IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ALIGN TECHNOLOGY, INC. *
*
VS. *
*
CLEARCORRECT OPERATING, *
LLC, ET AL. *

July 1, 2026

CIVIL ACTION NO. 6:24-CV-187

BEFORE THE HONORABLE ALAN D ALBRIGHT
JURY TRIAL PROCEEDINGS
Volume 6 of 7

APPEARANCES:

For the Plaintiff:
Daralyn J. Durie, Esq.
Richard S.J. Hung, Esq.
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Timothy S. Durst, Esq.
O'Melveny & Myers LLP
2801 North Harwood Street
Suite 1600
Dallas, TX 75201-2692

Brian Christopher Nash, Esq.
Morrison & Foerster LLP
300 Colorado Street
Suite 1800
Austin, TX 78701

Michael F. Tubach, Esq.
O'Melveny & Myers LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

Ian Simmons, Esq.
Brian P. Quinn, Esq.
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

ALIGN – EXHIBIT 2046
ClearCorrect Operating, LLC. v. Align Technology, Inc. IPR2025-00819

For the Defendants: Joseph Mueller, Esq.
Vinita Ferrera, Esq.
Mark A. Ford, Esq.
Marissa A. Lalli, Esq.
Jordan L. Hirsch, Esq.
WilmerHale
60 State Street
Boston, MA 02109

Todd Zubler, Esq.
Jennifer Milici, Esq.
Thomas G. Saunders, Esq.
WilmerHale
2100 Pennsylvania Avenue, NW
Washington, DC 20037

Omar Ali Khan, Esq.
WilmerHale
7 World Trade Center
250 Greenwich Street
New York, NY 10007

James Travis Underwood, Esq.
Gillam & Smith LLP
7232 Crosswater Avenue
Tyler, TX 75703

Court Reporter: Kristie M. Davis, CRR, RMR
PO Box 20994
Waco, Texas 76702
(254) 666-0904

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

08:57

08:57 (Hearing begins.)

08:58 THE BAILIFF: All rise.

08:58 THE COURT: Please remain standing for the jury.

08:58 (Jury entered the courtroom.)

08:58 THE COURT: Thank you. You may be seated.

08:58 Mr. Mueller, as I recall, you rested yesterday, correct?

08:58 MR. MUELLER: That's correct, Your Honor.

08:58 THE COURT: Okay. Does the plaintiff have any witness?

08:58 MR. TUBACH: Oh, yes, Your Honor. I think we were in the middle of an examination before we got to break for the day.

08:58 DIRECT EXAMINATION CONTINUED

08:58 BY MR. TUBACH:

08:59 Q. Good morning, Dr. Knittel.

08:59 A. Good morning.

08:59 Q. Welcome back. Just to reorient us to where we were when we stopped, we had been through the discount programs that Dr. Perryman had talked about. We had been through the contracts that Dr. Perryman talked about.

08:59 And again, I believe your testimony was, and

you heard this from Dr. Perryman, that Straumann and ClearCorrect are not seeking any damages relating to either of those, either of that conduct, correct?

A. Correct.

Q. So I want to turn to the iTero scanner now, which is the third --

MR. TUBACH: If we could pull up PDX-9.16, please.

BY MR. TUBACH:

Q. So the first two we talked about. We talked about those yesterday.

So today I want to focus on the iTero scanner. Now, we've heard a lot about the iTero scanner. I want to ask you a question about that.

First, did you hear Dr. Perryman testify that Align does not accept scans from other scanner companies?

A. I did.

Q. Okay. And what did you conclude, if anything, about how Align's scan policy accepts -- impacts other aligner companies?

A. Well, Align's scanner policy actually leads to orders of other aligners. Yes, orders of other aligners.

Q. Okay. And are there any procompetitive

reasons why Align would accept scans from its own scanner but not accept scans from any other scanners potentially?

A. There are.

Q. And what would -- give -- explain that to us.

A. Well, there's at least two.

The first is that it would take resources away from Align. So they have to qualify other scanners. They could use those resources for other potential uses that are better for the consumer. For example, they could apply those resources to making their own scanner better or making the process of ordering Invisalign from their own scanner easier.

The second is that if you're going to accept scans from another scanner, you're kind of forced to accept the quality of those scans. So if that other scanner doesn't have as high a quality as your own scanner, what that might lead to is you build some clear aligners based on a poor scan. That is going to negatively affect the consumer.

And that's especially important in this case because the consumer likely only remembers the brand name of the aligner and not the scanner. They're not going to go back in time and blame an Ormco scanner for their poor experience. They're going to see that they

are putting an Invisalign in their mouth and blame Invisalign.

So the reputation risk associated with accepting scans from other scanners can be quite large.

Q. So -- and have we heard -- you've sat through some of this trial. Have you heard any evidence of any poor-quality scanners out there?

A. I have.

Q. And who's that?

A. Well, we heard evidence that the -- Straumann's Virtuo Vivos scanner led to poor-quality scans.

Q. And does it make business sense for Align to accept digital scans only from the iTero?

A. It certainly does because of that reputational risk that I just discussed and the -- and the resources that would be required to accept or qualify another scanner.

Q. Well, so if Align is concerned potentially about quality of scans, why does it still accept -- why would it still accept PVS impressions, which it does, right?

A. It does accept PVS impressions. You know, that had been the gold standard for decades in the industry.

09:02 I think another reason they continue to accept those is in -- you know, for very small practices, it might not make sense to buy a scanner, especially in rural communities where you're only seeing a few patients a year. So leaving open the PVS option benefits those smaller practices.

Q. So -- and do other companies have -- that sell aligners also make scanners, some?

A. Many of them.

Q. And you've heard -- we've heard testimony that some of them accept scans from other companies?

A. Yes.

Q. And so what does that tell you about whether Align should or shouldn't have to accept a scan from another company?

A. Well, Align -- Align has their business strategy. Other companies have a different business strategy. It's kind of how we like markets to provide options to the consumer.

Q. Okay. So we've now been talking about the process of how Align decides what scans to accept to make its own product. I want to now turn to something different, which is -- of the iTero, the iTero system itself.

We've heard testimony about moats, many photos

of a moat here in the trial. And I want to ask you, as an economist, what does a moat mean to you?

A. Yeah. A moat is a classic business school term. A moat literally means any business advantage. Anything that gives one product an advantage over their competitors.

Q. And do you know who is at least reputed to have first coined the term "moat" in connection with businesses?

A. I do. Yeah.

Q. Who's that?

A. The term "moat" -- the person widely credited with coming up with that term or using that term in a business context is Warren Buffett, the famous investor. What is he called, the Oracle of Omaha.

He used it first in 1986. So in a shareholder letter, he was first to use the term "moat." And he actually used it in connection to GEICO, the insurance company. And the context was that their moat was their cost advantage.

So they had lower costs than other insurance companies, and he said that that created a moat around GEICO.

Q. So we've also seen here in court a 2013 document that says an iTero customer is a locked in

Invisalign customer. They put this document up on the screen many times.

Do you recall that document?

A. I do.

Q. Did you analyze iTero data to figure out whether iTero's customers are in fact locked into Invisalign?

A. I did.

Q. And what did you find?

A. Yeah. So we actually have data on whether or not iTero customers are ordering third-party aligners, in particular ClearCorrect. And we find that they do. So.

MR. TUBACH: Let's look at PDX-9.17.

BY MR. TUBACH:

Q. And so what is this graphic telling us?

A. Well, this cartoon just is underscoring the point that if you own an iTero scanner, you can use that scanner to order other clear aligners including ClearCorrect but any of the others as well.

Q. And did you look to see whether doctors in fact use this iTero -- not this one but the iTero -- to order ClearCorrect aligners?

A. I did.

Q. And what did you find?

A. Yeah. So we find that --

MR. TUBACH: Why don't we put up the Document 9.18?

BY MR. TUBACH:

Q. Sorry to interrupt, Dr. Knittel. Please go ahead.

A. Yeah. So this is another line graph tracking the percentage of ClearCorrect digital orders coming from an iTero. So you take all the ClearCorrect orders coming from a scanner and what percentage of those orders used an iTero.

So you see in 2020, that percentage was a little bit less than 10 percent. But by 2025, the last year we have data, over 20 percent of all ClearCorrect digital orders are coming from an iTero.

Q. Now, what data did you construct to create this chart? Was this data that came from -- that came from Straumann and ClearCorrect?

A. Yeah. This is data that they created and provided for this case.

MR. TUBACH: Let's look at PTX-694, if we could, Mr. Smith.

BY MR. TUBACH:

Q. What is this?

A. It's a spreadsheet. So this has the year.

You can see the year starts at 2015, ends in 2025.

The middle column is the number of submissions in that year.

And then the third column is the important one. That's the -- what's the scanner attributed to that -- those -- those submissions. So that first line, for example, is saying in 2015, 2,499 submissions were created by the CEREC scanner.

Q. And so you can see that happens for 2016, '17, all the way to 2025 there in the middle.

Those are all for CEREC, right?

A. Correct.

MR. TUBACH: And then if you scroll up to the -- yeah. Thank you. Right there.

BY MR. TUBACH:

Q. So then the next line is 2015 to 2025, and those are all for iTero?

A. That's correct.

Q. I see.

And then if you scroll down further, this is repeated, basically, for other scanners and for PVS impressions?

A. Yes.

MR. TUBACH: Move to admit PTX-694.

MR. MUELLER: No objection, Your Honor.

09:08 THE COURT: Admitted.

09:08 MR. TUBACH: So back to PDX-9.18. Actually, no. Let's go to another exhibit. JTX-060.

09:08 Let's put that up, please.

09:08 BY MR. TUBACH:

09:08 Q. Now, we've seen this document in court a few times. Mr. Straumann's counsel has put it up.

09:08 You had this document, right, as part of your -- part of the work that you did here?

09:08 A. Yes.

09:08 Q. Why did you not use this chart to help create the graph that we saw?

09:09 A. Yeah. So a few reasons. First, a few reasons why this is -- would be unreliable. I think the -- one of the biggest is if you look at that first row, there's not even a name associated with that. So we don't know what generated those. Should I give them to iTero? Should I give them to some other scanner? And that's a large number. So it's hard to ignore that fact.

09:09 Another reason is if you looked at -- now go to the bottom row. It just says "existing model." Again, I don't know. Is that the iTero? Is that another scanner?

09:09 And then less important but certainly pointing

to unreliability, there's something called a Stone model, and I've certainly never seen that scanner in the record.

Q. Okay. And what about, say -- let's look up and down. If you look at the total number of scans here, let's say for 2023, does this chart say that there are 169,336 scans?

A. Yeah. That's another red flag. So this is supposed to represent the number of orders from ClearCorrect. Right? And we know in 2023, ClearCorrect only had 26,000 orders. So that's such a large disconnect between the number of orders and the number of scans.

Q. So it's your conclusion that this document, JTX-060, was not reliable?

A. Correct.

Q. That's why you relied on PTX-694?

A. That's right.

Q. Okay. Now, let's go --

MR. TUBACH: The graph that we've seen, PDX-9.18, if we can pull that up.

BY MR. TUBACH:

Q. Did you -- this is data that came from ClearCorrect and Straumann, right?

A. That's correct.

09:11 Q. Okay. And did you look at any internal Align data to see whether this was consistent or inconsistent with what we were seeing internally within Align?

A. We did.

Q. And what did you find?

A. So for Align, we actually see for every doctor that has an iTero, the number of scans used to order Invisalign directly, the number of scans that create what's called an iRecord scan. And the iRecord scan contains the STL file. And then the number of scans that are used to do restorative care.

And a third of all scans that come out of an iTero are iRecord scans. So that's consistent with the fact that the doctor is creating an iRecord scan to order another clear aligner.

Q. Let's make sure we understand this. So you looked at all the scans that happened with an iTero over time?

A. That's right.

09:12 Q. And of all of those, 33 percent were scans that resulted in an STL file?

A. Correct.

Q. Now, based on this data and the other data that you looked at, would you consider the iTero to be an open system or a closed system?

09:12 A. Well, it's obviously an open system.
09:12 Q. Do you have any opinion about whether the process for ordering other aligners using the iTero is blocking competition?
09:12 A. Well, the data tells us it's obviously not.
09:12 MR. TUBACH: All right. Let's look at PDX-9.9 just to reorient ourselves.
BY MR. TUBACH
09:12 Q. So we've now looked at all three buckets of conduct here. And I'd like to ask you some opinions about Dr. Perryman's view that Straumann has suffered injury and damages.
09:12 MR. TUBACH: Let's look at PDX-9.20, if we could.
BY MR. TUBACH:
09:13 Q. And is it your -- you heard Dr. Perryman testify, correct?
09:13 A. Yes.
09:13 Q. Do you agree with his opinion that ClearCorrect and Straumann have been injured or suffered damages from anything Align has done?
09:13 A. I do not.
09:13 Q. I'd like to turn to Dr. Perryman's analysis here. All of Dr. Perryman's damages, as I understand his testimony, you correct me if I got this wrong, are

based on the -- what he views as a difficulty of exporting scans from an iTero to order other clear aligners; is that right?

A. That's correct.

MR. TUBACH: Now, let's pull up DDX-8.78, if we could, sir.

BY MR. TUBACH:

Q. Now, this is a slide that Straumann used during Dr. Perryman's direct examination, right?

A. It is.

Q. And I'd like to look at that first bucket, the doctors who previously purchased ClearCorrect and Invisalign.

And who are the doctors in that first bucket? So it explains it somewhat, but who are those?

A. Yeah. Those are doctors that -- where he sees that they're ordering both ClearCorrect and Invisalign.

Q. Okay. And let's start with some basics.

MR. TUBACH: And we can take this slide down.

BY MR. TUBACH:

Q. Let's start with some basics. For the doctors who bought both Invisalign and ClearCorrect, did they buy relatively more Invisalign than ClearCorrect after they got an iTero scanner?

A. They did.

Q. Okay. And do you agree with Dr. Perryman that the export process is the reason why they bought relatively more Invisalign than ClearCorrect?

A. I do not.

Q. Why not?

A. So Dr. Perryman establishes that for that group, for doctors that were -- are ordering Invisalign and ClearCorrect, they get an iTero, and it's certainly the case that after they get an iTero, they start to order more Invisalign.

But Dr. Perryman just attributes that increase to the export process. He doesn't have data to suggest or tell us that that's the export process. And I can think of at least two other reasons why we would see that increase in the data that is -- that is not the export process.

MR. TUBACH: Well, let's look at PDX-. -- 9-22.

BY MR. TUBACH:

Q. Here's a cartoon we have.

Can you explain to us, using this cartoon, what you mean?

A. Yeah. So the first -- the first thing an industrial organization economist would do with that

fact, right -- so I've learned this fact, that doctors that previously order both clear aligners order more after the iTero. The first thing I would ask is, well, why did they buy the iTero, right? That's information.

And the first thing comes to mind is that the doctor planned to order more iTero (sic) for a legitimate reason. For example, you could imagine a doctor has spent -- spends six months testing different clear aligners, and then after that testing, they determine Invisalign is the best.

So if they determine that Invisalign was the best, then they would want to order more Invisalign in the future. How would they make that as seamless as possible? They would order it or buy an iTero scanner.

So it's not the export process. It was that determination prior to buying the scanner that iTero and Invisalign was the best system.

Q. So you talked about two. So that was one possibility.

MR. TUBACH: Let's put up PDX-9.23.

BY MR. TUBACH:

Q. What's another possibility why we might see that after the doctor buys an iTero, their purchases of Invisalign go up relative to ClearCorrect?

A. Yeah. Another reason is something about the

scanner itself. So a doctor buys an iTero scanner, and then they learn, after they've purchased that scanner, that the outcome simulator that we heard about in the treatment planning software is really good.

So they learn it's really good. They're going to start ordering more Invisalign. That has nothing to do with the export process. That's the actual software in the scanner itself that makes Invisalign more effective for their patients.

Q. And did Dr. Perryman do anything -- did Dr. Perryman do anything to try to figure out which of any of these possible explanations might explain why it is that when you buy an iTero, you end up ordering more Invisalign and relatively less ClearCorrect?

A. No. He just assumes it's the export process.

Q. So do you agree with his conclusion that this export process on the iTero is what has caused damages to Align -- to Straumann and ClearCorrect?

A. I do not.

MR. TUBACH: All right. Let's look at that second bucket. If we could pull up again -- that's the one. Thank you.

BY MR. TUBACH:

Q. Let's look at that second bucket. Doctors who previously purchased only Invisalign.

So is this a group of doctors who -- has this group of doctors ever bought a ClearCorrect?

A. No.

Q. And I believe -- so I believe he divided this group into two buckets; is that correct?

A. Yes.

Q. And what are those two buckets, if you can explain them?

A. These are doctors that, well, just never ordered ClearCorrect and then doctors that only order Invisalign.

Q. Okay. So they've never ordered Invisalign -- sorry. They've never ordered ClearCorrect, and some of these doctors ordered Invisalign before they got the iTero?

A. Correct.

Q. And then they buy an iTero?

A. Yes.

Q. And then they keep ordering Invisalign?

A. Correct.

Q. These are the -- these are the Dr. -- the Dr. Pepper group?

A. That was your analogy.

Q. Okay. And do you agree with his conclusion --

MR. TUBACH: We can take this slide down.

Thank you.

BY MR. TUBACH:

Q. Do you agree with his conclusion that Straumann and ClearCorrect have been injured because those doctors didn't buy ClearCorrect -- didn't buy ClearCorrect aligners?

A. I do not.

Q. Why not?

A. Well, the first thing to think about is that 15 percent number that Dr. Perryman and I agree with, that was estimated using doctors that ordered both prior to the iTero.

Q. Let's reorient the jury to what that 15 percent is, just so we're all clear.

A. Yeah. So that's after -- after those doctors buy an iTero scanner, they order 15 percent more, relatively more Invisalign.

But those are doctors that were ordering both before. Doctors that never ordered ClearCorrect prior to buying an iTero, there's no statistical reason to apply that 15 percent number to that group.

Those doctors that never ordered ClearCorrect are telling us in the data that they -- they are loyal to ClearCorrect (sic). There's -- there's just no statistical justification to apply a result that comes

from a very different group of doctors to that group.

Q. Is there anything you saw in the data that suggested that that group of doctors, the ones who had never ordered anything but Invisalign, would have bought ClearCorrect aligners?

A. No.

Q. Now, are there any other reasons other than the export process for why a doctor might not want to buy ClearCorrect?

MR TUBACH: Let's put up PDX-9.24.

Oh, and for this, can we not publish this to the gallery, please?

BY MR. TUBACH:

Q. So what is this -- what is this chart showing us?

A. So this is data showing us the change in annual revenues across six different clear aligner companies.

So we talked about Dentsply Sirona and Ormco earlier. But now we also have ClearArc, Clarity, and Angel Aligner. So over the time period of 2019 to 2023, [redacted].

Q. So let me -- let me take a quick detour.

09:21 MR. TUBACH: And let's pull up JTX-21, if we could.

BY MR TUBACH:

Q. And is this the chart -- this is a previously admitted exhibit. Is this a chart that is the basis for this graph that we were just looking at?

A. Yeah. You're straining my eyes, but yes, this is -- this is -- there we go.

MR. TUBACH: Okay. And if we could enlarge just that very first column there that starts 2017 September.

BY MR. TUBACH:

Q. The one on -- that we're seeing on the very right there.

Do you see that?

A. Yes.

Q. So is that --

MR. TUBACH: Can we go back to that? Thank you.

BY MR. TUBACH:

Q. Is this the data that Straumann and ClearCorrect produced in this case?

A. That's correct.

Q. And what is the first month in 2017 for which they produced data?

09:22 A. September.

09:22 Q. September 2017. So we don't have data from Straumann and ClearCorrect for any months in 2017 other than from September on?

09:22 A. Correct.

09:22 MR. TUBACH: Okay. We can take that down. So let's go back to the -- let's go back to the chart PDX-9.24.

BY MR. TUBACH:

09:22 Q. So these companies, these five companies that are listed on the left, did they have to compete against Align, the same Align discount programs that we've heard so much about?

09:22 A. Of course.

09:22 Q. And did they have to compete against those Align contract provisions that we've heard about?

09:23 A. Yes.

09:23 Q. Did they face the same issues, whatever they've come up with, with respect to the iTero scan process?

09:23 A. Yes. They did.

09:23 Q. [redacted]

09:23 [redacted]

09:23 [redacted]

09:23 Q. And what about ClearCorrect?

09:23 A. They could not.

09:23 Q. Now, what does that tell you as an economist, sir?

09:23 A. Well, they're all facing the same behavior that ClearCorrect alleges is anticompetitive, [redacted] It suggests that there's something else going on with ClearCorrect.

09:23 Q. So after all the work you've done in this case, Dr. Knittel, all the work, what is your view about whether ClearCorrect and Straumann have suffered any injury or damages?

09:24 A. They have not.

09:24 MR TUBACH: Thank you, Your Honor. Pass the witness.

09:24 CROSS-EXAMINATION

09:24 BY MR. MUELLER:

09:26 Q. Good morning, ladies and gentlemen of the jury. And good morning, Dr. Knittel. Nice to meet you.

09:26 My name is Joe Mueller. May I ask you a few questions, sir?

09:26 A. Of course.

09:26 MR. MUELLER: And, Your Honor, may I approach the witness so that I can use the placard?

09:26 THE COURT: Sure.

BY MR. MUELLER:

Q. Dr. Knittel, you just showed this jury this chart, correct?

A. Yes.

Q. And here, we have change in annual revenues from 2019 to 2023, correct, sir?

A. Correct.

Q. And in that time period, that four-year time period, you show [redacted], true?

A. True.

Q. Over here, you have ClearCorrect, and you show ClearCorrect as having a negative result, or negative change, I should say, in revenue in this 2019 to 2023 time period, correct?

A. Correct.

Q. Now, we can agree, sir, there's one company not listed here, and that's Align, right?

A. That's correct.

Q. And Align also was selling clear aligners in this time period, 2019 to 2023, right?

A. Yes.

Q. So can we add Align to this chart, sir?

09:27 A. Sure.
09:27 Q. And, sir, the amount that Align's revenues changed in this time period was over half a billion dollars, $530 million in total.
09:27 You have no reason to dispute that, true?
09:27 A. Not at all.
09:27 MR. MUELLER: And, Your Honor, may we add this bar graph to reflect their revenue change?
09:27 THE COURT: Sure.
09:27 BY MR. MUELLER:
09:27 Q. This, Dr. Knittel, is to scale. It's the same scale as your chart. We've added Align's change in annual revenues from 2019 to 2023.
09:27 And you have no reason to dispute that this is to scale, do you, Dr. Knittel?
09:28 A. No reason.
09:28 Q. And so in fact, in that same time period, Align's revenues were literally off the chart, true?
09:28 A. That's fair.
09:28 Q. Now, let's go over to this market share chart that we've looked at a few times over the course of this trial. And here, we have Dr. Perryman's analysis of Invisalign versus other clear aligner competitors, correct?
09:28 A. Yes.

09:28 Q. Now, sir, Dr. Perryman's conclusion after his work in this case is that the relevant antitrust market is doctor-directed clear aligners in the U.S., right?

09:28 A. That's correct.

09:28 Q. And to be clear, you're not here to contest the market definition. That's for Dr. Jena, who's coming next, correct?

09:28 A. That's correct.

09:28 Q. You're here to say that Align, even if this is the market, has done nothing anticompetitive, correct?

09:29 A. That's correct.

09:29 Q. Now, Dr. Perryman's position is that there are various things that Align is doing -- and let me go through them -- that are foreclosing competition within the U.S. market for doctor-directed clear aligners.

09:29 That's his position, right?

09:29 A. That's his position.

09:29 Q. His position is that there's various activities that Align is using to suppress and foreclose competition in the U.S. market for doctor-directed clear aligners, correct?

09:29 A. That's his position.

09:29 Q. His position is that the what he calls the iTero lock-in effects, the iTero closed system is one of those factors. It's his opinion?

09:29 A. That's his opinion.
09:29 Q. He also takes a view that the exclusivity provisions in thousands of Align contracts with various dental service organizations and others are exacerbating the suppression of competition, right?
09:30 A. That's his position. Yes.
09:30 Q. He also takes the position that the loyalty program in this context, as deployed by monopolists, is helping to maintain their monopoly.
09:30 That's his position, right?
09:30 A. That's his position.
09:30 Q. Okay. You're here to say there's nothing wrong here, right?
09:30 A. I'm here to say that Align's behavior has been procompetitive.
09:30 Q. You're here to say that in fact Align is acting procompetitively?
09:30 A. That's correct.
09:30 Q. You're here to say that doctors -- I think you showed a graphic to the jury -- love it?
09:30 A. I didn't have a love graph. I --
09:30 Q. Well, let's take a look.
09:30 MR. MUELLER: PDX-9.22.
BY MR. MUELLER:
09:30 Q. Testing options. Doctor on the left. Loves

Invisalign.

And then the next graphic shows the doctor smiling and buying iTero, and there's a little bubble there.

Do you see what it says?

A. Yes.

MR. MUELLER: Let's blow that up.

BY MR. MUELLER:

Q. What's it say?

A. Well, it says, "I love Invisalign." Yes.

Q. "I love Invisalign" with a heart, and "I'm ordering an iTero 2." Right?

A. Correct.

Q. So here, we have what appears to be a love-struck doctor who loves Invisalign and is ordering an iTero 2, right?

A. That's correct.

Q. And then if we go back, orders more Invisalign and less ClearCorrect, true?

A. Yes. That's the cartoon. Yes.

Q. And so in the cartoon you showed the jury a few minutes ago, everyone loves what's happening here, true?

A. Well, there's one doctor in the cartoon. Yes.

Q. Dr. Knittel, that's what you showed the jury

09:31 just a few moments ago, right?
09:31 A. Well, I'm just confused with "everyone."
09:31 Q. Okay. You're saying that there are a
09:31 significant number of doctors that have emotions you
09:31 showed the jury just a few moments ago?
09:31 A. Yes.
09:31 Q. Okay. So you're saying a significant number
09:31 of doctors love this situation and think it's just
09:31 fine, correct?
09:31 A. I think that that term is consistent with the
09:32 data.
09:32 Q. And, Dr. Knittel, your opinion to this jury is
09:32 what we see here on this chart is a healthy,
09:32 well-functioning market, true?
09:32 A. I didn't provide that opinion.
09:32 Q. And so you're not willing to go so far as to
09:32 say this is a healthy, well-functioning market because,
09:32 Dr. Knittel, the truth is it's not?
09:32 A. That's not fair.
09:32 Q. All right. Well, let's get into it.
09:32 The first type of misconduct or
09:32 anticompetitive activity that Dr. Perryman identified
09:32 was Align's activities with respect to the iTero
09:32 scanner, correct?
09:32 A. That's a different order. But yes. Sure.

09:32 Q. And, sir, you would agree with me that today,
09:32 today, the only digital scanner for intraoral scanners
09:32 accepted by Align is iTero?
09:32 A. There's two legacy scanners that they still
09:33 accept, but --
09:33 Q. And those are legacy, meaning old. They've
09:33 been either decommissioned or they soon will be, true?
09:33 A. That's correct.
09:33 Q. And so of the scanners that are currently
09:33 being sold on the market, the only digital scanner, the
09:33 only one accepted by Align is iTero, correct?
09:33 A. That's accurate.
09:33 Q. Now, that has led to, led to the vast majority
09:33 of doctors who prescribe clear aligners purchasing an
09:33 iTero, right?
09:33 A. I'm trying to -- I'm sorry. I'm just trying
09:33 to think through the data. You used the term "vast
09:33 majority."
09:33 Q. Let's put it this way -- we'll start with
09:33 this. A substantial majority of the doctors who
09:33 prescribe clear aligners today have an iTero, right?
09:33 A. I believe that's the case. Yes.
09:33 Q. And they do because Align says you need to
09:33 have an iTero if you want access to Invisalign, true?
09:34 A. That's not correct.

09:34 Q. Okay. Well, let's see what -- we're going to get into what Align intended through this policy.

