- d. A reasonable number of resources would need to be allocated to support the distribution business as it would be greater than \$100MM.
- e.

**REDACTED**

3. **Multi-Channel Distribution.** In this, we would look at utilizing additional NiTi brands not currently marketed in the United States.

This would essentially give them a high-quality, recognized NiTi file that would absorb potential demand and provide an additional channel to the market place. This may substantially satiate the demand to enter the NiTi market, provide revenue and profit.

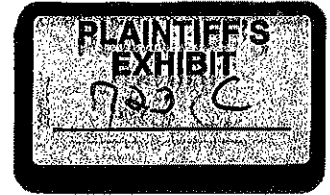
In Multi-Channel Distribution, we are dealing with the reality that the market will open and that there is a significant demand for NiTi products by the distribution network. This strategy allows us to maintain a level of control over the NiTi segment.

- a. While we have the NiTi brands of Flexmaster, M2, other brands would need to be identified or created to absorb demand requirements.

- d. Based on our success or lack therein of creating new users, we would have to anticipate that the majority of NiTi distribution sales would come at the expense of DENTSPLY brands due to our market share position.
- e. Overall, NiTi growth would continue to be at or below overall market growth. we would need to create strategic partnerships with key dealers that would preempt them from taking on additional NiTi competitive brands.

**REDACTED**

Endodontic Franchise  
Strategic Update



The worldwide Endodontic market (root canal treatment) has estimated retail sales of \$850million. The market is composed of the following product portfolios: Niti files (newer technology emerging over the past ten years), stainless steel files (lower cost commoditized product), obturation (filling materials used to replace the infected root),

**REDACTED**

Endodontic Treatment

An Apex locator is used to measure the termination length of the root canal to determine the file length to reach the end of the canal. :

Once the pulp canal(s) of the tooth is accessed, the necrotic or diseased root canal tissue is removed using files of different dimensions. The purpose of the file is to instrument the canal so that it can be cleaned and filled completely and effectively. Further cleaning, disinfection, and filling (using Gutta Percha as an obturation material), sealing the pulp canal and restoration complete the root canal treatment.

In order to instrument the canal(s) there are two basic techniques used, either complete hand filing using stainless steel or nickel titanium hand instruments in sequence to enlarge and clean the canal space, Or, rotary engine driven nickel titanium files along with a small number of hand instruments necessary to create a reproducible path for the rotary instruments to enlarge and shape the canal in a optimal fashion. In either technique, the responsibility of the GP or Endodontist is to remove diseased tissue and prepare the canal(s)for disinfection and obturation. Rotary NiTi files are more flexible, and are attached to a torque controlled Endo motor which rotates the files to achieve a predictable and reproducible shape consistently. The flexibility and memory (ability to return to its original shape) of NiTi files has accelerated the wide spread usage of the rotary technique. The success of rotary NiTi instrumentation has been driven by its effectiveness in terms of treatment time, reduced hand fatigue and Endodontist support. This success has occurred despite a cost premium of 5X versus traditional stainless steel.

Worldwide Endodontic Market

The world wide market growth rate is 5-7% and varies significantly based on geographic region.

Eastern Europe and Asia are seen as growth regions with Japan reasonably flat (due to little or no reimbursement) and Latin American growing at 2-3%. The various growth rates are driven by the current sophistication of dental care, growth of Endodontic treatments; economic and population growth and migration to more advanced dental treatments.

TDP 21176 CONFIDENTIAL

AEO

APP-A073

DENTSPLY has three Endodontic Divisions; Maillefer (Switzerland), Endodontics (Tulsa Dental in the US) and VDW (Germany) create a commanding position in the worldwide Endo Market. Total 3<sup>rd</sup> Party sales for the Endodontic Franchise exceeded \$320 million at wholesales in 2005, representing \$400MM at retail and correlating to a world wide share of approaching 50%. In the US, Tulsa Dental has direct sales of \$140 million, half of which is NiTi files.

DENTSPLY's market strategy has been to utilize the three Endodontic divisions collaboratively to increase market share and presence. In the U.S., Dentsply Endodontics (Tulsa Dental) sells product (primarily NiTi files and obturation materials) direct through Tulsa Dental, while Dentsply North America sells Maillefer and VDW products (primarily stainless steel files) through distribution. Maillefer and Tulsa Dental essentially market the same brands on a worldwide basis;

**REDACTED**

Our position in the US market position is somewhat protected through a series of patents on NiTi files,

Competition is increasing in the Endodontic segment. Overall the Endo franchise grew a 5.2% in 2005, Tulsa Dental with essentially no growth. This is part market circumstance (slower conversion to NiTi files in the US market) and part the result of high sales rep turnover and performance issues at Tulsa Dental. Also of importance is that performance has improved in 2006 under the leadership of a new General Manager, Bill Newell, hired in mid 2005.

A number of key strategic issues face the Franchise which is being addressed through the strategic planning process.

#### North American Strategic Issues

Tulsa Dental faces a number of key challenges including IP protection, new competitive entrants and key opinion leader support.

TDP 21177 CONFIDENTIAL

#### IP Issues

Dentsply holds 6 key NiTi patents which we essentially acquired with the Tulsa Dental business.

Overtime we have recognized that these patents are not strong enough to fully protect our market position. Early litigation ended in license agreements as we recognized that losing the litigation would eliminate our patent protection and thus open the market. Fortunately, the other parties recognized this as well and were willing to

AEO  
APP-A074



pay a \$1.00 per file to gain access to the US NiTi market and also keep it closed to other competitors.

Brasseler then entered into the same license agreement to avoid litigation costs and gain access to a protected market. The \$1.00 per file is significant as it represents a royalty in the 15% to 20% range.

Overall we can say that our licensing strategy has been successful as we have limited the players in the NiTi segment and in 2005 generated \$3.1 million in royalties. Also important is that the agreements require the licensees to sell direct sales versus through distribution. Accordingly, at More recently, another competitor, Guidance, has entered the market without a license and we have also been

New Competitive Entrants in the NiTi File Market

At present there are a number of new competitive threats to the protected NiTi business in the US A small company, Guidance Dental, entered the market in 2005 first on a direct basis and then entered into an d exclusive distribution agreement with Patterson Dental (our second largest distributor worldwide). We are preparing patent litigation against Guidance, which will have implications both for Guidance and also our relationship with Patterson Dental.

**REDACTED**

A final potential entrant is a group headed by Dr. Ben Johnson, founder of Tulsa Dental (employee of Dentsply from the 1996 to January of 2006) which has contacted us requesting a license. Dr. Johnson has a very strong following among opinion leaders worldwide, and is a true competitive threat to the business. Dr. Johnson also has a thorough understanding of the Company's strategy and the patent position (including any weaknesses in the patent protection).

Key Opinion Leader Issues

Through the introduction of

Rotary NiTi Endodontics and other unique products we have engaged, solicited feedback, sponsored studies, and funded clinical programs of the KOPL's which have supported our needs and theirs. Each year we sponsor Endodontic Forum's in North America, Europe, Asia, and Latin America. We cross pollinate KOPL's from the different regions and the attendee's are the Who's-Who's in Endodontics. Being invited to these forum's or requested to present essentially puts you on the "It" list in the field. Overtime we have used the KOPL's for new product ideas and evaluation, research, speakers and trainers and licensing relationships. The KOPL network is a key "asset" and competitive advantage for the business.

Dr. Johnson's departure from Dentsply in January 2006 was a significant event (Dr. Johnson's non-compete agreement also expired at that time). Subsequent to his departure, Dr. Johnson approached us with a request for a NiTi license for the US market and outlined a business plan to pull together a group of 30 Kops (including many of Tulsa's lead Kops) to market a "new and improved" NiTi file. The key threat is that Dr. Johnson will leverage his relationships with

Endodontist worldwide to support his products resulting in market share loss for our three Franchise businesses. Based on preliminary tests and results, we believe Dr. Johnson's "new NiTi file" may significantly reduce breakage in NiTi files, a primary driver of customer adoption. We are preparing to initiate active negotiations with Dr. Johnson towards and exclusive business arrangement.

### North American Distribution Options

Given our market position in the US, remaining life of the NiTi patents, and the evolving competitive situation, we are assessing our options.

As mentioned above, outside of the US we operate without patent protection and sell primarily through distribution. In the US, we sell NiTi products direct and stainless steel files primarily through distribution. Given the patent expiration in 2011, we are currently evaluating options to be considered as the expiration date nears, some of which are summarized below.

1. Maintain current direct distribution strategy. Fully leverage brands, KOPL network, clinical programs, product development and direct sales organization to maintain market position. This approach maintains the prohibition of current licensees from selling through distribution.
2. Leverage the DNA selective distribution model and put current direct Tulsa brands (\$140 million of sales) through distribution. This model may become more feasible following the "merger" of Tulsa (US Endo) and Friadent Ceramed (US implants) as it will naturally migrate some of the direct sales resources towards implants.
3. Utilize Multi Channel distribution model in which we maintain direct selling model of existing portfolios but provide alternative brands to market through distribution. We have two excellent Rotary NiTi systems we market in Europe (FlexMaster and MTwo) that are not marketed in the US. Between Maillefer and VDW there are likely other Endodontic products (Obturation, Motors, etc) that could be developed as distribution brands.
4. At a high level, Tulsa Dental has direct sales of \$140 million, half of which is NiTi files. To support the business, Tulsa maintains a direct sales force of 120 reps, with sales and marketing costs of approximately \$25 million. Any model that puts the current direct business through distribution has a number of significant ramifications including loss of margin to compensate the dealers and loss of our prohibition of current licensees from selling through distribution.

### Summary

Over the second half of 2006, the business will be formulating strategies and responses to all of the above circumstances. With respect to timing, we view it critical to secure a continuing relationship with Dr. Johnson and avoid disruption to the KOPL network. Also essential is resolving the competitive threat from the entrance of Guidance into the US NiTi market and the anticipated entrance of Brasseler Germany. Lastly, the Franchise is also actively considering long term distribution options for the US market.

TDP 21179 CONFIDENTIAL

ASD  
APP-A076

From: Newell, Bill  
Sent: Saturday, February 25, 2006 6:28 PM  
To: Vanderslice, Russ  
Cc: Clements, Keith  
Subject: Fw: Guidance Endo  
Attachments: DocLink1.ndl



Russ; wanted you to see this response. We should talk to Brian asap to see if this changes our positioning in any way.  
----- Forwarded by Bill Newell/Tulsa/Dentsply on 02/25/2006 07:25 PM -----

Bill Newell/Tulsa/Dentsply  
02/25/2006 07:25 PM

To Bret Wise/Dentsply  
cc Jim Mosch/Dentsply@Dentsply  
Subject: Re: Guidance Endo



DocLink1.ndl  
B)  
ject

**REDACTED**

Bret/Jim; Yes, unfortunately we heard this news Friday at Chicago Midwinter. Guidance launched their file system last year around the AAE, selling direct, making some noise, but not getting any real significant traction in the market to date and no significant OPL support. We have been researching the file and our patents with Legal Dept coming to the conclusion recently that

with Patterson's association with them. We believe we will find out very quickly whether they feel they can/will fight or whether they'll come to us asking for us to manufacture for them. This will get interesting now

We'll get with Legal on Monday and make sure we're moving forward as planned. I'll keep everyone posted.

Bill

Bret Wise/Dentsply  
02/25/2006 01:57 PM

To Jim Mosch/Dentsply@Dentsply, Bill Newell/Tulsa/Dentsply  
cc  
Subject: Guidance Endo

Jim/ Bill

I am sure you heard the same info on this as I did. Anyway, just in case, what I heard is that Patterson has entered into an exclusive arrangement to market rotary Niti in the US for Guidance Endo. Apparently, it was announced in some form at the Midwinter meeting. I also heard that Guidance already sells their product here, but it is small.

Have you heard this?

Bret

TDP 21199 CONFIDENTIAL

ASO

Wygant, Kim



From: Newell, Bill  
Sent: Friday, March 10, 2006 12:58 PM  
To: Mosch, Jim  
Subject: Fw: Guidance Endo  
Attachments: DocLink1.ndl; DocLink2.ndl; DocLink3.ndl

REDACTED

Jim; I'll call Brian and discuss. I hope there hasn't been any major change in our position or strategy.

Bill  
----- Forwarded by Bill Newell/Tulsa/Dentsply on 03/10/2006 01:56 PM -----

Brian Addison/Dentsply  
03/10/2006 08:59 AM

To: Bill Newell/Tulsa/Dentsply@Dentsply  
cc:

Subject: Re: Fw: Guidance Endo



DocLink1.ndl  
B)  
ct

Yes, we need to talk. Please call me at your earliest convenience. Thanks.

Brian Addison  
DENTSPLY International Inc.  
baddison@dentsply.com

Bill Newell  
03/09/2006 07:16 PM

To:  
cc:  
Subject:

Brian Addison/Dentsply@Dentsply  
Fw: Guidance Endo

Brian; Don't mean to be a pest on this, but I'm getting a lot of questions. Jim Kelly/Steve Buchanan asked Mike Murphy about our position on this.

Do we need to get back together via conf call to discuss any further, or are we pressing forward per our last conversation. Pls let me know next steps.

Thanks  
Bill  
----- Forwarded by Bill Newell/Tulsa/Dentsply on 03/09/2006 06:10 PM -----

Bill Newell/Tulsa/Dentsply



DocLink2.ndl (222  
B)

03/10/2006 03:05 PM

To: Brian Addison/Dentsply  
cc:  
Subject: Re: Fw: Guidance Endo

Thanks Brian. I'll mention to Jim and I'm sure he'll discuss with Chris.

TDP 21205 CONFIDENTIAL

ASO  
APP-A078



ocLink3.ndl (270 B)

**REDACTED**

**Brian Addison/Dentsply**  
03/01/2006 01:04 PM

To Bill Newell/Tulsa/Dentsply@Dentsply  
cc  
Subject Re: Fw: Guidance Endo

Brian Addison  
DENTSPLY International Inc.  
baddison@dentsply.com

**Bill Newell**  
02/27/2006 11:25 AM

To:  
cc:  
Subject:

Brian Addison/Dentsply@Dentsply  
Fw: Guidance Endo

) Brian;

Wanted you to see that they have teamed up with Patterson to market exclusively.  
Give me a call if we need to discuss.

Thanks  
Bill

----- Forwarded by Bill Newell/Tulsa/Dentsply on 02/27/2006 10:22 AM -----

**Bret Wise/Dentsply**  
02/25/2006 01:57 PM

To Jim Mosch/Dentsply@Dentsply, Bill Newell/Tulsa/Dent  
cc  
Subject Guidance Endo

Jim/ Bill

I am sure you heard the same info on this as I did. Anyway, just in case, what I heard is that Patterson has entered into an exclusive arrangement to market rotary Niti in the US for Guidance Endo. Apparently, it was announced in some form at the Midwinter meeting. I also heard that Guidance already sells their product here, but it is small.

Have you heard this?

)et

TDP 21206 CONFIDENTIAL

*ASO*



From: Newell, Bill  
Sent: Thursday, September 21, 2006 1:59 PM  
To: Mosch, Jim; Kates, Keith  
Subject: Guidance/Patterson

Jim/Keith;

Receiving more info day to day re; Patterson/Guidance activity in the market.

Just s/w Gales. He flew to NJ yesterday to visit with a large Endo acct. \$85k of rotary file business at risk

Dr had been sampling the Guidance file. Liked it/it worked fine. He likes ProTaper better but.....

ProTaper \$51/6 pk  
Guidance; \$34/6 pk

The doctor says he takes advantage of 100pk buying opps with us to bring price down to \$41/pk, however the gap to Guidance's price of \$34/pk is still too large. He's tested, likes the way they work, and on his volume will switch next month for the price savings. We think we can save the account so that's not the issue.

The issue is that we're seeing/I'm hearing more and more re; Patterson/Guidance activity. Last update from Brian indicated ~~we had worked the deal to get the Wong patents and were closing on the deal with the other patent owner, so it sounded like we were getting close, which is great.~~ Guidance/Patterson is aggressively pricing this file system and it is getting attention in the market. We're premium priced by far and are even high at large quant price breaks.

1. We need to continue to pursue legal strategy re; Guidance/Patterson
2. I don't believe we're in a position given our current pricing and competitive market position to consider price increase strategy on rotary for 2007.

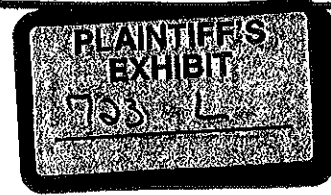
We can discuss in more detail on Monday.

Thanks,  
Bill

TDP 21219 CONFIDENTIAL

ASO

From: Vanderslice, Russ  
Sent: Thursday, March 16, 2006 2:38 PM  
To: Newell, Bill  
Subject: Re: Guidance/Wong



Bill:

I spoke with Brian this week in terms of some possible candidates. Mike and I have visited, but have not made a final decision on who to recommend. Brian is working on a script for the person to use when contacting Wong.

There is one more issue and I will try to visit in person with you later today or Friday.

Thanks.

Russ

p.s. What is this "...next week, while I'm out"? I thought I was the only one with a part-time assignment.

Bill Newell  
03/16/2006 02:15 PM

To:  
cc:  
Subject:

rvanderslice@dentsply.com  
Guidance/Wong

Russ; In order to keep this Guidance/Wong patent thing moving forward next week while I'm out, would you pls visit with Mike and see if you guys can get on phone with Brian A assuming we have someone in mind who could serve as a "buyer" for us of the Wong patents. Last time I s/w Brian it sounded like he really wants to try the purchase of the patents idea before we push the lawsuit. You and Mike know the customers better than I do and probably know who might be willing to help us out and who we could at least pursue with the idea. Probably need to talk to Brian to make sure we pursue the person on our end with the right message/info, assuming we have someone we'd ask.

THANKS in advance

Bill

TDP 21243 CONFIDENTIAL

ASO

Wyjant, Kim

From: Newell, Bill  
Sent: Monday, June 05, 2006 1:34 PM  
To: Vanderslice, Russ  
Subject: Re: Fw: Guidance Endo v NITI Patents  
Attachments: NITI V GUIDANCE.doc; DocLink1.ndl



NITI V GUIDANCE.doc (35 KI)

I saw last week that he just got the law firm engaged and they were trying to contact Wong...

Russ Vanderslice/Tulsa/Dentsply  
06/05/2006 02:30 PM

To: Bill Newell/Tulsa/Dentsply  
cc: Mike Murphy/Tulsa/Dentsply@Dentsply  
Subject:



DocLink1.ndl (270 B)

Re: Fw: Guidance Endo v NITI Patents

**REDACTED**

I thought we always thought the manufacturing patent might be hard to win/prove, but we were mainly going after them on the GT patents?  
Also, any word from Brian et al on our Texas dentist buddy?

Russ

Bill Newell  
06/05/2006 02:22 PM

To:  
cc:  
Subject:

rvanderslice@dentsply.com, Mike A  
Fw: Guidance Endo v NITI Patents

Check this out.

----- Forwarded by Bill Newell/Tulsa/Dentsply on 06/05/2006 02:22 PM -----  
Teresa Euculano/Dentsply

06/05/2006 02:07 PM

To: Brian Addison/Dentsply@Dentsply, Bill Newell/Tulsa/Dentsply@Dentsply, Jim Mosch/Dentsply@Dentsply, Francois Aeby/M/DentsplyEurope@DentsplyEurope  
cc:  
Subject: Guidance Endo v NITI Patents

TDP 21248 CONFIDENTIAL



**DENTSPLY**  
TULSA DENTAL  
SPECIALTIES

DENTSPLY Tulsa Dental Specialties  
5100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-6546  
(918) 493-6598  
(800) 662-1202  
Fax: (918) 493-6599

September 25, 2008

VIA FACSIMILE

Dr. Charles Goodis  
Guidance Endodontic, LLC  
7510 Montgomery Boulevard NE, Suite 205  
Albuquerque, NM 87109

Re: Manufacturing and Supply Agreement

Dear Chuck:

We have reviewed much of your advertising materials and heard many reports from the field regarding recent activities of Guidance. The purpose of this letter is to advise you that, beyond our tremendous disappointment in your conduct, that you are in default of the Manufacturing and Supply Agreement we entered only recently. The conduct of Guidance is also contrary to the representations you made to us repeatedly during our discussions leading up to the execution of the Agreement. The examples of such conduct are too numerous to list, but they include the following actions by Guidance:

*Marketing section*

- Representing that Guidance obturators are the same as Thermo! Fill obturators
- Broadly communicating that Tulsa/Dentsply is making the Guidance obturator and Guidance files
- Statements that the Guidance obturator can be used in place of their current thermo! fill filling obturator
- OneFil is nearly half the price of your current Thermal Filling obturator.
- The Guidance files are the same as ProFaper, ProFile, etc.

These actions, particularly those related to the obturator products, are in clear contravention of Sections 2.4 and 9.1 of the Agreement.

*Contract section*

Please advise us immediately in writing that you will cease and desist from all of this conduct. Until we receive such confirmation, it is our intention to discontinue the supply of the obturator product.

Additionally, as we further evaluate this situation and whether such conduct is even curable, we reserve all rights and remedies we have under the Agreement and otherwise. I want to again emphasize how disappointed we are in the actions you have taken despite the provisions of the Agreement and our discussions leading to the Agreement.

Very truly yours,

Bill Newell



TDP 07309  
CONFIDENTIAL

**ABQ Temp1**

**From:** Newell, Bill  
**Sent:** Friday, September 26, 2008 4:16 PM  
**To:** Addison, Brian  
**Cc:** Mosch, Jim  
**Subject:** Fw: Response to Sharon Bettes 9/23 letter to Sherry Hensley

----- Forwarded by Bill Newell/Tulsa/Dentsply on 09/26/2008 05:15 PM -----

Bill Newell/Tulsa/Dentsply  
09/26/2008 05:14 PM

To: drcjgoodis@aol.com

cc

Subject: Response to Sharon Bettes 9/23 let

**REDACTED**

Dear Chuck;

Sherry forwarded a copy of Sharon's 9/23/08 letter knowing that I was having some direct correspondence with you and I believe I also rec'd hard copy in today's mail. This email will serve as response to the questions raised (1-4) and we will also send via fax to; 505-884-4267.

1. It has been previously communicated that artwork for original EndoTaper order was finalized on 8/18/08, thereby making the target delivery date for this order 9/29/08. Sharon was contacted earlier this week and informed that we will be shipping some product on 9/29/08 as requested. Sharon can please contact Sherry the morning of 9/29 to get complete status of this order if she would like.

2 & 3. We do not confirm or acknowledge receipt of the purchase orders for V2 and OneFill attached to Sharon's 9/23 letter (PO# Dent100308 and Dent100108). Please refer to my prior email to you dated 9/25 regarding the lack of engineering drawings for V2. I believe that email was very clear as to what is required for us to manufacture V2. As these requirements have not yet been met, we unfortunately can not accept the purchase order at this time. Additionally, please refer to my 9/25/08 letter sent to you via fax (rec'd by your office at 1:51PM CDT) indicating your default of the Manufacturing and Supply Agreement and our intention to discontinue the supply of obturator product until certain and specific conditions are met. As a result, I must inform you that we do not confirm receipt of your above referenced PO for OneFill obturators either. We can confirm receipt of one (1) purchase order for EndoTaper (PO Dent 100208) dated 10/1/2008. Per our agreement, the 90 day lead time would mean a targeted delivery date for this purchase order of 1/1/09.

4. We do not confirm receipt of the final V2 specifications or label sample based on what has been sent to us. Again, it is your responsibility to provide complete detailed engineering drawings (reference 9/25 email) from which we can manufacture. The written information that Sharon sent attached to her 9/23/08 letter did not include such drawings.

I believe this clearly addresses the 4 points raised in Sharon's memo to Sherry.

Regards,

Bill Newell



TDP 20732 CONFIDENTIAL

Oct 14 2008 0:47PM

Tulsa Dental Specialties 918-493-6599

p. 2

**DENTAPLY**  
**TULSA DENTAL**  
**SPECIALTIES**

DENTAPLY Tulsa Dental Specialties  
3100 E. Skelly Dr., Suite 300  
Tulsa, Oklahoma 74135-4566  
(918) 493-6599  
(800) 682-1202  
Fax: (918) 493-6599

October 14, 2008

VIA FACSIMILE

Dr. Charles Goodie  
Guidance Endodontic, LLC  
7510 Montgomery Boulevard NE, Suite 205  
Albuquerque, NM 87109

Re: Manufacturing and Supply Agreement

Dear Chuck:

As noted in my prior letter to you, we have more fully evaluated the conduct of Guidance with respect to its promotional and marketing activities of the products being produced by Tulsa Dental for Guidance under the Manufacturing and Supply Agreement. As you know from our discussions leading up to the execution of the Agreement, although the principal focus of the manufacturing arrangement was on files, we were willing to agree to manufacture and supply you obturator materials based on certain representations made by you in our discussions, and commitments that you made in the Agreement.

We have concluded that the conduct of Guidance with respect to the obturator product has been in blatant disregard of the expectations and provisions incorporated into the Agreement. Moreover, this conduct is such that there is no way to cure the impacts of it in the market. For this reason, we have determined that the only appropriate action at this point in time is to discontinue supplying Guidance with the obturator product. I regret that we are forced to take this action, but frankly it was the conduct of Guidance that forced it and we see no other alternative.

We also continue to have concerns about Guidance's conduct with respect to the files that we are supplying under the Agreement. We expect that Guidance will rectify its conduct and discontinue making the statements that it is making regarding those files, which are a violation of the supply Agreement. In particular, this includes statements such as the following:

- Communicating that Tulsa/Dentaply is making the Guidance files
- The Guidance files are the same as ProTaper, ProFile, etc.

We will continue to closely follow the activities of Guidance regarding this activity.

Very truly yours,

*Bill*  
Bill Newell

**PLAINTIFF'S**  
**EXHIBIT**  
738

Wygant, Kim

From: Vanderslice, Russ  
Sent: Tuesday, March 01, 2005 10:43 AM  
To: Addison, Brian; Newell, Bill; Mosch, Jim  
Cc: Murphy, Mike; 'CN=Kurt Van Hofwegen/OU=Tulsa/O=Dentsply@Dentsply'  
Subject: Competition

**PRIVILEGED**

As you are aware, there is increasing competition in the U.S. niti file market.

Currently, we have three active license agreements in place in the U.S., including:

- a. Sybron Dental - Currently selling both direct and through distributors (supposedly distributor reps acting as mfg. reps for Sybron with the rep taking the order and Sybron shipping and billing). We are currently in the process of validating this is really happening.
- b. Union Broach/Miltex - Currently selling both direct (through Endo Solutions, a company owned by Miltex) and have recently launched a file without any flutes that will be sold through distributors. The belief is the new file sold through distributors (Liberator) is outside of our patents.
- c. Brasseler USA - Currently selling direct to end users. They sell two brands (RaCe and Sequence), both of which are manufactured by FKG in Switzerland.