But we can agree the majority of the scanners used for clear aligners in the U.S. today, today, are iTeros, correct?

A. I believe that's the case.

Q. Now, Dr. Knittel, you have no opinion on whether Align's scan acceptance policy has caused it to sell more iTero scanners than it would have without that policy, right?

A. Could you repeat that? I'm sorry.

Q. Sure. You do not have an opinion affirmatively that Align's policy of not accepting third-party STL scans has caused sales of the iTero to increase. You have no such opinion, right?

A. That's correct.

Q. And so because you have no opinion, you don't know the extent to which doctors are buying these iTeros because they need to to have access to Invisalign. You haven't studied that, have you?

A. Yeah. I discussed the three reasons, and we can't differentiate those three reasons.

Q. And you say in fact this is a procompetitive policy.

Do I have that right?

09:35 A. Their policy to only accept scans from the iTero is a procompetitive.

09:35 Q. And you understand there's a number of other scanners in the field, correct?

09:35 A. Yes.

09:35 Q. Including the Straumann SIRIOS scanner, right?

09:35 A. Correct.

09:35 Q. Including others as well, correct?

09:35 A. Yes.

09:35 Q. Some of those scanners are made by companies that have been in the dental industry for many decades, correct?

09:35 A. Yes.

09:35 Q. Including Straumann, right?

09:35 A. Yes.

09:35 Q. And your testimony to this jury is that none of those scanners are good enough from a quality perspective for Align to use.

09:35 Do I have that right?

09:35 A. That's not the only reason.

09:35 MR. MUELLER: Let's take a look at DTX-143.

BY MR. MUELLER:

09:35 Q. It's at Tab 5 in your binder. And take your time and let me know when you're there, sir.

09:36 Are you there, sir?
09:36 A. Yes.
09:36 Q. This is an e-mail among some Align executives
09:36 that we've seen correspondence from over the course of
09:36 this trial, including Daniel Stubbs.
09:36 MR. MUELLER: This is DTX-143 and,
09:36 Your Honor, I offer it.
09:36 MR. TUBACH: No objection.
09:36 THE COURT: Admitted.
09:36 BY MR. MUELLER:
09:36 Q. Let's take a look at Mr. Stubbs' e-mail --
09:36 MR. MUELLER: I'm sorry, Your Honor. May
I help the witness?
09:36 (Interruption.)
09:36 BY MR. MUELLER:
09:36 Q. Take your time, Dr. Knittel. Let me know when
09:36 you're there.
09:36 THE COURT: I don't think I've ever seen
09:36 anyone do that.
09:36 (Laughter.)
09:36 BY MR. MUELLER:
09:36 Q. All right, sir. Do you see this is an e-mail
09:36 among Daniel Stubbs, Mu Li, and Daniel Diederich,
09:36 right?
09:36 A. That's correct.

09:36 Q. These are top executives at Align, and we've seen various e-mails among them over the course of this trial, correct?

09:36 A. Yes.

09:36 Q. Let's take a look at what Daniel Stubbs said on February 23rd, 2020. He said: Between us, between us, this is all about complacent R&D, NIH, and poor portfolio/roadmap decisions. It's what I saw in Israel when I first got here and still has not changed. iTero has never had to stand on its own and compete in the real marketplace because it has been protected and sells primarily because of Invisalign.

09:37 Do you see that?

09:37 A. Yes.

09:37 Q. This was internal executives, right?

09:37 A. That's correct.

09:37 Q. Writing to each other long before Align filed this lawsuit, correct?

09:37 A. Correct.

09:37 MR. MUELLER: Now, let's take a look at DTX-159.

BY MR. MUELLER:

09:37 Q. And I want to take you -- this is a Align strategy, global business strategy team document. And I want to take you to Page 2, DTX-0159. It's Tab 14 in

your binder. Tab -- sorry. Page 2. And I want to take you to the section that says "The technology has progressed" in Paragraph 8, top of the page, "proliferation of scanners."

MR. MUELLER: I'm sorry. The paragraph right above that. No. 8. There we go.

BY MR. MUELLER:

Q. The number of scanners is growing quickly with new scanners being launched monthly. Many of the big dental companies have or are developing their own scanner, and new companies are building scanners. The technology has progressed to the point that there is now a very accurate scanner, Medit, that is low initial cost and has no ongoing service subscription. It is quickly gaining market share.

Right?

A. That's what it says. Yes, sir.

Q. Now, this is seven years ago, and at that time, Align was recognizing new scanners were being introduced, some by big dental companies, and there was a very accurate scanner even then, true?

A. Yes.

Q. And yet now, seven years later, Align refuses to accept scans from any other scanner in the marketplace other than iTero, correct?

09:39 A. That's correct.
09:39 Q. Now, they still accept PVS, the putty, right?
09:39 A. Yes.
09:39 Q. And, sir, you know digital scanners are far more accurate than putty?
09:39 A. Some are.
09:39 Q. Sir, digital scanners are far more accurate than putty, true?
09:39 A. Some are.
09:39 Q. Some are. At least some are, right?
09:39 A. Correct.
09:39 MR. MUELLER: Let's take a look at 8.43. PDX-8.43. This is a slide that Dr. Perryman showed.
BY MR. MUELLER:
09:39 Q. And you don't contest this data, that Invisalign's orders by source, iTero has skyrocketed and putty has plummeted, right?
09:39 A. iTeros has gone up and PVS has gone down.
09:39 Q. And that's consistent with the industrywide trend away from putty, right?
09:40 A. Yes.
09:40 Q. Doctors nationwide have decided to use intraoral scanners rather than putty, correct?
09:40 A. I'm only pausing because you used the term "nationwide." If we split the nation into rural versus

urban, I wouldn't know if that's the case.

Q. Well, Dr. Knittel, folks in rural areas still have intraoral scanners. They're not all using putty, right?

A. Many of them do.

Q. And where intraoral scanners are available, they are being chosen overwhelmingly by patients and doctors over putty, correct?

A. That's certainly the case.

Q. And yet today, yet today, Align's policy is we'll accept the putty and we'll accept our intraoral scanner but no others, true?

A. That's true.

Q. Now, let's see what the reason for that is.

And first, you agree that as a general matter, there's a concept in economics called contractual or operational friction, right?

A. I know what those words would mean. We don't use that term in economics.

Q. Well, you used -- you certainly used the term "contractual" -- or let's go to your report, actually. Pages 28 to 29, Paragraph 52.

You submitted an expert report in this case?

A. I did.

Q. Let's go to Paragraph 52. All right. I'm

09:41 sorry. There we go. 52.

In evaluating whether the conduct is capable of substantial foreclosure.

Do you see that?

A. Yes.

Q. And you understand Dr. Perryman in here saying there is substantial foreclosure shown in this marketplace. That's his position?

A. That's his position.

Q. His position is that all these folks in the basement, every other clear aligner company confined to the basement area down here is being foreclosed by Align.

That's his position, right?

A. That's his position.

Q. Now, let's see what you said about what can cause substantial foreclosure. And by the way, foreclosure for a case like this doesn't require 100 percent foreclosure, does it?

A. No.

Q. And that means that ClearCorrect doesn't show they've never made a sale to have an antitrust claim, correct?

A. That's fair.

Q. Well, and so any suggestion that if some

doctor or dentist somewhere is selling ClearCorrect means there's no problem here, you know that's wrong?

A. That's fair.

Q. And it's fair because substantial foreclosure, as Dr. Perryman has articulated it, can be shown where that companies down here in the basement are being foreclosed from a substantial segment of the market, right?

A. They have to be foreclosed.

Q. Foreclosed. And in fact, he has said: And it's not a small section that these folks in the basement are being foreclosed from. It's pretty much the whole clear aligner doctor-directed market in the U.S.

Right?

A. That's what he says.

Q. Okay. Let's see what you said in Paragraph 52 about what conduct is capable of substantial foreclosure. And I want to go to the bullet point where you had "Duration, commitment and practical ability."

So here, this is your own expert report, your words, true?

A. Yes.

Q. Duration, commitment, and practical ability to

09:43 access competing options. The question an economist
09:43 like you asks, how long are the restrictions in place,
09:43 how easily can customers terminate or bypass them, and
09:43 do contractual or operational frictions materially
09:43 impede customers' ability to access competing options.
09:43 Do you see that, sir?
09:43 A. Yes.
09:43 Q. And so here, you're saying if there are --
09:43 you're asking the question: If there are contractual
09:43 or operational frictions -- as you put it, those are
09:43 your, your words?
09:43 A. Yes.
09:43 Q. -- that can materially impede customers'
09:43 ability to access competing options.
09:43 Right?
09:43 A. That's correct.
09:43 Q. And so here, what Dr. Perryman is saying is as
09:43 an operational matter, the iTero scanner policy, having
09:44 difficulty in using those scanners with other competing
09:44 options, is creating friction, right?
09:44 A. That's what he assumes.
09:44 Q. He's saying that the iTero policy is
09:44 suppressing competition, foreclosing it, by making it
09:44 harder, creating friction in accessing other options
09:44 like ClearCorrect, correct?

09:44 A. That's his opinion.
09:44 Q. Now, his position is in fact consistent with what Align itself said in internal documents among the top executives before this lawsuit began, true?
09:44 A. I wouldn't agree with that.
09:44 Q. Well, let's take a look, DTX-185.
09:44 This is an e-mail chain between Joe Hogan, the top of the food chain, chief executive officer at Align, right?
09:44 A. Yes.
09:44 Q. Raj Pudipeddi, the chief of marketing, correct?
09:44 A. I believe that's the case.
09:44 Q. April 10th, 2023, right?
09:44 A. Yes.
09:44 Q. Let's go down to Mr. Pudipeddi's e-mail, second paragraph: My point is that iTero and Invisalign are in a closed ecosystem and hence tightly coupled. If we delink them by offering interoperability on other scanners, it dilutes our unique position in my view.
09:45 Right?
09:45 A. That's what he writes.
09:45 Q. Mr. Pudipeddi said, "This is a closed ecosystem," correct?

09:45 A. That's what he writes.
09:45 Q. Then Mr. Hogan responded: I have slowly come to this conclusion too Raj. Thanks. We both cannot be wrong.
09:45 Right?
09:45 A. Yes.
09:45 Q. Now, you've heard a few witnesses take the stand and then some folks from the table over here use the word "open" to describe the iTero system, right?
09:45 A. Correct.
09:45 Q. But behind closed doors in communications among themselves before this lawsuit was filed, the CEO and the chief marketing officer called it a closed ecosystem, correct?
09:45 A. They called the iTero and Invisalign a closed ecosystem.
09:45 Q. And do you agree with the chief executive officer and the head of marketing that the iTero and Invisalign are a closed ecosystem?
09:46 Yes or no, do you agree with the chief executive officer and the head of marketing at Align?
09:46 A. I disagree.
09:46 Q. Let's go to -- so you -- just to be clear, you disagree with what the CEO and the chief of marketing said themselves. Do I have that right?

09:46 A. Correct.
09:46 Q. All right.
09:46 MR. MUELLER: Let's go to DTX-1421.
BY MR. MUELLER:
09:46 Q. Once the majority of doctors had the iTero, I want to turn to the question of how easy or hard it was to use it with other clear aligners other than Invisalign, okay?
09:46 Have that question in mind?
09:46 A. Yes.
09:46 Q. All right. Let's go to DTX-1421. This is an e-mail chain again among top executives including Joe Hogan, right?
09:46 A. Yes.
09:46 Q. Let's go to Page 2, the e-mail from Raphael Pascaud. It says, "A couple of things," to Joe Hogan and Chris Puco.
09:47 And I want to focus you on the second paragraph: Whilst customers could potentially use iTero for submitting a scan to any company today, the workflow is not simple and we would of course not support it, facilitate it.
09:47 Do you see that?
09:47 A. Yes.
09:47 Q. And so what they were saying is the workflow,

09:47 1 if you want to use an iTero for something other than an
09:47 2 Invisalign, is not simple. And they would of course
09:47 3 not support it or facilitate it, correct?
09:47 4 A. That's what they said in 2017.
09:47 5 Q. Right. And in fact, sir, we saw yesterday
09:47 6 just how difficult it is to use an iTero for something
09:47 7 other than an Invisalign, right?
09:47 8 A. I thought we saw the opposite, actually.
09:47 9 Q. Well, you saw when Mr. Durst was questioning
09:47 10 Dr. Cohanim, if I'm pronouncing his name correctly.
09:47 11 And did you notice Mr. Durst had to stop every few
09:47 12 seconds because another thing had to be done, right?
09:48 13 A. I saw that he did it in 45 seconds.
09:48 14 Q. Sir, the examination took minutes, minutes and
09:48 15 minutes and minutes because every few minutes Dr. --
09:48 16 Mr. Durst had to stop and ask for an explanation,
09:48 17 right?
09:48 18 A. The examination took minutes, but the video
09:48 19 was 45 seconds.
09:48 20 Q. And, sir -- and, sir, that process that we
09:48 21 saw, okay, is not required for Invisalign, is it?
09:48 22 A. That's correct.
09:48 23 Q. Everything that was reviewed in that -- in
09:48 24 that question-and-answer session, everything Dr. Taylor
09:48 25 went over when he testified is not required for

Invisalign, correct?

A. That's correct.

Q. For Invisalign, you press a button and you're done, correct?

A. Well, I don't know if I could characterize it that way.

Q. You don't know one way or the other?

A. Well, you obviously have to do a scan. There's a more -- there's obviously more steps.

Q. And the point is there's more steps to doing it with something other than Invisalign, correct?

A. Yes.

Q. Now, you said, No big deal. The doctors can still use it for STL export, right?

A. That's not a quote, but...

Q. That's your testimony, This is not hard, correct?

A. Sure.

Q. And let's take a look at how many doctors are actually doing this.

MR. MUELLER: DTX-208.

BY MR. MUELLER:

Q. Here's Mr. Pudipeddi, Mu Li. These are again top executives at Align, correct?

A. Yes.

09:49 MR. MUELLER: Let's go down to the analytic section, a little bit lower in this e-mail. Second page. There we go. Analytics.

BY MR. MUELLER:

Q. STL export data. I want to focus your attention on that, and just let's have in mind these are top Align executives behind closed doors confidentially discussing how often this STL export is actually used.

Do you have that in mind, sir?

A. Yes. I do.

Q. So with that in mind, what this says is "Around," that's that squiggly mark, means around, correct?

A. Commonly. Yes.

Q. Around .5 percent of doctors use STL feature globally and in the USA, correct?

A. That's what it says. It's inconsistent with the data.

Q. Well, it's -- so you're, again, contesting what the top executives said behind closed doors, right?

A. Yes.

Q. And how much are you being paid per hour, sir?

A. $1,000.

09:50 Q. Now, here, in the document among the executives, they are saying .5 percent. If you'd help us with the math, what does .5 percent translate into doctors, out of 200?

A. That would be one doctor.

Q. One doctor out of 200 is actually using this STL export process, according to the top executives in correspondence among them before this litigation, correct?

A. That's what the e-mail says.

Q. Now, you say -- let's take a look at your slide, the one in five orders.

MR. MUELLER: It is PDX-9.19. You say -- I'm sorry, I think I had that wrong.

There we go.

BY MR. MUELLER:

Q. One in five ClearCorrect digital orders come from iTeros, right?

A. Correct.

Q. Now, sir, in fact, you looked at data about submissions, correct?

A. That's correct.

Q. Submissions are not the same thing as an order, right?

A. That's correct.

09:51 Q. An order is when there's an order for a clear aligner treatment program, correct?
09:51 A. Correct.
09:51 Q. That's going to result in multiple submissions over time, true?
09:51 A. Usually. Yes.
09:51 Q. And so you showed the jury this slide and said one in five orders come from iTeros, but you had actually looked at data about submissions, not orders, correct?
09:51 A. Well, that's the data that we have. Yes.
09:51 Q. Well, in fact, you have not done an analysis to try to estimate the number of orders ClearCorrect obtained from an iTero, correct?
09:51 A. No. This is a valid estimate of --
09:51 Q. Well, let's take a look at your deposition. If you could take a look at Page 230, Line 20 to 24.
09:52 230 Line 20 to Line 24.
09:52 Question: Have you done an analysis to try to estimate the number of orders ClearCorrect obtained from an iTero?
09:52 Answer: I don't think so.
09:52 Were you asked that question, did you give that answer?
09:52 A. Yes.

09:52 Q. Let's go back to your slide.

09:52 Having not done that analysis, you showed this jury a slide that said one in five orders come from an iTero, correct?

09:52 A. Correct.

09:52 Q. So you showed the jury a slide of an analysis you hadn't done, true?

09:52 A. That's not true.

09:52 Q. All right. Let's go to -- well, let me ask you one more question.

09:52 Even under this, this would be 20 percent, 21 percent you say of the orders come from an iTero?

09:52 A. Yes.

09:52 Q. But over half the scanning equipment are iTeros, correct?

09:52 A. That's correct.

09:52 Q. So if in fact the iTero scanning equipment were an open system that allowed for fair competition, over half the ClearCorrect orders would come from an iTero, true?

09:53 A. That's not true.

09:53 Q. Even though over more than half of the scanning equipment are iTeros, even under your own analysis, or I should say your own slide, 21 percent are coming from an iTero, correct?

09:53 A. That's correct.

09:53 Q. And, sir, the reason why there's the gap, even under your own slide, is because the iTero is so much harder to use with ClearCorrect and every other clear aligner on the market aside from Invisalign, true?

09:53 A. That's not true.

09:53 Q. Let's turn to -- oh, one more thing. You know Dr. Perryman did an event study to quantify the effects of the iTero -- what he calls the iTero lock-in policy, right?

09:53 A. He did.

09:53 Q. He did an event study to quantify the effects of the iTero study in foreclosing the competition in the market that we see on this slide right there or that placard right there, right?

09:53 A. That's not correct.

09:53 Q. Sir, he did an event study to quantify the number of sales that ClearCorrect had lost as a function of the closed system iTero scanner policy, true?

09:54 A. That is not true.

09:54 Q. Okay. Dr. Perryman's testimony will stand for itself.

09:54 He did an event study, right?

09:54 A. He did an event study.

09:54 Q. And, Dr. Knittel, you didn't?
09:54 A. I did not.
09:54 Q. You did not conduct an event study?
09:54 A. I agree with his event study.
09:54 Q. Sir, you did not conduct your own event study, true?
09:54 A. Well, we replicated his event study.
09:54 THE COURT: Just answer his question.
09:54 THE WITNESS: Okay. Sorry.
09:54 BY MR. MUELLER:
09:54 Q. You did not conduct your own event study, true?
09:54 A. Well, that's untrue because...
09:54 Q. You tried to correct, as you put it, Dr. Perryman's study. You didn't do your own?
09:54 A. I would disagree with that.
09:54 Q. Okay. Now, Dr. Perryman provided a damages estimate for the effects of the iTero system on the number of sales that he says ClearCorrect lost, correct?
09:54 A. That's correct.
09:55 Q. You have not provided any alternative to this jury, true?
09:55 A. My alternative is zero.
09:55 Q. Right. The only thing you told this jury is:

09:55 Nothing to see here. This is just fine. It's a
09:55 healthy marketplace, and ClearCorrect should receive
09:55 zero. Right?
09:55 A. That's correct.
09:55 Q. You haven't provided this jury with any
09:55 assistance if they conclude this is not fine, this is
09:55 not fine, that there's foreclosure happening,
09:55 anticompetitive effects by Align.
09:55 The only number they have in that
09:55 circumstance, if they reach that conclusion, is
09:55 Dr. Perryman's, correct?
09:55 A. That's fair.
09:55 Q. Now, Dr. Perryman said: The harm doesn't end
09:55 there. He said: In addition to the effect of the
09:55 iTero policy, there's exclusionary contracts.
09:55 Correct?
09:55 A. That's what he says.
09:55 Q. And he said those have harmed ClearCorrect,
09:55 right?
09:55 A. He does.
09:55 Q. He said to be conservative, he's only
09:55 quantified iTero, but there is additional harm from the
09:55 contracts, true?
09:55 A. That's what he says.
09:55 Q. And I want -- you said that these contracts

are justifiable because they help prevent bait and switch.

Do I have that right?

A. Yes.

MR. MUELLER: Let's take a look at Tab 23, DTX-210. And I want to go to Page 3 of this document.

BY MR. MUELLER:

Q. This is DTX-210. It's Tab 23 in your binder. If you want to look at the hard copy, whatever's easier.

Okay. Here, again, we have some -- an e-mail correspondence of Mr. Hogan and Brad Jergenson, again, CEO and an executive from Align, right?

A. I don't know who Brad is, but I'll take your word for it.

Q. Let's go to Page 2. And there's a blog post which they're e-mailing each other about, and I want to start with the blog post.

This is a dentist. Do you see? Chad Foster, right?

A. Yes.

Q. It says: It seems like new clear aligner alternatives exploded on the market, AAO in Washington, D.C. I've enjoyed using the big name aligner

09:57 product --

And of course that's Invisalign, right, sir?

A. I think that's fair.

Q. -- for many years and still do, but wanted to explore other options for better value and performance. Our office currently has about 20 cases going with Orthocaps from Rocky Mountain Orthodontics --

THE COURT: Mr. Mueller, if you could slow down just a bit.

MR. MUELLER: I'm sorry, sir.

THE COURT: When you're reading, you go a little fast.

MR. MUELLER: I apologize.

BY MR. MUELLER.

Q. -- and we have enjoyed the results we have seen thus far.

Do you see that, sir?

A. I do.

Q. Okay. So here's a doctor saying, I've used Invisalign and still do but want to explore other options for better value and performance, right?

A. Yes.

Q. Let's see what Mr. Hogan said about this. And let's go up the chain here, if we go to the previous page. And he said: Brad, please let me know if this

doc uses our product and is on Doc locator. If he's on doc locator, then we should take him off right away. Let me know what you think.

Do you see that?

A. Yes.

Q. Now, there's no evidence of bait and switch in that blog post that we just looked at, right?

A. That's fair.

Q. It's a doctor saying, I like Invisalign, I'm going to continue to use it, but I want to explore some other options, found one, seems pretty good, right?

A. Yes.

Q. Mr. Hogan's saying, let's get him off doc locator, right?

A. Yes.

Q. Let's go a little bit further up this e-mail.

Brad Jergenson says: I will have him removed and ask the team to follow up with him; perhaps we can help to adjust his thinking.

Do you see that, sir?

A. Yes.

Q. That sounds a bit like a threat, doesn't it?

A. No.

Q. Well, let's keep going. Let's go a little bit further up. Mr. Hogan says: That would be a good

first move. If not, let's get him off the list. I think we have to begin to be more active in removing these docs. Many will say they offer Invisalign if asked, but these are the same bait-and-switch orthos that have been stealing patients for years.

Do you see that?

A. Yes.

Q. And, Dr. Knittel, as we just discussed 30 seconds ago, there was no bait or switch here. There was a doctor exploring another option.

And Align labeled that bait and switch at the CEO level, right?

A. We don't know that.

Q. Dr. Knittel, you just told me, we agreed 30 seconds ago, that doctor's blog post showed no evidence of bait and switch, true?

A. What he wrote doesn't.

Q. Dr. Knittel, the blog post showed no evidence of bait and switch, true?

A. What he wrote does not.

Q. And immediately Joe Hogan says get him off the doctor finder and starts to lob around accusations of bait and switch.

That's what the e-mail says, correct?

A. Yes.

09:59 MR. MUELLER: All right. Let's take this down.

BY MR. MUELLER:

10:00 Q. Next issue. The discount program. You've heard references to that throughout this trial?

10:00 A. Yes.

10:00 Q. And Dr. Perryman said that's yet another way, in addition to iTero, in addition to the thousands of exclusionary contracts, that Align is trying to maintain its monopoly position in the market.

10:00 That's his position, right, sir?

10:00 A. That's his position.

10:00 Q. And he says that the Advantage Program is a barrier to switch and is protecting Align from competition, correct?

10:00 A. That's correct.

10:00 Q. His testimony is it's not just an ordinary discount program offered in a competitive market. We have here a monopolist trying to maintain a monopoly and do so by creating a barrier to switch that protects from competition.

10:00 That's his view, right?

10:00 A. That's his view.

10:00 Q. And it's not just his view; it's Align's view, isn't it?

10:00 A. I don't know about that.
10:00 Q. Well, let's take a look. This is DTX-1483. Global Advantage Reboot, Project Update & Review.
10:00 Do you see that?
10:00 A. Yes.
10:00 Q. Let's go to Page 4. Align project objectives. So what they were seeking to do with the Advantage Program, right?
10:01 A. Yes.
10:01 Q. Third bullet from the bottom: Create a "barrier to switch" - protect from competition.
10:01 Correct?
10:01 A. Correct.
10:01 Q. Internal document, never meant for this audience in court. This is ClearCorrect's -- I'm sorry. This is Align, Align, behind closed doors saying the Advantage Program is a barrier to switch, protects from competition, true?
10:01 A. It's a barrier to switch, yes.
10:01 MR. MUELLER: Let's take this down.
BY MR. MUELLER:
10:01 Q. A few more questions for you, if we could, Dr. Knittel.
10:01 You say that in addition to everything Align is doing being okay in your view, right?

10:01 A. Yes.
10:01 Q. You also say down here in the basement, ClearCorrect is doing a bad job of fighting for market share down here in the basement.
10:01 True?
10:01 A. I don't use the term "basement."
10:02 Q. You say ClearCorrect is doing a bad job, and that's why you showed the jury the graph right next to you, right?
10:02 A. That's fair.
10:02 Q. Now, you say that ClearCorrect is not as good on product quality and service and other characteristics of a quality competitor, true?
10:02 A. I don't know if I ever listed those. I might have but...
10:02 Q. Well, Dr. Knittel, you've been here for the whole trial?
10:02 A. I was not here the first day.
10:02 Q. Fair enough.
10:02 But you've been here for most of the trial?
10:02 A. Yes.
10:02 Q. Did you see Mr. Kossol testify?
10:02 A. I may have.
10:02 Q. He works down the road in Round Rock, and he showed the jury the manufacturing facility that

10:02 1 ClearCorrect runs in Round Rock, right?
10:02 2 A. I might have missed that testimony.
10:02 3 Q. Okay. But you're not here to say that
10:02 4 Mr. Kossol is anything other than an intelligent,
10:02 5 hard-working, thoughtful person who works in
10:02 6 manufacturing in Round Rock and is doing his best with
10:02 7 his colleagues to run a quality manufacturing operation
10:03 8 in Round Rock, right?
10:03 9 A. I don't know Mr. Kossol. I wouldn't impugn
10:03 10 his -- anything about him. Yes.
10:03 11 Q. But, sir, you say you're not impugning him,
10:03 12 but when you say ClearCorrect can't compete, we brought
10:03 13 the actual folks who are from the company to take the
10:03 14 stand, talk to the jury and answer questions, right?
10:03 15 A. Yes.
10:03 16 Q. So when you're impugning ClearCorrect and
10:03 17 Straumann, you're impugning them, aren't you?
10:03 18 A. The people?
10:03 19 Q. The people are the company, sir. It's
10:03 20 Mr. Kossol, it's Ms. Sterling, it's Mr. Coss, it's
10:03 21 Mr. Buitta. They took the stand, answered questions.
10:03 22 And did any of them strike you as anything
10:03 23 other than intelligent, hardworking, thoughtful, and
10:03 24 always looking to improve?
10:03 25 A. They -- they did not.

10:03 Q. Now, sir, what you're really saying is ignore this. You're saying let's get a magnifying glass out and look at the basement and see who's doing better and worse in the basement.

10:04 That's your chart over there, correct?

10:04 A. That chart is mine.

10:04 Q. And did you hear Dr. Perryman say that the positions Align is taking in this case is that ClearCorrect is really less effective, as he put it, fighting for the scraps down here, right?

10:04 A. I heard him say that. Yes.

10:04 Q. And what he said is if these anticompetitive practices were removed, all of these companies in the basement could compete more effectively, could achieve scale, right?

10:04 A. I believe he said that.

10:04 Q. Now, by the way, there was a reference yesterday to Align cutting their prices somewhat. Did you hear that?

10:04 In fact, you said that.

10:04 A. Yes.

10:04 Q. And you know, sir, you know as a matter of basic economics, a monopolist will sometimes cut prices, right?

10:04 A. Yes.

10:04 Q. And the fact that a monopolist cuts prices doesn't mean it's not a monopolist, as a matter of basic economics?

10:04 A. As a matter of basic economics, yes.

10:04 Q. Okay. Now, a few more things about how good ClearCorrect is.

10:04 MR. MUELLER: Let's take a look at DTX-0299.

BY MR. MUELLER:

10:05 Q. I want to -- this is a document that is in evidence, and I want to go to Page 23.

10:05 This is an Align document. See the Align code at the bottom of the page?

10:05 A. Yes. I do.

10:05 Q. And do you see it says: User data, ClearCorrect...came back eerily similar to Invisalign (March 2017).

10:05 Right?

10:05 A. Yes.

10:05 Q. And it goes on to say that ClearCorrect, in terms of customer reactions, stacked up very well to Invisalign.

10:05 Do you see that table there in the bottom?

10:05 A. Yeah. I'm just orienting myself.

10:05 Q. And look at what -- the questions that were

posed in this internal Align presentation: Does this mean we are a slave to what a doctor recommends?

Do you see that?

A. I do.

Q. And the next line down, the second question is: How can we when we don't own the patient?

Right?

A. Okay.

Q. So here, we have an internal Align document showing ClearCorrect is doing extremely well, even as of then.

And by the way, this is before they introduced that top quality Zendura FLX material with the hard-soft-hard. But even before that back in 2017, Align, Align's own data was showing ClearCorrect stacked up extremely well with Invisalign, right?

A. That's -- do they use "extremely well"?

Q. And the question they said: Does this mean we're a slave to what a doctor recommends?

Do you see that?

A. Yes.

Q. Do you think that's appropriate? Don't you think a company like this should be saying, If a doctor recommends that a patient use a particular option, that's up to them?

10:06 A. I'm not sure what they even mean by that.
10:07 Q. Well, let's go back to the happy doctor you showed the jury one last time.
10:07 A. Yes.
10:07 MR. MUELLER: This is PDX -- I'm sorry, 9.21 or 23.
BY MR. MUELLER:
10:07 Q. This is what you showed the jury, right?
10:07 A. Yes.
10:07 MR. MUELLER: Let's go to actual information of what doctors really thought, DTX-309, competitive metaanalysis, Page 2.
BY MR. MUELLER:
10:07 Q. Doctor experiences with competitive clear aligner brands.
10:07 Do you see that?
10:07 A. Yes.
10:07 MR. MUELLER: Let's go to Slide 12.
BY MR. MUELLER
10:07 Q. And do you see where it says: Relative to competitors -- middle of the page, right there -- relative to competitors, doctors' views of the Align, the company, are quite negative, driven by perceptions that Align cares more about itself than doctors.
10:08 Do you see that?

10:08 A. I do.
10:08 Q. Doctors also still have lingering negative feelings about the Smile Direct Club relationship, right?
Do you see that?
10:08 A. Yes.
10:08 Q. Now, by the way, we've heard a little bit of testimony about the Smile Direct Club, correct?
10:08 A. Yes.
10:08 Q. That went bankrupt, right?
10:08 A. I don't know if I know that.
10:08 Q. Did you know Align was an investor in that company?
10:08 A. I might have known that.
10:08 MR. MUELLER: Now, let's go to Page 14. It says at the bottom of the page -- I'm sorry, Slide 13. I misspoke, the one right before.
BY MR. MUELLER:
10:08 Q. And let's look at Align's status frustration. This is referring to the Advantage Program.
Do you see that?
10:08 A. Yes.
10:08 Q. And let's go look at the second sentence: Some doctors also grow tired of chasing status from year to year. Sometimes it requires making treatment

10:08 1 decisions that are unnecessary just so doctors can
10:09 2 achieve status and receive discounts.
10:09 3 Do you see that?
10:09 4 A. I see that written.
10:09 5 MR. MUELLER: Let's go to Page 32,
10:09 6 Slide 31.
7 BY MR. MUELLER:
10:09 8 Q. And I want to focus on doctors' perceptions of
10:09 9 Align and Invisalign. And look at the first paragraph.
10:09 10 It says: Doctors have starkly different views of
10:09 11 Align, the company, versus Invisalign, the brand.
10:09 12 Do you see that?
10:09 13 A. Yes.
10:09 14 Q. And it goes on to compliment Invisalign,
15 right?
10:09 16 Right, sir?
10:09 17 A. Yes.
10:09 18 Q. And, Dr. Knittel, we haven't been criticizing
10:09 19 Invisalign over the course of this trial, have we?
10:09 20 A. I don't -- I can't remember you doing that.
10:09 21 Q. Let's look at the company: Unfortunately,
10:09 22 their views of the company are quite negative, driven
10:09 23 by perceptions that Align cares more about itself than
10:09 24 the doctors.
10:09 25 Right?

10:09 A. Yes.

10:09 MR. MUELLER: Let's go to DTX-308.

BY MR. MUELLER:

10:09 Q. And again, you showed the jury the smiling
10:10 doctor, but actual surveys of doctors within Align's
10:10 own files show that doctor perceptions were quite
10:10 negative of Align, correct?
10:10 A. Well, what you just showed me is of Align.
10:10 Yes.
10:10 Q. Right.
10:10 MR. MUELLER: Let's go to DTX-308.

BY MR. MUELLER:

10:10 Q. Here's another competitive intelligence update
10:10 within Align, correct?
10:10 A. Yes.
10:10 MR. MUELLER: Let's go to Slide 27,
10:10 please.

BY MR. MUELLER:

10:10 Q. ClearCorrect. This is ClearCorrect's
10:10 strengths and weaknesses, right?
10:10 A. I would assume so. Yes.
10:10 Q. Now, this is from 2020, right?
10:10 A. I missed the date when you flashed it. But --
10:10 Q. Well, let me show you. There's the date,
10:10 March 2020. Let's go back to the other page.

10:10 One of the weaknesses -- this is aligner materials, right?
10:10 A. Yes.
10:10 Q. That was before Zendura FLX and the hard-soft-hard was introduced, true?
10:10 A. I believe so. Yes.
10:10 Q. On the left-hand side, we have attractive pricing as a strength?
10:11 A. Yes.
10:11 Q. Efficacy on low stage cases as a strength?
10:11 A. Yes.
10:11 Q. Easy company to deal with as a strength?
10:11 A. Yes.
10:11 Q. Made in the USA as a strength?
10:11 A. Correct.
10:11 Q. And at the bottom, it says: In addition to the strengths above, many felt an advantage of ClearCorrect was that it was not Align. These doctors felt Align had become a greedy and overly aggressive company that did not care very much about its doctor providers.
10:11 Do you see that, sir?
10:11 A. I see that.
10:11 Q. And that's from within Align's own files, correct?

10:11 A. Yes.
10:11 Q. Align's own analysis, right?
10:11 A. Yes.
10:11 Q. And, sir, that Align analysis is precisely consistent with the foreclosure described by Dr. Perryman, true?
10:11 A. Not true.
10:11 MR. MUELLER: Your Honor, I have nothing further for the witness. I pass the witness.

REDIRECT EXAMINATION

BY MR. TUBACH:

10:12 Q. Dr. Knittel, I have just a few follow-up questions for you here.
10:12 This chart that Mr. Mueller showed you, it suggests that Align's market share is going up from 84 to 92 percent.
10:12 Do you see that?
10:12 A. Yes.
10:12 Q. Is that accurate?
10:12 A. No.
10:12 Q. What has been happening with Align's market share from 2017 all the way to 2024?
10:12 A. Those numbers should be reversed. It went from 92 to 84.
10:12 Q. And in fact, has Align's market share gone

down every single year since 2017?

A. Yes.

MR. TUBACH: Now, let's put up PDX-9.22, if we could.

BY MR. TUBACH:

Q. This is the "I love Invisalign."

A. Correct.

Q. Right?

This is a cartoon that we created, right?

A. Yes.

Q. Is that in fact consistent with the document that Mr. Mueller just showed you about how doctors feel about the product Invisalign?

A. It is.

Q. And to be clear, you -- this was just a possibility about why it is that doctors might order relatively more Invisalign than ClearCorrect after buying an iTero, right?

A. Exactly.

Q. And did you -- you weren't suggesting that you had done analysis to prove that this was why they were doing it, right?

A. That's right. What was misleading about that discussion is that this was used to hammer home the point that the fact that we see an increase in

Invisalign sales after a doctor buys an iTero might actually be because the doctor has learned something about the material or about the clear aligners.

Q. And so your testimony providing other possible reasons, other than just this export process, is to show that Dr. Perryman hadn't really analyzed why it was; is that fair?

MR. MUELLER: Objection. Leading, Your Honor.

THE COURT: Sustained.

BY MR. TUBACH:

Q. Why is it that you provided the jury with this cartoon and with other explanations -- possible explanations for why the -- we see a shift towards Invisalign after a doctor buys iTero?

A. Yeah. And some of that was muddled in our previous discussion. You know, I do not take issue with the fact that a doctor that had previously ordered ClearCorrect and Invisalign, after they buy an iTero, orders relatively more Invisalign.

The issue at stake is why. And Dr. Perryman assumes that it's the export process, but there's nothing in the record to show that. And in fact, there's at least two other reasons why we might see that in the data that is not linked to the export

process.

MR. TUBACH: So let's look at DTX-185.

BY MR. TUBACH:

Q. Mr. Mueller showed you that document also. And in particular, the --

MR. TUBACH: If we could go down to the -- sorry -- up at the first page. My apologies.

BY MR. TUBACH:

Q. That -- my point is that iTero and Invisalign are a closed system. It's in the second e-mail.

He asked you some questions about iTero and Invisalign as a closed ecosystem and hence slightly coupled.

What is the relation -- how would you explain this relative to Align accepting policy, accepting scans from other companies, versus using the iTero to order other aligners?

A. Yeah. So we talked. You know, Align does not accept scans from other scanners. But that -- but the iTero itself, we showed with data, that is used -- that iTero's used to order other clear aligners.

Q. And in fact, is that the outbound, ordering other aligners from the iTero, is that what's being discussed in DTX-185?

A. No.

10:16 MR. TUBACH: Let's look at DTX-1483. We can go to the slide talking about the barriers to switch that Mr. Mueller talked about.

BY MR. TUBACH:

Q. Now, if you could look above all that, what is that -- what is that all telling us about what the Advantage Program does?

A. These are points that I was making yesterday about how these are procompetitive points or procompetitive attributes of the program.

Q. And when -- you disagreed with counsel for Straumann that barrier to switch was anticompetitive in some way?

A. That's right. It's being -- he was trying to use it as an anticompetitive term. It's similar to moat. The term "moat," the term "barrier" can be procompetitive too. If you have a good product, that's a barrier to switch.

Q. Is that sort of like the GEICO example?

A. Exactly.

Q. And what was GEICO's moat or barrier to try to stop their customers from going elsewhere?

A. They had lower costs. So they could charge lower premiums.

Q. So lower prices was the barrier?

10:17 A. Effectively. To be completely fair, Warren Buffett was just talking about their cost structure, but the implication is they'll pass some of those lower costs to consumers.

Q. Got it.

MR. TUBACH: Let's look at DTX-208. And this is the chart that refers to the 0.5 percent. If we could go to that, I believe that's on Page 2 perhaps.

BY MR. TUBACH:

Q. Mr. Mueller kept talking about everyone. Apparently every e-mail written by the company is by a top executive.

Do you have any idea whether this person named Jyoti is a top executive or even an executive at all at Align?

A. I do not.

Q. Now, is this -- wherever -- wherever this came from, is this consistent with the data you actually looked at from Align?

A. I have the actual data. This is entirely inconsistent.

MR. TUBACH: Okay. Let's look at PTX-3066.

BY MR. TUBACH:

10:18 Q. Mr. Mueller challenged whether this was a valid chart, and you suggested it was a valid chart. And you didn't get an opportunity to explain that on cross-examination.

So I want to ask you, sir, why do you believe this is a valid chart?

A. Yeah. So it's true we have data of scans. So the scans get submitted. Scans create orders. Multiple scans typically create one order.

This is still an estimate of the number of orders that come from iTero, and the reason why is as long as the rejection rate of scans is not appreciably different across scanners, then -- you know, for example, suppose for every scanner, five scans creates one order.

Well, if that was the case, then if you knew the number of scans, you would know the number of orders, right? Everybody has the same ratio, so to speak.

So unless there's a vastly different ratio across scanners, this is still a valid estimate of the number of orders. And I've seen nothing in the record to suggest that that's the case.

Q. And so when you looked at the number of scans, your best judgment, based on all the data you had, was

10:19 that this would also reflect the number of orders --
10:19 A. Correct.
10:19 Q. -- of ClearCorrect aligners?
10:19 A. Correct.
10:19 MR. TUBACH: Let's look at DTX-210.
10:19 Actually, we don't need to pull up the document.
BY MR. TUBACH:
10:19 Q. I'll just ask you about it.
10:19 You heard some questions from Mr. Mueller
10:19 about taking a doctor potentially off doc locator?
10:19 Do you recall that?
10:19 A. Yes.
10:19 Q. What is doc locator?
10:19 A. Doc locator is a website that Align runs to
10:20 advertise doctors.
10:20 Q. And in that document, he showed you a concern
10:20 that Align had about bait and switch.
10:20 Do you recall that?
10:20 A. Correct.
10:20 Q. And do you think as a company, Align should be
10:20 required to allow doctors to advertise on their own
10:20 website if they're engaging in bait and switch
10:20 proceedings?
10:20 A. Not at all.
10:20 Q. Now, the document that -- another document

that he showed you suggested that they'd done surveys to -- that the doctors loved Invisalign, right?

A. Yes.

Q. We saw that, right?

And the fact that doctors love Invisalign, would that explain why, when they buy an iTero, they buy Invisalign?

A. Obviously.

MR. TUBACH: I have no further questions. Thank you.

RECROSS-EXAMINATION

BY MR. MUELLER:

Q. Just a couple more questions, Dr. Knittel.

You were asked about bait and switch one more time, right?

A. Yes.

MR. MUELLER: Let's take a look at DTX-2019.

BY MR. MUELLER:

Q. And this is another internal Align document. Do you see it's titled Global White Paper?

A. I don't know if it's an Align document, but I'll take your word for it.

Q. And do you see it says: This -- these are the key customer experiences we must address.

10:21 Do you see that?
10:21 A. Yes.
10:21 Q. And then below that, in the last sentence in that paragraph, it says: Details and rationale are included for each later in the paper, right?
10:21 A. Yes.
10:21 MR. MUELLER: Let's go to Page 9.
10:21 MR. TUBACH: Sorry. Can you tell him the tab number?
10:21 MR. MUELLER: Tab 24.
10:21 BY MR. MUELLER:
10:21 Q. And the second bullet says: Tone has reverted -- second big bullet right below there: Tone has reverted to pre-2014. Internal, there is more of a sense that we are entitled to our customers' business and they are a barrier to be overcome.
10:22 Right?
10:22 A. That's what it says.
10:22 Q. And then the next one says: Blaming customers -- this is Align talking about itself: Blaming customers for not using more of Invisalign versus it's our responsibility. Very little respect or appreciation for our customers except for the top volume customers.
10:22 Do you see that?

10:22 A. I see that.
10:22 Q. And then it goes on to say: Bait and switch is frequently used which insinuates, insinuates, our customers have negative intentions of switching customers versus legitimate reasons for their behavior.
10:22 Right? Do you see that, sir?
10:22 A. Yeah. I'm -- I agree with the words. I'm just trying to --
10:22 Q. Right. And not only the words, sir, we saw an example of this in the e-mail exchange earlier between Mr. Hogan, the CEO, and Mr. Jergenson. They characterized a legitimate decision to switch -- or not even switch, bring on another clear aligner option as baiting and switching, right?
10:23 A. We did not see that.
10:23 Q. And then right below this, read further: It feels like we've resorted to how we can force our customers to do more cases versus how we can make it so they want to do more Invisalign.
10:23 Right, sir?
10:23 A. That's what it says.
10:23 Q. So again, once more in your back-and-forth just now, you said that doctors really like it, right?
10:23 A. I thought we both agreed to that.
10:23 Q. Sir, you showed the doctors loving it and the

10:23 hearts, the heart emoji, right, in your cartoon?
A. Yes.
Q. And here's Align in an internal self-analysis saying: It feels like we've resorted to how we can force our customers to do more cases, correct?
A. That's what they write.
Q. Including by insinuating they were engaged in baiting and switching by considering other options, true?
A. I'm just rereading the other bullet.
MR. MUELLER: Well, we'll let the document speak for itself, Your Honor.
I withdraw the question and pass the witness.
FURTHER REDIRECT EXAMINATION
BY MR. TUBACH:
Q. This document that he just put up, DTX-2019, this is a 23-page document; is that right?
And you probably -- you have it in your binder, but I'll just tell you it's a 23-page document.
A. Okay.
Q. Have you had a chance to review this at all?
A. No.
Q. Okay. And this is -- if it's an internal document critiquing how people, the company, Align,

10:24 itself doesn't have anything to do with Invisalign, the product?

A. No. Mr. Mueller and I were actually establishing the product itself was great.

Q. And if they're being self-critical and trying to improve their business and how people perceive the company versus the product itself, is that a good thing or a bad thing?

A. I would imagine that's a good thing.

MR. TUBACH: Thank you. No further questions.

MR. MUELLER: Nothing further for Dr. Knittel. Thank you, Your Honor.

THE COURT: You may step down, sir. Thank you.

THE WITNESS: Thank you.

THE COURT: Ladies and gentlemen of the jury, we're going to take our morning recess, and then we'll come back in about ten minutes.

Please don't discuss the case with yourselves.

THE BAILIFF: All rise.

(Jury exited the courtroom.)

THE COURT: Thank you. You may be seated.

10:25 I assume we got -- after the conference yesterday that the parties were able to work out the minor disagreements we had after the charge conference, or is there anything you all need to take up?

MR. TUBACH: I'll have to defer to others. They're coming forward, Your Honor.

10:26 MR. FORD: Good morning, Your Honor. Mark Ford. Ian Simmons and I and our teams discussed last night some of the remaining issues. And I'm happy to report --

THE COURT: Move up just a little.

MR. FORD: And I'm happy to report we're going to present to you a jury instruction form that requires no more decisions on your behalf.

THE COURT: That's great.

MR. FORD: We resolved everything. The parties -- I believe Align may be reserving some objections, but we're all done.

THE COURT: Oh, of course.

10:26 MR. SIMMONS: Thank you, Your Honor. Ian Simmons for Align.

That's correct. We'll provide a binder to the Court in the right font size, no staples, no clips. And at the lunch hour, we'd like to just put on the record some objections.

10:26 THE COURT: Okay. About how long do we anticipate the next witness is going to take?

10:26 MR. TUBACH: Your Honor, just for our side, we'll need less than -- I would expect less than an hour.

10:26 THE COURT: Well --

10:26 MR. MUELLER: And may I ask, Your Honor, if we could just -- he's the last witness -- get the Court's countdown for our remaining time, because that will dictate how long we'll cross.

10:26 THE COURT: I'm going to let -- I've stopped the -- I'm not -- I don't have a clock going.

10:26 MR. MUELLER: Okay.

10:26 THE COURT: But we need to get done.

10:27 MR. MUELLER: We'll do it in a very reasonable time.

10:27 THE COURT: Okay. We just need to get done as close -- for your sake, look, I'm agnostic. You know, the time is what the time is. I'm going to let you finish this last witness but keeping in mind that everything else is -- now, my plan is --

10:27 We don't need to be on the record for this.

10:27 (Off-the-record discussion.)

10:28 MR. MUELLER: Your Honor, the remaining

verdict form issue has to do with the infringement and validity questions. And we have offered, Your Honor, just to make this a little bit more streamlined for the jury, to dismiss without prejudice our counterclaim to allow for the conditionality Your Honor suggested yesterday, which would allow that if the jury finds no infringement, to move on.

So we move to dismiss without prejudice our counterclaim to allow for that conditional structure.

THE COURT: And do you oppose that?

MR. TUBACH: I can't imagine we would, Your Honor, but I honestly haven't been involved in that process. So I would prefer to -- well, we have someone to ask. I'll step aside.

MR. NASH: We do oppose that, Your Honor, it's my understanding. They have -- we've -- we had asked them to stipulate to a non-assertion in the future on invalidity. They are not able to do that. So we believe that this has already been teed up for the jury to decide validity now.

THE COURT: Okay. Since it has been tried and since it was a counterclaim when it started, I will allow the jury to answer it.

MR. MUELLER: Understood, Your Honor.

10:29 THE COURT: Anything else?
10:29 MR. MUELLER: Nothing from defendants, Your Honor. Thank you.
10:29 MR. TUBACH: No. Thank you, Your Honor.
10:29 THE COURT: Okay. I'll be back in about ten minutes.
10:29 (Recess taken.)
10:41 THE BAILIFF: All rise.
10:41 THE COURT: Please remain standing for the jury.
10:41 (Jury entered the courtroom.)
10:41 THE COURT: Thank you. You may be seated.
10:41 MR. TUBACH: Align Technology calls its next and last witness, Dr. Jena.
10:42 (The witness was sworn.)

DIRECT EXAMINATION

BY MR. TUBACH:

10:42 Q. Good morning, Dr. Jena.
10:42 A. Good morning.
10:42 Q. Could you introduce yourself to the ladies and gentlemen of the jury?
10:42 A. Sure.
10:42 Good morning, everybody. My name is Anupam Jena. I go by Bapu.

10:42 Q. What do you do for a living, Dr. Jena?

10:42 A. I do a few things. I'm a professor at Harvard University in Boston. I'm a medical doctor. I work at a hospital called Massachusetts General Hospital, which is the big teaching hospital in Boston.

10:42 I teach. I do research, and I'm also an economist. So I do a few things.

10:43 Q. Can you tell us just a little bit about your family?

10:43 A. Sure. I met my wife when we were both in medical school. She grew up in a town called Round Rock, which has a lot of prominence, it sounds like. And she went to Pflugerville High School, which is the sort of name that you don't forget after the first or second date.

10:43 Our life started there. We moved to Boston. Had two children. Our daughter's 11. She's going to middle school next year. And our son Aiden is 8.

10:43 And an interesting fact about our family is Aiden was born deaf. So we use American Sign Language in our home, and that's something that I'm incredibly proud of.

10:43 Q. Can you briefly describe your educational background for us?

10:43 A. Sure. I grew up in Richmond, Virginia.

10:43 That's where I went to school initially. Moved to
10:43 Boston for college. I went to Massachusetts Institute
10:43 of Technology, or MIT. I studied economics and biology
10:43 there.
10:43 Then I moved to Chicago in 2000. Spent eight
10:43 years there. Went to medical school. That's an M.D.
10:43 degree. And then I did my Ph.D. in economics also at
10:44 the University of Chicago.
10:44 Then I moved back to Boston to train in
10:44 residency.
10:44 Q. So you've got an M.D., you're a doctor, and
10:44 you're a Ph.D. in economics?
10:44 A. That's correct. I have an M.D. and a Ph.D. in
10:44 economics.
10:44 Q. How common is that?
10:44 A. It's not very common, maybe 10 or 15 of us in
10:44 the world, which is either a really good thing or it's
10:44 a really bad thing. We'll see.
10:44 Q. Did you focus on any specific studies during
10:44 your Ph.D.?
10:44 A. I did. I studied a few different areas.
10:44 Labor economics is one of the areas, industrial
10:44 organization. And then because I'm a medical doctor
10:44 and an economist, I spend a lot of my time and did
10:44 spend a lot of my time doing something called health

economics, which is the intersection between medicine and health in economics.

Q. What is industrial economics?

A. You can think about it as the study of how industries are organized. So how is it that companies compete with one another through lower prices, more innovation, and what happens to customers when companies don't compete.

Q. How long have you been -- how long have you been a professor at Harvard?

A. I've been at Harvard for about 15 years now.

Q. Now, in your academic work, can you give us some examples of some of the research you've done?

A. Yeah. I work on a few different areas. I study healthcare markets broadly, so what makes healthcare work and what makes it not work.

I study the economics of innovation, and then I work on a lot of different areas which people sometimes find interesting. And I'll give an example, if I can.

Q. Sure. Yeah. Please.

A. All right. So we had a study a couple years ago which looked at all deaths in the United States where we've been able to link it to the occupation of the person who died. And what we found was that it

crossed 500 occupations. The occupation with the lowest likelihood of dying from Alzheimer's disease was taxi drivers.

Q. What?

A. So think about why that might be. Taxi drivers use a specific part of their brain to get around. They have to know routes, right?

It's different now with Google maps, but you have to know how to get from place A, to B, to C. And that part of your brain is called the hippocampus. That part of your brain is also involved in memory formation.

And so taxi drivers strengthen that part of their brain because they use it day in and day out. And across 500 occupations is the least likely to die from Alzheimer's.

So I love my work because I get to work on lots of different things like that.

Q. Are you suggesting that perhaps we should stop using those GPS things to help us get around?

A. I'm not offering an expert opinion on that today, but maybe. I do that.

Q. How else do you spend your time, sir?

A. So I teach. I do research. I see patients at Mass General on the general medicine service there, and

10:46 I also do a lot of writing for the public.

I have a few books. I write a column for Time Magazine. I write a lot for the New York Times and Wall Street Journal. And I used to have a podcast called Freakonomics MD. If you've heard of the Freakonomics books, it was with them. I did that for about two years.

Q. Do you also do consulting on litigation like we're doing here?

A. Yes. I've been doing that for about seven or eight years.

Q. And how much time -- you've talked about your sort of medical/clinical work. You've talked about your research. You've talked about -- now about this litigation work.

How would you estimate you'd spend your time on that?

A. I'd say about 80 percent -- 80 to 85 percent of my time is spent doing academic work, meaning teaching, doing research, seeing patients. I have a family also, which takes up a lot of my time in a good way. And then I probably spend about 10 to 15 percent of my time doing work like this, testifying in litigation.

Q. What are you here to testify about today?

10:47 A. I'm here to talk about two things. The first is whether or not aligners that you get from your doctor, which are called doctor-directed aligners, whether those are sort of in a market with themselves or do they compete with other products. Like aligners you might get direct to consumer or braces. That's the first thing.

And the second thing relates to the first question, which is, does Align have monopoly power? Those are the two questions.

Q. Now, outside of your academic work, have you done any work related to antitrust?

A. I have. I've testified in probably 50 cases or so in the healthcare space, 10 of which have been in antitrust.

Q. Are you getting paid for your work today?

A. I am. My hourly rate is $1,600 per hour.

Q. And again, does your rate depend at all, at all, on the outcome of this case?

A. No, sir. It does not.

Q. How much time do you estimate you've spent working on this case to date?

A. Total, I'd say probably 100 to 120 hours, something in that range.

Q. Okay.

10:48 MR. TUBACH: Your Honor, we tender Dr. Jena as an expert in the field of economics.

MR. MUELLER: No objection, Your Honor.

THE COURT: Admitted.

(Clarification by Reporter.)

MR. TUBACH: Okay. I'll slow down. I'll slow down.

BY MR. TUBACH:

Q. This is a monopolization case, Dr. Jena. So I thought maybe I'd start with an obvious question.

What is a monopoly?

A. So the way I think you can think about a monopoly -- and I have these slides, which I just want you to see the question. Then you know what I'm talking about.

What is a monopoly?

You can think of a monopoly as a company that owns a product that doesn't face competition from alternatives.

And as a result of that, because it doesn't face that competition, it can do or it tends to do a few things. It raises its prices because it doesn't have the fear of losing customers to other sellers of other alternatives.