In addition, Tulsa Dental manufacturers niti instruments for several other people, including:

- a. Lightspeed
- b. Dental Powers

We have recently become aware of some other entries into the niti market, which include:

- a. DiaDent - currently selling niti hand instruments (k-files, h-files, and reamers). DiaDent is located Vancouver but sells in the U.S. through distributors. Their stainless steel files are manufactured in France, so we assume their niti hands files may also be manufactured there (possibly Micro Mega).
- b. Guidance Endodontics - this is a new company that is currently selling a series of rotary niti instruments. The company was started by a endodontists in New Mexico and has recently hired one of our former employees to run the sales/marketing activities. They launched the files at the Chicago Midwinter and plan another launch at the AAE meeting in April. The endodontists was a large customer of Tulsa Dental and they have made an inquiry about a license agreement through our sales rep. We told them to contact us directly, but to date there has been no additional contact.

My question: [REDACTED]  
[REDACTED] If we allow these to continue without any action, it may open the doors for others to enter the market.

We are currently in the process of ordering product (through a dentists) from Sybron (testing that Sybron is shipping and invoicing), DiaDent, and Guidance Endo.

[REDACTED]

Thanks.

Russ



TDP 21186 CONFIDENTIAL

EX. \_\_\_\_\_ APP-A086

Endodontic Franchise  
North American Distribution Strategy

The following is a more detailed management discussion document.

IP Expiration

Dentsply hold 6 key NiTi patents which we essentially acquired with the Tulsa Dental business. Overtime we have recognized that these patents are not strong enough to fully protect our market position. Early litigation ended in license agreements as we recognized that losing the litigation would eliminate our patent protection and thus open the market. Fortunately, the other parties recognized this as well and were willing to pay a \$1.00 per file to gain access to the NiTi market but also keep it closed.

Brasseler then entered into the same license agreement to avoid litigation costs and gain access to a protected market. The \$1.00 per file is not insignificant. At a sell price of \$6.00-\$7.00 and production cost \$1.50-2.00 this does limit pricing flexibility.

Overall we can say that our licensing strategy has been successful as we have limited the players in the NiTi segment and in 2005 generated \$3.1MM in royalties. Also important is that the agreements require direct sales versus through distributors which has maintained average sell price. However, the licensees have not grown the market and over the last 3 years Tulsa Dental market share has eroded from 88% to 78%. Guidance is a recent entrant and has utilized a similar strategy as Brasseler US. We have complexities from an IP perspective in litigating which to date has left an open question in the market. This was further compounded when Guidance signed an exclusive distribution agreement with Patterson Dental. We also have been approached by Brasseler Germany for a license as they wish to enter the US market. As we face more licensing situation the market essentially becomes open albeit with a royalty.]

Further research is required in this area to understand the impact of IP expiration. The patents licensed and utilized by each licensee as well as unlicensed patents need to be examined to determine if royalties would cease with the first patent expiration. We also are seeking to secure new patents which may improve our IP position.

New Competitive Entrants

In the patent expiration issue we addressed two new entrants Guidance and Guidance, while their product is not competitive, needs to be challenged as they set an undesirable precedent.

We also believe that Sybron will be entering the market with a new file in 2007 that may get around existing patents.



REDACTED

TDP 21180 CONFIDENTIAL  
AEO

Ex. \_\_\_\_\_ APP-A087

A final potential entrant is a group headed by Dr. Ben Johnson. Ben is being represented by a business agent, Mark Ferber. Ferber is smart, shrewd and well connected. He has 27 clients in the dental industry, key clinicians, business owners and possibly Henry Schein. Ben has the objective of securing his legacy in Endodontics, proving Dentsply wrong and taking care of his Endodontic compatriots. Ferber is the catalyst, but has bigger plans. One of his clients is Dr. Bill Dickerson of Las Vegas Institute (LVI). Ferber negotiated the sale of a majority share of LVI to a VC firm supporting Dickerson in getting money out of the transaction. We know the LVI business model is in trouble and we speculate the VC firm has expectations. Ferber also represents Dr. Steve Buchanan the licensor of the GT Brand of NiTi system sold by Tulsa Dental. GT represent 43% of our US NiTi sales but has been declining 10% per year due to Tulsa's launch of ProTaper. As a result Dr. Buchanan's royalties (\$2.0MM + per Year) have been declining at the same rate.

All the players represent a challenging alliance and Ferber is the catalyst. Ben has worldwide respect and acceptance of the Endodontic community and can influence the support of key opinion leaders. He is also an innovator and is skilled at clinically assessing and accessing new products. Steve Buchanan is well respected in the General Practitioner community in teaching and the practice of Rotary Niti Endodontics. Dr. Dickerson and LVI are well known and respected for its teaching facility and clinical programs. Expanding in to Endodontics with Ben and Steve and friends of Ben would mitigate his business issues. Ferber has approached us with a variety of options but would primarily wish to have a NiTi license. This group will sell Ben's new file design and other products from Ben's Endodontic network. Ferber gets 7% of any business arrangement. This would address all of the parties' objectives and likely minimize any issues Ferber may have with the VC firm.

### Key Opinion Leader Issues

The Endodontic franchise has a Key Opinion Leader (KOPL) program that significantly differentiates us from our competitors and is unique in Dentsply. Through the introduction of Rotary NiTi Endodontics and other unique products we have engaged, solicited feedback, sponsored studies, and funded clinical programs of the KOPL's which have supported our needs and theirs. Each year we sponsor Endodontic Forum's in North America, Europe, Asia, and Latin America. We cross pollinate KOPL's from the different regions and the attendee's are the Who's-Who's in Endodontics. Being invited to these forum's or requested to present essentially puts you on the "It" list in the field. Overtime we have used the KOPL's for new product ideas and evaluation, research, speakers and trainers and licensing relationships. While some earn reasonable compensation from programs, others are truly friends of Tulsa Dental and Maillefer.

Ben Johnson's departure from Dentsply in January is a significant event. Our relationship with Ben since the acquisition of Tulsa Dental has been contentious. Issues have arisen over compensation, contract terms, and respect. In January 2005 his contact formal contract with Dentsply expired and moved into a paid "Ambassadorship" for Dentsply. During Bill Jellison's tenure he attempted to resolve this issue and in mid to late 2005 we negotiated unsuccessfully with Mark Ferber to extend Ben's contract. Given the Ben/Steve/LVI scenario it may have never been Ferber's intent to reach agreement. Upon Ben's departure in January of 2006 the scenario outlined became visible. The non-compete of Ben's contract has ended but the confidentiality and non-solicitation of employee's continues. Upon his departure Ben proclaimed himself as a free agent and had many "ideas" for new products. Under the confidentiality Dentsply has rights to those but proving they are Ben's will be difficult, and after one year that assertion will be more difficult. The key issue is that Ben marketing his own products either with a license or through a relationship with another company such as Sybron/ Danaher is a threat. Ben will leverage his relationships with Endodontist

**REDACTED**

TDP 21181 CONFIDENTIAL

AEO

APP-A088

worldwide to support his products. We believe that this would lead to a loss of \$20-30MM of business over 3 years.

Ultimately we need to bring Ben back into the Dentsply fold. He maintains good relations with us and continues to speak on our behalf. Those who know him personally indicate that Ben puts his own interests before the Ferber scenario. Ben is 62 he wants to demonstrate to the Endodontic community he still has it and secure his legacy. He remains open to Dentsply. Creating an agreement with Ben only, would accomplish several objectives. We would eliminate a potential competitor, provide us access to new file designs and products, and solidify the KOPL network. We can not underestimate the impact of Ben in cooperation with a Sybron/Danaher or independently selling a file under the Ferber scenario. Finally, Ben owns Sportswire the Tulsa Dental sole source for NiTi wire for GT NiTi file production. Efforts over the last year have been unsuccessful in securing a long-term supply agreement or identifying alternative suppliers. In mid 2005 Ben approached us with a new NiTi wire that resists breakage 4X traditional NiTi. Breakage is the number one issue in regards to the adoption of Rotary NiTi by the GP. The new NiTi has the potential of increasing NiTi penetration and providing file design flexibility. We believe that continued development on our part can mitigate this issue but it remains a threat and opportunity in the short term.

Over the years we have learned what motivates Ben and what he wants. Personally and professionally he wants to create and innovate and be recognized and respected for his accomplishments. Past negotiations have revealed that he believes his worth is about \$1.5MM per year. Past contracts have outlined this in principal but have been based on business performance, reasonable to us but in Ben's mind outside his control. They have been unsuccessful. We would need to create a package of compensation that would meet these terms and would be paid substantially upfront and offset by future sales. We believe that new file designs, new NiTi material and other innovations would generate incremental sales. No doubt there would be cannibalization of GT and ProTaper NiTi sales of which we pay royalties of 5% and 6% respectively that would self fund. We are also confident that would could create a long-term agreement that would meet our non-compete and confidentiality issues.

### North American Distribution Strategy

In assessing our distribution options we need to build some context

- ◆ Our IP issues need to be fully assessed. We need to understand what patents are being used by our licensee's and for how long. We also need to assess the strength of our design patents and the impact of securing other patents. Regardless this will unlikely eliminate the expiration issue only the timing. We should then look at the worst case and assume an expiration of patent protection and licensee royalties. This would also open the market for competitors such as Micro Mega, FKG, and Mani to enter directly our through distribution.
- ◆ An agreement with Ben Johnson needs to be secured. While there are short term costs the benefits outweigh the risks.
- ◆ We need to fully litigate the Guidance NiTi entrance and be prepared to do the same with Brasseler GmbH. Current discussion with Brasseler may provide a longer term relationship that would necessitate a license but we would need to do this carefully and only after we have resolved the Johnson/Ferber scenario

TDP 21182 CONFIDENTIAL

**REDACTED**

AEO

- ◆ The Tulsa Dental business is improving performance. Bill Newell has focused heavily on the field force and the customer. New sales leadership, improved sales compensation and training are generating success. NiTi sales are 6% over prior year and growing for the first time in 3 years and the licensee's growth is flattening.
- ◆

Given our market position in the US, remaining life of the NiTi patents, and the evolving competitive situation, we are assessing our options. , we are currently evaluating options to be considered as some of which are summarized below.

1. Maintain current direct distribution strategy. Fully leverage brands, KOPL network, clinical programs, product development and direct sales organization to maintain market position

2.

We would need to consider the other \$70MM in the Tulsa portfolio particularly as we sell an Endodontic systems and all products are related.

3. Utilize Multi Channel distribution model in which we maintain direct selling model of existing portfolios but provide alternative brands to market through distribution. We have 2 excellent Rotary NiTi systems

Between Maillefer and VDW there are likely other Endodontic products (Oburation, Motors, etc)

#### Option 1

Maintaining our current distribution model becomes more difficult if we are unable to reach agreement with Ben and future licensees. Our KOPL network would be divided and would undermine one of our key strengths. We believe we would see sales loss in the \$ 20-30MM range over 3 years. This decline would trigger a reduction or reallocation of sales and customer facing resources. It would be difficult to offset Sales and Margin losses with expense savings. If we are able to secure an agreement with Ben our market strength is enhanced. We still face the base case scenario of losing licensee royalties and the distribution market opens up in November 2011. Despite our ability to leverage all our strengths I feel it would be impossible to maintain our current share in an open market and would face a resource realignment of some type.

TDP 21183 CONFIDENTIAL

AEO

**REDACTED**

APP-A090





In this option we would provide the dealers with one or more of our highly successful NiTi brands not currently marketed in the US. We would need to do this at least 2 years prior to the expiration  
I believe we would be able to negotiate favorable margin and exclusivity.

The Multi-Channel option would give us the opportunity to saturate the market with high quality products through distribution while maintaining our core brands and innovations through direct distribution. As we secure our base the dealers reach into non Dentsply customers may expand the market as they would tend to be more price competitive than Tulsa.

**REDACTED**

TDP 21185 CONFIDENTIAL  
AEO

**Opposition to Motion for Remittitur  
Appendix B**

<b><u>Official Trial Tr.</u></b>	<b><u>Page No.</u></b>
Day 1 – September 21	APP-B001
Day 2 – September 22	APP-B008
Day 3 – September 23	APP-B013
Day 4 – September 24	APP-B016
Day 5 – September 25	APP-B025
Day 6 – September 28	APP-B027
Day 7 – September 29	APP-B038
Day 8 – September 30	APP-B043
Day 10 – October 2	APP-B047
Day 11 – October 5 (Rough)	APP-B050
Day 12 – October 6	APP-B054

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. 2008-CV-1101 JB/RLP  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.  
and  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Counter-Plaintiffs,  
vs.  
GUIDANCE ENDODONTICS, LLC  
and DR. CHARLES GOODIS,  
Counter-Defendant and  
Third-Party Plaintiff.  
Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Monday, September 21, 2009, at 8:29 a.m. and concluding at  
5:35 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.  
Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 the whole thing inside the canal, then you just take a hand  
 2 piece, and with the burr you're just going to cut that off.  
 3 And that stays completely in the canal.  
 4 Q. What is that little pink part or the obturator you  
 5 mentioned?  
 6 A. It's culled gutta percha. They used to come from a South  
 7 American tree -- like golf balls or even baseballs used to have  
 8 that as the core -- but now it's all synthetically made.  
 9 Q. So where is Guidance located?  
 10 A. In Albuquerque.  
 11 Q. And where in Albuquerque?  
 12 A. At Montgomery and Pennsylvania.  
 13 Q. And what year did you start the company?  
 14 A. 2004.  
 15 Q. How many employees does Guidance have?  
 16 A. We have three full-time employees: John Ferone, Sharon  
 17 Bettes-Groves, and Debra Ruggles.  
 18 Q. Do you have any part-time employees?  
 19 A. Yes. We have -- Debra's mom and Sharon's daughter works  
 20 for the company.  
 21 Q. And what are the approximate revenues of the company?  
 22 A. About \$1.5 million.  
 23 Q. Do you have any plans to grow the company?  
 24 A. Yeah, my plans were to grow the company over seven years  
 25 of the contract to where we would get a hundred to \$200 million

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 per case. And you're not driving up the healthcare costs to  
 2 patients.  
 3 Q. Do dentists in other countries pay what American dentists  
 4 have to pay for NiTi rotary files?  
 5 A. In other countries, I believe it's less expensive, but I  
 6 don't have the pricing for that.  
 7 Q. Okay. So, what is needed to execute on your plan to grow  
 8 this into a \$100- to \$200-million-a-year company in  
 9 Albuquerque?  
 10 A. Being able to grow it to a hundred to \$200 million company  
 11 isn't really difficult at all. The market is doubling over the  
 12 next ten years. As the older dentists and endodontists who  
 13 don't use the new technology, they're leaving the field and all  
 14 the new dentists coming in are using that technology, so we're  
 15 talking about a rapid market growth around the country for the  
 16 use of this. So being able to grow it is very easy,  
 17 particularly when you're talking about selling the products for  
 18 half the price. But the big thing we need, is to stop  
 19 Dentsply's harassment and keep me out of business.  
 20 MR. GULLEY: Objection, Your Honor. He's not only  
 21 giving a narrative, but he's also going out of his way to  
 22 attack Dentsply, and the question is not even pertaining to  
 23 Dentsply.  
 24 THE COURT: Well, let's do questions and answers.  
 25 But overruled as to that question.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 in sales and add 30 to 40 jobs in Albuquerque.  
 2 Q. And what's holding you back from that?  
 3 A. The constant harassment from Dentsply, the lawsuits after  
 4 lawsuits.  
 5 Q. What company is it you're trying to emulate?  
 6 A. It's not going to be Dentsply.  
 7 Q. Why is that?  
 8 A. Because with their monopoly in the marketplace, they're  
 9 charging so much, it's driving up dental costs. Our model is  
 10 to be more like Dell Computer, where you get great product at  
 11 half the cost, so now companies can now afford computers and  
 12 they can be more profitable.  
 13 Q. And why is low cost so important in the dental/endodontic  
 14 market?  
 15 A. Because the procedures are getting so expensive and the  
 16 products are getting so expensive. That's the thing, that  
 17 every dentist just shakes their head. Why are each file, that  
 18 you can really only use once, costing almost \$10? So if you  
 19 have to use, let's say, seven files, that's \$70. Then if you  
 20 use the obturators -- and I'm rounding it up to ten now -- it's  
 21 getting -- if there are four canals, that's \$40, so you're  
 22 spending almost \$110 on instruments costs. I mean, no wonder a  
 23 root canal's going to cost so expensive.  
 24 So to cut it down below -- to get it maybe to \$30 or  
 25 \$40 or \$50 at the most, I think that's saving a lot of money

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. (By Mr. Bisceglie) Who's been financing  
 2 Guidance to date?  
 3 A. I have.  
 4 Q. And how much money have you put into the company?  
 5 A. Approximately \$7 million.  
 6 Q. And where does that money come from?  
 7 A. It comes from -- you know, from my practice, and it comes  
 8 from my family, too, because it's not really my money. It ends  
 9 up the kids' money.  
 10 Q. Now, how important is it -- advertising going to be in  
 11 terms of your plans to grow the company?  
 12 A. Advertising -- If we were able to advertise the way we  
 13 need to, getting it out there, letting people know that we're  
 14 selling it for much less price, it's very easy for this product  
 15 to take off.  
 16 MR. GULLEY: Your Honor --  
 17 Q. (By Mr. Bisceglie) Why --  
 18 MR. GULLEY: I'm going to object again, Your Honor.  
 19 I'm sorry to have to do this. But Dr. Goodie has been shown to  
 20 have no expertise in advertising and bringing in customers,  
 21 particularly when the file he's selling now is nothing like the  
 22 V-Taper file. He's just speculating and offering inadmissible  
 23 opinion testimony.  
 24 THE COURT: Well, I think his advertising to his  
 25 company is something he probably has some knowledge of.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Guidance is a small company. It has just several  
2 employees. It's revenues are in the neighborhood of \$1 million  
3 to \$2 million, and it's a local company, it's located,  
4 headquartered here in Albuquerque, New Mexico.  
5 Q. You said you represented Guidance in a couple lawsuits.  
6 When was the first lawsuit initiated?  
7 A. The first lawsuit was initiated when Dentsply filed a  
8 Complaint in June of 2007.  
9 Q. And where was that Complaint filed?  
10 A. The Complaint was filed with the International Trade  
11 Commission.  
12 Q. And where is that?  
13 A. The case was filed in Washington, D.C.  
14 Q. Okay. And can you tell us what the International Trade  
15 Commission is?  
16 A. Sure. The International Trade Commission -- shorthand,  
17 it's known as the ITC -- is an independent federal agency, and  
18 one of its responsibilities is to investigate claims concerning  
19 whether the importation of certain products would infringe any  
20 U.S. patents, trademarks, or copyrights.  
21 Q. How does one initiate a case there?  
22 A. They file a Complaint with the ITC.  
23 Q. Does one need to do anything else?  
24 A. No. All they need to do is file a Complaint.  
25 Q. Okay. So in that case, what was that case about?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 A. The case concerned Dentsply's allegations of infringement  
2 that Guidance as well as its, at the time, manufacturer of its  
3 dental files were infringing two Dentsply patents that it  
4 purportedly owned. The company who was manufacturing the files  
5 at the time was a company that was mentioned during  
6 Mr. Gulley's opening. The company name is Micro-Mega. It's  
7 located in France. So Dentsply was seeking to prevent the  
8 importation of products by Micro-Mega to Guidance Endodontics  
9 in the United States.  
10 Q. And you mentioned that they were asserting patents. What  
11 patents were they claiming?  
12 A. There were two patents that were being asserted in that  
13 case. I'll refer to them just by the last three numbers of  
14 patents that I recall. There was a 674 patent, which listed  
15 two inventors by the name -- the last name is Derek Heath, who  
16 Mr. Gulley mentioned in opening; the other name on that patent  
17 was Mooneyhan, I believe was the name; and the other asserted  
18 patent was a 695 patent --  
19 MR. GULLEY: Your Honor.  
20 THE COURT: Hold it.  
21 MR. GULLEY: May we approach?  
22 (Bench conference on the record.)  
23 MR. GULLEY: He's trying to go into the Wong patent,  
24 and that was the subject of one of our motions in limine, and  
25 I'm not sure the Court ever ruled on whether they could go into

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 the Wong patent and their allegation that it supposedly was  
2 acquired to crush Guidance.  
3 THE COURT: No, I think on this issue I'm going to  
4 allow him to testify on this. I'm not sure how much scope  
5 we're going to get into on the Wong patent, because I've got to  
6 keep this thing somewhat controlled. I'll let him --  
7 Are you going to go much further into --  
8 MR. BISCEGLIE: Not too deep. Just to respond to  
9 Mr. Gulley's statement in the opening that there was  
10 considerable risk that we'd lose this patent case, so I want to  
11 cover just that that's a false statement.  
12 THE COURT: Well, I'll allow a little bit at the  
13 present time. I'm not sure how much we're going to go into it  
14 in this case, so you can make objections as we go along, but I  
15 think I'm going to allow it to set the background for it.  
16 MR. BISCEGLIE: Thank you.  
17 MR. GULLEY: Okay.  
18 (Open court.)  
19 THE COURT: Mr. Bisceglie.  
20 Q. (By Mr. Bisceglie) Mr. Ginsberg, you can  
21 complete your answer if you can remember.  
22 A. I believe you were asking me about the two patents that  
23 were being asserted by Dentsply.  
24 Q. Correct.  
25 A. Just for the record, I like being on the other side of

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 this. I know how all witnesses feel sitting here.  
2 In any event, the two patents being asserted were the  
3 Heath and Mooneyhan patent; and the 695 patent listed  
4 Montgomery and Wong as inventors.  
5 Q. Can you just tell the ladies and gentlemen of the jury  
6 what those numbers signify, briefly?  
7 A. Sure. Patent numbers, when they're granted by the United  
8 States patent and trademark office, are given a number, and  
9 right now we're up to around seven-million-and-something, so  
10 patents -- patent attorneys will typically just use shorthand  
11 and use the last three numbers to identify patents. Instead of  
12 say 7,130,047, it's just an easier way to refer to patents that  
13 way.  
14 Q. What was the outcome of that first lawsuit?  
15 A. Dentsply terminated -- Dentsply and Tulsa Dental  
16 terminated that action in or around February of 2008.  
17 Q. Did you have any warning prior to Dentsply dismissing that  
18 lawsuit?  
19 A. No. To the contrary. At the time that I learned that  
20 Dentsply was seeking to withdraw the lawsuit, I had flown to  
21 Houston, Texas, to take the deposition of one of the inventors  
22 of the 695 patent, John Montgomery, and I had flown to Texas  
23 the day before and I was all set to take his deposition, to  
24 question him on the variety of topics that I had, and I was  
25 informed right before the deposition started, after I had

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

J. Gainsberg

1 already flown to Houston, Texas, that Dentsply/Tulsa Dental  
2 were withdrawing that action. So we did not proceed with that  
3 deposition, and I flew back home.  
4 Q. At the time that Dentsply dismissed the suit, how far away  
5 were you from trial?  
6 A. The case was very far along. We were approximately two  
7 months away from trial.  
8 Q. Okay. And just giving us a general overview, during the  
9 time the case was pending, you know, what happened? What did  
10 you do in the litigation?  
11 A. Well, there was an extensive amount of work that was done,  
12 because we were very close to trial, so thousands of pages of  
13 documents were produced by both sides, documents were reviewed,  
14 we went through those documents, there were numerous  
15 depositions that took place throughout the United States, and  
16 there were also depositions that were taken in Europe, because  
17 Dentsply has an affiliate over there that manufactures its  
18 variable-taper file that Mr. Gulley mentioned in the opening,  
19 and some individuals that were there had some relevant  
20 information about some prior art, prior patents that we  
21 believed supported our defense that the patents that were being  
22 asserted were invalid, so depositions were taken in Europe and  
23 across the United States and we were gearing up for trial.  
24 Q. And how easy or difficult are patent-infringement suits to  
25 defend?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

Van der Geest

1 better in that the loss was about half. Is that correct?  
 2 A. That's right. The loss decreased by \$400,000.  
 3 Q. And if we go back a page, to where we were a few minutes  
 4 ago, it's also the case that the income of the company doubled?  
 5 A. That's correct. We were looking -- I mentioned earlier,  
 6 '05 sales were right at \$491,000. At the end of '06, December  
 7 '06, they had increased all the way -- not quite to a  
 8 million-one, so more than doubling of revenues within a year  
 9 time period.  
 10 Q. Was 2006 the year that Guidance entered into a  
 11 distribution agreement with Patterson Dental?  
 12 A. I believe that's correct. They -- Prior to that  
 13 arrangement, they would sell direct to third-party buyers. In  
 14 an effort to expand the breadth of their market, they entered  
 15 into a distribution arrangement with Patterson Dental, one of  
 16 the largest distributing dental products company here in the  
 17 United States.  
 18 Q. If we move into the agreement further, we go to 2007 -- So  
 19 let's move to page 016. We're still in the same exhibit, 016,  
 20 of Exhibit 89B, and now we're comparing 2006 revenue to 2007.  
 21 Now, am I correct that sales increased in 2007?  
 22 A. That's correct. As I just stated, we finished the year  
 23 2006 not quite at a million-one in sales, and we finished 2007  
 24 right at \$1.7 million in sales. That's over a \$600,000  
 25 increase, roughly 60 percent increase from '06 to '07.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. And let's turn to the next page. And the expenses for  
 2 2007 -- Well, I had -- I mean this rhetorically, but there is a  
 3 bit of a surprise, isn't there, on expenses for 2007?  
 4 A. The total operating expenses for 2007 were pretty  
 5 astronomical. We're looking at just a shade under  
 6 \$2.3 million, which has changed from a comparable number in  
 7 '06, from right at \$650,000.  
 8 Q. And of that \$2,200,000, about 85 percent of that amount is  
 9 attributable -- well, no, excuse me -- about 50, a little less  
 10 than 50 percent of that amount is attributable to what?  
 11 A. There's a line item called "Legal Expenses," and it's a  
 12 \$1,049,000, so it's not quite 50 percent of that \$2.3 million  
 13 number we were referring to.  
 14 Q. And what is your understanding of the matter or matters in  
 15 connection with which that \$1,049,000 in legal fees was  
 16 incurred?  
 17 A. 2007 was the year that Guidance had to respond and defend  
 18 two claims, litigation issues that were brought against the  
 19 company by Denteply. The first action occurring in a European  
 20 legal body, trade commission, and then upon the conclusion  
 21 or -- conclusion of those -- of that litigation issue moved to  
 22 the United States in, I think, federal district court in  
 23 Pennsylvania relative to alleged patent infringement.  
 24 Q. Mr. Van Der Geest, if we wanted to see as of the end of  
 25 2007 the investment that Dr. Goodis had made to date, what page

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 would we look at to date?  
 2 A. At the end of 2007, you heard me describe a balance sheet  
 3 earlier. On that balance sheet --  
 4 Q. Before you answer the question, point us to a page number  
 5 so I can put it in front of the jury.  
 6 A. Down to the right, 24 -- 02425, which would be the second  
 7 page of the balance sheet for December of '07.  
 8 Q. All right. One moment. Well, '05 is the first page.  
 9 What's the actual last three digits of the page you're looking  
 10 at?  
 11 A. 015.  
 12 Q. 015. Thank you very much. All right. And this, we're  
 13 still in Exhibit 89B.  
 14 So this is a statement of liabilities and capital; is  
 15 that correct, assets, liabilities and capital?  
 16 A. That's correct. This document would cumulatively reflect  
 17 what -- what cash advances Dr. Goodis had made into Guidance in  
 18 the form of loans or advances and initial capital pursuant to  
 19 the arrangement with the three owners. So at any one point in  
 20 time this balance sheet would reflect those cumulative dollars.  
 21 If you look under the caption called "Long-term  
 22 Liabilities" in the 2007 column, you'll see a number  
 23 \$3.2 million. That's the cumulative advances that Dr. Goodis  
 24 has made to Guidance in the form of cash. If you go down a  
 25 couple more lines, under the line "Capital," there you see a

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 designation "Members Capital Charles C. Goodis, and there's a  
 2 number there \$270,000. That is additional cash that Dr. Goodis  
 3 has invested into Guidance.  
 4 So the combination of those two numbers, the 3.2 and  
 5 the \$270,000, you know, right at \$3.5 million, is what through  
 6 December of '07 Dr. Goodis has put into the company.  
 7 Q. And was 2008 also -- Did 2008 also involve litigation?  
 8 A. Yes. 2008, you had legal expenses which were tied to the  
 9 conclusion of that patent infringement case that was brought in  
 10 Pennsylvania. That action led to the signing of that  
 11 Manufacturing and Supply Agreement. So up until that time  
 12 there were expenditures or expenses tied to that action, so  
 13 those -- those costs would be reflected in the income statement  
 14 for the December '08 year-end time period.  
 15 Q. I'm looking in this exhibit and realizing I don't think we  
 16 have the '08 numbers here. Is that correct?  
 17 A. You don't have the full calendar year 2008 within this  
 18 document.  
 19 Q. Well, I take it back. If we look at the last --  
 20 A. Ah, yes we do.  
 21 Q. Look at the last two pages.  
 22 A. The last two pages. We sure do.  
 23 Q. All right.  
 24 A. So we had legal expenses associated with the culmination  
 25 of that action, the settling of the patent infringement issue

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283



1 and the signing of the Manufacturing and Supply Agreement, so  
 2 we had, you know, legal costs associated with that. That  
 3 spanned all the way, probably, to July time period of '08. And  
 4 then following that action, later 2008, we had the -- which was  
 5 the forerunner to this issue, the --  
 6 Q. Mr. Van Der Geest, are you referring to this current  
 7 litigation?  
 8 A. The current litigation, right. There was a --  
 9 Q. Mr. Van Der Geest, are you referring to this current  
 10 lawsuit?  
 11 A. This current lawsuit.  
 12 Q. And the commencement of this lawsuit?  
 13 A. And the commencement of this lawsuit.  
 14 Q. And the fees incurred in commencement with this lawsuit?  
 15 A. The fees incurred in commencement with this suit.  
 16 Q. And those fees are included in this number here, the  
 17 legal?  
 18 A. Yes. If we look at the income statement again on the  
 19 second page, there's that legal line item. That line item  
 20 reflects a total of \$701,000 for both of those issues we just  
 21 discussed.  
 22 Q. Is it accurate that -- to say that but for those legal  
 23 expenses -- if you look down at the bottom, operating income  
 24 and loss -- that Guidance would have at least been approaching  
 25 break even, although they would not have broke even?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. That's correct. The bottom line there shows that Guidance  
 2 for 2008, December 2008, calendar 2008, lost \$830,000. If you  
 3 were to assume the legal expenses would never have been  
 4 incurred and pull that out of the equation, the expenses would  
 5 have been reduced and, thus, the loss would have been reduced  
 6 by the same amount.  
 7 So doing that math -- \$830,000 loss, less \$760,000 --  
 8 the loss would have only been \$130,000. And you can compare  
 9 that to our discussion earlier, questions earlier about the  
 10 losses in the two previous years and you can see the loss was  
 11 substantially decreased.  
 12 Q. In the contract, the Manufacturing and Supply Agreement --  
 13 and I mentioned this, for your information, briefly in the  
 14 opening this morning, so the jury knows the general concept. I  
 15 mentioned that there is a manufacturing credit provided for in  
 16 the contract, in the Manufacturing and Supply Agreement. Are  
 17 you familiar with that?  
 18 A. I'm familiar with that clause.  
 19 Q. And that's addressed down here at the bottom, is that  
 20 correct?  
 21 A. That's correct. You'll see right above the Net Income  
 22 Loss description there, a couple lines up, the terminology  
 23 "Realized Manufacturing Credit." And that's the accounting  
 24 that is placed upon the clause in that agreement that affords  
 25 Guidance the right to purchase product at a reduced, free

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 price.  
 2 Q. So this is a price beyond the list price in the agreement,  
 3 there's a further reduction?  
 4 A. There's a further reduction. There would be a stated  
 5 price for product, and then once Guidance would order based on  
 6 those prices, the amount paid would be reduced by this clause.  
 7 For the first two quarters in 2008, the agreement afforded a  
 8 \$100,000 per-quarter credit regardless of the dollar purchased.  
 9 So if I bought -- if I ordered and bought \$200,000 of product  
 10 in one quarter, I would ultimately only have to pay \$100,000  
 11 because of this credit. That terminology happened for the  
 12 first two quarters of -- or the last two quarters of '08.  
 13 And then upon those two quarters concluding, the  
 14 clause reads that for every \$2 of product that Guidance would  
 15 purchase they would receive a credit of \$1; so you buy \$2 and  
 16 you pay for \$1. And that credit arrangement was limited to  
 17 approximately -- I believe \$125,000 per quarter going forward.  
 18 So if they bought more product than that, the most credit they  
 19 could get in a quarter is \$125,000.  
 20 Q. Thank you, Mr. Van Der Geest.  
 21 Moving into -- Well, let me ask you this question.  
 22 If the -- If the -- If the \$700,000 that was spent on legal  
 23 fees in 2008 had been available for use in moving the business  
 24 plan of the company forward -- I don't think you're going to  
 25 need your exhibit for this -- what would -- what was the --

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 what would the company have done with those resources?  
 2 A. In 2008, with the -- with the signing of the new  
 3 agreement, the company had plans to implement an  
 4 Internet-type-based marketing plan. The idea of the plan  
 5 would -- or the general idea of the plan was to be able to send  
 6 e-mails describing their product to subscribers of an  
 7 Internet-based Web site dealing with dental or endodontic  
 8 content and afford or purchase marketing e-mail activities from  
 9 these companies in an effort to reach potential buyers. They  
 10 had also planned to purchase e-mail addresses themselves from  
 11 the vast population of general dentists in the country as well  
 12 as the smaller population of endodontists.  
 13 In addition to those e-mail activities, they were  
 14 contemplating advertising on the same dental content Web sites  
 15 where, if a user of the Web site frequented and the topic was  
 16 in the area of endodontics, that this advertising would show --  
 17 you know, would pop up and say, you know, "Guidance  
 18 Endodontics," and there would be a link over to the endodontic  
 19 Web site reflecting the offer of the products that Guidance had  
 20 to sell.  
 21 They also anticipated advertising in these  
 22 Internet-based newsletters that were available from these Web  
 23 sites. Again, reaching a large subscription base that was tied  
 24 to these Web sites.  
 25 In addition to those Internet-based marketing

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. And that's because Guidance was not prospering. I'll put  
2 it that way. Correct?

3 A. Oh, no, not at all. That's not --

4 Q. Guidance, in 2005/2006, 2007, 2008, wouldn't have made a  
5 profit even without legal fees. You'll agree to that, won't  
6 you?

7 A. That's correct.

8 Q. Now, you mentioned that -- Well, did you -- You may have  
9 testified that you also do Dr. Goodis's personal income tax  
10 return.

11 A. We -- My firm and I do prepare his personal income tax.

12 Q. And the K1 for his endodontic practice, too, the  
13 partnership distribution?

14 A. We prepare the annual tax return for his practice  
15 business.

16 Q. And that business generates \$3 million or \$4 million a  
17 year, is that correct?

18 MR. KELLY: Objection, relevance.

19 THE COURT: Overruled.

20 A. He does not generate -- Sales or profits?

21 Q. (By Mr. Gulley) Well, I'm talking about gross  
22 sales for now.

23 A. The practice, in 2008 -- and I'm speaking from  
24 recollection -- may have grossed \$2.8 million, \$3 million.

25 Q. And in 2006 and 2007, Dr. Goodis took \$1.2 million, \$1.3

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 million as his share of the profits of that business; is that  
2 correct?

3 A. I don't know the exact number, but it was probably in the  
4 million-dollar range.

5 Q. Okay. And are you acquainted with Dr. Goodis's  
6 advertising that says part of the profits of his company, the  
7 Guidance Endodontics, goes to help abused women, children, and  
8 animals?

9 A. Speak to that again. I don't understand that question.

10 Q. Are you acquainted with some of his advertising that says  
11 part of his profits go to help abused women, children, and  
12 animals?

13 A. I'm not aware of that statement.

14 Q. He hardly gives anything to charity, does he?

15 A. Oh, that's not true.

16 Q. I have his 2007 partnership K1. It shows \$11,000 to  
17 charity out of over \$3 million in revenue.

18 A. That's his business. The contribution deductions are  
19 taken on his personal return.

20 Q. You were talking about in his -- Well, we can look -- We  
21 can look at his personal return, as well, but let's go to a  
22 different topic for a minute.

23 How much does he charge for a root canal?

24 A. Depending on which tooth. \$800 to a thousand.

25 Q. And how long does it take him to do a root canal?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 A. You'll have to ask Dr. Goodis that.

2 Q. If he did 3,500 in a year, that would be  
3 three-and-a-half-million dollars?

4 A. If you're using 3,500 times a thousand, your math is  
5 right.

6 Q. Are you acquainted with what other endodontists charge in  
7 Albuquerque?

8 A. No, I'm not.

9 Q. Has Dr. Goodis -- has he begun paying Rittenberry and  
10 Williams on the buyout agreement yet?

11 A. I believe that was to commence in September of '09.

12 Q. This month?

13 A. This month.

14 Q. And has he made any payments to them?

15 A. I believe so.

16 Q. Now, you said you weren't a marketing expert, but, yet,  
17 you testified about how Dr. Goodis was going to get repeat  
18 sales by his advertising. Were you just speculating there?

19 A. I don't recall the testimony. If you could refresh my  
20 memory.

21 Q. Well, I think you said he was trying to develop loyal,  
22 repeat buyers. Do you remember that?

23 A. That's right. That would be an objective -- long-term  
24 objective, is to increase sales, increase customer base, repeat  
25 sales from that customer base.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Q. Are you an expert in determining what percent of repeat  
2 buyers he should be seeing?

3 A. I didn't make any comment about percentages. I just made  
4 the statement that the objective was to increase the customer  
5 base and get repeat sales.

6 Q. So if we looked at his Guidance's sales and we measured  
7 the number of repeat buyers, I take it you would say the more  
8 the better that repeat?

9 A. Rephrase the question.

10 Q. If we look at all of Guidance's sales records, I take it  
11 you would agree that the more repeat buyers he has the more  
12 successful he's being, correct?

13 A. That's a true statement.

14 Q. And what -- Do you have any idea what kind of repeat  
15 purchases would be expected in a business like Guidance's?

16 A. That's not my expertise.

17 Q. You suggested that -- I believe you implied, at least,  
18 that Dentsply is the big bad guy for suing Guidance. Is that  
19 correct?

20 A. I didn't make any such statement.

21 Q. Well, you would agree with me that Dentsply's entitled to  
22 enforce its patents?

23 A. I would think that's a true statement.

24 Q. All right. And if the patents are valid and the defendant  
25 in the patent suit says they're valid, then that should be an

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

GUIDANCE ENDODONTICS, LLC,

Plaintiff,

vs.

No. 2008-CV-1101 JB/RLP

DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,

Defendants.

Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Tuesday, September 22, 2009, at 8:31 a.m., and concluding at  
5:33 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

1 it a second time. Now, the fact it's resterilized, it's still  
 2 a sterilized file, but there is a significant portion that will  
 3 use it twice.  
 4 Q. Okay. Why do the manufacturers -- And why is it best  
 5 practice to use a file once and discard it?  
 6 A. While you're doing the root canal, there's a lot of strain  
 7 that you're putting and stressing on the file, so it's going to  
 8 become weaker at some points. That can make it a less  
 9 efficient file.  
 10 Q. Okay. But then you said there's some -- there's a number  
 11 of dentists that don't, in fact, adhere to this use it once and  
 12 discard policy. Why is that?  
 13 A. There may even be 50 percent. And the reason why, is  
 14 because the files are so expensive, the cost is so great, that  
 15 to try -- when you're only using a single-use, it really drives  
 16 up costs. That's why a lot of dentists will say it's great  
 17 that our files are half the cost, so even the ones that were --  
 18 that were using their files multiple times go, "Okay, good.  
 19 Now I don't have to use files multiple times because." Ours  
 20 are so less expensive.  
 21 Q. Moving on to a different topic.  
 22 On obturators, how important are obturators to your  
 23 business?  
 24 A. The obturators I saw as being -- probably would develop  
 25 into the largest growth for our -- for our company. I saw that

391

1 I went back and looked at the motion in limine on this, and  
 2 what I think I said I was inclined to do I think is still  
 3 correct, and then everybody will kind of have to conform to it.  
 4 I mean, I'm not really sure this question implicates that, but  
 5 because there was really no evidence -- no sort of disclosure  
 6 in the -- in the initial disclosures or in the first  
 7 interrogatory, I think the damages are going to be -- described  
 8 in Mr. McDonald's first report is going to be the extent of it.  
 9 I think that other people can establish damages, so I don't  
 10 think that it has to all come through McDonald, so it may come  
 11 through him and other people, but the categories, the  
 12 calculations, those sorts of things, you're going to be stuck  
 13 with that since you didn't do any other disclosures of damages,  
 14 but other people can prove it, so I can't sit here and say  
 15 other people can't prove these damages.  
 16 MR. GULLEY: Prove what damages?  
 17 THE COURT: Well, whatever damages are in the  
 18 McDonald report. That's the only disclosure of damages. But  
 19 they're not limited to McDonald proving the damages. That's  
 20 just the disclosure aspect.  
 21 MR. GULLEY: Oh, I see.  
 22 THE COURT: So if he's proving up damages that were  
 23 disclosed in the damages report, he can do that, so if evidence  
 24 is going to go to damages they've got, the damages have to be  
 25 disclosed in the McDonald report. But some of this information

1 with having half the cost, we could get 50 percent of the  
 2 market share.  
 3 Q. And how big is the obturation market?  
 4 A. It's about \$40 million per year.  
 5 Q. And who controls that market?  
 6 A. From what I understand, 95 percent of the \$40 million per  
 7 year -- it may even be larger than \$40 million -- it's a  
 8 monopoly -- it's by Tulsa/Dental Dentsply.  
 9 MR. GULLEY: Your Honor, excuse me. May we approach  
 10 the bench?  
 11 THE COURT: You may.  
 12 (Bench conference on the record.)  
 13 MR. GULLEY: Your Honor, this line of questioning  
 14 about obturators relates to the issue of what damages they're  
 15 allowed to submit. The V2 damages only has to do with the  
 16 inability to sell the V2 file, and I think maybe if plaintiffs'  
 17 counsel's going to try to make a case that he could have sold  
 18 more obturators if he had more products or been able to  
 19 advertise them or so on, and that's all irrelevant, really, to  
 20 the case.  
 21 THE COURT: Mr. Bisceglie?  
 22 MR. BISCEGLIE: He has an expectation under the  
 23 agreement. We're entitled to discuss what his expectation was  
 24 in terms of what he was getting when he signed the agreement.  
 25 THE COURT: Well, on these -- on this damages issue,

392

1 is useful for other purposes, and so I'm inclined to admit it,  
 2 so unless there's something that indicates that this is really  
 3 being proved for some other purpose -- One of the examples --  
 4 and I guess we need to still sort through this evidence of  
 5 Guidance's attorney's fees in the prior litigation. I don't  
 6 see y'all seeking that in this case.  
 7 MR. BISCEGLIE: No.  
 8 THE COURT: But it may be relevant for other  
 9 purposes, and that's what I'm -- You know, yesterday, both  
 10 sides went into great detail about the attorney's fees. I'm  
 11 not sure what to do with that, since both of you seem to want  
 12 to establish that -- defendants wanted to establish that they  
 13 hadn't ever made a profit, which I understand why you want to  
 14 do that. Y'all want to establish that one of the reasons we  
 15 didn't make a profit is because we've got attorney's fees. So  
 16 that's relevant to everybody's case, so I'm not sure I can just  
 17 exclude some of this information.  
 18 But I guess I'm still inclined to think that Guidance  
 19 didn't properly disclose anything beyond what's in McDonald's  
 20 report, in the initial disclosure answers to interrogatories or  
 21 some sort of proper supplement to either the disclosure or the  
 22 answers to McDonald's report, so we're kind of limited to the  
 23 McDonald report as to what damages the plaintiff can seek, but  
 24 they don't have to prove it up just through McDonald; they can  
 25 prove it up through other people.

1 MR. GULLEY: I understand.  
 2 MR. KELLY: Your Honor, of course, the question of  
 3 the obturator goes to why he entered into the contract and why  
 4 this was an agreement he was willing to sign, and the fact --  
 5 we're going to get to the fact that the obturator was not  
 6 supplied and all of those issues, so we can't -- we certainly  
 7 can't not talk about the obturator or talk about the importance  
 8 of the obturator. It's -- In addition to it being a product  
 9 that he would make money from, it's very important to establish  
 10 breach and the Unfair Practices Act claim.  
 11 THE COURT: I guess I'd be inclined to think that's  
 12 true, that's part of the supply agreement.  
 13 MR. GULLEY: I don't object to discussion of the  
 14 obturators, Your Honor. The point I'm trying to make is that  
 15 the McDonald report damages is only on the inability to sell  
 16 the V2. Nothing in the McDonald report about inability to sell  
 17 obturators.  
 18 THE COURT: Well, but there's more reasons to talk  
 19 about the obturators than just damages.  
 20 MR. GULLEY: Well, I understand. I just didn't want  
 21 them to be putting on a long case about what money he could  
 22 have made from obturators, because that's not relevant to the  
 23 damages issue.  
 24 MR. KELLY: It is relevant to other issues.  
 25 THE COURT: Let's just take them one at a time. I

1 don't think I can probably give you any more guidance than what  
 2 I've done, so you'll have to take them one at a time.  
 3 (Open court.)  
 4 THE COURT: All right, Mr. Bisceglie.  
 5 MR. BISCEGLIE: Thank you. Your Honor, should I have  
 6 the court reporter read the pending question or would you like  
 7 for me to rephrase it?  
 8 THE COURT: It's up to you. The question that was --  
 9 that was asked -- I'm not sure you had a pending question. You  
 10 asked "who controls that market?" and you got an answer.  
 11 MR. BISCEGLIE: Okay. Great. Thank you.  
 12 Q. (By Mr. Bisceglie) That answer was, defendants  
 13 control 95 percent of it; is that right?  
 14 A. That I'm aware of, yes.  
 15 Q. Okay. Now, what does Guidance sell its obturator for?  
 16 A. \$4.  
 17 Q. And then you saw Mr. Gulley's opening and he put up their  
 18 obturators. Do you recall that?  
 19 A. Yes.  
 20 Q. He put up a Thermafil and a Densfil?  
 21 A. Yes.  
 22 Q. And did you hear him say that they're exactly the same in  
 23 terms of manufacturing and function?  
 24 A. Yes.  
 25 Q. Okay. What do defendants sell their two obturators for?

1 A. The Thermafil can be anywhere around \$8.50, \$8 to \$8.50  
 2 and Densfil, I know, is sold through distribution, and I think  
 3 that's sold even higher. Maybe \$9.  
 4 Q. So is it your understanding that OneFill is half the price  
 5 or even more?  
 6 A. It's even less than half of what their products are, and  
 7 being identical.  
 8 Q. So in terms of when you were entering this agreement and  
 9 you were getting the price you were getting, what was your  
 10 expectation in terms of the market share you'd pick up?  
 11 A. The fact that we were going to be able to sell for half  
 12 the cost, I expected we would pick up 50 percent of the market.  
 13 If you get the same house for half the price, you're going to  
 14 buy.  
 15 Q. So what is that in terms of annual sales, or what your  
 16 expectation?  
 17 A. My expectation's if the market's \$40 million per year,  
 18 that we would get \$20 million of that, but because we're  
 19 selling for half the price that would be -- in Tulsa Dental  
 20 dollars would be the \$20 million at their \$8 to \$9, but because  
 21 we're selling for \$4, that \$20 million would be \$10 million.  
 22 So I expected annual sales over the term of the seven-year  
 23 contract to be \$10 million per year, so \$70 million over the  
 24 term of the contract.  
 25 Q. And that was your expectation when you signed the

1 agreement?  
 2 A. Yes.  
 3 Q. Okay. On what basis would you believe that dentists and  
 4 endodontists would buy the OneFill at half the price?  
 5 A. I think dentists are historically very -- I won't say  
 6 cheap, but frugal, they like to save money, like everybody  
 7 does, and, as I mentioned before, if you need to use four  
 8 obturators for a canal, there's four canals and you need to  
 9 fill them at let's say \$9, that's getting close to \$40 to fill  
 10 that case, whereas if you use our product it's -- it's \$16.  
 11 That's pretty inexpensive.  
 12 Q. Now, did you have any discussions with dentists about  
 13 price, in terms of your decision on how to set price?  
 14 A. What I discussed with dentists about their thoughts about  
 15 the -- a thermal filling obturator and -- you know, Thermafil,  
 16 Densfil -- everybody said they really liked the product.  
 17 MR. GULLEY: Your Honor --  
 18 THE COURT: Hold on. Hold on.  
 19 MR. GULLEY: Object to this. It's hearsay.  
 20 THE COURT: Well, if it's being offered for the  
 21 truth, it sounds like it is. Sustained.  
 22 MR. BISCEGLIE: I was not offering it for the truth,  
 23 Your Honor. It was simply being offered to show state of mind  
 24 at the time he entered the agreement and set his prices.  
 25 THE COURT: Well, then I can give a limiting

A. L. Kelly

1 Q. You see the -- Do you have the exhibit still with you, or  
2 no?

3 A. No, I do not.

4 Q. The so-called contingent purchase price when gross sales  
5 reach \$5 million in four quarters -- do you recall that?

6 A. I do, yes.

7 Q. Are you holding your breath waiting for that check?

8 A. It's one of those things that you're just better off not  
9 counting on, and if it happens, that's great, but if you count  
10 on it, it's probably not going to happen.

11 Q. Does that seem like a prudent philosophy to you under the  
12 circumstances?

13 A. Yes, it does.

14 Q. Jake, Nick, Bo and Alexis were employees of Guidance  
15 Endodontics?

16 A. Yes, that's correct.

17 Q. And they worked with sales reps at Patterson Dental, is  
18 that right?

19 A. Right. They were regional sales managers. They had a  
20 region of Patterson Dental branches that they -- their job was  
21 to train the Patterson reps on how to sell the product.

22 Q. And by -- So, then, in effect, they were sales reps to  
23 distributor sales reps?

24 A. Yes.

25 Q. And by January of '08 if there was going to be an ]

1 agreement with -- between Guidance and Tulsa Dental at that  
2 time -- at that point in time, do you recall whether Tulsa  
3 Dental was going to permit the use of distribution?

4 A. They were not. We would have had to have -- We would have  
5 had to take the company direct again.

6 Q. So there would have been no need to have individuals  
7 selling -- educating sales reps of Patterson Dental?

8 A. That need was removed.

9 Q. And, in any event, could Guidance afford to keep these  
10 sales reps on at this point in time?

11 A. At that point in time, no. I mean, there was too many  
12 legal bills. Not knowing when the next product was going to be  
13 available, there was -- as Chuck stated in his e-mail, there  
14 was just no way to afford them.

15 Q. And that's -- That's not something you disagreed with?

16 A. No, I did not disagree with it. It was pretty hard. You  
17 couldn't argue with the math.

18 Q. And in exhibit -- Defendant's Exhibit F, counsel --  
19 counsel had you read a portion of this paragraph 3. Would you  
20 read the sentence that begins "Don't worry."

21 A. Mr. Kelly, it's a little cut off on my right, but --

22 Q. Let me do a little better.

23 A. Okay. Yeah, I can see it now. Thank you.

24 Q. Does that do it?

25 A. "Don't worry, I'm not cutting off anyone's pay and I will

1 give everyone plenty of time to find new jobs. I have not been  
2 getting paid from the start and will continue to not get a  
3 salary. We can have business meetings every two weeks to  
4 discuss the companies (sic) directions. Or if you do not want  
5 to be involved that is fine too. Once the company starts  
6 making money, we split it up according to ownership  
7 percentages. Let me know if you do not want to help in the  
8 transition, you will still get paid until you find a new job."

9 Q. In January of 2008, did you feel like you knew Dr. Goodis  
10 pretty well?

11 A. Yes, I did.

12 Q. And you talked to him regularly about the condition of the  
13 business and the challenges it faced?

14 A. Yes. Conversations were because he was seeing patients  
15 all day and we were trying to run the company all day, and  
16 Chuck's not a dentist that takes a lunch break -- or, I mean,  
17 once he's in the office -- he's there until the last patient  
18 leaves, so there were kind of little five-minute conversations  
19 in-between patients when he would get on the phone or -- In the  
20 beginning, when we were in his basement, is where his company  
21 started, in the basement of his dental practice, that's how we  
22 discussed the business strategy, was in five-minute increments  
23 between patients.

24 Q. And what was his -- What was his demeanor or concerns?  
25 How did he express how he felt -- or how did you understand him

1 to feel, based on how he communicated with you, about the  
2 situation that Tulsa Dental -- excuse me -- that Guidance was  
3 in at the time?

4 A. I'm sorry, Mr. Kelly, at which time?

5 Q. At the time --

6 THE COURT: Ms. Avitia.

7 Q. (By Mr. Kelly) -- of this communication?

8 THE COURT: Hold on.

9 MS. AVITIA: I would object that it's outside the  
10 scope of my cross.

11 THE COURT: I think it's related. Overruled.

12 Q. (By Mr. Kelly) I'm talking about this e-mail  
13 that we were just talking about.

14 A. Okay.

15 Q. I'm sorry to be changing gears on you.

16 A. That's okay.

17 Q. We're talking about this communication --

18 A. Right.

19 Q. -- that he wrote at 4:00 a.m., and I'm asking you, based  
20 on your relationship with him where he -- where his head was in  
21 terms of his concerns or thoughts about what was going to  
22 happen to this business?