It can tend to lower the quality of its

10:49 products because it doesn't have to compete with other
10:49 alternatives. It may invest less in innovation. Those
10:49 are the things you tend to see with a monopoly.
10:49 Q. And to be a monopolist, do you have to be
10:49 literally the only game in town?
10:49 A. No. You may have heard the phrase "only game
10:49 in town." You don't have to literally be the only game
10:49 in town, but effectively, you behave like you're the
10:49 only game in town.
10:49 Q. Now, you heard Dr. Perryman say that Align has
10:49 monopoly power in a market he calls the doctor-directed
10:49 clear aligner market, right?
10:49 A. Yes, sir.
10:49 Q. And you were here. You heard his testimony?
10:49 A. I was.
10:49 Q. Okay. You agree with that?
10:49 A. No. I disagree with that definition.
10:49 Q. Now, are there questions that you as an
10:49 economist would want to ask and answer in order to
10:49 arrive at a conclusion?
10:49 A. Yeah. I think there's two ways to think about
10:49 this. The first is -- and they're related. The first
10:50 is what are the alternatives to Invisalign? So does
10:50 Invisalign -- is it the only product? Are there other
10:50 aligners people can use either from a doctor or that

you can get direct to consumer? Are there braces? That's the first question you have to answer.

And the second one is related to that, which is, can Align raise the price of Invisalign without worrying about losing sales to other aligners, whether doctor directed, direct to consumer, or braces? Those are the two questions to think about.

Q. And after you did your analysis, did you come to any conclusions?

A. I did.

Q. Go ahead, please.

We see them. What are they?

A. So the two conclusions -- and I'll go through these in more detail with all of you, but the two conclusions is that Invisalign faces a lot of alternatives. I'll walk you through how I think about those issues.

And the second is that Align does not have monopoly power.

Q. All right. Let's talk about your first conclusion, your Invisalign competes with braces and other clear aligners.

Can you help us understand how you arrived at that conclusion?

A. Sure. I think that -- and I asked myself a

10:51 few questions. So I'll start with that, and we can think about this framework together.

So the first is what. What is it that Invisalign and these other products do? They straighten teeth. So Invisalign, other aligners that you get from your doctor, direct to consumer, braces, they all straighten teeth. So that's the what.

The next is maybe the who. Who is purchasing these things? Are they different sets of patients? This is the same set of patients who need (sic) teeth that need to be aligned. Who provides them? Are they different doctors?

Orthodontists provide both braces and aligners. You walk into the office. You have a medical problem, which is misaligned teeth. They offer you something, and you can choose between them.

And the last sort of question is sort of how much. So how much do these products cost to the patient?

So if you go into a orthodontist's office, how much do you pay? And I'll talk about the fact that you pay similar prices for braces or aligners.

10:52 Q. Now, you heard Dr. Perryman use the term "relevant market," right?

10:52 A. Yes, sir.

10:52 Q. And before I ask you to define that term, did Dr. Perryman say that economists have sort of a special meaning for relevant market different than the rest of us?

10:52 A. He did. And I would agree. When I use the term "relevant market," and I think when Dr. Perryman used the term "relevant market," we mean a very -- I'll slow down. We mean a very specific thing, which is different than what other people might use that term to mean.

10:52 MR. TUBACH: All right. Let's look at PDX-8.6. Thank you.

BY MR. TUBACH:

10:52 Q. So here's the question: To an economist, what is a relevant market, and why does it matter here?

10:52 A. So a relevant market is the set of products that are reasonable substitutes to one another. They're the products that compete with one another.

10:52 Another way to think about it is that it's the set of products that keep companies from just increasing prices and prices and just keep going, because it constrains the ability of a company to do that.

10:52 Q. And can you give us some examples, an everyday example you might know?

10:53 A. Maybe pain medications would be a good example. If you go to the store, Tylenol, Aleve, ibuprofen, Naproxen, different types of pain medications solve the same problem. You have pain. They might even come in liquid form, tablet form, chewable, but they're all sort of competing with one another.

Q. And do the products need to be identical to be in the same market?

A. They -- no. They definitely do not need to be in -- in that case, as a medical doctor, I'll tell you that they actually work in different ways.

Tylenol works in a different way than ibuprofen, even slightly different than Naproxen. So the things can work in different ways and still be reasonable substitutes to one another.

Q. Do you have an opinion about whether Dr. Perryman is correct that the relevant market here is limited to doctor-directed clear aligners?

A. I think that he's wrong on that. So that's something that we disagree about.

Q. Which relevant market do you believe Invisalign competes in?

A. Short answer, I think the overall market is products that straighten your teeth. That's how I

would describe it.

Q. And does that include direct-to-consumer aligners?

A. It does.

Q. And is it your conclusion that direct-to-consumer aligners compete with Invisalign?

A. Yes, sir.

Q. Now, why do you believe that braces and aligners compete in a teeth-straightening market?

A. Well, because they're doing the same thing. Now, they get there in different ways. Aligners and braces are different. We all understand that.

But they serve the same purpose, which is to straighten teeth. They're used by similar people. They are provided by similar types of providers, in this case orthodontists. So those are the reasons why.

Q. Let's take a look at the next slide.

What are the factors that you look at to determine whether braces and aligners are reasonable substitutes?

A. So I'll just list them out for you quickly here because we'll spend more time on them in the next few minutes.

But they're reasonable substitutes for a few reasons. One is that they effectively have the same

10:54 use. They get there differently, but they have the same use.

10:54 Customers, the same customers are choosing between them. These are people who want their teeth straightened. If you look at what the industry views these products as, they view them as substitutes.

10:55 And the last thing is the prices are similar. And I already alluded to that earlier, but we'll talk more about that.

10:55 Q. Yeah. Let's go through each of these. Let's turn to the next slide.

10:55 The first thing that you were looking at was same uses. So help us understand how this affects your conclusion that we're in the teeth-straightening market here?

10:55 A. So on the left of this slide, you have braces. On the right, you have aligners.

10:55 So these are -- first of all, these are both products that are straightening your teeth, which is what the title says. And it's also the case that with braces, you can do everything with braces -- everything that aligners can do, braces can do.

10:55 That's really important. Everything that aligners can do, braces can do. And everything that braces can do, 98 percent of the time, aligners can do

10:55 1 that.
10:55 2 Q. Do they offer the same health benefits?
10:56 3 A. I'd say so. Yes.
10:56 4 Q. Now, they look a little different obviously.
10:56 5 A. They -- they are different. They're not the
10:56 6 same, for sure.
10:56 7 Q. Does that matter for purposes of your analysis
10:56 8 about whether or not they're reasonable substitutes?
10:56 9 A. No, because things don't have to be literally
10:56 10 identical to be reasonable substitutes. That's why
10:56 11 they're called reasonable substitutes, not exact
10:56 12 substitutes.
10:56 13 They just have to serve the same purpose and a
10:56 14 lot of other criteria that I went through and that we
10:56 15 will go through. But just like in the pain medication
10:56 16 aisle, the medications work differently. They're
10:56 17 sometimes taken differently. But they're still
10:56 18 substitutes with one another.
10:56 19 Q. Now, we've heard -- we've heard in court an
10:56 20 analogy used between trucks and cars and that that is
10:56 21 somehow a good analogy for aligners and braces.
10:56 22 Do you agree with that?
10:56 23 A. First of all, I never thought that we'd talk
10:56 24 about trucks and cars when we talk about braces and
10:56 25 dentists. And I love analogies. I don't think that

10:56 the analogy quite works here.

10:56 Q. Why not?

10:56 A. Well, trucks and cars aren't the same obviously, right? They're obviously not the same. Their only purpose is not to get you from Point A to Point B.

10:57 If you're purchasing a truck, you might be doing it for other reasons. You might want to put things in the back, cargo. You might want to haul things. You might want to go off road, do things that would be difficult to do in a car.

10:57 So the notion that cars and trucks are in the same market, nobody, nobody here should think that that's true.

10:57 What we are disagreeing about is whether braces and aligners or direct-to-consumer and doctor-directed aligners are in the same market. That's where the disagreement is.

10:57 Q. Now, let's talk about -- let's turn to the industry views. How does --

10:57 MR. TUBACH: If we go to the next slide.

BY MR. TUBACH:

10:57 Q. How does the industry look at this?

10:57 A. So I think of the industry as a few things.

10:57 So one is -- well, maybe -- think about two

10:57 things. One is when a person that has teeth that need
10:57 to be straightened, how do they solve that? They go to
10:57 their dentist or their orthodontist.
10:57 And orthodontists who offer both braces or --
10:57 either offer braces or aligners, if you look at survey
10:57 data, for example, from Straumann, 65 percent of those
10:58 orthodontists will offer both braces and aligners. So
10:58 that's very useful information to know.
10:58 The second thing is who pays for these things?
10:58 So you as a customer will obviously pay. If you're
10:58 fortunate, you might have dental insurance. Dental
10:58 insurers will sometimes cover some of the cost. And if
10:58 you look at dental insurance policies, they actually
10:58 tell you something very interesting about braces versus
10:58 aligners.
10:58 Q. What is that?
10:58 A. Well, they cover both. They don't distinguish
10:58 between them. They cover both, and they don't
10:58 distinguish between them. And more -- sorry, go ahead.
10:58 Q. No, go ahead. As a doctor, how do you go
10:58 about getting reimbursed for that?
10:58 A. So if you're a doctor -- so when you go to
10:58 your doctor, for example, for an outpatient visit, when
10:58 they see you, they send the bill to your insurer.
10:58 That's called a billing code.

10:58 The same billing code applies for aligners versus braces, meaning the insurer does not distinguish between them. Does not distinguish between them.

Q. Now, let's take a look at the -- let's take a look at the next slide.

10:59 Did you also look at how the industry more broadly looks at braces and clear aligners?

A. I did.

Q. And what do we have here?

A. So this is from the American Association of Orthodontists. This is a professional organization that captures -- roughly 18,000 orthodontists in the U.S. and abroad are part of this organization. And here's what they say about these products. They say: Braces and clear aligners are the two most common treatments to adjust crooked teeth.

Q. How's that relevant to your findings?

A. It's relevant because this is a society that carries a lot of weight. It's the professional organization for orthodontists. And what they're describing here is that braces and aligners are alternatives.

Q. Now, Align and Straumann are also selling aligners. And did you look at any statements by them to see what -- how they describe what kind of market

they're in?

A. I did. I looked at documents produced by both of these companies.

MR. TUBACH: Let's take a look at the next exhibit, if we could.

Sorry. I'm sorry. Take that down.

Let's go to PTX-1615. My apologies.

There we go.

BY MR. TUBACH:

Q. What is this document?

A. This is an annual report from Straumann from the year 2024.

Q. Okay. And what's an annual report?

A. An annual report is a report that a company provides to its investors to tell them about the performance of the business.

MR. TUBACH: So let's take a look at Page 27 of this report. Now, let's blow up the "Becoming a leader" paragraph right there.

There we go.

BY MR. TUBACH:

Q. And what is this? This is something that Straumann has said to its investors, correct?

A. Yes.

Q. Can you just help us -- walk us through this,

11:00 if you would.

A. Sure. I'll just read the first part. We can certainly read more of it if you'd like. But, A person's smile plays a significant role in social perceptions, influencing how they are viewed in terms of attractiveness, success, and kindness.

And this is the part I'd like us to focus on: Clear aligners, a discreet alternative to traditional braces, offer effective teeth straightening while enhancing aesthetic appeal. Digital workflows reduce the need for in-person visits, providing greater convenience for patients. Such innovations have broadened the teeth-straightening market.

And it goes on.

Q. Okay. And how is this opinion -- how is this statement here from Straumann's annual report relevant to this question that we're answering here today?

A. It's primarily relevant because it very explicitly describes braces and aligners as being discreet alternatives to one another. They literally say that.

They also reference the term, quote/unquote, teeth-straightening market. Now, just to be clear, to reinforce what Dr. Perryman and I agree on, that term is not the way that we would use it as an economist,

but they call it that.

Q. And you've also seen documents where actually both ClearCorrect and Align have referred to an aligner market?

A. Correct. In fact, if you go further down -- we may not have time -- but it says "aligner market" in this document as well.

Q. And does that suggest to you that the market is limited to aligners?

A. No.

Q. As an economist?

A. As an economist, we have to think about the, quote/unquote, relevant market.

And I will bore you with some of those details in a little bit, but the way that we use it is not the same as others might use it.

Q. So the last question that you -- the last of those four topics that you were looking at was prices. And did you do -- we get a little preview by accident of what you found.

Did you look at what the prices were of aligners versus braces?

A. There are no accidents in the courtroom. No.

Yeah. I did. So let me -- let me tell you what I did. So here, the thought experiment, the way

11:02 to think about it is you're a patient. You need your
11:02 teeth fixed. You go to the orthodontist. How much are
11:02 they going to charge you?
11:02 We already heard testimony yesterday from
11:02 Dr. Cohanim that he charges roughly in the same
11:02 ballpark. What I also did was look -- did sort of a
11:02 survey of the marketplace to try to understand from
11:02 doctors' websites, industry research reports, how much
11:03 can patients expect to pay for braces and aligners for
11:03 the purpose of understanding are these widely different
11:03 prices or are they in the same ballpark.
11:03 Q. And so what do we have up here on the chart?
11:03 A. So what you have here is an industry report
11:03 average. Braces are on the left, $6,024 on average.
11:03 Aligners are on the right, $5,960 on average. And the
11:03 prices here are very similar from the patient
11:03 perspective.
11:03 Q. Now, you say these are average prices. Does
11:03 that mean everyone who goes to get either aligners or
11:03 braces is going to pay $6,000?
11:03 A. No, sir. It's an average. So there's a
11:03 range. You might get higher prices for one from one
11:03 doctor, lower prices for the other from another doctor.
11:03 But it's on average the same.
11:03 Q. And are there -- are there different levels of

11:03 1 treatment, depending on how crooked your teeth are, for
11:03 2 want of a better word?
11:03 3 A. Absolutely. So if your teeth are more
11:03 4 misaligned, then you're going to require more intensive
11:03 5 treatment that might cost more. If you have less
11:04 6 dental issues, it would cost less.
11:04 7 Q. Now, why is it relevant to you that the
11:04 8 price -- the average prices are roughly the same
11:04 9 between braces and aligners?
11:04 10 A. It's one marker that there's competition
11:04 11 occurring on price.
11:04 12 Q. Now, you heard Dr. Perryman testify that
11:04 13 braces and aligners are in a different product market
11:04 14 because the cost to the doctor is different between
11:04 15 aligners and braces.
11:04 16 Do you agree that that's relevant?
11:04 17 A. I think that it's not relevant, and it's not
11:04 18 correct from the following perspective. Just think
11:04 19 about the doctor. The doctor buys braces. They use
11:04 20 wires and these brackets. But it takes doctors time
11:04 21 for that doctor to put those braces into someone's
11:04 22 teeth.
11:04 23 So you have to figure that -- figure in that
11:04 24 cost. That is part of the cost to the doctor.
11:04 25 And the second thing is remember, who's

choosing? Where is the competition occurring? You have misaligned teeth. You go to the doctor. You're choosing as a patient, as a customer, between aligners and braces.

That is the price that is relevant to make the comparison between.

Q. And we've been talking here about braces and aligners. Does Dr. Perryman include in his relevant market all aligners?

A. He just includes what are called doctor-direct aligners. Aligners that you get from your doctor.

Q. And do you agree with his decision to exclude direct-to-consumer aligners?

A. No. I think he's incorrect to exclude direct-to-consumer aligners.

MR. TUBACH: Let's look at the next -- PDX-8.12, please.

There we go.

BY MR. TUBACH:

Q. What are we seeing here?

A. So you're seeing two very happy people. The left is an advertisement for direct to consumer, and the right is an advertisement from Invisalign for doctor directed.

Q. And so what is the business model for direct

to consumer?

A. The business model for direct to consumer is that you want to bypass the doctor. So maybe you do an impression kit at home. You mail it. You get your retainers mailed directly to you, literally direct to consumer. Maybe you go to a storefront itself and then get the aligners sent to you, but you're essentially bypassing the doctor.

Q. So is there any difference between the product itself between direct to consumer and doctor directed?

A. The products themselves are the same. It's just how you get them. Do you go through the doctor or do you bypass the doctor? That's the distinction.

Q. So how do we know that direct to consumer competes with doctor-directed aligners? How do we know that?

A. Well, you can look at what the companies do. Direct-to-consumer companies, they are literally trying to target people who would otherwise think about getting an aligner from their doctor. You can look at what aligner companies like Align have done.

When direct to consumer came sort of into vogue, Align was trying to compete, offering cheaper products that are for those patients who have less severe misalignment of their teeth.

11:06 Q. Are you aware the companies -- some DTC companies, like Smile Direct Club, have gone out of business?

A. Yes.

Q. Does that change your conclusion about what the relevant market is here?

A. No. This is a company that I think entered around 2014, went out of business in 2023, had hundreds of millions of dollars worth of sales for the period that it was around.

But it went out of business in 2023, and that's what you expect to see when there's competition. Companies come. Companies go. The notion that there are winners and losers, that's what it means to compete.

Q. Now, you saw -- you were in court yesterday; is that right?

A. Yes, sir.

Q. And did you see this photograph of the Ford dealership?

A. I did. Yeah.

Q. And was there something about this that struck you that might be relevant to the direct-to-consumer market -- the direct-to-consumer aligners?

A. There is. Yeah. Can I walk you through it?

11:07 Q. Yeah, please.

11:07 A. Can I walk us through it?

11:07 Q. Yeah. Go ahead.

11:07 A. So I want you to -- so this is a very big dealership. I want you to look at the bottom left of the screen there. Maybe we could blow that up, that yellow banner. It says: We'll beat any CarMax offer.

11:07 Q. How does that -- how does that relate to direct-to-consumer aligners?

11:08 A. So CarMax is like DTC, right? CarMax, you go online. There's sometimes storefronts, but you can go online, you can bypass the dealer and have a car sent to you.

And nobody would ever say that you -- I shouldn't say "nobody." I wouldn't say that a used car that you could get from CarMax would be in a, quote/unquote, different market or not compete with a used car that you would get at your dealer. It could be actually the same car. You're just getting it in different ways.

In one case, you're bypassing the dealer. For DTC aligners, you're bypassing the doctor. And clearly, this Ford dealership is saying they're competing. We'll beat any CarMax offer.

MR. TUBACH: We can take that down.

BY MR. TUBACH:

11:08 Q. So what's your conclusion about whether DTC aligners compete in the same market as doctor-directed aligners?

11:08 A. So I want to say this -- I'll say this slowly for our court reporter, but it's also because it's really important.

11:08 I mean, these are products that look the same, they do the same thing. For a person who can get a DTC aligner because of their teeth, the cost is going to be about the same. So they're both aligners. Why wouldn't they be in the same market?

11:09 Q. I'm going to shift gears now, Dr. Jena, and ask you about the hypothetical monopolist test.

11:09 You're familiar with that term?

11:09 A. I was hoping you weren't going to ask me questions about that, but please, go ahead.

11:09 Q. Can you remind the jury what a hypothetical monopolist test is?

11:09 A. Sure. The hypothetical monopolist test -- and let me say, Dr. Perryman presented this very nicely yesterday, but I'll recap what he spoke about.

11:09 The hypothetical monopolist test is a tool that economists use to try to identify what are the products that compete with one another. What are the

products that are reasonably substitutable with one another for the purpose ultimately of identifying the relevant market?

Q. And is the same hypothetical monopolist test used for any industry that you're looking at?

A. No. It varies. It has to be used on a case-by-case basis. You have to have, if you do have it, the right data, the right statistical approach. That's how it works.

Q. And as a -- as an economist, does -- do you understand that the hypothetical monopolist test has to sort of match up with the real world?

A. Absolutely. Yeah.

Q. So -- and we'll get to this in more detail, but does Dr. Perryman's hypothetical monopolist test match up in the real world?

A. No. It doesn't. And the way to think about the hypothetical monopolist test is that it's a tool. It has to match reality. Anytime a tool does not match reality, you have to ask yourself, is there something wrong in how the tool is being used?

And maybe a good example would be a weather app. Suppose that you download a weather app on your phone, and the weather app tells you that it's using statistics and new data to predict weather.

11:10 And you say, well, I really want to know what the weather is going to be tomorrow or the day after. And so you open up the weather app. The weather app says it's raining outside. And I look outside and it's sunny.

Are you going to rely on that app in the future? You're not going to because it got wrong what it should have gotten right. It did not match reality.

Q. Now, let's walk through Dr. Perryman's slides. This was a slide that he used during his examination, right?

A. Yes.

Q. And do you agree with him that the first step of the HMT is to look at the -- look at one particular brand?

A. That's correct. So you see one brand of Ford trucks here. To do the hypothetical monopolist test, you start with one product.

Q. And that's what Dr. Perryman -- that's how he described how one does a proper hypothetical monopolist test?

A. Correct.

Q. And did he in fact do that in his own analysis?

A. No. He did not.

11:11 MR. TUBACH: Let's go to the next slide.

BY MR. TUBACH:

11:11 Q. How did he do his test?

11:11 A. So the way to do the -- the rules to follow when you're doing a hypothetical monopolist test is you 11:12 start with one product. You ask yourself if that 11:12 product's prices went up, would customers switch to 11:12 other products or not? And if they keep on switching, 11:12 at some point they stop, and that is the, 11:12 quote/unquote, relevant market. So you always start 11:12 with the smallest set of products.

11:12 And if you look at the slide here and read the 11:12 first step, it says: Identify the smallest set of 11:12 products owned and sold by a single hypothetical 11:12 monopolist.

11:12 You see four products there, not one. The way 11:12 to do this would be to start with one product, not four 11:12 products.

11:12 Q. And in his -- when he was describing generally 11:12 how this test worked, what's the one product or brand 11:12 that he put up in the trucks?

11:12 A. There's a -- looked like a Ford truck.

11:12 Q. So it was a Ford truck. So if he's then 11:12 translating that to here, what should he have done?

11:12 A. He should have just picked one of these things

and started with it and then iterated forward to finally get to the relevant market.

Q. And did you in fact do the analysis to take one company and do the hypothetical monopolist model that he had created? Did you do that?

A. I did do that.

Q. And what was the result of that?

A. So if you follow the rules of the hypothetical monopolist test, here's what you see.

So let's suppose you start with just one product, like one Ford truck. And let's say that that's ClearCorrect. So I use the same statistical approach that Dr. Perryman used, the same data. I just use it from ClearCorrect. You put that into his model.

And what does his model tell you? It tells you that ClearCorrect does not compete with any other doctor-directed aligner. It tells you that ClearCorrect is in its, quote/unquote, own relevant market. It tells you that ClearCorrect is a monopolist.

Now, we know that's not true, right? Going back to the weather analogy, we know that that's not true. We know that ClearCorrect does compete with, at a very minimum, these other doctor-directed aligners.

So when you do the model and it tells you

something that's not right -- I think Dr. Perryman agreed to this yesterday. If your model's telling you something that doesn't make sense, meaning that with ClearCorrect alone, it would say that it faces no competition and is a monopolist, then you know something's not right with the model itself, it doesn't match reality.

Q. So what are the realities here?

MR. TUBACH: Go to the next slide.

A. I think the realities are based on what I've described, is that there's a number of ways to fix your teeth if they're misaligned.

So you have aligners that you can get from your doctor. Those are doctor-directed aligners. You have aligners that you can get direct to consumer. Those are direct-to-consumer aligners. And you have braces.

Braces do work differently than aligners, but they're serving the same purpose. They cost the same amount. The doctors who are providing them charge similar amounts. So they are all part of a broader market, which is products that straighten your teeth.

BY MR. TUBACH:

Q. Thank you.

Let's -- I think we've now covered your

first -- the first opinion.

MR. TUBACH: If you could pull up the next slide.

BY MR. TUBACH:

Q. That Invisalign competes with braces and other clear aligners.

Let's turn to the second opinion that you have, that Align does not have a monopoly power.

Can you remind us what is monopoly power?

A. So monopoly power, it means the ability to either exclude competitors from competing with you to not face competition from other alternatives and, as a result, to be able to increase your price. Maybe you don't innovate as much, the quality's lower.

That's what it means to have power.

Q. I think we've got these on the next slide. Why don't we just walk through these briefly, and then we'll go through them in more detail.

What is this -- what is this showing us?

A. So this is a slide just to orient you to what it means to be in competition versus to be a monopoly.

So if you have a monopoly and if you define the market correctly, a monopoly will often have high market share. A monopoly will often have high prices or increase its prices. A monopoly will restrict

production. It'll not produce as much to keep the prices high.

A monopoly environment doesn't have a lot of entry and exit of new companies. You often see limited innovation. You see the opposite of that when you see competition.

And I think Dr. Perryman did a good job also previewing some of these features yesterday of what a monopoly market looks like and a competitive market looks like.

Q. And are these just a checklist where you have to sort of just -- you have to get four out of five or three out of five?

Is that -- is that the way it works?

A. No. You shouldn't think about it as a checklist. You should think about it as these are some features that you need to consider and think about.

Q. All right. Let's take these -- let's take these and apply them to the teeth-straightening market.

What did you observe in the teeth-straightening market about the first fact? Let's go to that now.

A. So if you think about the products that straighten your teeth, doctor aligners, DTC aligners, braces, and you ask yourself what is Align's market

share there, it's about 25 percent.

And what do I mean by market share? You take all those products and ask what percentage of those, either in units or patients helped or sales, come from Align. It's about 25 percent.

Q. Now, you say it's "about 25 percent." How did you arrive at that?

A. I looked at a lot of different surveys, many conducted by Straumann and other companies that quantify the share of aligners, and Invisalign is part of that, in this broader set of products that straighten teeth.

Q. And why can't you be more precise about exactly what Align's share is of the overall teeth-straightening market?

A. We can't be more precise because the data just doesn't exist. You need to know how many people are getting braces, how many people are getting direct-to-consumer aligners, how many people are getting doctor-directed aligners.

That's the only way you can be precise.

Q. And so how did you arrive at the 25 percent?

A. I looked at the data that's been produced by different companies and surveys.

Q. And so what is the threshold that's generally

11:17 accepted for when someone might begin to have monopoly power?

A. I'd say at a minimum, it's about 50 percent. Yesterday Dr. Perryman said 60 to 70 percent. I think above 50 would be a place where you start to be concerned about the possibility of monopoly power.

Q. Okay. And what about the other aligner companies, are they -- they have lower market share in the teeth-straightening market?

A. They do.

Q. And what explains Align's higher share of the teeth-straightening market compared to the other aligner companies?

A. I think the single word answer is time. I mean, this is a company that's been around for a long time. They spend a lot on research and development, marketing. It's educated the market, meaning customers as patients, doctors. It's developed a lot of products. It's time.

Q. Now, we've been talking about how Invisalign competes with braces and other aligner companies.

Did you consider how many people are out there that potentially could get their teeth straightened?

A. Yeah. That's an -- that's an interesting question. If you -- you know, you may not know this,

but most people who have misaligned teeth don't actually get them fixed. It's a minority of people who actually get them fixed.

And that's important because when I talk to you about alternatives, I said there's doctor aligners, direct-to-consumer aligners, braces. Guess what, there's a fourth alternative which is not to do anything, which is what most people do.

So if you think about companies as they're investing in this space trying to get business, not only are they sort of competing with these groups of patients who are getting something done, but they're also trying to bring those people who aren't doing anything into the fold to get them treated.

Q. Now, looking just at companies, Dr. Perryman's doctor-directed clear aligner market, is it still your opinion that Align does not have monopoly power, notwithstanding its high market share in that limited market?

A. Yes.

Q. And why is that?

A. Well, it's because you have to look at those factors that I described to you earlier.

Q. The other ones. We're going to go through those now.

11:19 Okay. Now, let's -- let's discuss those. The
11:19 first thing I think you talked about was price.
11:19 Let's -- let's talk about that now.
11:20 What do we see happening to Align's prices
11:20 over time?
11:20 A. So what you see here, this -- these are the
11:20 prices to doctors, and this is the actual price that
11:20 they pay.
11:20 And I'm showing you here a line chart that
11:20 goes from 2017 until 2024. And what you can see is
11:20 that the prices that doctors are actually paying is
11:20 falling. It's falling by about 11 percent over this
11:20 time period.
11:20 Q. And what -- prices of which product are we
11:20 talking about here?
11:20 A. This is a product Invisalign Comprehensive.
11:20 It's about 70 to 75 percent of Align's aligners.
11:20 Q. So from 2017 to 2024, Invisalign's prices
11:20 dropped by 11 percent?
11:20 A. Correct. They dropped by 11 percent.
11:20 Q. Now, what was happening out there? We've
11:20 heard this, I think, before. Out there in the economy,
11:20 prices are doing what?
11:20 A. They're going up.
11:20 Q. By roughly how much, do you know?