23 A. His concern was that he could not go on paying the legal  
24 bills and trying to make the company work, he couldn't do all  
25 those things at the same time. It's -- Like he states, he's

1 Q. And you and he discussed the outlines of what would  
 2 eventually, a number of months later, in the summer of 2008,  
 3 become the definitive agreement that resolved the then-pending  
 4 patent litigation. And I'm referring to the contract the  
 5 parties entered into known as a Manufacturing and Supply  
 6 Agreement.

7 A. Initially, we discussed a lot of different alternatives  
 8 and options that we might consider, and, yes, eventually it led  
 9 to an outline and discussion of what became that agreement.

10 Q. Right. And one of the things that was very clear from the  
 11 beginnings of your negotiations was that if there was going to  
 12 be -- if there was to be an agreement Guidance would need to  
 13 give up using a distribution as a means of marketing their  
 14 product; is that correct?

15 A. I wouldn't say at the very beginning. At the very  
 16 beginning, we discussed and were -- discussed many alternatives  
 17 and several different alternatives, some of which included  
 18 going direct, some included different alternatives, and it --  
 19 it came down to that eventually, but not at the beginning, that  
 20 wasn't -- I wouldn't say that was at the beginning of the  
 21 discussions.

22 Q. You mean the subject didn't come up at the beginning?

23 A. It came up, yes, but I wouldn't say it was a -- I thought  
 24 you had asked was it a vital or important part of it, and my  
 25 thought was, we were discussing all kinds of alternatives.

1 Q. When it did come up, though, you made it clear that that  
 2 was not an option if there was going to be a settlement. Isn't  
 3 that correct?

4 A. I don't think I made it clear. I think I said that there  
 5 could be some problems, potential problems with that.

6 Q. And then you consulted with legal counsel and came back  
 7 and confirmed that there would be legal problems?

8 A. I didn't come back and say there were legal problems. I  
 9 came back and said, any agreement would need to be contingent  
 10 on going direct.

11 Q. Right. And part of the justification for that was the  
 12 fact that the existing settlement agreements that you had with  
 13 other competitors from prior litigation, from the perspective  
 14 of your company, at least, precluded the use of distribution?

15 A. It was one of the factors considered in that. It was also  
 16 not -- It was in all of our agreements, not necessarily just  
 17 those dealing with litigation, but any license agreements that  
 18 we had with nickel-titanium, but it was only one of the factors  
 19 considered.

20 Q. And why did you not allow any company with a license from  
 21 Tulsa Dental to use distribution in the United States?

22 A. Nickel-titanium, and particularly when you get into rotary  
 23 nickel-titanium, it was a completely different way of doing  
 24 root canal therapy. I'm not a -- I'm not a technical -- I'm  
 25 not a dentist, but root canal therapy is basically drill it and

1 fill it; you know, you clean out the stuff and then you fill it  
 2 up, the canal, each root canal.

3 Historically, it's been done with hand instruments.  
 4 When the idea of rotary came around as one of the -- I think it  
 5 was Tony mentioned -- Rotary was used with stainless steel. It  
 6 didn't work good. When nickel-titanium came around and rotary  
 7 came around, it wasn't a totally different way, it wasn't the  
 8 way they learned in dental school, and we felt that you cannot  
 9 just give a product, particularly that is new technology, new  
 10 techniques, new methods of using it -- you can't just give a  
 11 dentist that and sell it to them and say, "Here start using it  
 12 and you'll do a great job." It's very -- You have to train  
 13 them, you have to go through some training, and the dentist has  
 14 to go through a learning curve of how to use it. So we felt it  
 15 was very important to do that.

16 Over the history of our company and while I started  
 17 with Dentsply in 1996, I was involved with Ben Johnson all the  
 18 way back from 1988 when we were a little start-up company, had  
 19 one product, Thermafil, and we learned very easily -- early on  
 20 that, again, Thermafil was a different product, required  
 21 different techniques, and you just can't give that product and  
 22 say to dentists Learn to do a good. We learned you have to do  
 23 a tremendous amount of education. We put on hundreds and  
 24 hundreds of what we call CE, continuing education, events.  
 25 Thousands of dentists attend these events. And all that costs,

1 you know, lots of lots of money every year to do that.

2 What we felt is that any new person or new company  
 3 that we licensed to do that needed to go through that educating  
 4 the dentists to use it properly.

5 The worst thing that can happen is that a dentist out  
 6 there takes a product and misuses it, causes problems with the  
 7 patient; it hurts the whole -- the whole product category. In  
 8 other words, if we're selling products and educating, another  
 9 company is just going, "Here, use this product," and they start  
 10 making mistakes with it and have products with it, that hurts  
 11 the image of the entire product category, not just our product.  
 12 So we felt that it was important that anyone that we licensed  
 13 go through and do this education and training of the dentists  
 14 in the proper way to use the product.

15 Q. And you know who Patterson Dental is?

16 A. Patterson Dental?

17 Q. Yes, sir.

18 A. Yes, sir.

19 Q. You know who Schein -- Is it Henry Schein?

20 A. Yes, sir.

21 Q. Those are the two largest distributors in the United  
 22 States?

23 A. My understanding, they are.

24 Q. And they distribute a lot of high-tech products, do they  
 25 not?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. 2008-CV-1101  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.

Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Wednesday, September 23, 2009, at 8:30 a.m. and concluding at  
5:37 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283



1 Q. (By Mr. Bisceglie) They never sent you a  
2 red-line indicating that they made this change?

3 A. No.

4 Q. Okay. Now, you're a practicing endodontist, right?

5 A. Yes.

6 Q. Right. All the file systems, the prototypes that were  
7 sent there --

8 A. Yes.

9 Q. -- for example, how many files in those packages? How  
10 many individual files in each of those little packages?

11 A. There's six files per package.

12 Q. Okay. And so how many files -- And what is a full range  
13 of files?

14 A. Usually for this size it would be size 15 through 50; some  
15 file sizes even go up to 60.

16 Q. Was there any reason to have an .04 taper in only a 15, 20  
17 and 25?

18 A. No. It would be useless.

19 Q. Is this a change to the agreement that you wanted?

20 A. No, I didn't want this change.

21 Q. Does this change make any business sense from your  
22 experience as an endodontist?

23 A. No, because it would just cripple the file size line.  
24 Might as well not have it at all if I don't have these sizes.

25 Q. By the way, you see here. What did Mr. Vanderslice

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 A. Yes.

2 Q. That was the only product Guidance offered at the time?

3 A. That was the only significant product we offered.

4 Q. And what did you need to retain that?

5 A. We needed the .04 constant taper.

6 Q. And so as a result did you lose existing Guidance

7 customers?

8 A. A significant amount of existing customers.

9 Q. Okay.

10 A. We don't have a product for them anymore.

11 Q. Let's talk about new customers. What was Guidance

12 promised if it settled the lawsuit and entered into this

13 Manufacturing and Supply Agreement?

14 A. That we would get thermal filling obturators, which is

15 over a \$40-million-a-year market; that we would get the .06

16 taper, and we would get the .04 taper.

17 Q. So, how many product lines would Guidance be offering

18 under the Manufacturing and Supply Agreement?

19 A. Three product lines.

20 Q. And how much more is that than Guidance used to offer?

21 A. We only offered the one product line.

22 Q. Do you know -- From your experience, do you know what the

23 NiTi -- the size of the NiTi rotary market sales is in the

24 United States?

25 A. Approximately between, I believe, a hundred and

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 \$150 million per year.

2 Q. That's the size of the market?

3 A. Yes.

4 Q. What role does growth play, in terms of your management of

5 Guidance?

6 A. Getting new customers was going to be the primary way,

7 obviously, of growth. By us offering it for half the price, we

8 expected to easily be able to get 5 percent of the market.

9 Over seven years, if you look at the endodontic file market,

10 that's almost a billion dollars over seven years. I think it's

11 pretty --

12 Q. So when you say there's a billion dollars, there's a

13 billion dollars in terms of total rotary file sales in the

14 United States; is that right?

15 A. Over the next seven years.

16 Q. Over the next seven years. Why are you citing seven

17 years?

18 A. Because we had a contract with Dentsply/Tulsa Dental for

19 seven years that I know we were going to be able to keep our

20 prices significantly below everybody else's about 50 percent.

21 Q. Right. And then you testified before about the obturator

22 category. In the NiTi category, how much less expensive is

23 your .06 and your .04 than the Dentsply competing products?

24 A. With their retail prices, we can be up to 50 percent less.

25 After discounters, it might be 35 percent, but it's still a

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 significant reduction in price in the NiTi market.

2 Q. So was it your expectation that you'd get -- What is your

3 expectation that you would get as a result of the market being

4 the size that it is over the life of the contract?

5 A. With the market -- With the NiTi rotary sales being almost

6 a billion dollars over seven years, we thought, with our prices

7 being 35 to 50 percent less, we could easily get 5 percent of

8 the market.

9 Q. Now, when you estimate, by easily getting 5 percent of the

10 market, what is your basis for those projections?

11 A. When discussing with dentists and endodontists and we

12 talked about how high the cost is, then --

13 THE COURT: Mr. Gulley.

14 MR. GULLEY: Your Honor, until this witness is

15 qualified to express what are in the nature of expert opinions

16 about marketing matters, I think this testimony is

17 inadmissible.

18 THE COURT: Well, I'm going to allow this. These are

19 his estimates of how he was projecting growth, so I'm going to

20 allow it. Overruled.

21 Q. (By Mr. Bisceglie) You're an experienced

22 endodontist; is that right?

23 A. Correct.

24 Q. And you also run an endodontic company; is that right?

25 A. Yes.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Q. You speak to dentists a lot; is that right?

2 A. Yes.

3 Q. Daily?

4 A. Every day.

5 Q. You're very familiar with the endodontic market; is that

6 right?

7 A. Correct. Yes.

8 Q. Okay. So, in terms of your expectations of how your

9 company would perform with three product lines, rather than one

10 product line, do you feel qualified to estimate what your

11 expected growth would be?

12 A. Yes.

13 Q. Okay. So --

14 THE COURT: Mr. Gulley.

15 MR. GULLEY: Your Honor, based on your ruling on

16 damages, this is not relevant to any claim in the case.

17 THE COURT: Well --

18 MR. BISCEGLIE: I'm not aware of any ruling.

19 THE COURT: I'm not aware, either. Overruled.

20 Q. (By Mr. Bisceglie) Okay. So, I was asking you

21 to explain to the jury why you estimate

22 conservatively your company's been damaged, you know,

23 5 percent of the endodontic market.

24 THE COURT: Let me have counsel approach here.

25 (Bench conference on the record.)

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. 2008-CV-1101 JB/RLP  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.

Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Thursday, September 24, 2009, at 8:33 a.m. and concluding at  
5:20 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Johnson City -- will sell those products throughout the U.S.  
2 and Canada?

3 A. Correct.

4 Q. And there is a bookkeeping entry that has the effect of  
5 paying the Swiss firm, Maillefer, for its manufacturing and  
6 production of those files, so that it -- it gets -- Does it get  
7 credit for having made those files?

8 A. It's a little more complicated than that.

9 Q. I was afraid of that.

10 A. But essentially you're right. The requirements under U.S.  
11 GAAP is that you don't -- which is the U.S. accounting  
12 standards -- is that you can't recognition a sale of a product  
13 unless you actually sell it. So in this case, if Maillefer  
14 sells product to Tulsa, at that point it's not sold, it's just  
15 in their inventory. It's only when that product's ultimately  
16 sold to the end user that the revenue is recognized. But  
17 internally we do give Maillefer credit for those, although it's  
18 not part of the accounting of the company per se.

19 Q. But it probably has some internal implications unrelated  
20 to the accounting?

21 MS. AVITIA: Objection, Your Honor, relevance. So  
22 it's okay with background, but we've gone in pretty deep now.

23 THE COURT: I'll allow this to clean up this issue.  
24 Overruled.

25 A. I'm sorry, could you repeat the question?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

Final March

1 Is it your testimony that all of those products are  
 2 sold direct --  
 3 A. Correct.  
 4 Q. -- in the United States?  
 5 A. Correct.  
 6 Q. And with respect to the nickel-titanium files, then,  
 7 you've testified that those are sold direct in the U.S. and in  
 8 Australia?  
 9 A. And Canada.  
 10 Q. And Canada. Not in Latin America or South America?  
 11 A. No.  
 12 Q. Okay. What is the -- What's -- What is the market share  
 13 of Tulsa Dental for nickel-titanium rotary files in the United  
 14 States, to the best of your understanding, currently?  
 15 A. Approximately 70 percent.  
 16 Q. And in the five years -- Is it correct that we said five  
 17 years you've had the endodontic business?  
 18 A. Since a little over four.  
 19 Q. In the time that you've been with them, let's say from  
 20 2005 to the present, what's been the range from the low end of  
 21 that percentage to the high end?  
 22 A. It's varied. I think it's gone from perhaps maybe 75 to  
 23 68 back to 73. It's always been right around that 70 midpoint.  
 24 Q. It's been -- In the last almost five years, it's been as  
 25 low as 68 and as high as 75?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. That's my recollection, yes.  
 2 Q. Okay. And with respect to the obturators, when we use the  
 3 term "obturation," as I think probably people much more capable  
 4 than me have said, that refers to the function or the process  
 5 of after the surgical part of the root canal has been performed  
 6 and it's cleaned and ready to be restored, if you will -- that  
 7 has to do with -- obturation has to do with how and what you  
 8 use to fill the canal? You can correct me if I'm a little  
 9 bit --  
 10 A. Yeah.  
 11 Q. The jury would like to understand this.  
 12 A. Yeah. Basically, if you talk within the dental endodontic  
 13 circles, when they talk about filling the canal, the term they  
 14 use almost exclusively is "obturation." That's -- If you --  
 15 You obturate a canal. That's the commonly used term among  
 16 dentists and endodontists.  
 17 And the question is, as you said, how do you that?  
 18 And there's really three major ways to do it. One is the cold  
 19 basis, where you use pre-formed gutta percha rubber-like points  
 20 and you essentially stack them into the canal and fill out the  
 21 canal so you get a nice, tight fill, or use Thermafil. In the  
 22 case of Thermafil, what you have is you have gutta percha  
 23 that's on a plastic carrier. You stick that in a small oven,  
 24 it warms it. When you place it in the canal, it allows it to  
 25 flow and fill that. Because after you clean the canal, you

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 clean it and disinfect it, and quite frankly, what you're  
 2 trying to do is tune the bacteria, try to create an environment  
 3 when they can't survive. That's what makes a successful root  
 4 canal.  
 5 And then the final aspect would be, as I mentioned --  
 6 as Dr. Kratchman mentioned, which is the idea where you use  
 7 what we call flowable or a heated obturation, and that's where  
 8 you're essentially heating the gutta percha and through a --  
 9 through a needle, you're actually squirting that into the  
 10 canal, and that has a similar -- because it has a lot of flow  
 11 and it fills the canals.  
 12 But those are kind of the three basic ways that you  
 13 obturate a canal.  
 14 Q. And -- Did you talk about gutta percha? Did you use this  
 15 term?  
 16 A. Yeah. Gutta percha, at least at the present time, is  
 17 universally used throughout all three of those. Whether it's  
 18 cold, warm, or the heat flowable, they're -- it's basically all  
 19 gutta percha.  
 20 Q. So the material itself that's going to end up in the canal  
 21 is this material we call gutta percha?  
 22 A. Yes.  
 23 Q. And that is, if you can just tell us -- I know you're not  
 24 a chemical engineer, but just tell us about what that material  
 25 is that goes in our teeth after the root canal.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Yeah. Gutta percha is -- it's basically rubber. I mean,  
 2 that may not make you feel real good, but it's basically  
 3 rubber, and it has some interesting characteristics in that  
 4 it's -- when you heat it, it flows very well, and then once it  
 5 cools, it maintains its shape. All right?  
 6 It also has the -- It's also somewhat biocompatible,  
 7 which means that it doesn't have a negative impact on the  
 8 tissues that it comes in contact. Gutta percha has literally  
 9 been around for probably 150 years, and it's still, to this  
 10 day, the standard of care for filling canals.  
 11 Q. And I don't want to lose my screen that I've got right  
 12 here, so I'm just going to hold up an obturator, but this pink  
 13 part here at the top, that's the gutta percha; is that right?  
 14 A. That's correct.  
 15 Q. Can you see it from here?  
 16 A. I can.  
 17 Q. And your testimony was that there are two ways of -- two  
 18 basic ways of thinking about how you do -- how you use the  
 19 gutta percha. And one is what you called either the cold basis  
 20 or -- the cold way, and the other way is the heated way.  
 21 A. Uh-huh.  
 22 Q. And the heated way we also call -- you used the word  
 23 "thermal" to describe the heating of the -- So a thermal  
 24 filling obturator is a device like this one, that is heated  
 25 before it's used; is that correct?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Actually, I think the term I used -- I referred to it as  
 2 obturating, and I identified Thermafil as one of the ways in  
 3 which you could do that as -- it's a brand, it's a product.  
 4 Q. Right. But the word "thermal" means heat or heat.  
 5 Wouldn't you agree?  
 6 A. Yes.  
 7 Q. Okay. So all of these obturators -- forget about what the  
 8 brandname is and who manufactures them -- they all have to be  
 9 heated in order to be used?  
 10 A. No, that's not correct.  
 11 Q. The obturators?  
 12 A. I'm sorry. Yeah, that's one of -- one of the challenges  
 13 we -- As I said when I started out, that common term in  
 14 dentistry and endodontics is obturation, and that covers --  
 15 that kind of covers a category. In technical terms, what we  
 16 would call that is a carrier-based obturator.  
 17 Q. And this carrier-based obturator has to be heated to be  
 18 used?  
 19 A. That is correct.  
 20 Q. Those rubber-like points in the cold system, they don't  
 21 need to be heated?  
 22 A. Correct.  
 23 Q. Now, you are the third-most senior executive, am I  
 24 correct, currently at Dentsply International?  
 25 A. Technically, yes.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. I don't mean in age.  
 2 A. No. No. I know what you meant. But technically, yes.  
 3 Q. And so you're saying there's some important people below  
 4 you on this list, too?  
 5 A. Absolutely.  
 6 Q. But you have -- You have a great deal of responsibility,  
 7 and I assume over the years, particularly given your exposure  
 8 to the endodontic business, you've -- you've learned a lot  
 9 about how -- about the business, about the endodontic business  
 10 and nickel-titanium files and obturators in particular? You  
 11 know a fair amount about them?  
 12 A. On some levels, yes.  
 13 Q. So -- I don't think I asked you this question before I go  
 14 on -- of all obturation, what is the -- what is the percentage  
 15 of that market -- the obturation market, that is -- where the  
 16 customers use obturators?  
 17 MS. AVITIA: Objection, Your Honor. If we could just  
 18 specify which market. We've talked about a few.  
 19 Q. (By Mr. Kelly) Of course. Let's talk about the  
 20 U.S. market.  
 21 A. I'm sorry, again -- When you say "obturators," are you  
 22 referring to carrier-based obturators.  
 23 Q. Yes, sir.  
 24 A. If I can correct -- you've asked me what percentage --  
 25 Q. Of all obturation --

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. -- of all obturation --  
 2 Q. -- in the United States?  
 3 A. Yes.  
 4 Q. -- is carrier-based obturators?  
 5 A. I believe I -- I think you asked me this in an affidavit.  
 6 It was calculated. I think it was around 50 percent of all  
 7 obturation.  
 8 Q. Okay. So there's half of the obturation that is -- people  
 9 have chosen to use another product besides a carrier-based  
 10 obturator?  
 11 A. (Nodded head.)  
 12 Q. It could change next week, it could be 51 percent next  
 13 week, or 49, right?  
 14 A. Right.  
 15 Q. Conceptually, I want to make sure we're understanding each  
 16 other.  
 17 A. Yes.  
 18 Q. But then within that half or so that use carrier-based  
 19 obturators to perform the filling function, the percentage of  
 20 the U.S. market that Dentsply has inclusive of all of  
 21 Dentsply's brand names of obturators, including the various  
 22 Thermafil and related siblings of Thermafil -- There's  
 23 Thermafil Plus? Is there Thermafil Plus?  
 24 A. Uh-huh.  
 25 Q. A couple different ones. I don't know all the names. You

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 indicate your Densfil obturator, all different obturators, your  
 2 company has about 87 percent is your guess --  
 3 A. Yeah.  
 4 Q. -- of that market?  
 5 A. 85, 87 percent. That's good. That's a good  
 6 approximation.  
 7 Q. All right. Now, at what level within Dentsply  
 8 International is the function -- where does the function reside  
 9 that -- whose job it is to follow the ebbs and flows of the  
 10 NiTi file and obturator market, understanding what's happening  
 11 out in the marketplace, collecting data with respect to what's  
 12 happening in the marketplace, the resident -- the location  
 13 where the material and the information that executives like  
 14 yourself need to understand what's going on in the  
 15 marketplace -- where does that sort of market research function  
 16 reside?  
 17 A. It's a -- The reality is that Dentsply -- if you were to  
 18 look at the history of Dentsply, we're a company that's grown  
 19 primarily through acquisition, borrowing technologies,  
 20 acquiring businesses. As Mr. Kelly indicated, we have a lot of  
 21 divisions all over.  
 22 The philosophy of the company has always been that  
 23 we're built on the idea of independent atonics business units,  
 24 which means the individuals running these businesses are really  
 25 in charge of these businesses. So when you ask that question,

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 It's cumulative. We still stand by our relevance and 403  
2 objections, but at this point it's certainly cumulative.

3 THE COURT: Well, I'm beginning to think it is  
4 somewhat, too.

5 MR. KELLY: Your Honor, these are critical admissions  
6 by the defendants to key issues in this case and --

7 THE COURT: Well, let's make sure they're different  
8 ones, because to my ear they're sounding like the same.

9 MS. AVITIA: And I said one page. We've actually  
10 read two pages now, and I'm sure the jury can read.

11 Q. (By Mr. Kelly) That didn't help matters, did  
12 it?

13 So, in -- You have a discussion here about Guidance,  
14 is that correct, and you acknowledge that they signed a  
15 distribution agreement with Patterson to sell NiTi files?

16 A. Yes.

17 Q. That company had previously been in the business founded  
18 by an endodontic opinion leader?

19 A. Yes, that's what it says.

20 Q. But it became problematic because with Patterson's 1,400  
21 or 1,500 sales reps this small company had the -- a vehicle for  
22 getting its product out to many, many dentists in the United  
23 States; is that correct?

24 A. Actually, that's not correct. What was -- The issue at  
25 hand was that we had -- per our strategy had signed exclusive

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 A. Again, I wouldn't say that we -- I would say that an  
2 outcome of our agreement was that they were limited, but again,  
3 I want to say it was an agreement. And the reason why, is that  
4 we clearly demonstrated that in order to be successful selling  
5 NiTi files, that there were certain things that you needed to  
6 do.

7 Number one is, you needed to have a direct sales  
8 force that could go in and train and teach endodontists how to  
9 use these files. You have to recognize, previous to this  
10 rotary nickel -- Previous to our entrance in acquiring this  
11 business and developing this market -- and I think -- I think  
12 Dr. Kratchman used the term NiTi revolutionized the market.

13 I give us some credit for doing that, but in order to  
14 do that you've got to go into the marketplace, you've got to  
15 train people how to use this technique, you've got to provide  
16 clinical education hands-on courses, you've got to have opinion  
17 leaders who can speak intelligently and publish research papers  
18 on this technique.

19 And we did all those things in the marketplace, and  
20 we said that is the best way to expand the market. Now, at the  
21 same point in time while you're doing this you recognize you  
22 can only go so far in the marketplace, so we said, in order to  
23 fully expand the market and make rotary NiTi the standard of  
24 care, if we license other companies, they could do this, as  
25 well, and we had the expectation that they would develop the

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 licensing agreements.

2 And I think it's really important to understand that  
3 Dentsply had spent several hundreds of millions of dollars to  
4 acquire these patents and develop this business, and we  
5 undertook a strategy, because we felt in order to expand the  
6 market and protect our market position that we would engage  
7 licensees. The challenge was that part of that agreement with  
8 the licensees, that they agreed to, was that they would sell on  
9 a direct basis to the end user, because in our opinion that was  
10 the best way to develop the market. And they agreed to that.

11 I mean, I think the most important part is that  
12 there's an agreement between us and the licensees. They're  
13 going to pay a royalty of a dollar a file, they're going to  
14 agree to certain conditions, which is, they're going to go  
15 direct, and they're going to develop the market.

16 And the problem with the Patterson distribution is  
17 that this was a problem for our licensees, as well. And so we  
18 had agreements in place that said that they would go direct and  
19 develop the market per our agreement and suddenly we had  
20 someone in the marketplace that said, "I don't have to agree to  
21 that." And our licensees were looking at us, saying, "this is  
22 the agreement. What are you going to do about it?" So that  
23 was what was problematic.

24 Q. Well, with your other licensees, why did you limit them to  
25 direct, as opposed to distribution?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 market in the way that we felt was most successful, and that  
2 was one of the criteria of our agreement.

3 Q. By eliminating distribution, it increased likelihood that  
4 your company, because of its size and reach in the United  
5 States, would hold on to its market share for longer than if  
6 these companies were allowed to go through distribution. Is  
7 that not correct?

8 A. I'm sorry, could you repeat that question again, please?

9 Q. Yes. By requiring these companies that you've been  
10 referring to, that you entered into license agreements with, to  
11 enter into distribution -- to sell only direct and not be able  
12 to sell through distribution, you increased the likelihood that  
13 those companies would not be as successful at reducing -- said  
14 differently -- that you would be better able to protect your  
15 market share?

16 A. Actually, I disagree with that, because, for the reason  
17 that I stated, based on our experience in the marketplace, the  
18 way to be successful with selling nickel-titanium files was to  
19 do all the things I mentioned: Provide a direct sales force  
20 that can educate -- educate dentists, do clinical education, do  
21 hands-on courses.

22 I think, in fact, we understood that when we licensed  
23 these companies that our market share would drop, and it did,  
24 and not by an insignificant factor, because we believed that  
25 that was the best way to, essentially, make this the standard

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

*James March*

1 of care in the marketplace.  
2 I think one of the things that's -- and it's not --  
3 what was said earlier in this document -- I think you asked me  
4 to read it -- but these products -- although it's not a lot of  
5 money, but dentists are notoriously frugal -- let's put it that  
6 way -- but these files cost five times what they were using  
7 today. That's -- Even though it may be \$6 a file versus a buck  
8 or \$1.25, that education process and convincing them, say, Why  
9 would I use a product that costs five times as much, that  
10 requires a fair amount of engagement from your organization,  
11 and we just felt that this direct-sales model was the best way  
12 to educate and engage the market and make this technology that  
13 we owned the standard of care in the marketplace.  
14 Q. It's correct, isn't it, that these Niti patents that we're  
15 talking about -- that although you've sued a number of  
16 companies in connection with those patents, that you have never  
17 litigated to a judgment the validity of those patents?  
18 A. I honestly don't know the answer to that question.  
19 Q. Well, you have testified, or by through the vehicle of  
20 your strategic assessment here, that your patents aren't strong  
21 enough to control the marketplace.  
22 A. I guess my point is, you asked me a very legal question,  
23 and I don't know through the course of litigation if some of  
24 these licensees have essentially validated our patents. I'm  
25 not sure. And Mr. Addison can probably answer this question

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283



Brian Addison

1 He was one of the inventors named on the patent.  
 2 Q. Was Montgomery the other one or was he his lawyer?  
 3 A. Oddly, he was both.  
 4 Q. He was both?  
 5 A. That's my understanding, yes.  
 6 Q. When did -- When did the defendants -- Excuse me. When  
 7 did your company acquire the patent?  
 8 A. Boy, I'm not -- I'm not really sure exactly when that was.  
 9 And, actually, it wasn't -- When you say "your company,"  
 10 Dentsply International technically didn't acquire the patent.  
 11 It was a subsidiary of Dentsply.  
 12 Q. EndoAction, Inc.?  
 13 A. EndoAction, Inc, yes.  
 14 Q. Was that in 2006 sometime?  
 15 A. I think so. I think that's the time frame.  
 16 Q. There was e-mail traffic that suggests that you were  
 17 working on it in earnest in that period.  
 18 A. That makes sense.  
 19 Q. Does that make sense?  
 20 A. Yeah.  
 21 Q. And EndoAction was a special-purpose entity created to  
 22 acquire that patent, correct?  
 23 A. Well, we establish corporate entities from time to time to  
 24 do things other than pure operations. We established that, and  
 25 that was one of the purposes. There were other potential

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 purposes for it, but that was one of the primary purposes.  
 2 Q. But, in fact, that's the only purpose that you have used  
 3 it for thus far?  
 4 A. No. We did -- We looked at using it for some other  
 5 acquisitions, not of patents, but of some businesses, and I  
 6 really don't remember whether we did that or not. I don't  
 7 think we did. But there were other reasons like that that were  
 8 contemplated.  
 9 Q. Okay. But you agree with me that -- that one purpose  
 10 of -- one use of EndoAction, Inc., has been to acquire the Wong  
 11 patent?  
 12 A. That's correct.  
 13 Q. And you can't recall any other uses that you've put it to,  
 14 to date?  
 15 A. No other uses where we actually did something like that,  
 16 no.  
 17 Q. That's my point.  
 18 A. Yeah.  
 19 Q. Does it still hold the patent, or did you transfer it?  
 20 A. It no longer holds the patent. They were then transferred  
 21 to -- I think to Dentsply International.  
 22 Q. And so you purchased the patent, right? In other words,  
 23 Mr. Wong and Montgomery -- they don't have any interest in that  
 24 patent anymore?  
 25 A. That's correct.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

Beign Addison

1 if you can.

2 Q. There was a patent on the ProTaper, a design patent, or

3 no?

4 A. There is a patent on the ProTaper, but I'm not sure -- I

5 know there's one in Europe. I think it was -- that product

6 was -- I don't know if developed's the right, but that is where

7 it was sort of initiated, and I know there's a patent on it in

8 Europe. I'm not sure what the status is in the U.S.

9 Q. What may have been the situation is that the ProTaper was

10 unpatented in the United States and there was this other patent

11 out there owned by Wong that ProTaper was potentially

12 infringing in the United States?

13 A. Right. Right.

14 Q. And, by the way, during that time that the ProTaper was on

15 the market in the United States, no one sued Dentsply for

16 patent infringement, did they?

17 A. On the ProTaper?

18 Q. Yes, sir.

19 A. No.

20 Q. So, really, until you acquired the Wong patent, you didn't

21 have any -- any basis for suing Guidance challenging the design

22 of his patent, is that correct, challenging the design of his V

23 file?

24 A. On a pure product basis you're talking about, under a

25 product patent?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. Yes.

2 A. There were some other patents that we have rights to that

3 potentially would apply to the Guidance product, as well, but,

4 you know, when you look at bringing an infringement case you

5 try to limit it to the most relevant patents.

6 Q. So, that's the reason why you didn't include any other

7 patents in your ITC?

8 A. At that time, that's right. Oh, yeah, right. That's

9 right.

10 Q. And also in the patent infringement case filed in the

11 Middle District of Pennsylvania?

12 A. Well, you had noted that earlier. We -- Actually, there

13 was a different patent included -- or an additional patent

14 included in the district court action.

15 Q. And what was that patent?

16 A. That was a process patent on the nickel-ti production.

17 Q. Okay. But there was no -- We're in agreement that you had

18 no design patent, other than the Wong patent, that you could

19 use to sue Guidance?

20 A. No, I guess I disagree with that. We identified some

21 other patents that could have been asserted that were, I call

22 it, design or product patents, but --

23 Q. But you had --

24 A. But the strongest patents were the ones that were -- I

25 mean, in terms of the connection -- the strongest -- were the

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 ones asserted.

2 Q. There was certainly no prohibition against including

3 additional patents if you believed that they would have

4 survived the infringement claims; isn't that correct?

5 A. I don't know what you mean by "survived the infringement

6 claim."

7 Q. Yeah, you're right. That was a poor choice of words. I'm

8 putting you on the wrong side.

9 A. We would have asserted the best patents, I would say.

10 Q. And you did that?

11 A. Right.

12 Q. In Exhibit 723B, in this bracketed language here -- Would

13 you read that beginning with "We acquired"?

14 A. Okay. "We acquired the Wong patent which is substantially

15 the ProTaper IT for the North American market. This puts us in

16 a strong long-term design patent position and opened the way

17 for us to begin litigation against Guidance and eliminate NiTi

18 distribution by Patterson Dental."

19 Q. And that reads "the ProTaper IP"; is that right?

20 A. Right.

21 Q. And this is a document drafted according to this morning's

22 testimony by Mr. Mosch?

23 A. Right.

24 Q. So this is consistent with your testimony? The Wong

25 patent is substantially the ProTaper patent for the North

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

Newell

1 A. Correct.

2 Q. Many people in your organization refer to you as -- each  
3 of you as the boss, correct?

4 A. Correct.

5 Q. Right. So, when a decision to file a lawsuit or not is  
6 made -- Strike that.

7 When the decision to file a lawsuit or not against  
8 Guidance was made, isn't it true that is ultimately a business  
9 decision?

10 A. I understand your question. Yes, it's a business  
11 decision.

12 Q. Okay.

13 A. And as a business we felt that it was a good decision to  
14 file the lawsuit.

15 Q. And certainly you'll agree that in the e-mails we looked  
16 at, the communications around the business decision to file the  
17 lawsuit included the fact that Guidance was distributing  
18 through Patterson, right? We saw it in a number of e-mails.

19 A. I don't know if I would agree with that at all. Patterson  
20 and Guidance's relationship was certainly referenced in those  
21 e-mails. I didn't see anything that said that that was the  
22 basis for any lawsuit.

23 Q. Right. But you -- But you know, in fact, that that was  
24 what prompted the business decision to sue Guidance, right,  
25 that they were selling through distribution?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. 2008-CV-1101  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.

Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Friday, September 25, 2009, at 8:35 a.m. and concluding at  
5:32 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

Bill Newell

1 A. That is absolutely not the case. As I've mentioned many  
 2 times, there are many competitors. In addition to Guidance,  
 3 there are many competitors that sell at prices that are  
 4 significantly below the prices we sell at. We don't -- We are  
 5 not a price-strategy-driven company. We sell on value-add, and  
 6 additional support, and clinical information, et cetera,  
 7 et cetera, so pricing -- pricing is of interest to us,  
 8 certainly, but it's not of major concern. We've had  
 9 lower-priced competitors for -- forever.

10 Q. All right. So let's move on to a document that you  
 11 created called the Endodontic Franchise Strategic Update. You  
 12 said you prepared this document?

13 A. I think I said I may have. I may have been asked for  
 14 input. I don't recall preparing this, if that's your question.

15 Q. Okay.

16 A. I don't believe I did prepare this.

17 Q. Oh, okay. But you had input into the strategic update on  
 18 the endodontic franchise?

19 A. I'm -- I would imagine that I would have provided some  
 20 input for an endo franchise update, yes. Yes.

21 Q. Okay. Let me ask you -- Let me ask you another question  
 22 about -- You have no problem with competing on price as Tulsa  
 23 Dental. Who in the market currently sells NiTi rotary files in  
 24 North America that Dentsply or Tulsa Dental hasn't sued?

25 A. Who sells NiTi rotary -- There are a number of mail-order

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Internet-direct companies that, honestly, I can't -- I can't  
 2 mention by name, I can't recall by name, that are selling  
 3 rotary NiTi that we have not had litigation with.

4 Q. So other than the Internet providers, wherever they are,  
 5 in terms of companies located in North America to sell NiTi  
 6 rotary files into the North American market, who -- who sells  
 7 those files that Dentsply and Tulsa Dental hasn't sued at least  
 8 once?

9 A. Well, as I just mentioned, there are other companies that  
 10 are selling and marketing rotary NiTi that we have not  
 11 litigated with.

12 Q. You mentioned --

13 A. The fact that we have had litigation with other companies  
 14 is a direct result of our belief that they have violated  
 15 patents. And as I've mentioned, we've taken action to defend  
 16 our patents, as any company would.

17 Q. Right. But my question to you was that, aside from  
 18 those -- the ability for somebody to buy them on the Internet  
 19 wherever that may be, whether they're coming from China or  
 20 Europe or whatever, which North American-based supplier that  
 21 sells NiTi rotary files into the market hasn't Dentsply and  
 22 Tulsa Dental sued?

23 A. I can't answer that.

24 Q. You can't think of anybody?

25 A. I don't know where these -- I just mentioned, there are

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 other companies that are selling. I don't know where their  
 2 base of operations is, so your question, I think, was what  
 3 other North American suppliers. I'd honestly have to take some  
 4 time and do some research.

5 Q. Right. You're the head of Tulsa Dental who has  
 6 responsibility for the profits and loss on the rotary file  
 7 market and you can't tell me any other supplier in North  
 8 America who Tulsa Dental and Dentsply hasn't sued. Is that  
 9 what you're saying?

10 A. I'm telling you that I'd have to take a look.

11 Q. That's fine.

12 A. Yeah.

13 Q. In Guidance's case, though, you will admit that Tulsa  
 14 Dental and Dentsply have sued Guidance now, correct, three  
 15 times in the last year or so?

16 A. That could be the number. It sounds like it's correct.

17 Q. Right. And the third time you also sued Dr. Goodis  
 18 personally just as the extra kick, correct?

19 A. Just --

20 MR. GULLEY: Your Honor, he's going out of his way to  
 21 just say things that are nothing but attempts to evoke sympathy  
 22 or enflame the jury or something.

23 THE COURT: Well, this is cross -- This is  
 24 effectively cross-examination, so I'll allow it. Overruled.

25 A. I can answer that question.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. CIV 08-1101 JB/RLP  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.

Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Monday, September 28, 2009, at 8:28 a.m. and concluding at  
5:36 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

John Ferone

1 Q. All right. So what did you discuss with Dr. Goodis in  
 2 those conversations leading up to the -- entering the  
 3 Manufacturing and Supply Agreement?  
 4 A. Well, at the beginning of it, it was things of what  
 5 products we would be looking to get from Dentsply, how many  
 6 product lines we would carry, what our forecasts were for those  
 7 products, things of that nature.  
 8 Q. Okay. And what did you ultimately conclude from what you  
 9 understood Guidance was getting in the Manufacturing and Supply  
 10 Agreement?  
 11 A. That it was a very good deal and we could make a lot of  
 12 money with it.  
 13 Q. Now, around that time, did you also negotiate a  
 14 profit-sharing agreement with Dr. Goodis? Yeah. Around that  
 15 time, did you also negotiate a profit sharing agreement with  
 16 Dr. Goodis?  
 17 A. Yes. And my profit-sharing agreement goes in conjunction  
 18 with the employment agreement that I had with Dr. Goodis.  
 19 Q. Okay. When you say it goes in conjunction with, you're  
 20 saying the profit-sharing agreement was also an employment  
 21 agreement?  
 22 A. Correct.  
 23 Q. Okay. And when did you sign that profit-sharing  
 24 agreement?  
 25 A. It was the end of August of 2008.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. Okay. Would you say its around August 18th, 2008?  
 2 A. That is most likely accurate, correct.  
 3 Q. Okay. Was there any relationship between the  
 4 profit-sharing agreement and the Manufacturing and Supply  
 5 Agreement?  
 6 A. Yes. Within my agreement there are certain minimum  
 7 benchmarks that I need to hit in order to keep my employment  
 8 with Guidance Endo.  
 9 Q. Okay. Is it also -- Would there have been a  
 10 revenue-sharing agreement without the Manufacturing and Supply  
 11 Agreement?  
 12 A. No. When me and Chuck signed the  
 13 employment/profit-sharing agreement, they coincided with one  
 14 another. Without our agreement with Dentsply, the profit  
 15 sharing would not have taken place.  
 16 Q. Okay. And what was the reason that you and Dr. Goodis  
 17 worked out a profit-sharing agreement around the time you  
 18 signed the Manufacturing and Supply Agreement?  
 19 A. Well, one of the big reasons was, with the change to the  
 20 company, there was going to be a lot of work in rebuilding it.  
 21 I mean, anytime you go out and get entirely new products  
 22 everything has to change -- from marketing material to websites  
 23 to internal policies to new hires -- so in order for me to do  
 24 that I thought it was amicable to share in the profits of the  
 25 new entity.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. Okay. So you said that there were certain performance  
 2 goals in your profit-sharing agreement?  
 3 A. Correct.  
 4 Q. And by that -- By that, what do you mean, there were  
 5 certain performance goals?  
 6 A. Well, there were performance goals that stipulated minimum  
 7 criteria, which without I would be terminated.  
 8 Q. Okay. So you had to hit those minimum criteria in order  
 9 not to get fired; is that right?  
 10 A. That's correct.  
 11 Q. Okay. So what were those criteria based on?  
 12 A. The criteria was based on a forecast that I had given  
 13 Chuck that he took minimum numbers out of as far as my  
 14 applicable sales.  
 15 Q. Okay. So were these -- Was it based on company revenues?  
 16 A. Correct.  
 17 Q. Okay. In your profit-sharing agreement, what were those  
 18 company revenue minimums that you needed to hit?  
 19 MR. GULLEY: Objection, Your Honor. I'm not seeing  
 20 the relevance of this.  
 21 THE COURT: Well, I guess I do. Overruled.  
 22 A. In 2009 the number was \$3 million.  
 23 Q. (By Mr. Bisceglie) Okay. What about 2010?  
 24 A. Was \$4 million.  
 25 Q. In 2011?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. 4.75.  
 2 Q. Okay. What about 2012?  
 3 A. It goes straight up. I believe there's \$750,000 increases  
 4 right through 2014, I believe it is.  
 5 Q. So that would be 5.5 in 2012; is that right?  
 6 A. That sounds right, yes.  
 7 Q. And 6.25 in 2013?  
 8 A. Correct.  
 9 Q. And \$7 million in 2014?  
 10 A. Yes.  
 11 Q. So for 2015 that would be \$7.5 million?  
 12 A. Correct. In 2015 it was to increase by \$500,000.  
 13 Q. Now, how do you and Dr. Goodis arrive at those numbers?  
 14 A. Well, between me and Chuck, we speak to the accountant,  
 15 Jim Van Der Geest; we looked at numbers as far as market share  
 16 and revenue opportunity, and we arrive at the numbers through  
 17 modeling.  
 18 Q. Okay. So what revenues were you expecting -- was Guidance  
 19 expecting at the time you set these minimum performance  
 20 criteria?  
 21 MR. GULLEY: Same objection, Your Honor. Relevance.  
 22 THE COURT: Overruled.  
 23 A. It was -- The revenues that we expected were two to three  
 24 times my minimum performance criteria.  
 25 Q. (By Mr. Bisceglie) I'm going to try to add

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

~~5/24/10~~

1 those numbers up for you. Okay. So over the seven  
2 years from when you signed the profit-sharing  
3 agreement, is it accurate to say the company needed  
4 to sell at least \$38 million in supplies, otherwise,  
5 if you didn't hit one of those numbers in that year,  
6 you could be terminated?  
7 A. That's correct.  
8 Q. Okay.  
9 (Recess due to technical difficulties.)  
10 MR. BISCEGLIE: Does Your Honor want to give the  
11 court some explanation for doing --  
12 THE COURT: Okay. I'll just indicate you're going to  
13 try to repeat the last couple of questions and answers.  
14 (Jury in at 9:03 a.m.)  
15 THE COURT: I'll try to get your monitors here to  
16 work in a moment. Ms. Wild is ill this morning, so I didn't  
17 realize those weren't on.  
18 We're going to have to repeat maybe the last two  
19 questions and answers. Ms. Schutte Everett's machine didn't  
20 work, so Mr. Bisceglie will repeat the last two questions and  
21 answers.  
22 Mr. Ferone, I'll remind you, you're still under oath.  
23 THE WITNESS: Thank you.  
24 THE COURT: Mr. Bisceglie.  
25 MR. BISCEGLIE: Thank you, Your Honor.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283



Ferone

1 Q. Is OneFill -- Is OneFill in fact about half the price of  
2 Tulsa Dental's obturators?

3 A. It is.

4 Q. Now, did you ever say that the Guidance files are the same  
5 as the ProTaper or -- the ProTaper files?

6 A. No. Absolutely not.

7 Q. Now, what are the differences between the EndoTaper and  
8 ProTaper?

9 A. I mean, the ProTaper and the EndoTaper are distinctly  
10 different instruments. The number one difference between them  
11 is one is a variable-tapered file, the other one is constant.  
12 The pitch design between the instruments is different. There's  
13 a variety of differences between the files.

14 Q. I show you what's been marked in evidence as -- I'm sorry.  
15 I show you what's in evidence as Plaintiff's Exhibit 562. It's  
16 a letter from Brian Addison to Dr. Charles Goodis. Do you  
17 recognize this letter?

18 A. I do.

19 Q. Okay. Is this the Addison letter we referred to earlier  
20 regarding -- explaining Tulsa Dental's concerns with the  
21 Guidance marketing materials?

22 A. Yes.

23 Q. Okay. Is it fair to say that you did not agree with  
24 Mr. Addison's claims in this letter?

25 A. That would be fair to say, yes.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Q. Okay. You said it was around September 2008 that Tulsa  
2 Dental/Dentsply refused to supply the .04 file and the  
3 obturator, is that right?

4 A. Correct.

5 Q. Was there anything else going on around that time that  
6 affected Guidance?

7 A. Yes. That was the time that we began receiving a lot  
8 calls from our current customers.

9 Q. Now, when you say you were receiving a lot of calls from  
10 your current customers, I take it you often received calls from  
11 your customers. Was there anything in particular you remember  
12 about these calls in this time period?

13 MR. GULLEY: Objection, Your Honor, hearsay.

14 THE COURT: Well, this question's a yes/no question.  
15 Just answer it yes or no.

16 A. Mr. Bisceglie, can you repeat the question now?

17 Q. Yeah. Was there anything in particular that you  
18 remembered about the nature of these calls as to why they would  
19 stand out in your mind?

20 A. Yes.

21 Q. Okay. And what was that?

22 MR. GULLEY: Objection, Your Honor, hearsay.

23 THE COURT: Well, why don't we approach on this.  
24 (Bench conference on the record.)

25 THE COURT: Why is his state of mind important? What

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 is it that that's going to be relevant about his state of mind?

2 MR. BISCEGLIE: Well, he was -- he had about eight to  
3 ten of these calls personally. And I'm really not planning to  
4 elicit any hearsay, as I thought we had already established,  
5 both in the Court's written ruling and last time we dealt with  
6 this issue, was we can't disclose the statements are coming  
7 from Tulsa Dental, but he's entitled to share with the jury the  
8 questions that were being asked of Guidance. He was more  
9 directly involved in this than Dr. Goodis was since he  
10 received --

11 THE COURT: What is he -- What he is -- What is he  
12 going to say? What are the calls that he received? What is he  
13 going to say these people said?

14 MR. BISCEGLIE: He's going to say that is it true  
15 that Guidance files are off the market, is it true that we can  
16 no longer get Guidance files. Some of the calls --

17 THE COURT: So questions that are being asked of  
18 Guidance, he's of -- are the ones he got?

19 MR. BISCEGLIE: Correct. I could lead him.

20 THE COURT: Why don't you lead him through this.  
21 We'll take it a question at a time. If they're just questions  
22 he got, I think we're going to be okay. If he starts just what  
23 was said, I'm a little concerned we may lose some control over  
24 it, so why don't you just lead him through this.

25 MR. BISCEGLIE: What I'm not planning to do is ask

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 him -- I mean, when -- I told him we cannot identify that the  
2 calls came -- directly identify any of the statements that were  
3 made by Tulsa Dental to the customers. He doesn't -- doesn't  
4 really have knowledge of that, anyway.

5 THE COURT: Why don't you just lead him through this,  
6 get the questions. If there's a problem we'll have on a  
7 particular one, you can re-object.

8 MR. BISCEGLIE: Sure.

9 MR. GULLEY: Just for the record, Your Honor, it's  
10 obvious what he's trying to imply here, that there were Tulsa  
11 Dental people saying things. I mean, who else could it be in  
12 the context of this lawsuit?

13 THE COURT: Yeah. Well, that's why I've got to let  
14 him draw the inference, but --

15 MR. BISCEGLIE: And that is what I want to do.

16 THE COURT: Sure. It is --

17 MR. GULLEY: 403-12. Your Honor, we object on that  
18 basis because --

19 THE COURT: All right.  
20 (Open court.)

21 THE COURT: Mr. Bisceglie.

22 MR. BISCEGLIE: Yes, sir.

23 Q. Was Guidance getting calls asking if Guidance still sold  
24 files at this time?

25 A. Yes.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Q. Okay. And was it getting calls asking whether or not  
2 Guidance was going out of business?

3 A. Yes.

4 Q. When did these calls start?

5 A. I believe it was September of 2008.

6 Q. And about how many of these calls did Guidance receive?

7 A. I would estimate anywhere from 15 to 20.

8 Q. Okay. And how many of these calls did you receive  
9 personally?

10 A. Me personally, I received between six and ten.

11 Q. Okay. When you received these calls, what did you do when  
12 you received those calls?

13 A. Well, when we first started receiving them, you kind of  
14 dismissed it, but after I talked to Sharon and Debra and heard  
15 that they were receiving similar calls, I spoke to Chuck and we  
16 implemented a policy to document those calls.

17 Q. Now, did Guidance document all of these negative calls?

18 A. No, because some of the calls came in prior to this plan  
19 to document them, and at the end calls were forwarded via  
20 e-mail to counsel.

21 Q. Okay. Do you remember documenting one call from Jennifer  
22 at Endodontics Limited?

23 A. Yes.

24 Q. And I take it that Jennifer from Endodontics Limited  
25 called On October 2nd. Is that right?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 A. It sounds right, yes.

2 Q. I'm going to ask you some leading questions through this

3 area just to -- because I need to.

4 And is Endodontics Limited located in Philadelphia?

5 A. They are.

6 Q. And that's one of the Guidance customers?

7 A. It was, correct.

8 Q. Okay. Do you remember documenting a negative call from

9 Noreen at Sure Endo?

10 A. Yes.

11 Q. And is Sure Endo located in Toms River, New Jersey?

12 A. Correct.

13 Q. Do you remember receiving a call from Brian Bevan at

14 Clinical Research in Toronto?

15 A. Yes.

16 Q. Do you remember a call from Susan who works at

17 Dr. Elizabeth Perry's office in Massachusetts?

18 A. Yes, I do.

19 Q. Do you remember getting a call from Dr. Kratchman in

20 Philadelphia?

21 A. Yes.

22 Q. Do you remember getting a call from Dr. Stramback?

23 A. Yes.

24 Q. Where does Dr. Stramback practice?

25 A. In Matawan, New Jersey.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 MR. BISCEGLIE: Your Honor, I'd like to move for

2 admission of 722H. I understand Mr. Gulley objects.

3 THE COURT: 722H?

4 MR. BISCEGLIE: Yes, Your Honor.

5 THE COURT: All right. And, Mr. Gulley, the

6 objection is?

7 MR. GULLEY: That this document -- this witness has

8 no firsthand knowledge of this document, Your Honor.

9 MR. BISCEGLIE: And, Your Honor, we resolved this

10 issue two days ago, I believe. This is an admission by a party

11 opponent.

12 THE COURT: Let me take a look at it.

13 (Bench conference on the record.)

14 THE COURT: Okay. I'm not picking up who this

15 document is to and from.

16 MR. BISCEGLIE: It's all internal Tulsa Dental.

17 These are the --

18 THE COURT: Okay.

19 MR. BISCEGLIE: -- the e-mails we had the other day

20 where Mr. Gulley raised the exact same objection. We cited

21 some authority, then Your Honor got back to us and said --

22 THE COURT: Yeah. Unless there's objection to the

23 authenticity of the document --

24 MR. BISCEGLIE: And there's not.

25 MR. GULLEY: This one, Your Honor, is different in

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 that this witness is not copied or sent. He knows nothing

2 about this. It's just it's an internal Tulsa e-mail and --

3 MR. BISCEGLIE: And that's exactly the same issue we

4 had the other day.

5 THE COURT: I think it is. On these, I think the

6 only foundation that's going to be necessary is that -- unless

7 there's some other objection -- is going to be that these

8 are -- you know, if there's some question about who produced

9 it, so the only foundation I'm going to require on these is

10 that it be uncontested that it was produced by the defendants.

11 MR. GULLEY: We produced it, Your Honor. Just show

12 my objection on the grounds --

13 THE COURT: I will.

14 MR. GULLEY: -- of lack of firsthand knowledge,

15 Rule 403, and it's also irrelevant.

16 THE COURT: All right.

17 MR. GULLEY: Thank you.

18 THE COURT: Plaintiff's Exhibit 722H will be admitted

19 into evidence.

20 (Plaintiff's Exhibit 722H admitted into evidence.)

21 (Open court.)

22 THE COURT: Mr. Bisceglie.

23 MR. BISCEGLIE: Yes, Your Honor.

24 Your Honor, has the exhibit been admitted?

25 THE COURT: It has been.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. I'll show you what's been admitted as Plaintiff's Exhibit

2 722H. It's an e-mail from a Brandon Miller, who appears to be

3 a sales -- who appears to be an employee of Tulsa Dental. Do

4 you see that?

5 A. Yes.

6 Q. Okay. And I will zoom in a little further.

7 See this statement: "The Guidance files are off the

8 market"?

9 A. Yes.

10 Q. Were customers asking -- Was this one of the questions

11 that customers were asking you, if Guidance files were off the

12 market?

13 A. Yes.

14 Q. Do you know who Brian Rooney is?

15 A. I do.

16 Q. And how do you know Brian Rooney?

17 A. I worked with Brian at Tulsa Dental.

18 Q. Who is Brian Rooney?

19 A. He's is the sales representative for Philadelphia.

20 Q. Okay. By the way, do you recognize some other names on

21 this e-mail?