11:20 A. 30, 31 percent over this time period.
11:20 Q. Now, you also mentioned the next thing on the slide, which is that often monopolists result in -- monopoly power results in reduced sales or reduced output, right?
11:21 A. Correct.
11:21 Q. Why is that?
11:21 A. Well, the reason why is because a monopolist, one way they keep their prices high is they restrict production. They don't sell to everybody who might want to pay for that product at a competitive price. They restrict the production.
11:21 Q. And what have we seen in the sale of aligners, just looking at Dr. Perryman's subset of aligner companies that he looked at?
11:21 A. So if you look at the -- I'm looking at seven big companies here that sell aligners, and I'm looking at how much production is changing over time.
11:21 So are we seeing a decline in sales? No, we're seeing an increase in sales. Sales more than doubled. If you look from 2017 until 2023, sales more than doubled of aligners.
11:21 Q. And is this -- what we're seeing here, is this consistent, in your view, with a company having monopoly power?

11:21 A. No. When you think about a market that is
11:22 monopolized, one of the things that you think about is
11:22 restricted production. You are not seeing that here.
11:22 You are not seeing that here.
11:22 Q. Now, you also testified that in a -- in a
11:22 monopoly, you generally wouldn't see a company coming
11:22 in and out of that -- of that -- of selling that
11:22 product.
11:22 And did you take a look at whether there are
11:22 new companies that have come in and started selling
11:22 aligners or any other teeth-straightening mechanisms?
11:22 A. Yes, sir. I did.
11:22 Q. Let's look at the next slide.
11:22 What are we seeing here?
11:22 A. You see a very busy slide with a lot of
11:22 companies.
11:22 Let me start with the left. The left goes
11:22 back many years when we had just braces. So there are
11:22 companies like 3M, American Orthodontics, Henry Schein,
11:22 Ormco, some of those companies now actually sell
11:22 aligners.
11:22 1999, Invisalign was introduced. And since
11:22 then -- 40 is the number I want you to remember. 40
11:22 companies have entered -- actually, more than 40 but
11:23 I'm showing you 40 here. 40 companies have entered and

are selling aligners or braces. So it's an immense amount of entry.

Q. Now, some of these companies on here, are they -- they're sort of small start-ups?

A. Yeah. Some of them are -- most of them are actually smaller, but some of them are actually quite large. I mean, billion-dollar-plus parent companies.

Q. And what does that tell you about their expectation of how they're going to do when they enter this -- if they enter this market, why would they be doing that?

A. Well, they expect to be profitable. Whether they are or not is the result of competition, but they certainly expect that.

Q. Now, among those large well-resourced companies, you would put Dentsply Sirona?

A. Yes.

Q. You'd put Ormco?

A. Yes.

Q. And would you put Straumann in that category?

A. I would.

Q. Now, in a competitive market, would you expect all of these companies to succeed?

A. No. And when there's competition, I mean, again, to compete means to win or lose. It's one of

those two outcomes. So you will see winners and you will see losers.

Q. Now, you're familiar with the term "barriers to entry"?

A. Yes, sir.

Q. What does that mean to you as an economist?

A. It -- well, let me give you by example, actually.

Q. Sure.

A. So let's say that to sell a product you need a huge manufacturing plant and you need enough scale to be able to sell that product. That might be a barrier to entry because it makes it harder for you to enter into that market, if you will.

Q. And does this chart tell you anything about whether there are barriers to entry getting in to start competing with Align?

A. It suggests that there's not because there's so much entry. And we heard the discussion yesterday about companies making new manufacturing facilities across the U.S.

So that's what I'm talking about here. We're seeing entry into this place, and not just a little bit but a lot.

Q. Now, Dr. Jena, you testified in a competitive

market you would expect to see innovation.

Do you recall that?

A. Yes.

Q. And in a monopoly market, you would expect to see less innovation?

A. Correct.

Q. So help us understand what you concluded about that.

A. I mean, this is a market where there's been -- it's good for patients, really good for patients, a lot of innovation.

You see that aligners are improving. The technology, the offerings are improving. You even see that braces, which are these old stodgy things from the 1900s, even braces are becoming digital and they're improving. The scanning technology is improving.

And that's important for aligners because as you make scanning better, more efficient, more effective, you improve the quality of the product, the ultimate product. I don't care about a scan when I go into someone's room. I care about the actual aligner. And so those things are all linked, and they're improving.

Q. Now, the fact that aligners and braces have both been improving recently, does that tell you

anything about whether there's competition here?

A. They have to compete with each other. That's the whole idea.

Q. So what does all this innovation tell you about the teeth-straightening market? Is there monopoly power, or is there no monopoly power?

A. It's a check in the competitive column, because that's what you expect to see, companies innovate. They innovative to compete.

Q. Now, let's focus just on Align.

How is it that Align has been able to innovate over the course of time that we've been talking about here?

Let's look at the next slide.

A. You know, innovation sometimes happens by accident, and there's nice examples of that in history. But most of the time, new ideas, innovative ideas, don't happen by accident. They happen by investment.

And if you just look at Align from 2017 onwards, it's not even looking before 2017, they've invested about $2.2 billion in research and development.

Q. And has the amount that Align has invested each year gone up or down?

A. It's gone up.

11:26 Q. So when we look, for example, at 2021, it says
11:26 $250,300,000. Is that the amount that they invested
11:26 just in 2021 on research and development?
11:26 A. Yes, sir. That's correct.
11:26 Q. And then there was another 305 million in the
11:26 following year?
11:26 A. Yes, sir.
11:26 Q. Okay. Is this what you would expect a
11:27 monopolist to do?
11:27 A. Not typically, no. Monopolists can innovate,
11:27 but typically when you see -- you're concerned about a
11:27 monopolized market, you're concerned about low
11:27 innovation, not this kind of innovation.
11:27 Q. Okay. Now, companies sometimes engage in
11:27 marketing as well, correct?
11:27 A. Yes, sir.
11:27 Q. And would you expect a monopolist to do a lot
11:27 of investment and spending in marketing and education?
11:27 A. They can, but that's not what you expect to
11:27 see.
11:27 Q. And why not?
11:27 A. Well, because marketing is a form of
11:27 competition, you know, why -- why does -- why do
11:27 companies market? They market because they're trying
11:27 to compete with other companies.

11:27 So when you see a lot of marketing, you think to yourself -- the first reaction you should have is: All right. They're trying to compete.

Q. And let's look at this chart.

What does this chart tell us?

A. This is the marketing and education spending from 2017 until 2025, and what you can see, that it's been quite large, about $1.6 billion.

Q. So why would a company that is supposedly a monopolist spend over 1 and a half billion dollars in less than ten years on marketing and education?

A. Because it's trying to compete. It's trying to compete with people who want their teeth straightened, and it, like other companies, are also trying to compete for those people who do not yet know or want their teeth straightened, but those are people we're trying to bring in.

Q. Let's go to the next slide.

I want to end, Dr. Jena, where we began, which is the question: Does Align have monopoly power?

What is your answer to that question as an economist?

A. It's an important question, and you've spent a lot of time thinking about it, and you will spend more time about it. And my answer to that question is no.

11:28 And the reason why is if you think about what it means to have monopoly power, at a very minimum, at the start, you have to think about what are the products that that monopolist, quote/unquote, is competing with.

11:28 If the market includes direct-to-consumer aligners, braces, and doctor-directed aligners, Align's share is low. It's not something you'd be worried about from a monopoly perspective.

11:29 But even putting that aside, to have monopoly power means to exercise that power, to charge higher prices, to limit innovation, to limit the amount that you sell, to not face entry and exit from other companies. And that is not what we are seeing here.

11:29 Q. And what are we seeing happening to prices?

11:29 A. They're falling.

11:29 Q. And innovation, we've seen increased innovation?

11:29 A. Yes, sir.

11:29 Q. And so at the end of all this, what's your conclusion as an economist about whether Align has monopoly power?

11:29 A. The answer is no, in my opinion.

11:29 MR. TUBACH: Thank you.

11:29 Pass the witness.

11:29 1 CROSS-EXAMINATION
11:29 2 BY MR. MUELLER:
11:31 3 Q. Good morning, Dr. Jena. It's nice to meet
11:31 4 you. My name is Joe Mueller. May I ask you a few
11:31 5 questions?
11:31 6 A. Sure. Nice to meet you as well.
11:31 7 Q. Now, Dr. Jena, you've been here for the trial,
11:31 8 I take it?
11:32 9 A. Just a couple of days.
11:32 10 Q. Okay. But you were here for Dr. Perryman's
11:32 11 testimony?
11:32 12 A. Yes, sir.
11:32 13 Q. And you saw that Dr. Perryman offered the jury
11:32 14 his opinion that there's a doctor-directed market for
11:32 15 clear aligners in the United States, right?
11:32 16 A. Yes, sir.
11:32 17 Q. His view is that the activities of Align,
11:32 18 multiple activities, are foreclosing competition in the
11:32 19 market as he's defined it, true?
11:32 20 A. Correct.
11:32 21 Q. He has pointed to activities involving the
11:32 22 iTero scanner, right?
11:32 23 A. I've heard those.
11:32 24 Q. Exclusivity contracts, true?
11:32 25 A. Yes.

11:32 Q. And a discount program as well, right?
11:32 A. Yes, sir.
11:32 Q. Now, he has also said -- he has also said that it is inappropriate to define this market more broadly to include things like braces, right?
11:32 A. Yes, sir.
11:32 Q. And Dr. Taylor, an orthodontist, took the stand as well, right?
11:32 A. Yes, sir. And I saw him testify.
11:32 Q. And he also said that he views braces as different in important respects than clear aligners.
11:33 You heard him say that too?
11:33 A. Yes, sir.
11:33 Q. All right. And, Dr. Jena, you're not here to discuss the activities that Dr. Perryman has highlighted, the iTero scanner policy, the exclusionary contracts, the Advantage Program? You're not here to address those, right?
11:33 A. That is correct, sir.
11:33 Q. Nor are you here to criticize the quality of ClearCorrect's products, right?
11:33 A. That is also correct.
11:33 Q. And you heard me say to Dr. Knittel that he was sort of putting a microscope under these companies down here at the bottom and asking the question whether

11:33 ClearCorrect was competing effectively or not.

You're not here to talk about that, are you?

A. No, sir. I'm not here to talk about that.

Q. You are here to say that this market is actually much broader and includes braces and direct-to-consumer clear aligners, correct?

A. That's correct.

Q. And so you're here to say that even though these numbers here look like Invisalign and Align have a large market share, the market's actually much bigger such that Align's share is smaller.

Do I have that right?

A. That was part of my testimony, sir.

Q. Okay. And so you're here to say that rather than the magnifying glass that Dr. Knittel took us through of these companies down here, you're looking at more of a big picture and saying the actual market is much bigger, includes braces, includes direct to consumer.

Do I have that right?

A. I think that's correct.

Q. Okay. Now, if the ladies and gentlemen of the jury conclude that direct to consumer is not fairly treated as part of the market -- are you with me so far?

11:34 A. Yes, sir.
11:34 Q. And if the ladies and gentlemen of the jury conclude that there are significant differences, meaningful differences, for this case between braces and clear aligners -- are you still with me?
11:34 A. I'm staying with you.
11:34 Q. -- you're not here to criticize the actual numbers that Dr. Perryman presented to the jury as reflected here, right?
11:34 A. Not the shares, no.
11:35 Q. So you're not here to contest what he has depicted here as the revenue numbers for Align, right?
11:35 A. No.
11:35 Q. Nor the revenue numbers for the other companies, correct?
11:35 A. No, sir.
11:35 Q. Nor his calculation of the market share in the market as he's defined it, correct?
11:35 A. Correct.
11:35 Q. He's calculated for the market, as he's defined it, 84 to 92 percent of market share for Align.
11:35 And again, just based on the numbers, you're not here to contest what he's presented here, true?
11:35 A. I would say I'm not here to contest his calculation of the shares in his defined market.

11:35 Q. Fair enough.

11:35 You're here to say that we should be including other things like braces and DTC, or direct to consumer, but if the ladies and gentlemen of the jury agree with Dr. Perryman, those shouldn't be included. You're not here to contest the math shown on this board, true?

11:35 A. I would say generally no.

11:35 Q. No, you're not here to contest the math. Right?

11:35 A. Correct.

11:35 Q. So I just want to make sure the record's perfectly clear.

11:36 You're not here to say Dr. Perryman's numbers are wrong. You have no reason to dispute the numbers themselves presented on this placard, correct?

11:36 A. I haven't looked at the bottom numbers. I would not take issue with the share in the market that he defines it to be.

11:36 Q. In the market as he's defined it, you are not taking issue, and you have no quarrel with the numbers here, right, in the market as he's defined it?

11:36 A. I think that's correct, but I think my answer before is hopefully clear.

11:36 Q. All right. Now, I'm going to come back to DTC

11:36 in a moment. But -- well, let me ask you one quick
11:36 question about DTC.
11:36 MR. MUELLER: Could we pull up 8.12? I'm
11:36 sorry, PDX-8.12.
11:36 BY MR. MUELLER:
11:36 Q. This is a slide that you showed the jury a
11:36 little while ago; is that right, sir?
11:36 A. Yes, sir.
11:36 Q. And you showed two young women, each of whom
11:37 have clear aligners in their hands?
11:37 A. Yes, sir.
11:37 Q. And they're both smiling, and they both look
11:37 like satisfied patients; is that fair?
11:37 A. They're both smiling. I don't know whether
11:37 they're satisfied, but they're both smiling.
11:37 Q. Now, you understand, sir, that the industry --
11:37 and when I say "the industry," I mean orthodontists and
11:37 dentists -- have actually found that there's something
11:37 quite dangerous about DTC, right?
11:37 A. I haven't studied that.
11:37 Q. Well, sir, did you know it's illegal in the
11:37 state of Texas?
11:37 A. I heard some testimony about that yesterday,
11:37 but I haven't studied it specifically.
11:37 Q. You may not have studied it, but it's illegal

11:37 to provide clear aligners to someone here in Texas
11:37 under Texas state law unless they first see a doctor,
11:37 right?
11:37 A. I don't know one way or the other.
11:37 Q. And so this young lady on the left-hand side,
11:37 unless she had seen a doctor, a doctor, what happened
11:37 to her would be illegal right here in Texas.
11:37 A. I'm not a lawyer, and I haven't studied that
11:37 question. So I wish I could tell you, but I can't.
11:38 MR. MUELLER: Let's go to DDX-8.1 --
11:38 8.23, please.
11:38 BY MR. MUELLER:
11:38 Q. This is a slide that Dr. Perryman showed to
11:38 the jury, right?
11:38 A. Yes, sir.
11:38 Q. And, Dr. Jena, on the left-hand side, we have
11:38 Dr. Perryman providing an example of a market that was
11:38 too narrowly defined. And as he explained, that would
11:38 be just one pickup truck model and one clear aligner,
11:38 right?
11:38 A. Correct.
11:38 Q. On the left-hand side, he gave an example of a
11:38 market that was too broadly defined. And as he
11:38 explained, it included all vehicles available for
11:38 purchase on the top, and then various types of

11:38 teeth-straightening equipment, including both braces and aligners, on the bottom.

Do you see that, sir?

A. I do. You just said left-hand side, but it's the right-hand side. But I'm still with you.

Q. Okay. I apologize if I got the direction wrong.

But the right-hand side, he had the all vehicles on the top and braces and aligners on the bottom, right?

A. Correct.

Q. And he said that those were examples of too broad, including too many different types of things, right?

A. Yes, sir.

Q. In the middle, he said here's a good example of how to draw an appropriate or relevant antitrust market.

He had pickup trucks of various types on the top, right?

A. Yes, sir.

Q. And clear aligners of various types below that.

Do you see that, sir?

A. Doctor-directed clear aligners of various

types.

Q. Right. And he said that this is a good example of an appropriate definition of a relevant antitrust market, right?

A. Correct.

Q. Now, let's talk about braces first.

And you would certainly agree with me, sir, that there are some very obvious differences between braces on the one hand and aligners on the other, right?

A. Yes, sir.

Q. And just to give you one example, are you able to take -- is a patient able to take out of his or her mouth braces?

A. No, sir.

Q. Are braces invisible?

A. They are less visible but not invisible.

Q. And they're not invisible because they have wires, right?

A. There are ceramic and clear braces and lingual braces that can be, quote/unquote, invisible. But less visible.

Q. Less visible.

And even those ones, the examples you gave do have wires, right?

11:40 A. Yes, sir.

11:40 Q. Now, those types of differences, the fact that they can be removed, the fact that they're invisible, make a huge difference to many patients in the United States, correct?

11:40 A. They can definitely make a difference to patients who are choosing between those.

11:40 Q. And, sir, have you ever had braces or clear aligners yourself?

11:40 A. No, but our daughter has braces. She was offered aligners. And our son just got evaluated.

11:40 Q. Well, I want to ask you. You right now today, if today, if today your dentist were to say to you, "Dr. Jena, I think you would benefit from some teeth straightening."

11:40 This is a hypothetical, okay?

11:41 A. It's not a hypothetical, it's true. But go ahead, please.

11:41 Q. If you -- if your dentist were to say that to you today, sir, would you want clear aligners or braces as an adult sitting here right now?

11:41 A. I don't know. I haven't thought about it.

11:41 Q. Okay. So you yourself right now don't see a difference for the adult population between braces on the one hand and clear aligners on the other?

11:41 A. I'm speaking for myself. I'm not talking about all adults in this country.

11:41 Q. Well, sir, you understand this is a very important question for this case whether adults, who make up a huge percentage of the market as Dr. Perryman has defined it, whether adults would consider braces to be a legitimate alternative to clear aligners.

That's a major question in this case, isn't it?

A. I hadn't heard it talked about yesterday. But if you're saying it's a major question, I'm happy to answer it.

Q. And, sir, have you studied that question at all, whether adults would consider switching to braces to be a reasonable alternative to clear aligners for adults?

A. In part, yes. In my expert report, you could maybe see some discussion of that.

11:42 Q. And, sir, you know that the truth is there's hundreds of millions, hundreds of millions of patients, both adults and younger folks as well, there's hundreds of millions of patients that want orthodontic treatment, okay? They want it, but they want it digitally with plastics, clear aligners. They want the removable option and the invisible option. There's

11:42 hundreds of millions of folks like that, and those folks would never, never go with old analog wire-and-bracket systems.

You know that to be true?

A. I don't know that to be true.

Q. Well, let's put up some testimony the jury has heard, and let me use this other board here.

MR. MUELLER: Your Honor, may I set up a board here?

BY MR. MUELLER:

Q. Dr. Jena, were you here when we played some excerpts of interviews that a chief executive officer, Joe Hogan, of Align gave?

A. This was the same day as Dr. Taylor?

Q. It was the same day. Were you here for that?

A. Yeah. I was there for Dr. Taylor so...

Q. Okay. Let me make sure the jury can see this too.

And did you hear him say -- this is Mr. Hogan, the CEO: We go with those 65,000 doctors really beyond, beyond the wires and brackets market.

And he said: Hundreds of millions of additional patients that would want orthodontic treatment, but they want it digitally with plastics. They would never go with the old analog

wires-and-bracket systems in order to get it.

Do you see that, sir?

A. Yes, sir.

Q. And so what Mr. Hogan, the CEO of Align, was saying is that for hundreds of millions of patients, they're not going to be choosing between wire braces and clear aligners. In fact, he was very explicit about this: They would never go with the old analog wires-and-bracket systems in order to get it.

He said that, right?

A. He did.

Can I ask a clarifying question?

Q. Sure, Dr. Jena. What's your clarifying question?

A. There's 280 million people in the U.S. Was he referring to the U.S. or the world?

Q. Well, I'd say whatever he's referring to is hundreds of millions of patients, right?

A. I can see that.

Q. And he said: Hundreds of millions of patients would never go with the old analog wires-and-bracket systems.

Right, sir?

A. I see that. Yes.

Q. And so the CEO of Align is telling us that for

11:44 hundreds of millions of persons, Dr. Perryman has defined the market in exactly the right way by not including braces because for those hundreds of millions of folks, they would never go with braces.

That's what Mr. Hogan said publicly in an interview, correct?

A. I think there was two questions as part of that. Can you break those questions out, if you don't mind?

Q. Sure. Dr. Perryman, in his definition of the relevant antitrust market, defined it to be clear aligners, doctor-directed, in the U.S., right?

A. That is correct.

Q. He didn't include braces, correct?

A. Correct.

Q. His market is entirely consistent with what Joe Hogan, the CEO of Align, said when he said hundreds of millions of patients would never go with braces, right?

A. I would not draw that connection.

Q. Okay. Now, let's take a look at --

MR. TUBACH: Can you take that down so I can see the witness?

MR. MUELLER: Sure. Sure.

MR. TUBACH: Thank you very much.

11:45 MR. MUELLER: Now, let's take a look at PDX-8.11.

BY MR. MUELLER:

Q. This is a slide that you showed the jury with the prices between the two.

Do you see that, sir?

A. Yes, sir.

Q. Now, first of all, you didn't yourself do a price analysis. You found the data on a website, correct?

A. This is from a report from the Levin Group.

Q. It's from a March 29, 2023, article, correct?

A. It was -- I don't remember the specific date. But 2023 from Roger Levin of the Levin Group.

Q. And fair to say you yourself didn't conduct the pricing survey, right?

A. Yes, sir. That's correct.

Q. Okay. Now, here, we have some price information. 6,024 on the right -- on the left for braces, 5,960 on the right.

Do you see that?

A. Yes, sir.

Q. Now, this is the price to customers, not the price to doctors, right?

A. Yes, sir.

11:46 Q. So in this case what we're talking about is the price to doctors because the doctors are the customers for Align and the doctors are the customers for ClearCorrect, right?

A. Disagree.

Q. All right. Well, these are patient prices. We can agree on that?

A. Agreed.

Q. So let's just take these patient prices for a moment. And you mentioned this hypothetical monopolist test, right?

A. Yes, sir.

Q. And then ask the question if one company owned an entire area of products, let's take clear aligners, one company owned it -- with me?

A. Yes, sir.

Q. So in this example, instead of a line up here and these other companies down here, in my example just Align has 100 percent -- are you with me?

A. Yes.

Q. And even if we take the price to customers as opposed to the price of doctors, this hypothetical monopolist test wants us to say if the prices were increased by 5 percent, could the monopolist still maintain the same profit level, true?

11:47 A. Correct. Well, not quite right. No.
11:47 Q. 5 percent profitably, correct?
11:47 A. Thank you. That's correct.
11:47 Q. There we go.
11:47 Now, here, if we take just 5 percent of the numbers we see here -- and again, these are patient prices -- that would be about $300 for the aligner prices, correct?
11:47 A. Can you restate that question?
11:47 Q. Sure. 5 percent of about 6,000 is about $300, true?
11:47 A. Correct.
11:47 Q. Now, under this test, even if we take the customer prices, what we're basically asking is if aligners went up to $6,200, would enough people leave for braces to make the aligner manufacturer less profitable or unprofitable, true?
11:48 A. Can you -- can you ask that again? I'm not sure that's correct.
11:48 Q. Sure. If one company had all aligners -- you with me, sir?
11:48 A. Yes.
11:48 Q. And they raised the prices we see here on your slide by 5 percent -- still with me?
11:48 A. Yes, sir.

11:48 Q. That'd be about a $300 increase, right?
11:48 A. Correct.
11:48 Q. And so under this test, we're asking the question: Would enough people say, $300 more? I'm going to switch over to braces.
11:48 Right?
11:48 A. Correct.
11:48 Q. And, sir, you've done absolutely no analysis to establish that that would happen, have you?
11:48 A. This is 1.5 percent difference.
11:48 Q. Sir, you did no study in which you attempted to determine whether folks who bought clear aligners would leave for braces if the price went up by that amount. You did absolutely no study on that issue, did you?
11:48 A. I think that's right. You're describing a switching analysis, which I did not do.
11:48 Q. You did not do that analysis, right?
11:48 A. The specific one you described, no.
11:48 Q. Okay. And you were here when Dr. Taylor testified. He's an orthodontist, correct?
11:49 A. Yes.
11:49 Q. And he said that for many of his patients, in his decades of work as an orthodontist, they wouldn't consider braces, right?

11:49 A. I heard that testimony.
11:49 Q. That's exactly what Mr. Hogan said, the CEO of Align, that for many patients, he said hundreds of millions, they wouldn't consider braces, right?
11:49 A. Okay.
11:49 Q. Sir, you're not an orthodontist, true?
11:49 A. Correct.
11:49 Q. You're not a dentist, right?
11:49 A. Also correct.
11:49 Q. You're a medical doctor, correct?
11:49 A. Correct.
11:49 Q. And an economist?
11:49 A. I thought you were going to forget that. Yes, also an economist.
11:49 Q. But not -- you do not have the experience of Dr. Taylor as an orthodontist, true?
11:49 A. Absolutely not.
11:49 Q. And so you mentioned a few times Dr. Perryman. Dr. Taylor also offered an opinion to this jury, right?
11:49 A. He did.
11:49 Q. And his opinion was entirely consistent with what the chief executive officer of Align said. Many folks will not consider braces as an alternative to clear aligners, correct?
11:49 A. I'm not sure if they're completely consistent,

but I understand both of those testimonies -- or one testimony in this statement.

MR. MUELLER: Let's go to PDX -- or DDX-14.3.

BY MR. MUELLER:

Q. I'll represent to you these are just two prices for the Ford dealership in town. We have a Ford F-150 on the right and a Ford Mustang, looks like an electric vehicle, on the right.

Do you see that?

A. Yes, sir.

Q. And they're relatively close in price, 40,000 and 41,000, right?

A. Yes.

Q. But you know, sir, that for many folks, they're never going to consider the electric Mustang as an alternative to that pickup truck, correct?

A. I 100 percent agree with you.

Q. Both are vehicles, true?

A. Correct.

Q. Both take you from Point A to Point B, right?

A. Also correct.

Q. But for many people, they prefer the pickup truck, correct?

A. Absolutely.

11:50 Q. And then for dental appliances, braces and clear aligners both straighten teeth, right?
11:50 A. Correct.
11:50 Q. They move teeth from Point A to Point B, right?
11:50 A. Also correct.
11:50 Q. But for some folks, the fact that braces are not removable and are visible makes them very, very different from clear aligners, correct?
11:51 A. Also correct.
11:51 MR. MUELLER: Let's go to DTC, the direct-to-consumer issue. And let's go to DTX-2883.
11:51 BY MR. MUELLER:
11:51 Q. This is an article that you cited in your expert report.
11:51 MR. MUELLER: I'm sorry. 2886. I misspoke. DTX-2886.
11:51 MR. TUBACH: Could we get a tab number?
11:51 MR. MUELLER: Sure. It's Tab 3.
11:51 A. That's in this binder here?
11:51 BY MR. MUELLER:
11:51 Q. It is. Yes. Tab 3. Whatever is easier for you, sir. We'll put it on the screen as well.
11:51 A. It doesn't hurt to do both. I'll open it up. Thank you.

11:51 Q. This is the American Association of Orthodontists.

11:52 Do you see that, sir?

11:52 A. Yes.

11:52 Q. And this is an article or materials that you relied on in your own report, correct?

11:52 A. I believe so.

11:52 MR. MUELLER: Your Honor, I offer it.

11:52 MR. TUBACH: No objection.

11:52 THE COURT: Admitted.

11:52 BY MR. MUELLER:

11:52 Q. Let's look at Page 1. It says: Moving teeth is a complex biological process. Midway down the page.

11:52 Do you see that, sir?

11:52 A. Yes, sir.

11:52 Q. It's not just a cosmetic procedure.