22 A. Not really, no.

23 Q. Okay. So -- But Brian Rooney is somebody you know?

24 A. Correct.

25 Q. Do you know who the Dentsply sales rep is for Endo

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. (By Mr. Bisceglie) Guidance doesn't have all  
 2 those things going into its SG and A, correct?  
 3 A. Correct. There's the one office in Albuquerque here.  
 4 Q. How many employees?  
 5 A. There are myself, Debra, Sharon, and Chuck.  
 6 Q. And that's it?  
 7 A. And there are two part-timers that I don't know their  
 8 schedules and can't comment to.  
 9 Q. Okay. Does Dr. Goodis draw a salary?  
 10 A. Not -- No.  
 11 Q. So his salary doesn't distribute anything to the company's  
 12 SG and A, correct?  
 13 A. Correct.  
 14 Q. So, if Guidance's -- So, if Guidance's goods sold are 50  
 15 percent and your forecasted SG and A is 30 percent, what does  
 16 that leave for profits?  
 17 A. 20 percent.  
 18 Q. So you previously testified that Guidance expected under  
 19 the Manufacturing and Supply Agreement to have revenues of  
 20 \$75 million to \$114 million, correct?  
 21 A. Correct.  
 22 Q. So, 20 percent profit margin on \$114 million, would that  
 23 be approximately \$22.8 million?  
 24 MR. GULLEY: Objection, Your Honor. That's not  
 25 relevant.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 THE COURT: Overruled.  
 2 A. If your math is correct, yes, that's accurate.  
 3 Q. (By Mr. Bisceglie) So that was Guidance's  
 4 original projection for profits under the  
 5 Manufacturing and Supply Agreement, correct?  
 6 A. Correct.  
 7 Q. You also had a low-end projection of 20 percent of  
 8 \$75 million; is that right?  
 9 A. Correct.  
 10 Q. Is that approximately \$15 million?  
 11 MR. GULLEY: Same objection.  
 12 THE COURT: Overruled.  
 13 A. Sounds right.  
 14 Q. (By Mr. Bisceglie) Okay. And so in terms of  
 15 this range of projected profit, how conservative was  
 16 this at the time that you and Dr. Goodis made this  
 17 estimate?  
 18 A. At the time when we signed this Manufacturing and Supply  
 19 Agreement, they were conservative estimates.  
 20 Q. And why were they -- Why were they conservative estimates?  
 21 A. Because, typically, when I put together a sale forecast,  
 22 as I've said before, you don't want to miss your sales  
 23 forecast, you want to put something out there conservative and,  
 24 hopefully, go above and beyond.  
 25 Q. Did Dr. Goodis have a view that the anticipated profit

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 would be even higher?  
 2 A. Yes.  
 3 Q. And he communicated that to you at the time?  
 4 A. Yes.  
 5 MR. BISCEGLIE: Okay, Your Honor, I have no more  
 6 questions for this witness.  
 7 THE COURT: Thank you, Mr. Bisceglie.  
 8 Mr. Gulley, do you have cross-examination of  
 9 Mr. Ferone?  
 10 MR. GULLEY: I do, Your Honor.  
 11 THE COURT: Mr. Gulley.  
 12 CROSS-EXAMINATION  
 13 BY MR. GULLEY:  
 14 Q. Hello, Mr. Ferone.  
 15 A. Mr. Gulley, how are you?  
 16 Q. Good. Good. I hope you're doing well.  
 17 You gave a number for the advertising budget per  
 18 month and I missed that number. What is that number?  
 19 A. Currently?  
 20 Q. No. Your plan. I think you called it your plan.  
 21 A. I believe \$15,000 to \$25,000.  
 22 Q. A month?  
 23 A. Correct.  
 24 Q. So \$25,000 a month times 12 -- What is that? \$300,000?  
 25 Would you agree with that?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. I would agree with that.  
 2 Q. And that's before -- That's before you ran into problems  
 3 with legal fees, correct?  
 4 A. Correct.  
 5 Q. And if your legal fees in 2009, January to July, had been,  
 6 let's say, \$600,000 instead of \$1.2, you could have used that  
 7 \$600,000 for advertising, correct?  
 8 A. I'm not sure I understand the question.  
 9 Q. Well, if you assume your legal fees -- Guidance's legal  
 10 fees for 2009 for January to July were \$1.2 million --  
 11 A. Okay.  
 12 Q. If you had only spent \$600,000 on legal fees, you would  
 13 have used that other \$600,000 for advertising, I take it?  
 14 A. That would be Dr. Goodis's call whether he was willing to  
 15 allocate that much.  
 16 Q. It would be available for advertising, wouldn't it?  
 17 A. I guess it would be.  
 18 Q. So if you use \$300,000 of it, 25 times 12, you could have  
 19 doubled that advertising budget to \$50,000 a month, correct?  
 20 A. Theoretically.  
 21 Q. I want to show you what is marked as Defendant's  
 22 Exhibit T.  
 23 Now, you saw a copy of the supply agreement while it  
 24 was being negotiated, correct?  
 25 A. Correct.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Yes, sir.

2 Q. There is a case to be made, is there not, that sometimes

3 instruments, even if they're more expensive, may be worth the

4 money, because they let you do the procedure more efficiently

5 or more quickly?

6 A. Yes, sir.

7 Q. But it's your view that even -- even though that may be

8 the case, that dentists are more often than not going to go for

9 the cheaper, less expensive file or obturator; is that correct?

10 A. The dentists who are not as concerned with the quality

11 will always go for the cheaper, and sometimes the others, as

12 well.

13 Q. And some is -- Some dentists and endodontists are going to

14 be loyal to a particular brand. They like that brand, they

15 have used that brand, they don't want to change, and so even in

16 a situation in which there's a disparity in price, some

17 dentists and endodontists will stick with their preferred

18 brand; is that correct?

19 A. I would assume that is correct. In my experience, it is

20 usually more their loyalty to the salesperson as it's much more

21 likely to keep them from buying one brand than changing. It

22 doesn't matter who the salesperson is. It's one they have

23 developed a relationship with.

24 Q. You agree with me that although many of you who are in the

25 field of nickel-titanium instruments know differently, that

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 many, many dentists buy files without -- not without regard --

2 but buy files without focusing on the precise geometry of the

3 file. Is that correct?

4 A. That is correct, yes, sir.

5 Q. So, dentists are more interested in having a tool that

6 will work in a particular situation for them than they are

7 interested in the -- sort of the science and design of the file

8 itself?

9 A. I would say that the science behind the file has very

10 little to do with their selection. The job that they are able

11 to achieve with the instrument is probably more important to

12 them than anything that has to do with the science.

13 Q. And so if we posit a situation in which there are three

14 files with -- from three different manufacturers, with

15 different geometry in the three files, what is going to be the

16 principal criteria that the dentist uses to choose between the

17 files?

18 A. I'm --

19 MS. AVITIA: Objection. May we approach?

20 THE COURT: You may.

21 (Bench conference on the record.)

22 MS. AVITIA: I would object to the foundation. He's

23 testifying as to dentists' preferences in buying the files.

24 It's gone on for quite a bit of time and I am not seeing any

25 foundation for where he has the experience or is qualified and

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 expertise on the purchasing patterns of endodontists and

2 dentists.

3 THE COURT: Well, it probably would be good to lay a

4 better foundation. I'm probably going to let him testify on it

5 given what he does for a living, I mean, given that he goes out

6 and lectures, the defendants hire him to do it, they're doing

7 it because, you know, they want people to listen to him and buy

8 their product. And I think he is going to just from that

9 experience know it, but why don't you lay a better foundation

10 and I'm probably going to allow this testimony.

11 (Open court.)

12 THE COURT: Mr. Kelly.

13 MR. KELLY: Thank you, Your Honor.

14 Q. (By Mr. Kelly) Dr. Henson, how often do you

15 lecture for Tulsa Dental?

16 A. Approximately 40 times a year.

17 Q. Four-zero, did you say?

18 A. Yes, sir.

19 Q. When we talk about the term "lecture," are we talking

20 about the dental community, the dental industry as opposed to

21 the inside sales reps -- the sales reps at Tulsa Dental?

22 A. Yes, sir.

23 Q. So you talk to dentists and endodontists and perhaps

24 others who work in their offices 40 times a year?

25 A. Yes, sir.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. Correct?

2 A. Yes, sir.

3 Q. Thank you. And is that all over the United States?

4 A. Yes, sir.

5 Q. And what is -- Is it usually in connection with some kind

6 of an annual meeting or convention, professional meeting of

7 some kind?

8 A. Not always, no, sir.

9 Q. Sometimes it's an event that is set up specifically for

10 you to lecture at?

11 A. Yes, sir.

12 Q. And -- But do you do both kinds of lecturing?

13 A. Yes, sir.

14 Q. And when you're speaking to a large -- Excuse me. When

15 you're speaking to a convention or gathering at which you're

16 one of the speakers, what's the -- what's the average size of

17 the audience?

18 A. Oh, I would say 70 dentists.

19 Q. And when you're speaking to a group that's been pulled

20 together specifically by Tulsa Dental for you to speak with,

21 what's the average size of that group?

22 A. Thirty.

23 Q. And in connection with these speaking engagements, do

24 you -- do you get feedback from the dentists and do you

25 exchange thoughts and ideas with them? Do they ask you

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

Henson

1 questions?  
 2 A. Yes, sir.  
 3 Q. And do you get -- Do you learn from them what their  
 4 preferences are, what their experiences are, et cetera?  
 5 A. I usually learn more about what their problems are.  
 6 Q. But they feel free to share those with you?  
 7 A. Yes, sir.  
 8 Q. And you also talk about specific products in your  
 9 lectures, don't you, specific Tulsa Dental Products?  
 10 A. In a portion of the lecture, yes, sir.  
 11 Q. And I think you do -- I know you do a lecture on  
 12 nickel-titanium files. Right?  
 13 A. Yes, sir.  
 14 Q. At least one?  
 15 A. Yes, sir.  
 16 Q. And I know you do one on obturators. At least one?  
 17 A. Yes, sir.  
 18 Q. So you do these presentations and you have interaction  
 19 with dentists?  
 20 A. Yes, sir.  
 21 Q. And you've been doing this for Tulsa Dental for how many  
 22 years?  
 23 A. Since 1993.  
 24 Q. And you also at the trade booths converse with dentists  
 25 about products?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Yes, sir.  
 2 Q. Over time, have you gained an understanding, at least in  
 3 some areas -- you know, I'm not saying all areas -- but have  
 4 you gained an understanding of the preferences, the concerns,  
 5 the likes and dislikes of dentists --  
 6 A. To some degree.  
 7 Q. -- with respect to products?  
 8 A. To some degree yes.  
 9 Q. Okay. If I ask you something that you don't know the  
 10 answer to based on your experience with dentists, you just say  
 11 that. Okay?  
 12 A. Yes, sir.  
 13 Q. All right. So, I'd like your view of when a dentist is  
 14 deciding to purchase a nickel-titanium file and he has three  
 15 options from three different manufacturers and -- what, in your  
 16 mind, is going to be the principal factor or criteria that the  
 17 dentist is going to use in making his decision about what to  
 18 buy?  
 19 A. If I'm speaking with him, sir? Is that what you're  
 20 asking?  
 21 Q. I'm asking you to answer the question based on -- No, not  
 22 when you're speaking with him. Because when you're speaking  
 23 with him, he or she knows that you're a Tulsa Dental rep.  
 24 Correct?  
 25 A. Most of the time, yes.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. All right. So I'm really asking for your opinion about  
 2 how a -- how dentists make the decision to choose between  
 3 products A, B and C.  
 4 MS. AVITIA: Objection, Your Honor. He's not  
 5 disclosed in this area.  
 6 THE COURT: Well, if he can answer this question,  
 7 I'll allow the answer. If he can't, if he doesn't have the  
 8 knowledge, then he can just say so. Overruled.  
 9 A. I'm really not sure. I think what they would try to do is  
 10 see which instrument would work for them, because not all  
 11 instruments work for every -- not any instrument works for  
 12 everybody.  
 13 Q. (By Mr. Kelly) Okay. So that's -- That's an  
 14 important factor?  
 15 A. Yes, sir.  
 16 Q. After that factor, what's more important? Price or brand?  
 17 A. Price.  
 18 Q. Do you -- Is it your view that the price of files is one  
 19 of an endodontists largest costs, perhaps as large as  
 20 personnel?  
 21 A. It is a large cost, yes.  
 22 Q. Can you think of what would be a larger cost for a  
 23 dentist?  
 24 A. Personnel.  
 25 Q. Is that about the only exception?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Well, it could be their facility. It depends on the type  
 2 of office they have. Rent, own.  
 3 Q. But after facilities and personnel, files are right up at  
 4 the top?  
 5 A. Files or obturation, yes.  
 6 Q. Thank you. Now, over the long-term, let's say over the  
 7 next five years, do you agree with me that dentists who use  
 8 obturators are going to -- if they're currently using Tulsa  
 9 Dental obturators, are going to move from Tulsa Dental  
 10 obturators to Guidance obturators if the price stays at 50  
 11 percent of the Tulsa Dental obturator price?  
 12 A. Because I have some information about the industry, I'm  
 13 going to have to tell you no.  
 14 Q. Has information been shared with you since your deposition  
 15 was taken?  
 16 A. I beg your pardon?  
 17 Q. Since your deposition was taken in this case on April 9,  
 18 2009, has this information been shared with you?  
 19 A. Yes, sir.  
 20 Q. Since that date?  
 21 A. Yes, sir.  
 22 Q. Through counsel?  
 23 A. No, sir.  
 24 Q. Through legal counsel?  
 25 A. No, sir.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

Henson

1 Q. Otherwise?

2 A. Yes, sir. Science.

3 Q. On April 9th in your deposition, I asked you on page 76

4 the following question. And I'd like you to tell me if I've

5 accurately stated -- and I'll show you this -- have accurately

6 stated your testimony. Why don't I let you read it first.

7 MR. KELLY: May I approach the witness?

8 THE COURT: You may.

9 Q. (By Mr. Kelly) And I'll represent to you that

10 this is page 76 of your deposition.

11 A. Yes, sir.

12 Q. Two paragraphs. Take a moment --

13 A. That are circled?

14 Q. Yes, sir. Take a moment and read those.

15 Thank you.

16 Dr. Henson, at line 5 of page 76 of your April 9

17 deposition, I asked the question, "So does it make sense to

18 you, that it then, that a lot of dentists are going to look at

19 this Guidance OneFill obturator, notice that it's significantly

20 less than the Tulsa Dental obturator and go with it?"

21 And your answer was?

22 A. Yes.

23 Q. And then I asked you: "And if the dentist is satisfied

24 that OneFill obturator is going to get the job done and get it

25 done as quickly and for all practical purposes as efficiently,

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 it's going to be hard to pull that dentist away from that

2 significantly cheaper product."

3 And what was your answer?

4 A. Yes.

5 MR. KELLY: May I approach the witness?

6 THE COURT: You may.

7 Q. (By Mr. Kelly) What was the precise word that

8 you used in your answer?

9 A. "Absolutely."

10 Q. Thank you.

11 It's also your view, isn't it, that there is going to

12 be a strong and rapid increase in the use of obturators by

13 dentists and endodontists over time?

14 A. Yes.

15 Q. That's partly because obturators are a time-saver,

16 correct?

17 A. Yes, sir, and quality.

18 Q. It does --

19 A. A better job faster.

20 Q. It makes a nice fill of that canal?

21 A. It does a better job faster.

22 Q. And even the general dentists -- Not to be dismissive of

23 general dentists, but the general dentists can do it

24 efficiently and faster?

25 A. Yes, sir.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 MR. KELLY: I have no more questions for the witness,

2 Your Honor.

3 THE COURT: Thank you, Mr. Kelly.

4 Ms. Avitia, do you have cross-examination of

5 Dr. Henson?

6 MS. AVITIA: I do, Your Honor.

7 THE COURT: Ms. Avitia.

8 CROSS-EXAMINATION

9 BY MS. AVITIA:

10 Q. Hello, Dr. Henson.

11 A. Hello.

12 Q. You stated that most dentists don't focus on the geometry

13 of files?

14 A. That is true.

15 Q. In other words, they're fairly unsophisticated purchasers?

16 A. Yes.

17 Q. And I take it, then, that it's important for dentists to

18 be educated about products that they're going to use?

19 A. It's important to educate the dentists on how to use the

20 product that they buy.

21 Q. And that's a big part of what you do?

22 A. Yes, it is.

23 Q. Of those lectures that we heard about, a big part of all

24 those lectures?

25 A. Yes, it is.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. Is it all?

2 A. No.

3 Q. No? Most of it, though?

4 A. No.

5 Q. Large? Give me an estimate.

6 A. Thirty percent.

7 Q. Okay. And you're also educating the sales reps?

8 A. I do.

9 Q. I assume that education -- Well, let me ask this first.

10 Is Tulsa Dental a direct-sale company?

11 A. Yes, it is.

12 Q. And I assume education is a big part of being a

13 direct-sale company?

14 A. I can't answer that.

15 Q. You would consider your education of dentists to be

16 truthful?

17 A. Absolutely.

18 Q. With an unsophisticated audience, I assume that's pretty

19 important, that you're truthful with them?

20 A. Yes, it is.

21 Q. And as a consultant for Dentsply's and Tulsa Dental, I

22 assume you're pretty knowledgeable about their products?

23 A. Yes, I am.

24 Q. So if a product looks like -- just like a Dentsply or

25 Tulsa Dental file, would you automatically assume that Tulsa

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

Henson

1 Dental was making it?

2 MR. KELLY: Objection. Outside the scope.

3 THE COURT: Well, I'll allow that. Overruled.

4 A. I really have never thought of that. I guess -- I don't

5 know. I know that there's -- there are patents that regulate

6 the manufacturing, and I don't know about that. I know that

7 Tulsa Dental borrows patents from other file companies to

8 incorporate into their files to make them better files. So I

9 don't know for sure on that answer.

10 Q. (By Ms. Avitia) You said you're from Dallas?

11 A. Yes, ma'am.

12 Q. I've been there quite a few times and I see a lot of

13 people walking around with Louis Vuitton purses. Have you seen

14 that, those brown purses?

15 A. Yes, ma'am.

16 Q. They all look pretty similar, right?

17 A. To me, they do, yes.

18 Q. Just because they look the same, you don't assume that

19 Louis Vuitton actually makes all of them, right? There's some

20 knock-offs out there?

21 A. Yes.

22 Q. Okay. Same probably goes for files? You could -- From

23 the way you look at it, doesn't necessarily tell you who

24 manufactured it?

25 A. Yes, ma'am.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. You testified that dentists are concerned with price?

2 A. Yes.

3 Q. Maybe cheap?

4 A. Yes.

5 Q. Let's say a dentist can get files for less. Would you

6 then expect them to lower their prices to customers because of

7 this?

8 A. No.

9 Q. Where does that money go?

10 A. In their pocket.

11 Q. And you testified that if a file is cheaper they'll try

12 it?

13 A. Not always, but --

14 Q. Some of them?

15 A. Yes.

16 Q. The cheaper ones?

17 A. They -- Depends on the dentist and their working with the

18 file. I'm not going to say that they will continue to buy it,

19 but I would say that they will probably try it, yes.

20 Q. And that was my next question. If they buy a file because

21 it's cheap and it turns out they don't like it or it's of poor

22 quality, they won't buy it again, will they?

23 A. No, they won't.

24 Q. You testified that it would be hard for you as a salesman

25 to sell a product for twice as much if the same file was being

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 sold by a competitor -- or same product?

2 A. Well, not only am I cheap a dentist in the way I buy

3 things, I'm a very inexpensive dentist in the way I perform

4 services.

5 Q. And if it's -- Well, would you agree with me, then, that

6 if files are different in their attributes and the way they

7 perform, and they're also different in price, that the salesman

8 selling the more expensive file can focus on those differences

9 when he's selling the product?

10 A. Absolutely.

11 Q. So, Dentsply's files aren't cheap, right?

12 A. They're not to me, no.

13 Q. So, presumably, many dentists purchase Dentsply files?

14 A. Yes, ma'am.

15 Q. And we can assume they're not buying them because they're

16 cheap?

17 A. No, ma'am.

18 Q. So they're buying them for other reasons?

19 A. Yes, ma'am.

20 Q. Quality may be one of them?

21 A. You know, when you say "quality," I'm not sure exactly

22 what you mean. When I say use these files, it's because

23 they're able to achieve what they're trying to achieve at a

24 faster rate of speed.

25 Q. Sales rep relationships, I think you mentioned --

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. I think that's the most important thing about gaining and

2 maintaining customers that I've seen in my years with Dentsply,

3 is the relationship of the salesman with the dentist, because

4 you're not going to -- if a guy has a good relationship with

5 his dentist, you're not going to steal him away from him.

6 Q. And Tulsa Dental and Dentsply have the best and most

7 respected sales force in the United States, don't they?

8 A. They have --

9 MR. KELLY: Objection, leading.

10 THE COURT: Sustained.

11 Q. (By Ms. Avitia) Can you -- Do you know how

12 large Tulsa Dental's sales force is?

13 A. I do not.

14 Q. Do you know if it is one of the largest?

15 A. In the dental industry?

16 Q. Yes.

17 A. Yes.

18 Q. I'm sorry?

19 A. Yes. In the dental industry, yes.

20 Q. Is it respected?

21 A. Yes.

22 Q. You testified that you go to trade shows?

23 A. Yes.

24 Q. And you testified that there was a stir when the sales

25 reps at Tulsa Dental learned that Guidance's files were made by

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. CIV-08-1101 JB/RLP  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.  
Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Tuesday, September 29, 2009, at 8:30 a.m. and concluding at  
5:33 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

Higgins

1 can't you tell?  
 2 A. I have no idea.  
 3 Q. You can't tell?  
 4 A. I have no idea.  
 5 Q. Okay. Can you tell that it's a drawing for an .04  
 6 constant-taper file?  
 7 A. All except for the 15/.02. That would be an .02 constant  
 8 taper.  
 9 Q. So we've got a drawing for 15, 20, 25, 30, 35, 40, 45, 50  
 10 size .04 constant-taper file?  
 11 A. That's correct.  
 12 Q. Along with diameter measurements at various indicated  
 13 points along the length of the file, right?  
 14 A. That's correct.  
 15 Q. And so as of this point in time, you already had in your  
 16 CAD system a drawing for the V-Taper file, correct? It's  
 17 obvious, but I'm asking you just to say yes.  
 18 A. Correct. Yeah.  
 19 Q. And the -- In connection with the drawings that we looked  
 20 at a little while ago in the manufacturing agreement --  
 21 A. Yes.  
 22 Q. -- did Ms. Littleton ask you for specific information on  
 23 those drawings, or did you just give her what you would  
 24 normally produce?  
 25 A. I gave her what I had at that time.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. What you had at that time? And that's -- Is that also  
 2 true of this -- of this V-Taper drawing we just looked at?  
 3 This is what you would have had at the time?  
 4 A. Correct.  
 5 Q. Okay. But there would have been data sheets elsewhere in  
 6 the system that would have married up with this to provide more  
 7 information to produce the file?  
 8 A. Correct.  
 9 MR. KELLY: One moment, please, Your Honor.  
 10 THE COURT: Certainly.  
 11 Q. So these drawings are a representation in the file, right?  
 12 A. Yes.  
 13 Q. They're not -- The way they're done here, they're a  
 14 helpful visual image, but they don't include all the  
 15 information that you need to make the file?  
 16 A. Correct.  
 17 Q. And -- But the information that you need to make the file  
 18 is in the data sheets?  
 19 A. Yes.  
 20 Q. And those data sheets are available on site at Tulsa  
 21 Dental?  
 22 A. Yes.  
 23 Q. Even if you've saved over the last data sheet in your  
 24 system, they're -- when those last prototypes were made the  
 25 data sheet is sent out to the floor so somewhere there's a hard

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 copy, right?  
 2 A. I would think so.  
 3 Q. So it would be possible, with efforts, to retrieve that  
 4 data sheet?  
 5 A. I don't know the process for keeping those --  
 6 Q. Sure.  
 7 A. -- after they're made.  
 8 Q. Sure. But --  
 9 A. I don't know if they keep them, if they file them, or if  
 10 they destroy them. I have no idea what that process is. I  
 11 don't take part in it.  
 12 Q. Right. But you testified that if not on every occasion  
 13 there's certainly occasions when those data sheets are going to  
 14 be available in a hard form somewhere in another part of the  
 15 facility that -- since -- that data may no longer be available  
 16 on your system, given that you've saved over it?  
 17 A. Right. I would think that it is possible to be able to  
 18 find a hard copy somewhere.  
 19 Q. And if you pulled that data sheet, and if you -- it would  
 20 be possible -- indeed, that's the way you would normally do  
 21 it -- that data sheet would go out on the floor and the company  
 22 then would make a file, right?  
 23 A. Yes.  
 24 Q. So it's the data sheet and not the drawing that you  
 25 actually use to make the file from the machinist's perspective?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Correct.  
 2 Q. He or she may want to look at the drawing, but the actual  
 3 information they need to make that specific file is on the data  
 4 sheet?  
 5 A. It's very rare that they ever look at their drawing.  
 6 Q. They don't even look at the drawing?  
 7 A. Not usually. Usually the data sheet has all of the  
 8 information that is pertinent to manufacturing the file.  
 9 Q. Mr. Higgins, I appreciate your coming here.  
 10 MR. KELLY: And I have no more questions for the  
 11 witness, Your Honor.  
 12 THE COURT: Thank you, Mr. Kelly.  
 13 Mr. Gulley, do you have cross-examination --  
 14 MR. GULLEY: I do, Your Honor.  
 15 THE COURT: -- of Mr. Higgins?  
 16 CROSS-EXAMINATION  
 17 BY MR. GULLEY:  
 18 Q. Eric, I'm going to do my best to get you on that airplane,  
 19 but there's just a few things I need to ask you about.  
 20 Mr. Kelly showed you this drawing from Exhibit --  
 21 Plaintiff's Exhibit 508. Do you remember looking at -- Do you  
 22 remember looking at this drawing?  
 23 A. Yes.  
 24 Q. We looked at this last night, didn't we?  
 25 A. Yes.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

McDonald

1 THE COURT: Okay.

2 MR. GULLEY: Your Honor, just one point here, that,

3 as I understand it, plaintiff is seeking -- still seeking an

4 injunction to force us to make the V2 file, so if Dr. McDonald

5 testifies about damages down the road, then it seems to me to

6 be inconsistent that you would issue an injunction. They can't

7 have it both ways.

8 MR. KELLY: I agree.

9 THE COURT: You understand you may run a risk there

10 by --

11 MR. KELLY: But right now we don't know which way

12 this is going to go, and Dr. McDonald understands that we --

13 Guidance may get the file in three months, may get it in three

14 years, may never get it.

15 THE COURT: Okay. Just as long as everybody

16 understands there's a risk of seeking future damages if I look

17 at your request for injunctive relief.

18 MR. KELLY: Right.

19 (Open court.)