11:52 Do you see that?

11:52 A. Yes.

11:52 Q. And then if we go a bit further down, it says: The complexity of the process of moving teeth requires that a trained expert, dentist, or orthodontist have all necessary information at their disposal which can only be gained through an in-person examination before starting treatment.

11:52 Do you see that?

11:52 A. I see that.
11:52 Q. And so here, sir, we have, we have -- if you go to the top of the page, the American Association of Orthodontists providing public guidance -- go back down again -- that the complexity of straightening teeth requires a trained expert.
11:53 Do you see that, sir?
11:53 A. Yes, sir.
11:53 Q. And again, Dr. Perryman has accounted for this by defining his relevant antitrust market to be clear aligners doctor-directed, right?
11:53 A. That's how he's defined it. I don't know that you can connect it to this article, though.
11:53 Q. Well, what you've said, sir, is the market should be broader and should include where there is no doctor involved, right?
11:53 A. That's not quite correct.
11:53 Q. Dr. Jena, you analogized it to CarMax and said that the DTC was like CarMax, right?
11:53 A. That's correct. But there's braces where a doctor is involved, and DTC, where you bypass the doctor. I want to make sure your question was clear.
11:53 Q. Dr. Jena, Dr. Jena, you understand that, again, right here in this state, it's illegal to do DTC unless you have doctor direction, right?

11:53 A. I take your representation for that. I don't
11:54 know one way or the other, unfortunately.
11:54 Q. And in fact, it's illegal because it's
11:54 dangerous, true?
11:54 A. I definitely don't have an opinion on that.
11:54 MR. MUELLER: Well, let's take a look at
11:54 DTX-2884.
11:54 MR. TUBACH: Can we get a tab number?
11:54 MR. MUELLER: This is Tab 2.
BY MR. MUELLER:
11:54 Q. And take your time, Dr. Jena. Let me know
11:54 when you're there. I want to go to your expert report
11:54 at Page 186 (sic), Paragraph 133 -- 131. Note 352.
11:54 A. Did you say Paragraph 86?
11:54 Q. Page 86.
11:54 A. Oh, Page 86. I apologize. Yes.
11:54 Q. Paragraph 131, Note 352.
11:54 MR. MUELLER: A little bit lower on the
11:54 page. There we go.
BY MR. MUELLER:
11:54 Q. And do you see you cited an article that's
11:54 titled Cheapest Ways to Straighten Teeth in 2025?
11:55 A. Yes. You're talking about Footnote 352. I
11:55 see that.
11:55 Q. Right. Let's go to that article. This is

DTX-2884. There's that very same article. Cheapest Ways to Straighten Teeth in 2026. Right, sir?

A. I see here it says March 27, 2026. And the Footnote 352, it says October 9, 2025. Is this the same article or a different article?

Q. Well, do you see the same title, same author?

A. That's incorrect. It's a different title. It says 2026. If you look at Footnote 352 of my report, it says 2025. So that's incorrect.

Q. Well, let me show you a piece of this, and let's see if this refreshes your memory on this.

MR. MUELLER: And if we could go to Page 2.

A. Page 2 of what? This here?

BY MR. MUELLER:

Q. Of this article right there. It's on the screen too.

A. Is that a tab in my --

Q. It's Tab 5. And you can also look on the screen, whatever's easier.

A. I'll do both. Thank you.

MR. MUELLER: And if we go to What to Know on Page 2. A little bit further down.

BY MR. MUELLER:

Q. It says: Supervised treatments follow the

diagnostic standard.

That means doctor directed, right?

A. You left out "in office or hybrid."

Q. And do you see it says: Reported DTC injuries include bite changes, pain, and gum damage?

Do you see that?

A. Yes, sir. I see that.

Q. And that's a fact, that DTC has led to injuries, and that's part of the reason why it's illegal here, correct?

A. I don't know that one way or the other.

MR. MUELLER: Let's go to PDX-8.20.

BY MR. MUELLER:

Q. These are some of the companies that you say are part of the market as you define it, correct?

A. Correct.

Q. Now, you say this is -- the market as you describe it is vibrant, new entrants, lots of competition, true?

A. Correct. Not all of these companies are still here, just so you know.

Q. Well, that's an important point. Not all the companies that you showed this jury on this slide are even in existence today, true?

A. Which is what I told them.

11:57 Q. Now, Dr. Perryman again defines the doctor-directed clear aligner market for the U.S., right?

Right, sir?

A. He defines that for the U.S.

Q. And he noted that there's been some new entrants into that market over the years, right?

A. I haven't looked at that portion there. So I can't tell.

Q. And, sir, if you could -- we can blow it up if you need to -- but do you see how all the other new entrants in the clear aligner doctor-directed market in the U.S. are right there in the basement?

Do you see that, sir?

A. I can see his chart.

Q. And as we talked about earlier, you're not contesting the numbers in this chart, correct?

A. I'm not even talking about any of the numbers at the bottom of the chart. So I'm not contesting them one way or the other.

Q. And, Dr. Jena, which of the new entrants in the market as Dr. Perryman has defined it, clear aligners under the direction of a doctor in the U.S., which of those new entrants has escaped the basement?

A. I can't even see what you're calling the

basement from here. So I definitely don't have an opinion on that.

Q. And, Dr. Jena, that's the problem, it's that you can't even see the companies down here. You can see Align up here, right?

A. Well, part of the problem is that the slides are not in front of me but --

Q. Well, I'm happy to move it over.

A. Yeah. Please do.

Q. Dr. Jena, you can see Align up here, right?

A. Yes. I can see that.

Q. Can you see Align's growth in the time period that Align showed the jury, 2019 to 2023?

A. Yes, sir. That's hard to miss.

Q. It's hard to miss because it's so much greater than all of the other clear aligner companies, right?

A. And it's also bright blue, but yes.

Q. It's bright blue and much, much, much, much, much larger, right?

A. Yes, sir.

Q. And you're here to say that what we see right here is a well-functioning market, true?

A. I haven't said that, no.

What I'm saying -- well.

Q. Well, you haven't said that because actually,

11:59 if the market is as Dr. Perryman defined it, you have
11:59 no opinion, true?
11:59 A. That's incorrect.
11:59 Q. Your opinion is Dr. Perryman should have
11:59 included braces, right?
11:59 A. That is correct.
11:59 Q. Your opinion is Dr. Perryman should have
11:59 included DTC, right?
11:59 A. Also correct.
11:59 Q. But in the doctor-directed clear aligner
11:59 market in the U.S., Align is way up here. And every
11:59 other company, new entrant and old, is in the basement,
11:59 correct?
11:59 A. I would disagree.
11:59 Q. And over here in the clear aligner
11:59 doctor-directed market in the U.S., Align's revenue
11:59 growth is off the charts, and everyone else is far,
11:59 far, far below, true?
12:00 A. I haven't studied that graph, but it is what
12:00 it is.
12:00 Q. And many of the companies that you showed the
12:00 jury, which include braces, right?
12:00 A. Say that again.
12:00 Q. Over here on PDX-8.19, many of those companies
12:00 you showed the jury in your market include braces,

12:00 correct?
A. Correct.
Q. Include direct-to-consumer companies that have gone out of business, right?
A. Some have gone out, and some have come back in.
Q. Smile Direct Club, for example, is gone, true?
A. Let's see. Yeah. 2014, Smile Direct Club went out; 2023, Smilist is in; 2Usmiles is in, and Smilese is in.
Q. And the truth is, sir, the truth is, sir, that the direct-to-consumer market blew itself apart through Smile Direct Club, right?
A. Smile Direct Club left in 2023.
Q. Here's some more Joe Hogan testimony, the chief executive officer of Align.
He said: I don't see it as a direct-to-consumer market. That market blew itself apart through Smile Direct Club obviously and other companies all around the world to try that.
He said you need a doctor in the process, right?
A. I see those words.
Q. And so again, we have the chief executive officer of Align saying, I don't see it as a

direct-to-consumer market.

But, sir, you do?

A. Correct.

Q. He said: That market blew itself apart through Smile Direct Club obviously and other companies all around the world to try that.

You don't agree that the market's been blown apart, do you?

A. No.

Q. He said that you need a doctor in this process. And you don't agree, do you?

A. I don't have an opinion on whether you need a doctor in the process.

Q. So you don't agree with the CEO, and you don't agree with the law right here in Texas that requires a doctor to be part of the process.

You disagree with all that. Do I have that right?

A. Why would I agree or disagree with the law? I'm not a lawyer. I have no opinions on that.

Q. Now, with respect to pricing in the clear aligner market in the U.S. --

MR. TUBACH: Your Honor, can we just take down the chart?

MR. MUELLER: Sure. I'm sorry. Sorry.

12:02 BY MR. MUELLER:

Q. I'd like to take you, sir, to Tab 15, DTX-2892.

This is a conference, and the participants included Joseph Hogan, chief executive officer, and John Morici, chief financial officer.

Do you see that, sir?

A. I see that.

Q. And I want to take you to Page 3. And let me just show you a little what Mr. Hogan said. He said: I mean, we have pricing power in the market. I think we show that every year.

Do you see that, sir?

A. Yes, sir.

Q. Now, you said that the prices that Align has charged have gone down a bit over time, right?

A. 11 percent. Yes, sir.

Q. But you would agree with Dr. Knittel that it's basic economics that a monopolist may in certain circumstances cut prices and still be a monopolist?

A. Not commonly.

Q. Sir, you would agree that as a matter of basic economics, it is absolutely possible for a monopolist to cut prices and still be a monopolist, true?

A. Yes. But not commonly.

12:03 Q. Sir, is it possible for a monopolist to cut prices and still be a monopolist?
12:03 A. Yes. That's possible.
12:03 Q. Okay. Now, just a few more questions, sir.
Again, you're not here to defend the activities that Dr. Perryman described as foreclosing competition in the market as he defined it, correct?
12:03 A. Correct.
12:03 Q. And you're the last witness of the case, right?
12:03 A. That's what they tell me.
12:03 Q. And you're being paid $1,700 an hour, true?
12:03 A. Incorrect.
12:03 Q. Is it more than that?
12:03 A. It's less than that.
12:03 Q. How much is it?
12:03 A. $1,600 per hour.
12:03 Q. So it's $1,600 an hour; is that right?
12:03 A. Yes, sir.
12:03 Q. Now, you've been here for the witnesses that Align has presented in rebuttal to our antitrust claims, right?
12:04 A. Can you say that again?
12:04 Q. Sure. You've been here for the last two days?
12:04 A. That's a much better way to say it. Yes.

12:04 Q. We rested, and then Align had a second chance to present witnesses to this jury, right?

12:04 A. Yes, sir.

12:04 Q. And to be fair, we called Mr. Miller. They brought him here for questioning by us, okay?

12:04 Do you recall that, Mr. Miller (sic)?

12:04 A. I did see that testimony.

12:04 Q. Now, I want to talk about when Align had their chance to say their piece. The witnesses that they called when they had their chance to say their piece were Dr. Reitman, being paid over $1,000 an hour, and a multiple-time testifier for Align, correct?

12:04 A. I don't know.

12:04 Q. Dr. Cohanim, being paid $7,000 a day, and he's also a multiple-time testifier for Align, correct?

12:04 A. Also don't know.

12:04 Q. Dr. Knittel, again, being paid over $1,000 an hour. He testified today, right?

12:04 A. I think he said $1,000 an hour. So I think you might have got it wrong.

12:04 Q. Everybody's over $1,000 an hour, and you're at $1,600 an hour, right?

12:05 A. Yes, sir. That's correct.

12:05 Q. And they played a little snippet of video from a ClearCorrect witness. Were you here for that?

12:05 A. The German gentleman?
12:05 Q. That's right.
12:05 A. Yes. I was here for that.
12:05 Q. Did Align, in putting on its case after we had presented Dr. Perryman's testimony of 84 to 92 percent market share foreclosure, every company confined to the basement in this market, did they call to the stand one fact witness from Align in rebuttal to what Dr. Perryman, Dr. Taylor, and our other fact witnesses said?
12:05 A. I don't know one way or the other. I mean, I've been here for the last two days but...
12:05 Q. Did Mr. Hogan show up?
12:05 A. I haven't seen him, but I don't know him. So I haven't seen him testify.
12:05 Q. Did Mr. Kaza show up?
12:05 A. I don't know who that is.
12:05 Q. Did Mr. Diederich show up?
12:05 A. I don't know who that is.
12:05 Q. Did any of the folks that we've seen on these internal documents at Align saying precisely the opposite of what witnesses and lawyers have said, did any of those folks take the stand, take the oath, and testify to this jury?
12:06 A. I saw testimony from Matt Miller, and he was

on an e-mail, was he not?

Q. Mr. Miller did show up.

A. Was he on an e-mail?

Q. Did anyone in their portion of the case show up, take the stand, take the oath, and answer questions?

A. I just saw Matt Miller. He was testifying here I think a couple of days ago. He was on some e-mails. He works at Align. That's all I remember.

MR. MUELLER: Thank you, sir.

Your Honor, I pass the witness.

REDIRECT EXAMINATION

BY MR. TUBACH:

Q. Dr. Jena, a few follow-up questions for you.

Straumann's counsel asked you some questions about what's happening in Texas with regard to direct-to-consumer aligners.

Do you recall that?

A. Yes, sir.

Q. Did he tell you that SmileSet -- do you know SmileSet is a direct-to-consumer aligner?

A. It's actually one of the slides.

Q. Did he tell you that that's actually available here in the state of Texas?

MR. MUELLER: I object to the leading.

12:07 THE COURT: Sustained.

12:07 Actually, I don't know how else you would ask that. Overruled.

12:07 You -- if you'd repeat it, though.

MR. TUBACH: Sure.

BY MR. TUBACH:

12:07 Q. Did he tell you that SmileSet is available in the state of Texas?

12:07 A. No, sir. He did not say that.

12:07 Q. And did he tell you that Straumann itself bought a direct-to-consumer company called Dr. Smile?

12:07 A. No. We didn't hear that either.

12:07 Q. Okay. Now, he asked you about this chart and how much higher Align's sales are compared to ClearCorrect and the other aligner companies.

12:07 Do you see that?

12:07 A. Yes, sir.

12:07 Q. Is it surprising to you that Align sells more aligners than these other companies?

12:08 A. No.

12:08 Q. Why not?

12:08 A. Because it's been around since 1999. It's what people -- when people talk about aligners, they often talk about Invisalign. So this is not at all surprising to me.

12:08 Q. Now, you heard Dr. Taylor testify that he would never make a decision based on economics, right --

A. Yes.

Q. -- for a patient -- that -- when a patient's health was at stake, right?

A. I remember something like that.

Q. And do you agree with that?

A. I would agree with that.

Q. As a medical doctor?

A. I would. Yeah.

Q. Why would a doctor not make a decision based on economics when they're taking care of a patient?

A. I think a lot of reasons. I mean, my wife and I both went to medical school. We did it because we wanted to care for patients. So first and foremost, there's that personal desire.

There's also a professional obligation that dentists, orthodontists, medical doctors like myself make. So I think that to expect to see something other than that, it's not what I would expect to see.

Q. Now, you heard a lot of questions from Straumann's counsel about who would and wouldn't choose braces, right?

A. Yes, sir.

12:09 Q. In fact, he tried to pin you down on what you would do, right?
12:09 A. He was trying to push one or the other. I wasn't sure which one. But yeah.
12:09 Q. Okay. Are there people in this country who will only drink Pepsi and they won't drink Coke?
12:09 A. I think so.
12:09 Q. Are there people in this country who will only drink Dr. Pepper and they won't drink Pepsi?
12:09 A. Here, yes. For sure. I think so.
12:09 Q. And would anyone say that Dr. Pepsi (sic) and Coke -- Dr. Pepsi -- Dr. Pepper and Coke and Pepsi are not in the same relevant market?
12:09 A. I don't think they'd say that, sir.
12:09 Q. And why not?
12:09 A. Because they're sodas. They're sodas. They're priced the same. People who drink them enjoy them. It'd be a hard sell.
12:09 Q. Now, finally, counsel for Straumann was asking you who did and didn't show up to testify in this courtroom today or during the course of the trial, right?
12:10 A. Yes, sir.
12:10 Q. Did Straumann bring in their CEO, Guillaume Daniellot, from Switzerland to testify in this

courtroom?

A. I don't believe so.

Q. Now, what about Florian Kirsch? He didn't come, did he?

A. I don't think so.

Q. That's the head of ClearCorrect here in the United States; is that right?

A. I think so.

Q. And those folks didn't come in to explain --

THE COURT: Counsel, will you take that down, please?

MR. TUBACH: I'm sorry.

THE COURT: You using that?

MR. TUBACH: Oh, no.

BY MR. TUBACH:

Q. And did the CEO of Straumann, the ClearCorrect folks that are here trying to accuse us of monopoly -- monopolization, did they come in and explain why their bar chart there is red and the competitors are doing fine?

A. I don't believe so. No.

MR. TUBACH: I pass the witness. Thank you. Thank you, Your Honor.

RECROSS-EXAMINATION

BY MR. MUELLER:

12:11 Q. Just a few final questions, Dr. Jena.
12:11 A. Sure.
12:11 Q. Ms. Sterling did show up, right?
12:11 A. I thought you were going to point to the slide. Yes. She did show up. Yes, sir.
12:11 Q. She took the stand. She answered questions about all aspects of the operations, right?
12:11 A. That's my understanding.
12:11 Q. Mr. Kossol did show up. He came, explained the manufacturing facility in Round Rock to the jury, explained how it works, explained what it does and who does it, right?
12:11 A. I don't know. I read her testimony, so I know. But I don't know this other gentleman.
12:11 Q. Mr. Coss did show up. He explained the scanner market, Straumann's activities in that market, and he explained how the iTero scanner policy is harming competition.
12:11 You were here for that?
12:12 A. No, sir. I wasn't.
12:12 Q. Mr. Buitta did show up. He took the stand. He explained sales of clear aligners and how those sales were being impaired by Align's conduct, right?
12:12 A. I'm not familiar with that testimony.
12:12 Q. The CEO, Mr. Daniellot, his deposition was

played to the jury last week.

Were you here for that?

A. No. But I heard that.

Q. So we have, in actuality, a situation where the CEO's deposition was played for the jury, and I just listed four fact witnesses who took the stand, took the oath, and testified to this jury, right?

A. I haven't seen one way or the other. So I couldn't say.

Q. And the truth is all those folks showed up, answered all the questions, and they told their side of the story, and you have no reason to question those folks told the truth?

A. I have no reason to question any of that.

MR. MUELLER: Thank you, sir. I have no further questions.

MR. TUBACH: Nothing further, Your Honor. Thank you.

THE COURT: Thank you, Doctor.

Any other witnesses for the defendant?

MR. TUBACH: No, Your Honor.

THE COURT: Do you rest?

MR. TUBACH: Yes.

THE COURT: Ladies and gentlemen of the jury, we're done with the trial. We're done with the

12:13 evidence. So let me first point out that even though later this afternoon we are going to hear the closing arguments, which are my favorite part of the trial because we'll have good lawyers doing the arguments --

Yes, sir.

MR. TUBACH: Please have the witness step down.

THE WITNESS: I was enjoying this.

THE COURT: I thought I told you you could -- please. Thank you for being here, Doctor.

The evidence is in. So when you hear the arguments this afternoon, it's the lawyers' effort to summarize for you what the best arguments were, criticize the other side's arguments, all that, but the evidence is in. And you may only consider the evidence in your deliberations.

So it's 12:15. I'm going to release you until --

Do we -- they have lunch here?

(Off-the-record discussion.)

THE COURT: So I'm going to release everyone until 1:30. At 1:30 if you'll be back, I'll read the jury charge. We'll then have the closing arguments, and then you may begin your deliberations.

THE BAILIFF: All rise.

12:14 (Jury exited the courtroom.)

THE COURT: Thank you. You may be seated.

Does the plaintiff --

Yes, sir.

MR. MUELLER: Yes. I'm sorry, Your Honor. Very, very brief housekeeping issue.

There were two documents that I discussed with the witness that I just wanted to make sure were part of the record, DTX-2884 and DTX-2892. I'm not sure if there was any objection to those.

MR. TUBACH: I thought the evidence was closed, Your Honor.

THE COURT: I'm going to allow them in.

MR. MUELLER: And then the last one is one of the exhibits that was entered yesterday, there's a typo when it was read by us. JTX-66 should be JTX-67.

THE COURT: Okay. That'll be admitted as well.

I'm going to start with the plaintiff, if the plaintiff has any Rule 50 motions to make or not. And I'll also take up any objections to the jury charge.

MR. TUBACH: Could I have the Court's

12:15 indulgence for just a minute?

THE COURT: Well, in fact, if you're okay with it, why don't I take up the defense's Rule 50 and do the same, and then you can collect your folks.

MR. TUBACH: Thank you.

THE COURT: So, Mr. Mueller, Rule 50 motions and objections to the charge.

MR. MUELLER: If I could do the Rule 50 motions first, Your Honor, and then some other folks can raise the objections.

THE COURT: Sure.

MR. MUELLER: On the Rule 50 motions, we renew our previous Rule 50 motions that we made at the conclusion of the plaintiff's case as well as the conclusion of our own case. So we would respectfully renew all those motions, Your Honor, on the same grounds.

The only one I would additionally like to note again, Your Honor, or to note -- it's a previous motion, but to make a little bit more of a point on it, is we still think there's no evidence of intent, which is not just for willfulness, it would also go to the indirect infringement claims. We don't think a reasonable juror on this record could find a requisite intent.

12:16 THE COURT: I thought yesterday I'd resolved the willfulness issue.

12:16 MR. MUELLER: Willfulness is resolved. I'm speaking with respect to indirect infringement only.

12:16 THE COURT: Okay. Is that all for you?

12:16 MR. MUELLER: That's all, Your Honor. Otherwise, just the same as we had before.

12:16 THE COURT: I'll overrule those motions.

12:16 Objections to the jury charge, please?

12:16 MR. NASH: Your Honor, briefly, before objections to the jury charge, we would renew the same Rule 50 motions that we raised the other day at the close of the --

12:17 THE COURT: Respectfully overruled.

12:17 MR. NASH: Thank you, Your Honor.

12:17 THE COURT: And jury charge objections?

12:17 MR. SIMMONS: Thank you, Your Honor. Ian Simmons for Align.

12:17 We have several objections, Your Honor.

12:17 First, Align objects to the omission of an infringement instruction on the '936 patent because Align believes that there's sufficient evidence to submit this question to the jury.

12:17 Second, Align objects to omission in its

12:17 proposed Instruction No. 25 on joint infringement for the reasons stated in Footnote 19 of the proposed instructions.

Third, Align objects to the omission of its proposed Instruction No. 28 on willful infringement because Align believes there is sufficient evidence to submit this question to the jury.

Fourth, Align objects to including Instruction 37. In Instruction 37, the following sentence, quote: Irrespective of your findings with respect to Align's patent claims, you must independently evaluate ClearCorrect's antitrust claims, closed quote.

For the reasons stated in Align's opposition to ClearCorrect's motion on judgment of the pleadings, Docket No. 462, Align believes that a finding of patent infringement would foreclose ClearCorrect's antitrust claims during the relevant time period.

As a matter of law, antitrust lost profits cannot be what would have been infringing sales.

No. 5, Align objects to the admission of its proposed Instruction No. 48 on unilateral refusal to deal with a competitor for the reasons stated in

12:18 Footnote 99 of the proposed instructions.

12:18 This case at its core involves duty to deal, namely with the inbound charges that Align is accused of, require it to accept non-Align scan images, and the outbound technical impediments charges require -- impose upon Align a duty to make its iTero product comply with some person's concept of friction.

12:19 That's -- those are the extent of the objections.

12:19 Thank you, Your Honor.

12:19 THE COURT: Those will be overruled.

12:19 Yes, sir.

12:19 MR. SAUNDERS: Hello, Your Honor. Tom Saunders for ClearCorrect.

12:19 We object on four grounds.

12:19 First, the failure to get proposed Instruction No. 38 regarding damages, single recovery. The full text of that instruction is at Docket 489-1, Pages 59 through 60. And we would object for the reasons stated in Footnote 29 of that document.

12:19 We also object to the inclusion of extensive language from the inequitable conduct instructions in Instruction 45 for the reasons given in Footnote 107 and 108 of Docket 489-1.

12:20 We also object to instructing the jury on

all issues on which ClearCorrect moved for judgment as a matter of law.

And finally for completeness, we would renew our objection to failure to give the curative instruction requested at Transcript 988 through 992 regarding the fact that the '936 patent is no longer in the case.

THE COURT: Thank you, sir. Those are overruled.

But let me put on the record since we did it informally yesterday. I thought the lawyers were exceptional yesterday during the jury charge conference. Antitrust is not my forte, and you all were extremely helpful and articulate in what you were -- when you tried to help me with the jury charge.

So the Court is very grateful for the lawyers who were involved yesterday and the job that they did.

Is there anything we need to take up from the plaintiff's side or defense side?

MR. TUBACH: Not for us, Your Honor. Thank you.

MR. MUELLER: Just one tiny thing, Your Honor. If we might, after the plaintiff finishes their first closing argument, if we could just take a

two-minute break to set up some things.

THE COURT: Sure.

MR. MUELLER: Okay. Thank you, Your Honor.

THE COURT: No problem.

And someone will have sufficient copies of what I'm going to read for me. I think Judge Wolfe is going to be here. If we could have one for him and also for the jurors and ready to go.

MR. MUELLER: Absolutely.

THE COURT: And the verdict form is done, and Jen can have it.

MR. SIMMONS: We have them ready for you, Your Honor.

THE COURT: If you'll get the verdict form to Jen, she's the one who gets it to the back.

MR. SIMMONS: We'll have them in a few minutes.

THE COURT: Anything else we need to do?

MR. MUELLER: No, Your Honor.

MR. TUBACH: No. Thank you.

THE COURT: Okay. I will see you at 1:30.

THE BAILIFF: All rise.

(Recess taken.)

01:32 THE BAILIFF: All rise.

01:32 THE COURT: Please remain standing for the jury.

01:32 (Jury entered the courtroom.)

01:32 THE COURT: Thank you. You may be seated.

01:32 Ladies and gentlemen of the jury, I'm about to read the charge to you. And at the end of me reading the charge, I'm going to take a short bio break and then we'll start with the closing arguments just so -- if someone needs a break before then, if you'll just let me know. So.

01:33 Members of the jury, it is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is regardless of any opinion you might have as to what the law ought to be.

01:33 Each of you has your own printed copy of the following jury instructions.

01:33 (Off-the-record discussion.)

01:33 MR. TUBACH: If we could have a moment to confer.

01:34 (Pause in proceedings.)

01:34 MR. TUBACH: I believe there was a misunderstanding about whether the jurors were going to have physical copies. We thought we were not going to get them. It's possible we can collect them at the end. Everyone here has lots of copies, if you'd like us to do that, or would you --

THE COURT: And they each need a copy.

MR. TUBACH: Thank you, Your Honor.

01:35 THE COURT: And if I could have one counsel up here from each side. I need to ask you something.

(Bench conference.)

THE COURT: Following what the Delaware judges do, I have stopped reading out loud all 15 of the Georgia-Pacific factors. I'm just letting you know. You can object if you want. I'm just going to tell them here you had them during trial. I'm not going to take the time to read all 15 factors.

MR. NASH: Understood, Your Honor. Thank you, Your Honor.

MR. MUELLER: Thank you, Your Honor.

(Bench conference concludes.)

MR. TUBACH: My apologies again, Your Honor.

THE COURT: No, no, no. No problem.

01:35 There's no problem.

01:35 A lot of times I think I'm clear, and my wife lets me know I'm rarely clear. So it's...

01:36 Okay. Each of you has a copy.

01:36 If I've given you the impression during the trial that I favor either party, disregard that impression. If I've given you the impression during trial I have any opinion with respect to the facts of this case, disregard that impression because you are the sole judges of the facts of this case.

01:36 Other than these instructions to you on the law, disregard anything I may have said or done during the trial when you arrive at your verdict.

01:36 Consider all the instructions about the law as a whole; regard each instruction in light of the others without isolating any particular statement or paragraph.