20 THE COURT: Mr. Kelly.

21 Q. (By Mr. Kelly) Excuse the interruption,

22 Dr. McDonald, members of the jury.

23 So in -- There's a category of damages that you have

24 considered in this case in connection with former V-File

25 customers; is that correct?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. That's correct.

2 Q. And are there -- And are you going to provide testimony

3 today to calculate -- provide a calculation of those damages?

4 A. I will. I'll provide my opinion of the economic damages

5 for the loss of the existing V-File customers.

6 Q. Now, are there other components of damage, which you may

7 not have quantified, that could exist conceptually?

8 A. Yes.

9 Q. And what are those components?

10 A. Well, one of them would be a loss of profits on the sale

11 of the V2 file to new customers of Guidance. Another category

12 would be the lost profits on the sales of the EndoTaper file,

13 which Guidance is currently selling under the Manufacturing and

14 Supply Agreement, if that agreement were discontinued for some

15 reason. Then there would be lost profits on the lost sales of

16 the single-use obturators that Guidance is currently selling

17 under the Manufacturing and Supply Agreement, again if that

18 agreement were discontinued. And then, finally, because

19 Guidance Endodontics had not been able to implement their

20 business plan as they had planned, there are other damages

21 associated with a loss of the market share they might have

22 obtained in the endodontic market for the nickel-titanium

23 rotary file and the single-use obturators.

24 Q. Thank you, Dr. McDonald.

25 Let's go back to the first two categories. I think

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 they both concern the -- what you refer to as the V2 --

2 A. Yes.

3 Q. -- and what we've been discussing in the courtroom as the

4 V2 or the .04 constant-taper file.

5 A. That's correct.

6 Q. And those first two categories, one has to do with

7 existing customers, and the other has to do with future new

8 customers?

9 A. That's correct.

10 Q. And what you're addressing here is a limited area, and it

11 has to do with the -- what were the then-existing customers of

12 Guidance Endodontics at the time -- Well, you tell us when.

13 A. Well, I looked at the existing customers that Guidance had

14 of the -- what's called the V-Taper file and looked at the

15 beginning of the third quarter of 2008, the loss of customers,

16 Guidance customers who previously had purchased the V-Taper

17 file who no longer were purchasing from Guidance because they

18 did not have the V2 file, which would have been an adequate

19 substitute for the V-Taper file.

20 MR. GULLEY: Your Honor, there's no factual

21 foundation for Dr. McDonald's testimony about the -- I think he

22 said "adequate substitute."

23 THE COURT: Well, I'll let you deal with that on

24 cross. Overruled.

25 Q. (By Mr. Kelly) Go ahead and repeat that last

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 part so that the full thought comes out.

2 A. Well, Guidance had existing customers of their V-Taper

3 file. Beginning in the third quarter of 2008 when the V-Taper

4 file essentially was no longer available and Guidance intended

5 to sell the V2 file to their existing customers, for the most

6 part, they were not able to maintain those -- that existing

7 customer base, and so there were lost sales of the V2 file to

8 existing customers of Guidance of the V-Taper file. And I've

9 also limited it just to a five-quarter period. I've looked

10 from the third quarter of 2008 through the end of 2009.

11 Q. And what was the assumption that -- or the reason why you

12 said, Well, I'm going to look at this through the end of 2009?

13 A. Well, at the time I did my report, this trial was

14 scheduled for December 2009, and so I was thinking that,

15 depending upon the outcome of this trial, that would determine

16 how long the damages would go.

17 Q. So you used that as the time period over which you

18 calculated the damages?

19 A. That's correct, for these existing customers.

20 Q. When you did your analysis, you didn't know specifically

21 when the trial would be, nor did you know when, if ever,

22 Guidance would get the V2 file?

23 A. That's correct, I didn't. I had some general idea when

24 trial would be, and I assumed that, you know, depending upon

25 the outcome, that pretty soon thereafter Guidance would be able

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

*McDonald*

1 MR. KELLY: Thank you, Your Honor.

2 Q. (By Mr. Kelly) Dr. McDonald, conceptually, did

3 this business model of Guidance's have the potential

4 to expand Guidance's market share, particularly

5 within an industry that is dominated by one or two

6 large suppliers?

7 A. Yes, it did. I think dentists like --

8 MR. GULLEY: Objection, Your Honor. That was a

9 yes/no question.

10 A. Yes, it did.

11 Q. (By Mr. Kelly) You can elaborate, but don't go

12 into any --

13 THE COURT: Well, just -- Why don't you ask another

14 question?

15 MR. KELLY: All right.

16 Q. (By Mr. Kelly) So, why did you think that

17 Guidance might be successful pursuing this low-cost

18 strategy?

19 MR. GULLEY: Objection, Your Honor.

20 THE COURT: Well, I'll allow a brief answer on this.

21 Overruled.

22 A. Well, as an economist, I don't believe dentists or

23 endodontists are any different than the average, typical

24 consumer when they're confronted with a lower price for a

25 product -- and in the case, we're looking here at significantly

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 lower prices -- that a dentist would prefer to buy a

2 nickel-titanium rotary file or a single-use obturator at a

3 lower price from Guidance rather than from some other

4 competitor.

5 Q. (By Mr. Kelly) Thank you, Dr. McDonald.

6 And you've not undertaken to quantify any potential

7 loss based on whatever Guidance's expectation may have been

8 about increased market share?

9 A. I have not.

10 Q. The \$239,000 number per quarter that you testified to a

11 little while ago, that does not take into account any increase

12 in market share through a low-cost marketing strategy targeted

13 at new customers?

14 A. It does not. It was only for existing customers.

15 Q. And it does not take into account any potential profits

16 based on lost sales of obturators if the contract were to end?

17 A. It does not. That's correct.

18 Q. And that \$240,000 does not take into account any potential

19 future profits based on lost sales of EndoTapers if the

20 contract were to end or supply interrupted or anything of that

21 nature?

22 A. It does not.

23 MR. KELLY: That completes my examination, Your

24 Honor.

25 THE COURT: Thank you, Mr. Kelly.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Mr. Gulley, can we take our afternoon break here

2 before you do your cross?

3 MR. GULLEY: Most certainly.

4 THE COURT: All right. All right, ladies and

5 gentlemen, let's be in recess for a few minutes.

6 (Jury out at 3:35 p.m.)

7 THE COURT: All right. We'll be in recess for a few

8 minutes.

9 (Court stood in recess at 3:35 p.m. and resumed at

10 3:52 p.m. as follows, with jury present:)

11 THE COURT: Dr. McDonald, I'll remind you that you're

12 still under oath.

13 THE WITNESS: Yes.

14 THE COURT: Mr. Gulley, if you wish to conduct

15 cross-examination of Dr. McDonald.

16 MR. GULLEY: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY: MR. GULLEY:

19 Q. How is your grandbaby?

20 A. He's doing great.

21 Q. You and I are friends, right?

22 A. Right.

23 Q. Not close friends, but friends. And I've hired you and

24 been against you in cases before?

25 A. Yes. That's correct.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. Nothing personal in my questions here. Your whole

2 quantification of damages -- I think what Mr. Kelly asked you

3 about actual damages for sales of the V2 that Guidance believes

4 it could have had but didn't get because the V2 wasn't in the

5 market -- is based on what Dr. Goodis or his lawyers have asked

6 you to assume, correct?

7 A. Well, there -- it's based on the assumption that the V2

8 file is a substitute for the V-File that the existing customers

9 purchased, yes.

10 Q. And that's because -- I'm not sure Dr. Goodis told you

11 that or his lawyers told you that, but one or both told you to

12 make that assumption?

13 A. Well, I -- that was an assumption that I knew, as I began

14 the damage analysis, that I needed to have an answer for that,

15 or a basis for it, and I did talk to Dr. Goodis about it,

16 because it's an important assumption.

17 Q. Okay. And if that assumption turns out to be untrue, then

18 your calculations, then, are essentially worthless, correct?

19 A. Well, it's based on that assumption, yes, and so my

20 calculations would be incorrect.

21 Q. Would be what?

22 A. Incorrect.

23 Q. Okay. And you're -- I think the jury already knows this,

24 but you're not an expert in endodontic files, I take it?

25 A. No. I've learned more than I want to know about them in

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

Bettes-Groves

1 Q. (By Mr. Bisceglie) Do you remember  
 2 approximately how many times they've delayed  
 3 shipment?  
 4 A. I know two for sure. There might have been three, but I  
 5 can say confidently two for sure.  
 6 Q. Okay. I know you're not a lawyer, but do you have a --  
 7 are you aware or do you have an understanding that Guidance has  
 8 some right to ask for early shipment of goods?  
 9 A. Yes, that is in the Manufacturing and Supply Agreement.  
 10 Q. Okay. Have you requested early shipment of goods before?  
 11 A. I have.  
 12 Q. Has Tulsa Dental ever shipped goods early?  
 13 A. Not that I can recall, no.  
 14 Q. Okay. Were you aware, in September and October, that  
 15 Guidance began getting questions from customers that they're  
 16 going out of business, not selling files?  
 17 A. We --  
 18 MS. AVITIA: Objection, Your Honor. May we approach?  
 19 THE COURT: Yes. But I think the -- I think the  
 20 question -- the way he's worded the question is appropriate,  
 21 but you can approach if you want.  
 22 MS. AVITIA: I can take it question by question.  
 23 THE COURT: All right.  
 24 A. Would you mind repeating that? Sorry.  
 25 Q. (By Mr. Bisceglie) I think I can remember this

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 one. Do you recall Guidance getting questions, in  
 2 September and October of 2008, from customers as to  
 3 whether Guidance is going out of business and whether  
 4 Guidance is no longer selling files?  
 5 A. That was one of the many questions we got, yes.  
 6 Q. What other types of questions did Guidance get?  
 7 A. What -- You know, "What happened with the V-Taper? Why  
 8 are you not selling V-Taper?" That's one of the questions we  
 9 would get. Sorry.  
 10 Q. It's okay.  
 11 A. A lot in my head.  
 12 Q. It's the end of day. I don't need to ask you every  
 13 question that you remember. But do you remember how frequent  
 14 or voluminous it was around this time?  
 15 A. At that time, it was almost every call. Close to.  
 16 Q. Okay. And who answers the phones at Guidance?  
 17 A. Myself and Debra.  
 18 Q. Okay. And is that -- I take it -- Is there a reason that  
 19 you and Debra can never be in court at the same time?  
 20 A. Because that's our whole corporate office.  
 21 Q. Right. So somebody has to be at the office, right?  
 22 A. Correct. Correct.  
 23 Q. Thank you for your time.  
 24 A. Thank you.  
 25 MR. BISCEGLIE: I have no more questions.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 THE COURT: Thank you, Mr. Bisceglie.  
 2 Ms. Avitia, do you have cross-examination of  
 3 Ms. Bettes-Groves?  
 4 MS. AVITIA: Yes, Your Honor.  
 5 THE COURT: Ms. Avitia.  
 6 CROSS-EXAMINATION  
 7 BY MS. AVITIA:  
 8 Q. Good afternoon. Do you -- Could you pronounce your last  
 9 name for me?  
 10 A. It's Bettes-Groves.  
 11 Q. Ms. Bettes-Groves. Okay. I want to make sure I get that  
 12 right.  
 13 Ms. Bettes-Groves, you're the operations manager at  
 14 Guidance?  
 15 A. Yes, I am.  
 16 Q. Since July 2008?  
 17 A. That is correct.  
 18 Q. And you said that your duties include overseeing customer  
 19 service and inventory?  
 20 A. Yes.  
 21 Q. And that you also answer phone calls?  
 22 A. Yes.  
 23 Q. You testified that you understood -- Well, first of all,  
 24 you understand there's a contract in this case?  
 25 A. Yes, I do.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. And you testified that you understood, from that contract,  
 2 that there were certain terms relating to delivery of products?  
 3 A. Yes.  
 4 Q. I'd like to hand you what at this point has only been  
 5 marked for identification purposes as Defendant's AF.  
 6 MS. AVITIA: May I approach, Your Honor?  
 7 THE COURT: You may.  
 8 Q. (By Ms. Avitia) Do you recognize that document?  
 9 A. Yes, I do.  
 10 Q. What is it?  
 11 A. This is a summary that Dr. Goodis had asked me to put  
 12 together once the contract was signed.  
 13 Q. And I assume that in the process of putting this together  
 14 you also became more familiar with the terms of the agreement?  
 15 A. Yes.  
 16 Q. And you only have one position or role at Guidance, right?  
 17 That's as operations manager?  
 18 A. Yes.  
 19 Q. So his request for you to do this, that also fell under  
 20 your role as operations manager?  
 21 A. Because many things in this agreement are things that I  
 22 would be handling, yes.  
 23 MS. AVITIA: At this time, Your Honor, I move for the  
 24 admission of Defendant's AF.  
 25 THE COURT: Mr. Bisceglie, any objection?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. CIV-08-1101 JB/RLP  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.

Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Wednesday, September 30, 2009, at 8:32 a.m. and concluding at  
5:39 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 MS. AVITIA: Objection, vague as to the negative. If  
 2 we could lay some foundation about that.  
 3 THE COURT: Let me look. I was talking to Mr. Fisher  
 4 right then.  
 5 MR. BISCEGLIE: Just in response, I'm trying --  
 6 THE COURT: Why don't you -- You did ask two  
 7 questions there. Why don't you start with the first one? Do  
 8 you recall getting negative calls, and just get a yes no and  
 9 lay a foundation first.  
 10 Q. (By Mr. Bisceglie) Okay. Do you recall getting  
 11 negative calls in and around the fall of 2008?  
 12 A. I do.  
 13 Q. And you got those negative calls while you were at  
 14 Guidance; is that right?  
 15 A. That's right.  
 16 Q. Do you remember approximately how many negative calls you  
 17 received?  
 18 A. I believe there was five or six prior to us starting --  
 19 starting to document them, because we were getting quite a few.  
 20 Q. Okay. So that's -- Let me understand. So there were five  
 21 or six that -- When you say "documented," I take it at some  
 22 point in time, because of the frequency of the calls, you  
 23 started writing down the negative testify calls?  
 24 A. Right. There was five or six before we started  
 25 documenting them because we were getting so many.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. Okay. And do you remember how many you received after you  
 2 started writing them down?  
 3 A. I believe I personally documented five or six, as well.  
 4 And there was several that I didn't get documented just because  
 5 of the volume of calls.  
 6 Q. Okay. Just tell me up there, when you say there's --  
 7 There's a point in time you started writing down these negative  
 8 calls, but you said you didn't write down every one that came  
 9 in; is that correct?  
 10 A. That's correct.  
 11 Q. And you said that was because of the volume of calls?  
 12 A. Right.  
 13 Q. Can you explain to the jury what you mean by that?  
 14 A. Well, I, most of the time -- Well, I'm the only one that  
 15 answers the phone, then. If I'm on the phone, then, Sharon  
 16 will try to pick it up. But being one person answering the  
 17 phone, I've got several on hold at one time, so I try not to  
 18 make the calls go too long, so I'm not dropping calls and  
 19 taking one after another. Some of them I just didn't get  
 20 documented because I was taking orders and answering other  
 21 peoples' questions.  
 22 Q. Okay. So it was just simply as a matter of available  
 23 time, sometimes you didn't have time to take them down?  
 24 A. Right. And we didn't have that sophisticated of a phone  
 25 system, so, you know, the customers were just being put on

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 hold. At first, they didn't even have music to listen to and  
 2 so a lot of them would just hang up.  
 3 Q. Okay. Now, these calls came from customers; is that  
 4 right?  
 5 A. Uh-huh.  
 6 Q. Okay. Without telling me who the customers are at this  
 7 point, without telling me anything they said, did they ask any  
 8 questions?  
 9 A. Yes, they do.  
 10 Q. Okay. Can you tell me the types of questions that these  
 11 customers were asking you?  
 12 A. A lot of times it's just pricing, how they're packaged,  
 13 how they're available.  
 14 Q. I'm sorry, I'm referring to the customers with regard to,  
 15 you know, what we call the negative calls.  
 16 A. Oh, the negative calls? The negative calls were that they  
 17 had heard that Guidance was going out of business due to a  
 18 lawsuit, that we weren't able to provide, you know, or  
 19 manufacture any files any longer. Calls like that.  
 20 Q. Anything else?  
 21 A. Reps were coming in and telling them -- telling their  
 22 doctors or the doctors' offices --  
 23 MS. AVITIA: Objection, Your Honor.  
 24 THE COURT: Hold on. Hold on. Just relate the  
 25 questions that they ask.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. Okay. Calls like "Patterson and Guidance aren't going to  
 2 be selling files any longer, so you have to purchase them  
 3 through -- through us."  
 4 Q. (By Mr. Bisceglie) When the customer asked if  
 5 they had -- if they had to purchase them through  
 6 another company, did they ask what company?  
 7 A. I was told by doctors and assistants that were calling  
 8 in --  
 9 MS. AVITIA: Objection.  
 10 MR. BISCEGLIE: Let me lead the witness, Your Honor.  
 11 Q. Did they ask you if it was true -- Did the customers ask  
 12 you if it was true they had to buy files from Tulsa Dental now?  
 13 A. They asked that, but I told them that it was incorrect,  
 14 that we were still selling and had a line of files.  
 15 Q. Okay. Do you recall getting a phone call from a Dr. Steve  
 16 Bozoian or somebody at his staff?  
 17 A. Sounds familiar. I'd have to look at more documentation  
 18 that I wrote to familiarize myself with, actually, the date  
 19 that I received it.  
 20 Q. Okay. You don't remember? Is there a document that would  
 21 help you refresh your recollection?  
 22 A. Yes, what I documented. There's a negative call log.  
 23 Q. Okay.  
 24 MR. BISCEGLIE: Your Honor, may I approach?  
 25 THE COURT: You may.

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 Q. (By Mr. Bisceglie) Just take a look at that.

2 A. Okay.

3 Q. I'm going to take it away from you.

4 A. Okay.

5 Q. You don't have to be exact, but do you remember if

6 Dr. Stephen Bozoian or someone from his staff called Guidance

7 in and around October 2nd, 2008?

8 A. Yes, I do.

9 Q. Okay. Did Dr. Steve Bozoian ask some of those questions

10 that we went over earlier?

11 A. He did. He was a previous V-Taper user.

12 Q. Did he ask questions about Dentsply's suing Guidance?

13 A. He did.

14 Q. Okay. Did he ask questions about things he was hearing

15 from the Tulsa representative?

16 MS. AVITIA: Objection. May we approach?

17 THE COURT: Well, you can, but on that particular

18 question it's just a yes/no question, and so it should be

19 answered that way. If you wish to approach on that.

20 MS. AVITIA: Well, I take it, it's overruled, but my

21 objections's on hearsay.

22 THE COURT: All right. I think it's just a yes/no

23 question on that.

24 A. Yes.

25 Q. (By Mr. Bisceglie) Can you answer that

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 question?

2 A. Yes.

3 Q. So yes?

4 A. Yes.

5 MR. BISCEGLIE: Your Honor, if it's okay, may I just

6 go back and forth to give her --

7 THE COURT: You may.

8 MR. BISCEGLIE: Okay. Thank you.

9 Q. (By Mr. Bisceglie) Do you recall getting a call

10 from Dr. Stramback in and around October 15th, 2008?

11 A. Uh-huh. I do.

12 Q. Okay. Did he also ask similar questions?

13 A. He did.

14 Q. Okay. Do you remember getting a phone call from

15 Dr. Crawford's office or somebody in Dr. Crawford's office

16 around October 20th, 2008?

17 A. I do.

18 Q. Did someone from Dr. Crawford's office ask questions about

19 whether or not Guidance can sell files anymore?

20 A. Yes, she did.

21 Q. Do you remember getting a phone call from Erica with

22 Dr. Philip -- I believe it's pronounced Jesus. It could be

23 Jesus. I don't know which --

24 A. Uh-huh.

25 Q. -- on October 14th, 2008?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. I do.

2 Q. And October 14th, 2008, did Erica ask you questions about

3 Guidance's litigation with Dentsply?

4 A. She did.

5 Q. Did you receive a call on June 5th, 2009, from Dr. Michael

6 Khanna?

7 A. Yes.

8 Q. And was there a question about that Tulsa bought out

9 Guidance?

10 A. I believe that's what the document was written about.

11 Q. Okay.

12 THE COURT: I think on one of the objections that

13 Ms. Avitia raised, on the -- on one of the questions I think a

14 limiting instruction is appropriate. And so on the question,

15 did he ask questions about things he was hearing from the Tulsa

16 representatives, I don't think you can consider that for the

17 truth of the matters that may have been stated, but simply that

18 these are the questions that were coming to Guidance and -- but

19 what they were about, you can't consider them for the truth of

20 the matter, so you can consider those questions only for that

21 limited purpose.

22 MR. BISCEGLIE.

23 MR. BISCEGLIE: Thank you, Your Honor.

24 Q. (By Mr. Bisceglie) How far apart do you and

25 Sharon work, physically?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. About our distance.

2 Q. Okay. With regard to that telephone call from Dr. Michael

3 Khanna, with regard to that one, is it possible that it was

4 Sharon who received that call, rather than you?

5 A. Yes.

6 Q. Okay. And would you -- Would the two of you ever sort of

7 exchange information about when a negative call came in

8 sometimes?

9 A. Yes, we would discuss it.

10 Q. And that part because it was a big deal for you guys at

11 Guidance?

12 A. Definitely.

13 Q. Did you believe that this was hurting the company?

14 A. Yes. That's why we started documenting them.

15 Q. Was it confusing the customers of the company?

16 MS. AVITIA: Objection, calls for speculation.

17 THE COURT: Well, perhaps you can reword that. I

18 think that might call for speculation.

19 MR. BISCEGLIE: I understand, Your Honor.

20 THE COURT: She can give her impressions or opinions,

21 but it needs to probably be worded in that way.

22 Q. (By Mr. Bisceglie) Based on your perceptions of

23 being on that call, how would you characterize your

24 customers' questions?

25 A. Most of them were frustrated and concerned, because they

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283



1 management team saying that there had been some  
2 things going on or occurring and then, as I had  
3 mentioned, Bill Newell did send out an E-mail, I  
4 don't have the exact date, but approximately October  
5 to November requesting that under no circumstances  
6 should we be discussing any litigation of Dentsply  
7 versus Guidance V-Tapers.

8 "And I have not said anything to any reps, I mean to  
9 any customers from that point.

10 "Q. I show you what's been marked as Exhibit 118,"  
11 which is trial Exhibit 482.

12 "Have you seen this document before?"

13 "A. Yes, I have.

14 "Q. Do you remember when you saw it?"

15 "A. Approximately that date.

16 "Q. Do you remember how you got it?"

17 "A. From Bobby Morrow.

18 "Q. So you remember some memorandum from Bobby  
19 Morrow on the V-Taper file; is that right?"

20 "A. I don't recall who it was from, but when the  
21 file was -- was initially introduced, which I don't  
22 even remember the date, but I recall getting  
23 information sent out to the field to be aware of it.

24 "Q. Okay. There's some statements here about the  
25 potential risk of the EndoTaper design.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. CIV-08-1101 JB/RLP  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.

Transcript of Trial before The Honorable James O.  
Browning, United States District Judge, held in Albuquerque,  
Bernalillo County, New Mexico, commencing on Friday,  
October 2, 2009, at 8:30 p.m. and concluding at 5:30 p.m.  
Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Q. Okay. Did you ever -- Did you or Mr. Mosch ever tell  
2 Mr. Wise that you expected Guidance to spend a lot of money on  
3 its own marketing and its own overhead?  
4 A. Again, I think I just answered. I did not -- I don't  
5 recall ever reporting to Mr. Wise on any of this, and I can't  
6 speak to what Mr. Mosch may have done.  
7 Q. Did you and Mr. Mosch and Mr. Vanderslice, after the  
8 meeting, discuss your belief that Guidance was going to spend a  
9 lot of money on its own marketing and overhead?  
10 A. We certainly concurred with what they told us they were  
11 going to do, which was they were going to spend a lot of money  
12 on building their direct organization, so I'm sure we talked  
13 about -- I'm sure we talked about the expense that's required  
14 to build a company, a direct-selling company.  
15 Q. Okay. So after the meeting, did you, Mr. Vanderslice and  
16 Mr. Mosch discuss your expectation that Guidance would have a  
17 large direct-sales force?  
18 A. As I just mentioned, I'm sure that we discussed and  
19 reviewed what was discussed and what we were told at that  
20 meeting, which was that they were going to be building a  
21 direct-sales force. I think they mentioned about 25 or 30  
22 people, as I recall.  
23 Q. Right. Did you and Mr. Mosch, Mr. Vanderslice after that  
24 meeting discuss how much money Guidance would spend on  
25 marketing and overhead?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 A. Specifically, no, I don't recall that we did.  
2 Q. Now, why didn't you put in the contract a requirement that  
3 Guidance build a large internal sales force?  
4 A. I really can't answer that. I didn't, you know, draft  
5 the -- you know, the legalese in that final agreement, so I  
6 don't know.  
7 Q. Well, you know, for example, you negotiated for Guidance  
8 for giving up their distribution, correct, as one of the  
9 negotiating points?  
10 A. That was an agreed-upon term.  
11 Q. Right. And it ended up in the Manufacturing and Supply  
12 Agreement, correct?  
13 A. I believe it did.  
14 Q. Right. And you negotiated for, you didn't want any  
15 employees approached, and that ended up in the Manufacturing  
16 and Supply Agreement, right?  
17 A. Yes.  
18 Q. Right. So why didn't you require Guidance to take on 25  
19 salespeople?  
20 A. In hindsight, we probably should have.  
21 Q. Okay.  
22 A. I think it was -- it was pretty clear to us what was being  
23 represented, and, again, we know what it takes to build a  
24 direct-sales organization, so we just we took them at their  
25 word.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Q. Okay. And so why didn't you put into the agreement that  
2 Guidance should have a head of sales, if that was something  
3 that was important to you?  
4 A. Like I said, in hindsight, maybe we should have.  
5 Q. Why didn't you put into the agreement an expectation from  
6 Dentsply that Guidance spend a certain amount of money on  
7 overhead every year?  
8 A. Don't know. Can't answer that.  
9 Q. Why didn't you just negotiate to have Tony Rittenberry  
10 stay at the company as a term of the Manufacturing and Supply  
11 Agreement?  
12 A. We had no reason to believe that Tony wasn't going to  
13 stay. He was actually representing himself as a big part of  
14 plans, that we knew were not short-term plans and initiatives  
15 to kind of build that company out. So, again, we took him at  
16 his word. We assumed that he was -- he was a key player and  
17 was going to be there.  
18 Q. Right. Well, you didn't take Guidance at its word that  
19 they would give up distribution, right? You put this in the  
20 agreement, correct?  
21 A. It ended up in the agreement, yes.  
22 Q. Yes. You didn't take Guidance at their word that they  
23 wouldn't solicit Tulsa Dental employees? You put that in  
24 agreement, right?  
25 A. That's correct.