01:36 The testimony of the witnesses and other exhibits introduced by the parties constitute all of the evidence. The statements of counsel are not evidence. They are only arguments.

01:36 It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their

arguments in light of the evidence that I've admitted and determine whether the evidence admitted in this trial supports the arguments they make.

You must determine the facts from all of the testimony that you heard and the other evidence submitted.

You are the exclusive judges of the facts. But in finding those facts, you must apply the law that you're about to hear in this jury instruction as I instruct you.

You've heard evidence submitted by plaintiff and counterclaim defendant Align, and the defendants and counter-plaintiffs ClearCorrect and Straumann. I will refer to the defendants collectively as ClearCorrect throughout these instructions.

You are required by law to decide this case in a fair, impartial, and unbiased manner based entirely on the law and on the evidence presented to you in the courtroom.

You may not be influenced by passion, prejudice, or sympathy you might have for either party in arriving at your unanimous verdict.

After the remainder of these instructions, you will hear closing arguments from the lawyers. Statements and arguments of the lawyers, I

remind you, are not evidence, and they are not instructions on the law. They're intended only to assist you in understanding the evidence and the parties' contentions.

A verdict form has been prepared for you.

At some point I'm going to fix this. You are not going to take the verdict form back. The verdict form will be brought back to you when you're in the jury room.

When you've reached a unanimous decision or agreement as to the verdict, your foreperson will fill in the blanks in the verdict form. He or she will date it and sign it. Answer each question in the verdict form from the facts as you find them as judges to be. Do not decide who you think should win the case and answer any question to reach that result.

Your answers and your verdict must be unanimous.

What is evidence? The evidence you are allowed to consider consists of the testimony of the witnesses here at trial, the testimony of the witnesses whose depositions were presented to you, the documents and exhibits that I admitted into evidence, and any facts the parties agreed to stipulate to.

Were there any facts that you all

stipulated to? I don't remember any.

MR. MUELLER: I don't think so, Your Honor.

THE COURT: Okay. You are to apply any fair inference and reasonable conclusions you can draw from the facts and circumstances that you believe have been proven. Nothing else is evidence.

Statements, arguments, and questions by the lawyers are not evidence. Objections that they might have made to the questions are not evidence. Any comments or questions made during the course of the trial are not evidence. Any notes taken by you as the jurors are not evidence.

The evidence -- the attorneys that are seated in front of you may have objected during the trial if they believe that documents or testimony that were attempted to be offered into evidence were improper under the rules of evidence.

During the trial, I may not have let you hear the answers to some of the questions the lawyers asked. I may have ruled that you could not see some of the exhibits the lawyers wanted you to see. I may have ordered you to disregard things that you saw or heard or struck things from the record.

Whatever I ordered, you must follow. You

must follow my rulings, completely ignoring anything that I did not permit to come into evidence. Don't speculate about what a witness might have said or what an exhibit might have shown. Those are not evidence, and you're bound by your oath to not let them influence your decision in any way.

Generally speaking, there are two types of evidence. The first is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, which is evidence that proves a fact from which you can logically conclude a separate fact exists.

As a general rule, the law makes no distinction between direct and circumstantial evidence. It simply requires you, as the judges, to determine from the facts all the evidence that you've heard in the case, whether it be direct, circumstantial, or some combination.

As you were instructed before the trial began, in judging the facts, you must consider all the evidence you heard, both direct and circumstantial. But that does not mean that you have to believe or accept all of the evidence you heard.

It is entirely up to you to give the evidence you receive in this case whatever weight you

01:41 1 individually believe it deserved. It will be up to you
01:41 2 to decide which witnesses you believed, which witnesses
01:41 3 you did not believe, and the weight you gave any
01:41 4 testimony you heard and how much of any witness'
01:41 5 testimony you as the judges decide to either accept or
01:41 6 reject.
01:41 7 Never allow -- do not allow yourself to
01:41 8 be influenced in your deliberations by any ruling I
01:41 9 made on any objection. If I sustained an objection,
01:41 10 pretend the question was never asked. If there was an
01:42 11 answer, ignore it. If I overruled the objection, then
01:42 12 act like it was never made.
01:42 13 If I gave you instructions that some item
01:42 14 of evidence was received for a limited purpose, follow
01:42 15 those instructions. If I gave any limiting
01:42 16 instructions during trial, follow it. Any testimony I
01:42 17 told you to exclude or disregard is not evidence and
01:42 18 may not be considered. Do not speculate about what a
01:42 19 witness might have said or what an exhibit might have
01:42 20 shown.
01:42 21 The fact that Align filed a lawsuit and
01:42 22 ClearCorrect filed a countersuit is not evidence that
01:42 23 either is entitled to a judgment in this case. The act
01:42 24 of making a lawsuit or making a claim by itself does
01:42 25 not in any way tend to establish that claim. It is not

evidence.

The fact that ClearCorrect has arguments against the patent claims asserted is not evidence that ClearCorrect is entitled to a judgment on those claims. The fact that Align has arguments against the antitrust claims asserted is not evidence that Align is entitled to a judgment on their claims.

The act of making assertions or arguments by itself does not in any way tend to establish that those arguments have merit and they are not evidence.

You may not conduct any independent research or investigation during your deliberations. You must make your decision based only on the evidence as I've defined it here, nothing else.

I don't remember anything coming in for a limited purpose. Did it?

MS. DURIE: I don't think so, Your Honor.

MR. MUELLER: Agreed.

THE COURT: Okay.

During the trial, you may have seen documents where content had been redacted and replaced with white spaces or blacked out. Those documents were redacted to comply with my orders. Therefore, you should not and may not guess or speculate about what was redacted in any document or why the redaction was

made.

In the course of this case, the parties entered an agreement that would protect each parties' business information from disclosure to the public or third parties. Under the agreement, the parties added confidentiality labels to their documents and in some cases redacted information, with my permission, from documents to protect the confidential nature of the information.

You may have seen documents with confidentiality labels or redactions during the course of trial. The use of those labels and/or redactions has no bearing on them as evidence and should not be construed in any way by you with respect to either party.

There were charts and summaries that were shown to you solely to help explain or summarize facts disclosed by books, records, or maybe some other document that were already in evidence. Charts and summaries are not evidence or proof of any fact unless I specifically admitted that chart or summary into evidence.

You must determine the facts in this case exclusively from the evidence.

Certain evidence -- I'm sorry. Certain

exhibits were shown to you such as PowerPoint presentations, posters, or models, and they are illustrations of evidence but are not themselves evidence.

They may have been referred to during trial as demonstrative or demonstrative exhibits. It's a party's description, picture, or model used to describe something that is involved in the trial. If your recollection of the evidence differs from any demonstrative you saw, rely on your recollection.

You alone determine the questions of credibility or truthfulness of the witnesses that you heard. In weighing their testimony, consider the witness' manner and demeanor on the witness stand, feelings or interest they might have in a case, any prejudice or bias they may have, and the consistency or inconsistency of the witness' testimony considered in light of all the circumstances.

Ask yourself: Has the witness been contradicted by other credible evidence? Has the witness made statements at other times that are contrary to those made here on the witness stand? Give the testimony of each witness the credibility that you as judges believe it deserves.

Even though a witness may have been a

party to the action and, therefore, is interested in the outcome, you may still accept their testimony as long as it was not contradicted by direct evidence or by any inference that may be drawn from the evidence if you believed the testimony.

You're not to decide this case by counting the number of witnesses who testified for either side. Witness testimony is weighed. Witnesses are not counted.

The test is not the relative number of witnesses but the relative convincing force of the evidence I admitted. The testimony of but a single witness is sufficient to prove any fact even if a greater number of witnesses testified to the contrary if, after you've considered all the evidence, you elected to believe one single witness.

In determining the weight to give the testimony of a witness, consider whether there was evidence that at some time the witness said or did something or failed to say or do something that was at odds with the testimony you heard at trial.

A simple mistake by a witness does not necessarily mean that witness was not being truthful as the witness remembered it. People forget things. They remember things inaccurately.

Consider whether misstatements were an intentional falsehood or simply an innocent mistake. The significance of the misstatement might depend on whether it has to do with an important fact or an unimportant detail. This instruction applies to the testimony of all of the witnesses you heard, both fact and expert.

Certain testimony was presented to you in the form of video depositions. A deposition is the sworn recorded answers to questions a witness was asked in advance of trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, the witness' testimony may be presented under oath in the form of a deposition.

Sometime before this trial began, attorneys representing all the parties in the case questioned each of those witnesses, and they were under oath. There was a court reporter present who recorded the testimony. The questions and answers were shown to you. The deposition testimony is entitled to the same consideration and is to be weighed and considered by you in the same way as if the witness had been present and testified here in court from the witness stand.

In addition, some of the video recordings that you may have seen might have been of lower quality

because we now have witnesses being taken remotely, which the parties agree was permissible for the convenience of the witness and/or the lawyer. Never let the quality of the video or the location of the witness weigh against any witness you saw.

You heard the testimony of experts. Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. That skill or knowledge is not common to the average person but was acquired by the expert through special study and/or experience.

In weighing expert testimony, consider their qualifications, the reason for their opinions, and the reliability of the information that support their opinions, as well as all of the other factors I've already mentioned for weighing testimony of any witness in this case. Expert testimony should receive whatever weight and credit you believe as judges to be appropriate given all the evidence admitted in the case.

You are not required to accept the opinion of an expert. You are free to accept or reject the testimony of experts just as you may do so with all of the witnesses.

Were there stipulations?

01:49 MS. DURIE: No, Your Honor.

01:49 THE COURT: Okay.

01:49 Do not let bias, prejudice, or sympathy play any part in your deliberations. A corporation and all other persons are equal under the law and must be treated as equals here in a federal court of justice. A party's overall financial size, wealth, or executive compensation may not have any impact on your deliberations.

01:50 Now, let's turn to an important concept called the burden of proof in this case.

01:50 In any legal action, facts must be proven by a required amount of evidence known as the burden of proof. The burden of proof in this case is on Align for some issues and ClearCorrect for others.

01:50 There are two burdens of proof that will apply in this case, two different burdens of proof. The first is called the preponderance of the evidence. The second is called clear and convincing evidence.

01:50 Let's start with an explanation of preponderance of the evidence.

01:50 The burden of proof applicable to some of the claims in this case is called preponderance of the evidence. Align has the burden of proving patent infringement by a preponderance of the evidence, has

01:51 1 the further burden of proving damages for any alleged
01:51 2 patent infringement by the same burden, a preponderance
01:51 3 of the evidence.
01:51 4 The burden of establishing invalidity of
01:51 5 a patent or any claims rest solely on ClearCorrect as
01:51 6 the party asserting allegations of invalidity.
01:51 7 ClearCorrect has the burden of proving
01:51 8 each element of its antitrust claims by a preponderance
01:51 9 of the evidence, though, as I will describe, Align
01:51 10 would have the burden of proving by a preponderance of
01:51 11 the evidence any procompetitive justification it offers
01:51 12 for its conduct as a defense.
01:51 13 If Align does, the burden shifts back to
01:51 14 ClearCorrect to show that the procompetitive benefits
01:51 15 are outweighed by the anticompetitive effects of the
01:52 16 conduct.
01:52 17 ClearCorrect also has the burden of
01:52 18 proving by a preponderance of the evidence its damages
01:52 19 for any anticompetitive conduct you might find.
01:52 20 A preponderance of the evidence means to
01:52 21 prove something is more likely so than not. The
01:52 22 evidence is such that it persuades you that a claim is
01:52 23 more probably true than not true. Sometimes this is
01:52 24 talked about as being the greater weight and degree of
01:52 25 credible testimony. You may think of the preponderance

of the evidence standard as one that is slightly greater than 50 percent.

Let's turn to the other burden of proof. The burden of proof for invalidity applicable to ClearCorrect's -- to ClearCorrect is known as clear and convincing evidence.

ClearCorrect has the burden of proving patent invalidity by -- I'm just repeating it. ClearCorrect has the burden of proving that an alleged product or publication is prior art by clear and convincing evidence.

Clear and convincing evidence means evidence that produces in the minds of the judges a firm belief or abiding conviction as to the truth of the matter in the dispute. It is evidence so clear, direct, weighty, and convincing as to enable you to come to a clear conviction without hesitancy.

Now, the standard is different from the preponderance of the evidence standard which applies to Align's burden of proving infringement and damages if any are found.

These standards are different from what you may have learned about on television, in criminal proceedings, where a fact must be proven to the standard of beyond a reasonable doubt. I'm sure you

all have heard that.

On a scale of the various burdens of proof or standards of proof, the lowest is the preponderance of the evidence where the proof need only be sufficient to tip the scales in favor of the party proving the fact.

The highest burden at the other end of the scale is beyond a reasonable doubt, where the fact must be proven to a very high degree of certainty.

Therefore, you may think of what we're talking about, clear and convincing evidence, as somewhere between the lower standard and highest standard.

Now, I'm going to give you a summary of each side's contentions on the patent issues in this case. I will then provide you with detailed instructions on what each side must prove to prevail on each of their contentions.

First, whether Align has proved by a preponderance of the evidence that ClearCorrect infringes Claims 1, 12, 13, and/or 14 of the '613 patent; Claim 11 of the '384 patent; Claim 1, 3, and/or 10 of the '090 patent; and Claims 1, 10, and/or 11 of the '091 patent.

What ClearCorrect has proven by clear and

convincing evidence that Claims 1, 12, 13, and/or 14 of the '613 patent, Claim 11 of the '384 patent, Claims 1, 3, and/or 10 of the '090 patent, and Claims 1, 10, and/or 11 of the '091 patent are invalid.

For the claims of the '613, '384, '090, and '091 patents, Align accuses ClearCorrect of directly infringing by making, using, selling, offering for sale, or importing aligners made with Zendura F-L-X or FLX, or indirectly infringing by inducing or contributing to others making, using, selling, offering for sale, or importing aligners made with Zendura FLX.

To prove infringement of a patent, Align must prove that ClearCorrect infringes one or more of the claims of the patent that are asserted by a preponderance of the evidence. That means that Align must show it is more likely that ClearCorrect infringes than that ClearCorrect does not infringe.

To determine this question of infringement, you must compare the technologies used or functionalities of ClearCorrect's products to each asserted claim of the relevant patents.

Some of the asserted claims recite methods, and others recite systems. In order for a method claim to be infringed, a party must prove by a preponderance of the evidence that the other party

performed each and every step of the claimed method and they did it in the United States.

In order for a system claim to be infringed, a party must prove by a preponderance of the evidence that the other party made or used a product that performs each and every element in the United States.

You must determine direct infringement with respect to each asserted patent claim individually.

You heard that there is more than one claim asserted here. Therefore, you have to determine for each of the claims asserted whether or not it is infringed. You have to do that for each individual claim.

ClearCorrect denies that it is infringing any of the asserted claims. Noninfringement is, therefore, a defense to Align's allegations or assertions of asserted infringement.

ClearCorrect also contends that the asserted patents are invalid. Invalidity of the asserted patent claims is also a defense to infringement. Therefore, even though the patent examiner allowed each of the Align patent claims, you, the jury, must decide whether each claim of the

asserted patents that is challenged by ClearCorrect is in fact invalid.

ClearCorrect carries the burden of proof on the subject. ClearCorrect must prove invalidity of each challenged claim by clear and convincing evidence in order to overcome the presumption of validity.

A patent may be invalid for a number of reasons. Here, ClearCorrect alleges that the Align patent claims are invalid for lack of enablement.

I will read you separate instructions concerning these invalidity theories.

It is your job to consider the evidence presented by all the parties and determine independently whether or not ClearCorrect has proved the patent is invalid by clear and convincing evidence and do so on a claim-by-claim basis.

If you find that one or more of the claims of Align's patents is infringed by ClearCorrect and you also find that the claims that you found infringing are not invalid, then you will need to determine what amount of damages, if any, Align has proven that will compensate it for ClearCorrect's infringement.

As a reminder, patents are granted by the United States Patent and Trademark Office, known as the

PTO, which gives a patentholder the right to prevent others from making, using, offering to sell or selling the patented invention here in the United States or from importing it into the United States without the patent owner's permission. A violation of the patentholder's rights is called infringement.

Before you can decide many of the issues in this case, you need to understand the role of patent claims.

The claims of the patent are the numbered sentences at the end of each of the patents asserted. The claims define the patent owner's rights under the law. The claims are important because it is the words of the claims themselves that define what the patent covers.

The figures and the text that are in the rest of the patent provide a description or example of the invention and provide a context for the claims, but it is exclusively the claims that define the breadth of the patent's coverage.

Therefore, what a patent covers depends in turn on what each of the asserted claims covers.

To know what a claim covers, a claim sets forth in words a set of requirements. Each claim sets forth its requirements in a single sentence. The

requirements of a claim are often referred to as either claim elements or limitations.

The coverage of a patent is asserted -- is assessed claim by claim. When a thing such as a product or process meets all of the requirements of a claim, it is said to cover that thing or that the thing falls within the scope of that claim.

A claim covers a process where each of the claimed steps is performed by the accused infringer for method claims or covers a product where each of the elements or limitations is present in the product for system claims.

If a product or a process is missing even one limitation or element of a claim, then the product or process is not covered by that claim.

The first thing you need to understand is what each claim covers in order to decide whether or not there is infringement of it and to decide whether or not the claim is invalid.

The first step is understanding the meaning of the words used in the patent claim.

The law requires me to define the terms of the claims, and it is up to you in your role to apply my definitions of the terms as I've construed the issues that you are asked to decide in this case.

If I have not defined the claim term or the parties have not agreed to the definition of a claim term, then you are to use what is known as the plain and ordinary meaning of the limitations that would be understood by what is called one of ordinary skill in the art, which is to say, in the field of technology of the patent at the time of the invention.

The meanings of the words of the patent claim must be the same when deciding both the issue of invalidity and infringement.

Let's start with the difference between the claims. This case involves two types of patent claims: independent and dependent.

An independent claim sets forth all the requirements that must be met in order to be covered by that claim. It is not necessary to look at any other claim to determine what an independent claim covers.

And here, Claim 1 of the '613 patent, Claim 11 of the '384, Claim 1 of the '090, and Claims 1 and 10 of the '091 patents are independent.

The remainder of the asserted claims of the patents here are called dependent claims. What does that mean?

A dependent claim does not itself recite all of the requirements of the claim but refers to a

different claim for at least some of its requirements. In this way, the claim depends on a separate and different claim.

A dependent claim incorporates all the requirements of the claim to which it refers. The dependent claim then adds its own additional requirement or requirements.

To determine what a dependent claim covers, it is necessary to look at both the dependent claim and any other claim to which it refers. A product or process that meets all the requirements of both the dependent claim and the claim to which it refers is covered by the dependent claim.

If any requirement of the dependent claim is not met or if any requirement of the independent claim from which the dependent claim depends is not met, then the product or process cannot infringe that dependent claim.

On the other hand, if the requirements of an independent claim are all met but a requirement of a dependent claim is not met, then the independent claim is still infringed.

The preamble to some of the asserted claims of the Align patents uses the word "comprising." For example, a phrase "a system comprising" or "a

method comprising."

What does "comprising" mean? It means including the following but not excluding other. A claim that includes the word "comprising" is not limited to methods or systems having only the elements recited in the claim but also covers methods and systems that have the elements recited in the claim and add additional elements.

For example, a claim to a table comprising a tabletop, leg, and glue would cover a tabletop that does include a tabletop, legs, and glue even if it also includes wheels on the legs.

Let's turn to "consisting of" claims.

The phrase "consisting of," when used in a claim, means including the following and excluding others. If a claim limitation uses the words "consisting of," and this is as opposed to "comprising," you must determine whether the part of the accused product that Align identifies as allegedly satisfying that limitation includes only the element or material to which the "consisting of" phrase refers.

If one or more additional elements or materials are included, the limitation is not met.

Now, let's turn to the subject matter that is the first one you will address.

I'm now going to instruct you as to the rules you must follow when deciding whether Align has proven that ClearCorrect infringed any of the claims of the asserted patents.

Infringement is assessed on a claim-by-claim basis. Therefore, there may be infringement as to one claim but not as to another.

A patent owner has the right to stop others from making or using within the United States products or methods covered by the patent claims without the patent owner's permission. There's nothing legally improper in filing a patent application or writing patent claims to cover an adverse party's product.

Here, Align alleges that ClearCorrect infringes Claims 1, 12, 13, and 14 of the '613 patent; Claim 11 of the '384; Claims 1, 3, and 10 of the '090; and Claims 1, 10, and 11 of the '091 patent. The accused products for those patents are Zendura FLX and aligners made from Zendura FLX.

In reaching your decision on infringement, keep in mind that the only -- that only the claims of a patent can be infringed. You must compare the asserted patent claims to the accused products and processes and determine whether or not

there's infringement.

You should not compare the accused products and processes with any specific example that might or might not be set out in the specification of the patent, the patent owner's commercial product, or the prior art in reaching your decision on infringement. The only comparison allowed is with the language of the claims themselves.

You must reach your decision as to each assertion of infringement based on the meaning and scope of the claims, the legal requirement for infringement, and the evidence presented to you and received by the Court here.

In deciding whether defendants' products infringe Align's patents, do not compare Align's products with the accused products. Again, you must only compare the accused products with Align's patent claims.

A claim of a patent may be infringed directly or indirectly. Align has accused defendant of both.

You may have heard evidence and arguments in this case about ClearCorrect's own patents relating to some of its products. However, owning a patent is not a defense to claims of infringement of a different

patent. Whether ClearCorrect sought and obtained patents has no bearing, and you may not consider whether ClearCorrect -- consider that when deciding whether ClearCorrect has infringed Align's patents.

A party can directly infringe a patent without knowing of the patent or without knowing that what the party is doing amounts to patent infringement. There is no intent element to direct infringement. Even if a party independently creates the accused product or method, it can still infringe.

In order to -- let me start over. Sorry.

In order to prove direct infringement of a patent claim by ClearCorrect, Align must prove by a preponderance of the evidence that it is more likely than not that a product or method that meets all the requirements of an asserted claim was made, used, sold, offered for sale within, imported into, or performed in the United States by ClearCorrect during the time the asserted patents were in force.

You must compare ClearCorrect's activities with each and every one of the requirements of an asserted claim to determine whether all the requirements of the claim are met. A claim element is present if it exists in ClearCorrect's products, systems, or methods.

02:08 1 You must determine, separately for each
02:08 2 asserted claim, whether or not there's infringement.
02:08 3 For the dependent claims, you may find that a claim to
02:08 4 which a dependant claims refers does not infringe.
02:09 5 There cannot be infringement of that dependent claim.
02:09 6 On the other hand, if you find that an
02:09 7 independent claim has been infringed, you must still
02:09 8 decide separately whether ClearCorrect's performance of
02:09 9 a method or ClearCorrect's systems or products contain
02:09 10 the additional requirements of any claim that depend
02:09 11 from the independent claim to determine whether those
02:09 12 dependent claims have also been infringed.
02:09 13 This is because a dependent claim
02:09 14 includes all the requirements of any of the claims to
02:09 15 which it refers plus additional requirements of its
02:09 16 own. Intent to infringe is not an element of direct
02:09 17 infringement.
02:09 18 Let's turn to inducement.
02:09 19 Align alleges that ClearCorrect is liable
02:09 20 for induced infringement of Claims 1, 12, 13, and 14 of
02:09 21 the '613 patent; Claim 11 of the '384; Claims 1, 3,
02:09 22 and/or 10 of the '090 patent, and Claims 1, 10, and 11
02:09 23 of the '091 patent by actively inducing its customers,
02:09 24 including related entities, unrelated entities, or end
02:09 25 users, to directly infringe the asserted patents.

02:10 As with direct infringement, you must determine whether there's been active inducement on a claim-by-claim basis.

To prove induced infringement of a patent claim, Align must prove by a preponderance of the evidence that:

First, ClearCorrect aided, instructed, or otherwise acted with the intent to cause acts by another person that would constitute direct infringement of the patent;

And ClearCorrect knew of the patent or showed willful blindness to the existence of the patent at that time and/or after the filing of the complaint in this matter;

And ClearCorrect knew or showed willful blindness that the actions of another person would infringe at least one claim of the patent;

And the other person directly infringed at least one patent claim.

Align must prove all four elements to establish induced infringement.

Let's turn to contributory infringement.

Align alleges that ClearCorrect is liable for contributory infringement by selling, offering to sell, or importing the Zendura FLX for use in

third-party aligners, thereby contributing to the direct infringement of the asserted claims of all four patents by third-party aligner manufacturers. As with direct infringement, you must determine contributory infringement on a claim-by-claim basis.

ClearCorrect is liable for the contributory infringement of a claim if Align proves by a preponderance of the evidence that:

First, ClearCorrect sells, offers to sell, or imports in the United States a component of a patented product or a material or apparatus for use in practicing a patented process during the time the asserted patents were in force;

And the component, material, or apparatus is not a staple article or a commodity of commerce suitable for a substantial noninfringing use;

And the component, material, or apparatus constitutes a material part of the invention;

And ClearCorrect is aware of the asserted patents and knows the component, material, or apparatus is made or adapted for use as an infringement of the claim;

And ClearCorrect customers use the component, material, or apparatus to directly infringe a claim.

02:12 Align must prove all five elements to establish contributory infringement.

02:12 Let's turn to the issue of invalidity. We're moving from infringement and moving on to invalidity.

02:12 I will now instruct you on the rules you must follow in deciding whether or not ClearCorrect has proven that the asserted claims are invalid.

02:12 The patent is presumed to be valid. The burden of proof of establishing invalidity of a patent are on -- or any claims rest solely in this case on ClearCorrect because they are the party asserting invalidity.

02:12 To prove that any claim of the patent is invalid, ClearCorrect must persuade you by clear and convincing evidence, that is, you must be left with a clear conviction that the claim is invalid.

02:12 Even though the Patent Office examiners allowed the asserted claims as valid, you as the judges here have the responsibility for deciding whether ClearCorrect has in fact met its burden of proof of clear and convincing evidence that the claims of the patent are invalid.

02:13 As with infringement, invalidity is also assessed on a claim-by-claim basis.

Now, let's turn to enablement, which is the argument of patent invalidity being asserted.

Another requirement contained in patent law for the part of the patent called the specification is called an enablement requirement.

ClearCorrect contends that the asserted claims of the '613, '384, '090, and '091 patents are invalid because the specifications of each does not fully enable the full scope of the claimed invention as of May 14th, 2012.

To succeed, ClearCorrect must show by clear and convincing evidence that the asserted patent specification does not contain sufficiently full and clear descriptions to have allowed a person of ordinary skill in the field of technology of the patent to make and use the full scope of the claimed invention as of the effective filing date without undue experimentation.

If a patent claim is not enabled, it is invalid.

Enablement serves a dual function of ensuring adequate disclosure of the claimed invention and preventing claims broader than what was disclosed in the invention.

The enablement requirement prevents both

inadequate disclosure of an invention and overbroad claiming that might otherwise attempt to cover more than was actually invented.

The scope of the claims must be less than or equal to the scope of the enablement to ensure that the public knowledge is enriched by the patent specification to a degree at least commensurate with the scope of the claims.

Claims are invalid for the lack of enablement if their broad scope is not reasonably supported by the scope of enablement in the specification.

Further, the enablement requirement does not require the specification enable one of ordinary skill in the art to make and use a perfected commercially viable embodiment, absent a claim limitation to that effect.

Further, the fact that a patent invention requires further development to achieve commercial success does not show non-enablement. The enablement requirement does not require evidence that the patented device could be manufactured commercially.

The question of undue experimentation is a matter of degree, and what is required is that the amount of experimentation must not be unduly excessive.

Some amount of experimentation to make and use the invention is allowable.

In deciding whether a person having ordinary skill would have to experiment unduly in order to make and/or use the inventions asserted, consider the following:

Time and cost of any necessary experimentation;

How routine any necessary experimentation is in the relevant field;

Whether the patent discloses specific work examples of the claimed invention;

The amount of guidance presented in the patent;

The nature and predicability of the relevant field;

The level of ordinary skill in the relevant field;

The nature and scope of the claimed invention.