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 Q. And they didn't take you at your word that you would  
2 supply endodontic products at a certain price? That went into  
3 the agreement, right?  
4 A. Right.  
5 Q. So you're describing this expectation that you claim you  
6 had, and I'm asking you -- as to their overhead and the costs  
7 that they would spend -- and I'm asking you, why didn't you put  
8 it into the agreement?  
9 A. I think I answered that. I don't know.  
10 Q. Just didn't feel like it?  
11 A. You know, if -- the agreement could probably be thousands  
12 of pages long if you try to cover everything that you think  
13 somebody is going to, you know, lie to you about. So I think  
14 in any contract there's certain terms, key deal terms, from my  
15 experience, that you negotiate in and you put in writing, and I  
16 think then there's some implied good faith, and I would say  
17 that to the extent that, you know, Tony Rittenberry and Neal  
18 Williams were representing themselves as key players in a very  
19 small company, like I said, of five, six people or so, we  
20 just -- we believed that they were -- they were going to be  
21 part of it. We certainly didn't believe or have any reason to  
22 believe that they had already quit.  
23 Q. Right. Now -- So you -- I guess those are the reasons why  
24 you didn't put it in the agreement, apparently, right, the way  
25 you just described?

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

*B.W. Newell*

1 A. I would say so, yes.

2 Q. Right. We also agree you didn't negotiate for it, you

3 didn't negotiate that Guidance would have sales

4 representatives, you didn't negotiate that they would have high

5 overhead, you didn't even try to negotiate any of these points

6 that you now claim are so important to Dentsply and if they

7 weren't going to do those things you wouldn't have entered the

8 agreement?

9 A. Well, we didn't negotiate direct-sales people because they

10 told us how many they were going to add. That seemed to make

11 sense.

12 Q. Well, I mean, isn't it the fact that you, Dentsply, can

13 not dictate to Guidance what its internal margin's going to be

14 and that's the reason you didn't negotiate for it?

15 A. We can't dictate that. We had no intension of doing so.

16 We were just told certain things during the negotiation that we

17 believed to be true.

18 Q. I'm sorry. Did you say you can -- you believe it's legal

19 in the United States for you to negotiate what another company

20 spends on its overhead?

21 A. No. I think I said I don't believe we can.

22 Q. Right. So you can't even negotiate for it, right?

23 A. I think I just answered that I don't think --

24 Q. Right. It's illegal in the United States to reach an

25 agreement like that, with the Guidance's of the world?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. I think I just answered, I agree with you.

2 Q. So you have no right to any expectation about what

3 Guidance spent -- spends on its internal margins, do you?

4 A. I don't think I ever said that we did have that right. I

5 think what I said was that we had the right to at least believe

6 that we weren't being lied to. We thought that there was -- We

7 thought that certain people were going to be key players.

8 Q. I got it. I understand what you're saying.

9 So you're saying that even though you didn't put it

10 in writing, that you and the principals of Guidance reached an

11 illegal agreement, you know, an unwritten understanding as to

12 what Guidance's overhead costs would be? Is that what you're

13 telling me?

14 A. No, I'm not telling you that at all.

15 Q. No. You didn't even reach an unwritten agreement on that

16 point, correct?

17 A. No. I really appreciate you putting those words in my

18 mouth, and I'll say once again, no, we didn't.

19 Q. So you didn't negotiate for it, right?

20 A. That's right.

21 Q. Right. You didn't reach a written negotiated -- a written

22 agreement on these points, right?

23 A. Right.

24 Q. And you didn't reach some sort of unwritten side agreement

25 on this point, correct?

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 A. That's correct.

2 Q. Okay. And the reason is, it's illegal in the United

3 States to reach an agreement like that, whether written or

4 unwritten, whether spoken or unspoken, with a third-party

5 licensee, correct?

6 A. I think we've repeated that now a couple times. That

7 would be correct.

8 Q. Thank. I have no more questions.

9 THE COURT: Thank you, Mr. Bisceglie.

10 Mr. Gullely, do you have any redirect of Mr. Newell?

11 MR. GULLEY: Thank you, Your Honor.

12 THE COURT: Mr. Bisceglie. I mean, Mr. Gullely.

13 REDIRECT EXAMINATION

14 BY MR. GULLEY:

15 Q. Bill, would there be any reason to give Guidance that

16 credit you discussed at the front end or as part of the terms

17 of the agreement where they have to offset against their costs

18 this credit, if you believed Guidance would not be building a

19 direct-sales force?

20 A. No, there wouldn't.

21 Q. And would there be any reason to give that pricing to

22 Guidance that wound up in the supply agreement if Guidance were

23 not going to need cash flow to build its sales and marketing

24 organization?

25 A. Well, there could be other reasons, but that was certainly

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

1 the reason why we gave it to them in this case.

2 Q. And Mr. Bisceglie asked you about why didn't you put in

3 the agreement that they had to build a direct-sales force, that

4 I believe he asked you why didn't you put in there that

5 Rittenberry and Williams had to stay. Are those kinds of

6 provisions typical in contracts that Tulsa Dental and Dentsply

7 enter into?

8 A. I don't believe they are.

9 Q. And are there some things that you just take what you hear

10 and assume that the party who's telling you that is going to do

11 what they say they're going to do?

12 A. I think I mentioned that there is some good faith that

13 goes into every business deal, yes.

14 Q. And did you believe that Guidance, Dr. Goodis, Neal

15 Williams and Tony Rittenberry were negotiating in good faith at

16 the time of the Dallas meeting?

17 MR. BISCEGLIE: Objection. Lack of foundation and

18 speculation on the part of the witness.

19 THE COURT: Overruled. Overruled.

20 Q. (By Mr. Gullely) And did you later have reason

21 to believe that they were not, in fact, negotiating

22 in good faith at the Dallas meeting?

23 A. I believe -- At the Dallas meeting, I certainly believed

24 they were acting in good faith. Subsequent to that, when it

25 turned out that two of the three people we had spent most of

Danna Schutte Everett  
 Official United States Court Reporter  
 333 Lomas Boulevard, Northwest  
 (505) 348-2283

*Littleton*

ROUGH DRAFT 1

1 \*\*\*\*\*  
2 THIS ROUGH DRAFT TRANSCRIPT IS NOT FINALIZED, IS UNCERTIFIED  
AND MAY CONTAIN MISPELLED NAMES AND/OR NONSENSICAL ENGLISH  
3 WORD COMBINATIONS OR STENO UNTRANSLATES. ALL SUCH ENTRIES  
WILL BE CORRECTED ON THE FINAL CERTIFIED TRANSCRIPT UPON ITS  
4 DELIVERY TO YOU, IN ACCORDANCE WITH OUR STANDARD DELIVERY  
TERMS.

5  
6 DUE TO THE NEED TO CORRECT ENTRIES PRIOR TO CERTIFICATION,  
7 THIS DRAFT IS INTENDED ONLY FOR THE PURPOSE OF AUGMENTING  
COUNSEL'S NOTES, AND IS NOT INTENDED TO BE COPIED, USED OR  
8 CITED IN ANY COURT PROCEEDINGS OR DISTRIBUTED TO ANY OTHER  
PARTIES.

8 \*\*\*\*\*

9  
10  
11  
12  
13  
14  
15 Monday, October 5, 2009. Guidance Endodontics versus  
Dentsply. CIV-08-1101 JB/RLP.

16 THE COURT: S.

17 MR. KELLY:

18 MR. GULLEY:

19 MS. AVTILA:

20 MR. BISCEGLIE: Monday, October 5, 2009. Guidance

21 Endodontics versus Dentsply. Monday, October 5, 2009,

22 8:30 a.m.

23 THE COURT: Good morning everyone. I appreciate

24 everyone being here and ready to go on time. I've handed out

25 to you a set of jury instructions that I worked on this

ROUGH DRAFT 234

1 some tests performed comparing the Guidance files with some

2 other files?

3 A. Yes.

4 Q. And you recall that he wanted that information about the

5 files in connection with some marketing materials that they

6 were sending out through Bobby Morrow to sales reps. Do you

7 recall that?

8 A. I know that he wanted me to do the tests. I can't

9 honestly say that's what he wanted it for. I don't know that

10 he even would share that with me but he did want the tests.

11 Q. To the best of your knowledge, do you know of any -- Do

12 you know of any other reason why he would have been asking you

13 for this test? Did he tell you why?

14 A. Other than we do this to all of our competitors files just

15 to see how they stack up against ours.

16 Q. And then do you typically use that information in a

17 marketing campaign?

18 A. No.

19 Q. You don't do that with your other customers?

20 A. No.

21 Q. And this test in 723A compares oh toe if we can look at it

22 closely, this box right here at the top, it's comparing four --

23 four different files of four different manufacturers; is that

24 correct?

25 A. Correct.

ROUGH DRAFT 235

1 Q. The first one the series X files, is a Tulsa Dental file?

2 A. Correct.

3 Q. And I'm not sure that I recall what series X specifically

4 refers to. Is that a ProFile?

5 A. GTX.

6 Q. Oh, GTX.

7 And then the second file is the Sybron endo file,

8 endo K3 file, correct?

9 A. Correct.

10 Q. And yurt has heard testimony already that that Sybron is a

11 company based in California that's in the marketplace competing

12 with Guidance and Tulsa Dental making NiTi rotary files?

13 A. Correct.

14 Q. And then Brasseler's EndoSequence, that's a particular

15 file?

16 A. Correct.

17 Q. Particular sequence of series of theirs and they're

18 likewise a competitor?

19 A. That's right.

20 Q. And the test that you performed last fall (W) tests

21 (W) were to measure -- what were the when were the three

22 things that you were trying to measure? Do you recall?

23 A. We were measuring sick sell fatigue that's longevity in

24 the canal (W) and and I can't hardly read this. We did

25 torque (W) circle (W), heat torque on them, as well.

ROUGH DRAFT 236

1 Q. And then what's the third one?

2 A. Can you put it become on the screen? I can't --

3 Q. You know what? I'm not helping you at all here. I'll

4 help you. There's the answer. There's the cyclical fatigue do

5 you see that?

6 A. Yes.

7 Q. That's page 1. I think you've got a copy there. If you

8 look at page 2 you see that?

9 A. Flexibility.

10 Q. Flexibility is the second test?

11 A. Yes.

12 Q. And if you look at page 3 you see that torque is the third

13 test?

14 A. Collect.

15 Q. Right? Is (W) cyclical (W).

16 Q. Now, with respect to tell us what cyclic fatigue is?

17 A. Sick fatigue is how many turns (W) that the instrument's

18 going to take before it breaks or a better definition would be

19 longevity in the canal, how many times it can turn in a canal

20 or how many times it can be used in the canal. And again even

21 though it's only supposed to be used only once.

22 Q. And the way that cyclic fatigue test is performed is

23 that there's some object that oil sure you can describe better

24 better than me into which the file is the the tip of the file

25 or the file itself is placed, it's on a power rotary motor and

ROUGH DRAFT 237

1 it's put in there and it's run. Is that correct?  
 2 A. Yes, it's put into a hand piece just like the doctor would  
 3 use.  
 4 Q. Right?  
 5 A. And then put into a curved bind just like you would think  
 6 it would be put into going into the canal, and you know  
 7 tightened down and then it runs until it brakes. It's timed  
 8 for that.  
 9 Q. And so basically what you're measuring is how long it  
 10 takes for that file to break?  
 11 A. Time to breakage, correct.  
 12 Q. And do you recall how many (N) she did say cyclic (M)  
 13 you would normally have a protocol that you're following when  
 14 you're doing a test like this, is that correct?  
 15 A. Yes.  
 16 Q. And would you -- Do you know the details of that or do  
 17 you manufacturing engineers know the details of for example how  
 18 many pieces you would test?  
 19 A. We would do 30.  
 20 Q. You would test 30 pieces?  
 21 A. Yes.  
 22 Q. So to the best of your recollection you would have tested  
 23 30 pieces with respect to these four files?  
 24 A. Yes.  
 25 Q. And then you collect the data?

ROUGH DRAFT 238

1 A. Correct.  
 2 Q. And so we're testing here a whole series of file sizes,  
 3 correct?  
 4 A. Correct.  
 5 Q. From a .2 millimeter tip up to a .4 millimeter tip, and  
 6 then with a variety of -- a variety of tapers. Is that right?  
 7 A. That's correct.  
 8 Q. Okay. Now, what does it mean where the space where there  
 9 is no data, what does that mean?  
 10 A. It would mean we didn't have those sizes.  
 11 Q. Okay. So there a -- Are these numbers here -- if you'd  
 12 look at this in -- it says minutes.  
 13 A. Yes.  
 14 Q. Let me get in here on this one right here. Let's look at  
 15 your GTX file.  
 16 So would these first couple of files here we're  
 17 measuring how long it takes before it breaks, correct?  
 18 A. Correct.  
 19 Q. So these files -- Let's take -- Let's take the second one  
 20 the 20.06. Is this its signature averaged the 30 files averaged  
 21 3.991 minutes before the file broke?  
 22 A. Correct.  
 23 Q. And then if we look over at the Guidance file on the same  
 24 line, that's this number, the Guidance file didn't break until  
 25 4.501 minutes on average for the 30 pieces you tested?



ROUGH DRAFT 239

1 A. Correct.  
 2 Q. So that would -- That would indicate that with respect to  
 3 cyclic fatigue, that the Guidance file performed better than  
 4 the series X file?  
 5 A. Not necessarily. If you look at the standard deviation.  
 6 Q. The standard deviation?  
 7 A. Is 1.73, which is very high over.  
 8 Q. And the other one is .67?  
 9 A. Correct.  
 10 Q. So -- But you used -- You used the average here in your  
 11 comparison, right?  
 12 A. That's correct.  
 13 Q. It was the average that you used?  
 14 A. Correct.  
 15 Q. To compare it?and -- okay.  
 16 And then let's find another one that -- It looks as  
 17 though there are no other -- there are no other -- with respect  
 18 to cyclic fatigue, there are no other files of your company and  
 19 Guidance that are comparable here. It looks like we don't have  
 20 two that match up. Do you see that?  
 21 A. Correct. There's only one file in there that's ours,  
 22 which is an SMR.  
 23 Q. Right. So my point is the two data points that I just  
 24 pointed to are actually the only two that compare your  
 25 company's file with Guidance's file on this first page of

ROUGH DRAFT 240

1 Exhibit 723A.  
 2 A. As far as I can tell, yes.  
 3 Q. Okay. So certainly it's true that with respect to cyclic  
 4 fatigue Guidance's file compared favorably?  
 5 A. Again, it just depends on -- it's 30 files and standard  
 6 deviation meanings a lot, so you're doing 30 different files.  
 7 If your standard deviation is fluctuating a lot, you may be  
 8 concerned, but overall it did well.  
 9 Q. It did well overall? And the second test that you did was  
 10 a flexibility test. And explain to the jury what a  
 11 flexibility -- Explain to me, excuse me, to the Court, what a  
 12 flexibility test is?  
 13 A. We just put it into a -- it's a type of gauge and we turn  
 14 it so many degrees until we see that it the dial will snap back  
 15 and you can tell that that's as far as it's going to go before  
 16 it could potentially break. So it's showing how flexible it is  
 17 it's a dial indicator that we put it in and put the instrument  
 18 into a bind and clip it into it.  
 19 Q. And so unlike the last test, the cyclic fatigue test,  
 20 where it's rotating like this and it's being held firm down at  
 21 the bottom and the question is how long does it take to break,  
 22 now what we're doing is we're just we're putting it in  
 23 something and bending the file?  
 24 A. Yeah we're putting it in laterally.  
 25 Q. You're putting it in laterally?



ROUGH DRAFT 241

- 1 A. Uh-huh.
- 2 Q. Afternoon what are you doing bending it down?
- 3 A. We bend it -- no just circularly. Like at the dial and
- 4 the dial will tell you it's took as much as it can take before
- 5 it's going to break.
- 6 Q. Okay of the and that's a particular instrument that you do
- 7 that with?
- 8 A. Yes.
- 9 Q. And that's -- In terms of the -- what you're measuring
- 10 here is peak torque in -- is that in ounces?
- 11 A. Inch ounces.
- 12 Q. Inch ounces? Explain that to us laymen.
- 13 A. It's a unit of measure each ounce is how many inch ounces
- 14 it will take before it.
- 15 Q. Okay?
- 16 A. Before it will lose its flexibility or --
- 17 Q. So the higher the number, the less -- the longer it lasts;
- 18 is that correct?
- 19 A. The higher the number --
- 20 Q. The higher the number in the peak torque, how -- that
- 21 means the more times you can rotate it before it gets to the
- 22 point where it's going to break?
- 23 A. Actually, I think the higher the number the worse the
- 24 outcome is. I'm not really sure. I can't remember exactly.
- 25 Q. You're not sure?

ROUGH DRAFT 242

- 1 A. I'm not sure.
- 2 Q. Actually, you note here -- Okay. But your note here says
- 3 at the bottom we'll get the good with the bad, right?
- 4 A. Yep.
- 5 Q. The lower <sup>(^er)}</sup>{er^} the peak torque value means the
- 6 file is more flexible.?"
- 7 A. It's the lower, yes.
- 8 Q. Okay.
- 9 A. Not the higher.
- 10 Q. Okay. So on the -- on your file there, the 2006 you're at
- 11 .58 do you see that?
- 12 A. I do.
- 13 Q. And this is what's the unit of measurement inch ounces?
- 14 A. Inch ounces.
- 15 Q. Okay haven't Ann and then over here Guidance is at .63,
- 16 correct?
- 17 A. What's the standard deviation on it?
- 18 Q. .67.
- 19 A. Correct.
- 20 Q. So there's a difference there but it's not a great
- 21 difference?
- 22 A. It's not a great difference at all.
- 23 Q. In fact, if we look at -- the higher the number the worse
- 24 it is, is that right?
- 25 A. Correct.

ROUGH DRAFT 243

- 1 Q. Okay. So if you look at Sybron's numbers here, these
- 2 numbers are off the chart in comparison, aren't they? They're
- 3 much higher?
- 4 A. Correct.
- 5 Q. And then the final test is the -- not sure I've got this
- 6 right.
- 7 Okay. Let me step back a second because we may have
- 8 confused each other, I may have confused you.
- 9 The flexibility test right here measures the
- 10 flexibility of the file and the note says the lower the peak
- 11 torque value means the more flexible the file is.
- 12 A. Right.
- 13 Q. And those are the numbers we just looked at?
- 14 A. Yes.
- 15 Q. Okay. The next test, though, is called the torque test.
- 16 And you're going to have to tell us what that is. What's the
- 17 torque test?
- 18 A. If I were using it as a dentist would, it would be how
- 19 much torque or force they could potentially put on the file as
- 20 they're using it, pounds were pressure.
- 21 Q. You mean actually?
- 22 A. Torque.
- 23 Q. Not the speed it's rotating but the pushing?
- 24 A. Yes.
- 25 Q. The amount of foot-pounds or whatever it would be?

ROUGH DRAFT 244

- 1 A. Yeah the torque the amount of torque they'd have to use.
- 2 Q. Okay. And with respect to that test, the higher the peak
- 3 torque value the better the file -- the better the file's
- 4 rating?
- 5 A. Correct.
- 6 Q. Okay. And looking at the GTX file here, it has for the
- 7 2006 it's at 1.15, and then over here on the -- on the Guidance
- 8 file it's 1.20. So the Guidance file is a little higher. It
- 9 compares favorably. Would you not agree?
- 10 A. Go back.
- 11 Q. In fact?
- 12 A. Go back to the other. I'm sorry.
- 13 Q. Sure. Here is -- Here is -- So you've got 1 you've got
- 14 1.15 for the peak torque. Do you see that?
- 15 A. Yes, I do.
- 16 Q. You've got 435 for the number degrees of rotation?
- 17 A. Correct.
- 18 Q. And then over here on Guidance you have 1.20 for the peak
- 19 torque and 629 degrees of rotation?
- 20 A. Correct.
- 21 Q. So this data that you developed last September certainly
- 22 supports the proposition that the, with respect to these three
- 23 tests that the Guidance file compares favorably with the GTX
- 24 file?
- 25 A. Those particular sizes are comparably the same. Close.

Littleton

ROUGH DRAFT 245

1 Q. Those are the the ones those are the the ones you tested  
2 for better or worse?  
3 A. Yes.  
4 Q. ' and these tests are performed by your engineering  
5 department?  
6 A. By my lab text.  
7 Q. By your lab text. Excuse my. They're are they part of  
8 the engineering department? Was this little room that I  
9 remember seeing when I was in Johnson City.  
10 A. I guess. It had all it has lots of testing equipment in  
11 it.  
12 Q. Right. So lab text did this, they followed a protocol?  
13 A. Yes.  
14 Q. -- that's a customary protocol?  
15 A. Yes it's a written procedure.  
16 Q. And it's one that you would use and follow no matter whose  
17 products you were comparing to what?  
18 A. Correct.  
19 Q. Is that right? Thank you.  
20 Now, I'd like to talk to you a little bit about  
21 wholesale customers. You made the statement earlier that -- I  
22 gather this is in your experience -- wholesale customers  
23 typically provide you with detailed engineering drawings before  
24 a -- before a product is made for you.  
25 A. Yes.





1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
GUIDANCE ENDODONTICS, LLC,  
Plaintiff,  
vs. No. CIV-08-1101 JB/RLP  
DENTSPLY INTERNATIONAL, INC.  
and TULSA DENTAL PRODUCTS, LLC,  
Defendants.

Transcript of Trial Proceedings before The Honorable  
James O. Browning, United States District Judge, held in  
Albuquerque, Bernalillo County, New Mexico, commencing on  
Tuesday, October 6, 2009, at 8:35 a.m. and concluding at  
5:33 p.m. Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided-transcription.

Danna Schutte Everett, CRR, RPR, RMR, CCR 139  
United States Court Reporter  
333 Lomas Boulevard, Northwest  
Albuquerque, New Mexico 87102  
Phone: (505) 348-2283  
Fax: (505) 348-2285

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 THE COURT: All right. Good morning, everyone. I  
2 appreciate how y'all have gone about being here and everything.  
3 I know it's tough on you, but I appreciate the way you've been  
4 here ready to go in the morning.

5 Let me give you some inclinations I have. And, of  
6 course, we're getting down to the wire, so we're probably going  
7 to be pretty close to ruling, given everything that I have to  
8 do.

9 But let me go back to the directed verdict. And I  
10 studied -- I believe it's Mr. Kelly's letter of October 3rd --  
11 or Mr. Flynn's letter of October 3rd, and I want to study some  
12 of the cases a little bit more on this, but I'm inclined to  
13 think on the first -- this is on the implied covenant issue,  
14 that the first issue of providing reasons for refusing to  
15 supply obturators to Guidance that were mere pretext and  
16 offered in bad faith, I think that's governed by the contract  
17 and that's not really implied covenant and I think that just  
18 overlaps with the breach of covenant. So I'm inclined to grant  
19 the motion on that and not allow that to be support for the  
20 implied covenant of good faith and fair dealing.

21 Similar as to imposing requirements for the  
22 manufacture of new Guidance products that do not exist in the  
23 supply agreement, that that was pretext and in bad faith.  
24 Again, I don't think that that one should be support for the  
25 implied covenant. I'm finding that drawings were required by

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 the contract, and so I'm disagreeing as a matter of law with  
2 the assumption here that engineering drawings were not  
3 required.

4 The one about deliberately taking longer than  
5 necessary to supply Guidance products, I think the Dunlap  
6 versus State Farm case takes this outside of the range of the  
7 implied covenant. This is, again, more of a breach of  
8 contract. Those are arguments that the plaintiffs are free to  
9 make as far as to support the breach of contract, but I'm not  
10 sure that they support implied covenant of good faith and fair  
11 dealing.

12 However, the last point on using its status of  
13 Guidance's exclusive manufacturer of products, the defendants  
14 developed a brochure disparaging Guidance's new file, that one  
15 might satisfy it, and I think Guidance has presented evidence  
16 during the testimony of Mr. Newell that the memo was sent to  
17 defendants' sales force before the testing was completed, and  
18 so I think that that one can go forward. The last one -- so  
19 that one can go forward on the covenant of good faith and fair  
20 dealing, so I will be submitting jury instructions on the  
21 breach of the covenant.

22 The last one that Mr. Flynn pointed to, attaching  
23 incomplete, inaccurate drawings to the supply agreement in  
24 order to provide TDP with latitude within the final design  
25 parameters, I'm not sure how that one would work. It doesn't

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 seem to deny Guidance the benefit bargain, especially since the  
2 product it got was apparently acceptable.

3 So I'm inclined to narrow the implied covenant of  
4 good faith and fair dealing to that one issue about the  
5 brochure, but otherwise other theories would not go to the  
6 jury.

7 Let me get a little organized here. I need to put  
8 these jury instructions aside, because I focused on the  
9 substantive issues last night. I'm not taking these in a  
10 particular order, but let me talk a second about the directed  
11 verdict on the Lanham Act and the UPA. I'm looking for  
12 Mr. Kelly's letter, but I did review that letter of  
13 October 3rd, 2009, which Mr. Kelly went through the history of  
14 the interrogatories in this case, and I'm inclined -- I lean  
15 toward agreeing with Mr. Kelly on this. It seemed to me the  
16 lack of an interrogatory that was particular to the New Mexico  
17 UPA and the difference between the Delaware UPA claims were  
18 significant, and so it seemed to me that on those theories the  
19 defendants should have probably pinned it down more and that  
20 there was sufficient evidence in the record in the pretrial  
21 proceedings from the original Complaint.

22 I looked at the original Complaint, and I think it  
23 was properly incorporated into the New Mexico UPA. And so I'm  
24 inclined to think that that theory can be used to support the  
25 UPA claim. And so I'm largely leaving the UPA claim alone. It

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283

1 seems to me that there is evidence to support it. I do have  
2 those questions about the damages and whether the plaintiff  
3 will be limited to statutory damages, but I'm inclined to think  
4 at least on the theories those should go forward to the jury.

5 Now, I've been thinking about this Lanham Act just  
6 because the Lanham Act evidence came in so differently or  
7 differently from what was presented in the motion for summary  
8 judgment. If y'all would help me with this, and it might be --  
9 also be helpful on the UPA, but I'd like see the exhibits of  
10 the development of the fact sheet for Bill Newell, which seems  
11 to be the principal basis of the Lanham Act and UPA claims. I  
12 don't have a set the documents up here, so I would appreciate  
13 it if y'all would maybe pull that exhibit and let me take a  
14 look at it.

15 I think the plaintiffs are trying to use other  
16 representations in the negotiations of the supply agreement to  
17 support the UPA claims, statements from the defendants to  
18 Guidance, rather than ones from the defendants to Guidance  
19 customers and prospective customers, so I'm a little concerned  
20 about the Lanham Act claim, whether -- because the evidence  
21 came in differently, but to see whether there was -- that a  
22 reasonable jury could infer dissemination of these issues to --  
23 or this information to its sales agents and then infer that  
24 that was passed on, then, to customers, I'm going to have to  
25 look at that -- the exhibits of the development of the fact

Danna Schutte Everett  
Official United States Court Reporter  
333 Lomas Boulevard, Northwest  
(505) 348-2283