No one or more of these factors is alone dispositive. Rather, you must make your decision about whether or not the degree of experimentation required is undue based on all the evidence presented to you.

You should weigh these factors and

02:16 determine whether or not, in the context of this
02:16 invention and the state of art at the time of the
02:16 effective filing date, a person having ordinary skill
02:16 would need to experiment unduly to make and use the
02:16 full scope of the claims in the invention.
02:16 Now, you've heard over and over "level of
02:16 ordinary skill." What does that mean?
02:16 In deciding what the level of ordinary
02:16 skill in the field of the invention is, consider all
02:17 the evidence introduced at the trial, including but not
02:17 limited to, one, the levels of education and experience
02:17 of the inventor and other persons actively working in
02:17 the field; the types of problems encountered in the
02:17 field; prior art solutions to them; the rapidity with
02:17 which innovations are made; and the sophistication of
02:17 the technology.
02:17 Now, ordinarily I'm very happy here
02:17 because we're nearly -- this would be the last section
02:17 of the charge. But we're just getting through the
02:17 patent part here. So don't get as excited as I
02:17 normally am when I see patent damages.
02:17 So damages for patent infringement are
02:17 only appropriate if you find that Align has proved that
02:17 ClearCorrect has infringed an asserted claim of the
02:17 asserted patents and that you determine that

ClearCorrect has not proven is invalid.

If patent damages are appropriate, you must then consider what amount of damages to award plaintiff for the infringement.

If you find that each of the asserted claims is not infringed or that they are invalid or both, then there are no damages for patent infringement here.

Now, by instructing you on patent damages, please do not take it as a suggestion who I think should win the case or whether the damages are or are not appropriate. That's up to you. You are the judges in this case.

If you find that ClearCorrect has not infringed any valid claim of the patent, then Align is simply not entitled to damages.

But if you find that Align is entitled to damages, then they must be adequate to compensate them for the infringement but in no event less than what we would call a reasonable royalty for the use made of the invention by the infringer. There can be an award of no damages -- there can be an award of no damages where none were proven.

Damages are not meant to punish an infringer. Your damage award, if you reach the issue

of damages, should put Align in approximately the same financial position it would have been had the infringement never occurred.

Align has the burden of proof in establishing the amount of damages of a preponderance of the evidence. You should award only the damages that Align established that more likely than not that it has suffered.

While Align is not required to prove the amount of damages with mathematical precision, it must prove them with reasonable certainty. You may not award damages that are speculative, damages that are only possible, or damages that are based on guesswork.

In this case, Align seeks what it claims is a reasonable royalty. A reasonable royalty is defined as the money amount Align and ClearCorrect would have agreed upon as a fee for use of the invention; in other words, a license at the time immediately prior to when any infringement began.

You must be careful to ensure that any award you make is no more but also no less than the value of the patented invention.

Let's talk about reasonable royalty.

A royalty is a payment made to a patent owner in exchange for the right to make, use, offer to

sell, sell, and/or import the claimed invention.

A reasonable royalty is the amount of money that a patent owner and an alleged infringer would have agreed to exchange for a license to the patent during what you heard was a hypothetical negotiation taking place at a time immediately prior to when the infringement first began.

Align, the plaintiff, bears the burden of proof proving the amount of a reasonable royalty by a preponderance of the evidence.

In considering the hypothetical negotiation to determine a reasonable royalty for a license to a patent in this case, focus on what the expectations of the patent owner and the alleged infringer would have been had they entered into an agreement at that time and had they acted reasonably in their negotiations.

In determining this, assume that both parties believed that the patent is valid and that it's infringed and that they are both willing to enter into some form of agreement.

Your role as judges is to determine what the result of the negotiation would have been.

The reasonable royalty you determine must be a royalty that would have on one hand -- I'm sorry,

must be a royalty that would have resulted from the hypothetical negotiation. It may not be simply a royalty that either party would have preferred.

Evidence of things that happened after the infringement first began can be considered in evaluating the reasonable royalty to the extent that the evidence aids in assessing what royalty would have resulted at the hypothetical negotiation.

A reasonable royalty award must be based on the incremental value that the patented invention adds to an accused system or process. Measuring this value requires a determination of the value derived from the patented invention and its use as distinguished from other features, factors, or contributions.

An appropriate combination of royalty base and royalty rate must reflect the value attributable to the infringing features of the accused process or products, if any. No more.

Let's talk about apportionment.

Any amount of damages for patent infringement must be based on the value attributable to the patented invention as distinct from unpatented features of the accused apparatus or other features, factors, or contributions such as marketing or

advertising. A royalty compensating Align for damages must reflect the value attributable to the infringing feature of the accused apparatus. No more.

The process of separating the value attributable to the allegedly infringing features from the value of all other features, factors, or contributions is what we call apportionment.

When the systems or method accused of infringement have both patented and unpatented features, your award must be apportioned so that it is based solely on the value of the patented features and no more.

Ladies and gentlemen, the damages experts went over to you what the relevant factors are. So with the agreement of the parties, you have these factors. And you can just -- I'm not going to read three pages of what you've -- you have. But you have those in front of you in terms of the relevant factors for a reasonable royalty.

And I'm turning to Page 53.

In determining the amount of damages, you must determine when damages began. Damages commence on the date that the alleged infringer both infringed and was notified of its alleged infringement, or Align was complying with the marking requirements provided under

35 United States Code Section 287.

For the '613 patent, the period began on May 24th, 2021.

For the '090, it began on May 16th, 2023.

For the '384 patent and the '091 patent, determine what -- you must determine what the damages period or when the damages began.

If you find that a product has been sold or licensed by Align that includes the claimed inventions of either the '384 patent or the '091 patent or both, determine -- you must determine whether the product was marked with the patent number.

Marking is placing either the word "patent" or the abbreviation "PAT" with a patent -- also with a patent number on all the products that include the patented invention.

The marking requirement may also be satisfied by including with the product an Internet address to a posting that associates the patented articles with the numbers of the applicable patents.

Align has the burden of establishing that it substantially complied with all the necessary marking requirements. That means Align must show that substantially all the products made, offered for sale, or sold under the '384 patent and '091 patent had been

marked and a reasonable effort was made to ensure the licensees who made, offered for sale, or sold products under the '384 or '091 patents marked the products.

If Align or any of its licensees have not marked substantially all practicing products with the patent number of the '384 and '091 patents, or if any licensees were not required to mark practicing products, then the date damages began for the '384 patent and the '091 patent is April 11th, 2024, because that's the date the lawsuit was filed.

Reasonable royalty awards can also take the form of what we call a lump-sum payment. A lump-sum payment is equal to an amount that the alleged infringer would have paid at the time of the hypothetical negotiation for licensing covering all the sales of the licensed product, both past and future.

When a lump sum is paid, the infringer pays a single price for the license that covers all past and all future infringing sales.

Reasonable royalty awards may also take the form of a running royalty based on the revenues from or the volume of sales of the licensed products. A running royalty can be calculated, for example, by multiplying a royalty base by a royalty rate.

It's exclusively up to you as the judges,

using only the evidence submitted, to decide what type of royalty, if any, is appropriate in this case.

Okay. I'm now going to instruct you on the law relating to ClearCorrect's antitrust claims against Align.

Irrespective of your findings with respect to Align's patent claims, you must independently evaluate ClearCorrect's antitrust claims. Those claims involve the Sherman Antitrust Act. The purpose of that act is to preserve free and unfettered competition in the marketplace. It rests on the central premise that competition produces the best allocation of our economic resources, lowest prices, highest quality, and the greatest material progress.

Let me explain to you what the law is on monopolization.

ClearCorrect alleges it was injured by Align's unlawful monopolization of the market for doctor-directed clear aligners in the United States in violation of Section 2 of the Sherman Act.

To prevail on its claims, ClearCorrect must prove the following elements:

First, the relevant market is what ClearCorrect alleges it to be: The market for doctor-directed clear aligners of the United States --

in the United States;

Second, that Align possesses monopoly power in the relevant market;

Third, Align willfully maintained monopoly power in the market -- in that market, the relevant market, by engaging in anticompetitive conduct; and

Fourth, such conduct caused damages to the business or property of ClearCorrect.

The burden is exclusively on ClearCorrect to establish each of those elements, and it must do so by a burden of proof of a preponderance of the evidence.

In order for you as judges to find that Align is liable for monopolization, you must conclude that ClearCorrect has established each of the four elements of its claim by a preponderance of the evidence. If they fail to establish any one or more of these four elements, you must find that Align is not liable for monopolization.

What is a relevant market?

ClearCorrect must prove by a preponderance of the evidence that Align had monopoly power in a relevant market. Defining a relevant market is essential because you're required to make a judgment

about whether Align has monopoly power in a properly defined economic market.

To make this judgment, you must be able to determine what, if any, economic forces restrain Align's freedom to set prices for or to restrict the production level of the products and services it provides.

The most likely and most important restraining force will be actual and potential competition from other firms and their products or services. This includes all firms and products or services that act or likely could act as restraints on Align's power to set prices as it pleases because customers could switch to them if Align sets it own prices too high.

All the firms and products or services that exert such restraining force are within what is called the relevant market.

There are two aspects to consider in determining whether ClearCorrect has met its burden to prove the relevant market by a preponderance of the evidence.

The first is the relevant product market. The second is the relevant geographic market. The parties agree that the relevant geographic market is

the United States, so my instructions will focus only on the relevant product market.

The basic idea of a relevant product market is the products within it are reasonable substitutes for each other from the customer's point of view; that is, the products compete with each other. The relevant product market includes products that a customer believes are reasonably interchangeable or reasonably substitute for each other.

This is a practical test with reference to the actual behavior of customers and marketing efforts of sellers. Products need not be identical or precisely interchangable so long as they're reasonable substitutes.

To determine whether products are reasonable substitutes for each other, you may consider whether a small but significant and non-transitory increase in the price of one product would result in enough customers switching from that product to another product such that the price increase would not be profitable.

Will customers accept the price increase or will so many customers switch to alternate products that the price increase would be forced to be withdrawn?

Generally speaking, a small but significant and non-transitory increase in price is approximately a 5 percent increase in price not due to cost factors.

If you find that customers would switch to alternative products and that the price increases would not be profitable, then you may conclude that the alternative products are in the product market.

On the other hand, if you find that customers would not switch in sufficient numbers to the alternative products and that price increase would be profitable, then you may conclude that the alternative products are not in the product market.

In evaluating whether various products are reasonably interchangable or reasonable substitutes for each other under the price increase test I have given you, consider:

Customers' views on whether the products are reasonably interchangeable;

The relationship between the price of one product and sales of another;

The presence or absence of specialized vendors;

The perception of either industry participants or the public as to whether the products

are in separate markets; and

The views of ClearCorrect and Align regarding who their respective competitors are; and

The existence or absence of different customer groups or distribution channels.

Here, ClearCorrect contends a relevant product market is all doctor-directed clear aligners.

In contrast, Align contends that ClearCorrect's product market does not include all reasonable substitutes and is not a valid antitrust market because the relevant market is the market for teeth straightening and includes doctor-directed clear aligners, direct-to-consumer clear aligners, and braces.

If you find that ClearCorrect has proven a relevant market, then you should continue to evaluate the remaining elements of ClearCorrect's monopolization claims. However, if you find that ClearCorrect has failed to prove such a market, then you must find in Align's favor with respect to all claims.

To prove monopolization, ClearCorrect must prove that Align has monopoly power and has a -- in a relative -- a relevant antitrust market. Monopoly power is the power to control prices or exclude competition in the relevant market.

Possession of monopoly power in itself is not unlawful. It becomes unlawful where it is acquired or maintained through anticompetitive or exclusionary acts or conduct. There can be both direct and indirect proof of the existence of monopoly power in a market.

Let's talk first about direct proof.

Monopoly power may be shown by direct evidence in several ways.

Monopoly power may be shown by proving that Align has the ability to raise or maintain the prices that it charges for goods or services in the relevant market above competitive levels for a significant period of time.

ClearCorrect must prove that Align has the power to do so by itself, that is, without the assistance of and despite competition from any existing or potential competitors.

If Align attempted to maintain prices above competitive levels but will lose so much business to other competitors in the relevant market that the price increase would become unprofitable and would later have to be withdrawn, then Align does not have monopoly power.

Similarly, ClearCorrect may show that Align has monopoly power by proving that Align has the

ability to exclude competition. For example, if Align attempted to maintain prices above competition levels but new competitors could enter the relevant market or existing competitors could expand their sales and take so much business that the price increase would become unprofitable and would have to be withdrawn, then Align does not have monopoly power.

The ability to earn high profit margins or a high rate of return does not necessarily mean that Align has monopoly power. There are other factors which may enable a company without monopoly power to sell at higher prices or earn higher profit margins than its competitors, such as the ability to offer superior products or services, the ability to maintain an efficient business operation, or superior marketing.

An ability to sell at higher prices or earn higher profit margins than other companies for similar goods or services over a long period of time might be elements of monopoly power.

By contrast, evidence that Align would lose a substantial amount of sales in the market if it raised prices substantially or that Align's profit margins were low compared to its competitors, or that Align's margins go up and down or are decreasing might be evidence that Align does not have monopoly power.

Let's turn to indirect proof.

Monopoly power may be proven indirectly by evidence of the structure of the market, market share, market share trends, barriers to entry in the market, entry and exit by other companies, and the number and size of competitors.

If this evidence establishes that Align has the power to control prices or exclude competition in the relevant market, then you may conclude that Align has monopoly power in the market.

Let's talk about market share.

The first factor you should consider is Align's share in the relevant market.

Based on the evidence that you've heard about Align's market share, you should determine Align's market share as a percentage of total sales in the relevant market.

Align must have a significant share of the market in order to possess monopoly power. A market share of about 50 percent may be sufficient to support an inference that Align has monopoly power, but in considering whether Align has monopoly power, it is also important to consider other aspects of the market.

The likelihood that a company has monopoly power is stronger the higher the company share

is above that threshold of 50 percent.

Along with Align's market share, there are other factors that you may consider in determining whether Align has monopoly power.

The trend in Align's market shares is something you may consider. An increasing market share may strengthen an inference that the company has monopoly power, particularly whether the company has a high market share, while a decreasing share might show that the company does not have monopoly power.

You may also consider whether there are barriers to entry into the relevant market. Barriers to entry are long-run costs that were not incurred by the existing companies in a relevant market but must be incurred by new competitors to enter the market, or other factors in a market that deter entry of new competitors while permitting existing companies to earn monopoly profits.

Barriers to entry make it difficult for new competitors to enter in the relevant market in a meaningful and timely way.

Evidence of low or no-entry barriers may be evidence that Align does not have monopoly power regardless of Align's market share because new competitors could easily if Align attempted -- I'm

sorry; I misread that -- because new competitors could enter easily if Align attempted to raise prices for a substantial period of time.

By contrast, evidence of high barriers to entry along with high market share may support an inference that Align has monopoly power.

The history of entry and exit in the relevant market may also be helpful to consider. Effective entry of new competitors or expansion of existing competitors may be evidence that Align lacks monopoly power.

On the other hand, departure from the market or the failure of firms to enter the market, particularly if prices and profit margins are relatively high, may support an inference that Align does have monopoly power.

You may consider whether Align's competitors are capable of effectively competing in the relevant market. In other words, you should consider whether the financial strength, market shares, and number of competitors act as a check on Align's ability to price its products.

If Align's competitors are vigorous or have large or increasing market shares, this may be evidence that Align lacks monopoly power.

On the other hand, if you determine that Align's competitors are weak or have small or declining market shares, this might support an inference that Align does have monopoly power.

The next element, ClearCorrect must prove that Align willfully maintained monopoly power in the relevant market through anticompetitive acts or practices.

Anticompetitive acts are acts, other than competition on the merits, having the effect of preventing or excluding competition or frustrating the efforts of others -- of other companies to compete for customers within the relevant market.

Harm to competition is to be distinguished from harm to a single competitor or a group of competitors, which does not necessarily constitute harm to competition. Some examples of harm to competition include increased prices, decreased production levels, and reduced quality.

Mere possession of monopoly power, if lawfully required, does not violate antitrust laws. Therefore, you must distinguish the maintenance of monopoly power through anticompetitive acts from the maintenance of monopoly power by applying -- by supplying better products or services, possessing

superior business skills, or because of luck, which is not unlawful.

A monopolist may compete aggressively without violating the antitrust laws. A monopolist's conduct only becomes unlawful when it involves anticompetitive acts.

The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. This is because all companies have on the one hand a desire to increase their products and increase their market share.

But these goals are -- and these goals are an essential part of a competitive marketplace, and the antitrust laws do not make these goals or the achievements of these goals unlawful as long as a company does not use anticompetitive means to achieve these goals.

There are many ways in which a firm can act anticompetitively. In determining whether Align's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to customers and would make business sense apart from any effect it has on excluding competition or harming

competitors.

The acts or practices that result in maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or commercial success. They must represent conduct that has made it very difficult or impossible for the competitors to compete.

You may not find that a company willfully maintained monopoly power through anticompetitive means if it has maintained that power solely through the exercise of superior foresight and skill, or because of economic or technological efficiency, including efficiency resulting from scientific research, or by obtaining one or more lawful patents, or because of the changes in cost or consumer preference.

ClearCorrect alleges that Align has engaged in four types of allegedly anticompetitive acts.

First, refused to accept scans from doctors using a third party, i.e., non-iTero, scanners to get an Invisalign while erecting technical impediments in connection with iTero which make it unnecessarily difficult for doctors to use iTero scanners to order non-Invisalign aligners.

Entered into contracts with exclusivity

provisions.

Three, offered loyalty pricing or discount programs, including a program called the Advantage Program.

Fourth, sought to enforce patents in this case against ClearCorrect that Align had obtained by defrauding the Patent Office.

The law states that you should consider Align's conduct as a whole but only with respect to conduct that you find to be anticompetitive.

In determining whether the first category of conduct described above relating to the iTero is anticompetitive, you should determine whether or not it meets the definition of the anticompetitive acts I have just described.

With respect to the remaining three categories of conduct, you should determine whether each meets the definition of anticompetitive acts that follow.

The first act, let's talk about it.

With respect to the second and third categories of conduct, exclusive contracts and the discount and loyalty programs, you should evaluate whether each of these constitutes an anticompetitive exclusive dealing arrangement.

Exclusive dealing arrangements require a buyer of a product or service to obtain that product or service exclusively from one supplier for a period of time. Such arrangements, however, may be anticompetitive even if they do not require complete exclusivity from each consumer or customer.

There are several forms of exclusive dealing arrangements.

The arrangement may take the form of an agreement forbidding the buyer from purchasing a product or service from the supplier's competitors, or requiring contracts committing the buyer to purchase all or a significant portion of its requirements of specific products or services from the supplier, or a pricing policy that creates a substantial disincentive to purchase from competitors.

The law does not prohibit a firm from offering low prices that are profitable to it even if a seller expects that all of its competitors will be unable to meet that low price and that they will eventually go out of business.

The fact that a defendant had financial resources that would allow it to retain its business while charging low prices does not show that the prices were anticompetitive.

From the standpoint of either the buyer or the seller, exclusive dealing arrangements may have potential procompetitive effects that benefit consumers and that need to be weighed against the potential anticompetitive effects of substantially foreclosing competing suppliers' access to the buyer and the buyer's access to competing suppliers' products and services.

In determining whether Align's alleged exclusive deals had a substantially harmful effect on competition in the relevant market, consider the following:

The nature and history of the use of exclusive dealing contracts in the industry;

Whether buyers of clear aligners have independent reasons for entering into the exclusive dealing contracts or were coerced into entering them;

Whether other competing suppliers also offer exclusive dealing contracts;

The extent of the competition among competing suppliers for exclusive dealing contracts with buyers;

Align's position in the marketplace;

The competitive alternatives to Align's products or services;

The reasons Align and buyers entered into the exclusive dealing contacts at issue; and

The effect of the use of exclusive dealing contracts on the ability of new firms to enter the market and on price and other competition in the market.

With respect to the allegations of anticompetitive conduct that I just described, ClearCorrect alleges that Align restricted doctors' ability to purchase competing clear aligners, including ClearCorrect's clear aligners.

Such conduct may violate the antitrust laws when it forecloses competition in a substantial share of the market.

It does not need to be impossible for a competitor to sell to customers for the customer to be foreclosed.

Competition is foreclosed if rivals' sales to those customers are restricted by anticompetitive conduct, including a contract or other arrangement that makes it more difficult for rivals to sell to those customers than would otherwise be the case.

In deciding whether conduct has foreclosed a substantial share of the market, you

should consider all the conduct that you found foreclosed competition in the relevant market altogether.

But unless you find that an act is anticompetitive as described above, you should not consider the act as a basis for finding substantial foreclosure of competition.

In determining whether foreclosure is substantial, you should take into account the relative strength of Align within the relative -- relevant market, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market, and the probable immediate and future effects of exclusion of competition from the market on competition.

In determining the extent to which Align's alleged conduct forecloses competition on the merits, it is relevant to consider the percentage of the market foreclosed. Similarly, the shorter the duration of the alleged foreclosure, the less likely it is to harm competition. The longer the duration of the alleged foreclosure, the more likely that the harm to competitors -- to competition will be greater.

You should also consider whether the buyer is the final end user of the product. If the

buyer is the final end user, foreclosure of competitors from that portion of the market represented by the buyer's purchases makes it more likely that competition may be harmed if the buyer represents a substantial portion of the market.

If the buyer is a distributor or reseller and there are other alternatives for competing sellers to market their products to end users, then competitors' access to the market may not be foreclosed and thus not substantially harm competition.

By considering all these factors, you should determine whether the anticompetitive acts, including anticompetitive contracts or other arrangements, adversely affected the price paid by buyers, output, or the quality of products offered in the relevant market.

Where a restraint does not adversely affect price, output, or product quality in the relevant market, it is unlikely to substantial -- to substantially harm competition.

The final category of alleged anticompetitive conduct in this case is ClearCorrect's allegation that Align acquired its '613, '384, '090, and '091 patents through fraud on the United States Patent Office.

Align has sought to enforce each of those patents against ClearCorrect in this case. To find that Align's assertion of these patents constitutes anticompetitive conduct, you must determine whether Align obtained these patents through an act of fraud on the Patent Office.

Fraudulently obtaining a patent is not by itself a violation of Section 2 of the Sherman Act. Rather, it is evidence that the acquisition or maintenance of monopoly power through anticompetitive conduct needed to prove a Sherman Act violation, about which you've previously been instructed.

To evaluate ClearCorrect's contention, you must first determine for each of the four patents whether Align defrauded the Patent Office. ClearCorrect must prove by clear and convincing evidence that a specific individual associated with the filing and prosecution of the relevant patent application or applications intentionally withheld or deliberately falsified material information that, had the Patent Office known about it, would have resulted in the PTO denying the patents to Align.

ClearCorrect alleges that Dr. Chunhua Li committed fraud on the Patent Office. To prove fraud on the Patent Office, ClearCorrect must prove by clear

and convincing evidence that Dr. Chunhua Li withheld material information from the USPTO or submitted materially false information or statements to the United States Patent Office during the examination of the '613 patent, and that Dr. Chunhua Li did so with the specific intent to derive the examiner -- to deceive the examiner into issuing one or more of the patents.

Let me explain to you what is meant by material and intent to deceive.

Material information is information that was withheld from the PTO which is material if the United States Patent Office would not have allowed the claim had it been aware of the withheld information.

A false or misleading statement is material when the USPTO allows a claim because the statements were made.

You may only find information, statements, or misconduct to be material if there's clear and convincing evidence that they are material.

Next is intent to deceive. In order for fraud on the Patent Office to have occurred, ClearCorrect must establish that any failure to disclose material information or false or misleading statements was done with an intent to deceive the

patent examiner.

If the failure to disclose material information or false or misleading information occurred through negligence, oversight, carelessness, or an error in judgment, even if it was grossly negligent, then there was no intent to deceive.

With regard to the -- I'm sorry. Let me start over on intent to deceive.

In order for fraud on the Patent Office to have occurred, ClearCorrect must establish that any failure to disclose material information or false or misleading statement was done with an intent to deceive the examiner.

If the failure to disclose material information or false or misleading statements occurred through negligence, oversight, carelessness, or an error in judgment, even if it was grossly negligent, then there was no intent to deceive and there's no fraud on the Patent Office.

Intent may be shown through direct evidence, such as documents or testimony from one's intent to deceive -- about one's intent to deceive.

Intent also may be shown through indirect evidence. It may be inferred from conduct. However, an intent to deceive may be inferred only where it is

the single most reasonable inference that can be drawn from the evidence. It's -- if it could be reasonable to conclude that the failure to disclose material information was an honest mistake, intent to deceive cannot be found.

Materiality and intent to deceive are separate issues. Proof of materiality does not give rise to an intent to deceive, and proof of an intent to deceive does not give rise to an inference of materiality.

There must be clear and convincing evidence that establishes materiality. And there must be clear and convincing evidence that establishes an intent to deceive. If clear and convincing evidence of either or both is missing, there's no fraud on the Patent Office.

If you find that one of the patents was procured by fraud, you may find that other patents were likewise procured by fraud if ClearCorrect establishes that the fraudulently procured patent had a necessary and immediate relationship to the grant of the other patents.

Inadvertent errors or honest mistakes by Align do not constitute fraud. By the same token, even deliberate falsification of material information is not

sufficient to support a monopolization claim if you determine that the Patent Office, knowing of the falsification, would have issued that patent anyway.

If you find that ClearCorrect has not met its burden in proving fraud on the Patent Office by clear and convincing evidence, you must find for Align and against ClearCorrect on ClearCorrect's contention that Align's knowing enforcement of a fraudulently procured patent was anticompetitive conduct.

If you find that ClearCorrect has proven fraud on the Patent Office by the standard of clear and convincing evidence and that the patent would not have issued except for that fraud, you must determine whether Align has enforced or attempted to enforce the fraudulently obtained patents with knowledge of the fraud.

If you find that Align was not aware of the fraud when enforcing or attempting to enforce the fraudulently obtained patents, then you must find for Align on ClearCorrect's contention that Align's knowing enforcement or attempt to enforce a fraudulently procured patent was anticompetitive conduct.

If, having found from clear and convincing evidence that Align fraudulently obtained a patent, you also find that Align enforced or attempted

02:59 to enforce the patent knowing it had been fraudulently
02:59 obtained, then you must decide whether ClearCorrect has
02:59 proven the remaining elements of its monopolization
02:59 claim.
02:59 Fraudulently obtaining a patent and
02:59 knowingly enforcing the patent with knowledge of the
02:59 fraud is not by itself a violation of the antitrust
02:59 laws of the United States. Rather, it is evidence of
02:59 the willful maintenance of monopoly power through
03:00 anticompetitive conduct needed to prove a violation,
03:00 about which you were previously instructed.
03:00 See Instruction No. 42 if you need to.
03:00 ClearCorrect still must prove the
03:00 remaining elements of the claim for monopolization.
03:00 See Instruction No. 38.
03:00 If you find that ClearCorrect has proven
03:00 fraud by clear and convincing evidence, you may
03:00 consider that conduct as anticompetitive conduct
03:00 supporting ClearCorrect's monopolization claim along
03:00 with any other conduct by Align that you as judges have
03:00 found to be anticompetitive.
03:00 Even if you do not find that ClearCorrect
03:00 has proven fraud as to any of the '613, '384, '090, or
03:00 '091 patents, Align may still be liable for
03:00 monopolization based on the other anticompetitive

conduct.

Regardless of your decision regarding ClearCorrect's claims for monopolization and its claim for attempted monopolization, which I will discuss next, you will be asked on the verdict form to decide whether Align has acquired the '613, '384, '090, and '091 patents through some form of fraud on the United States Patent Office.

Let's talk about the pattern of the alleged anticompetitive conduct.

ClearCorrect argues that Align's alleged iTero technical implements -- impediments, contractual terms, loyalty programs, and procurement and enforcement of fraudulent patents constitute a pattern of anticompetitive conduct that is harmful to competition in the alleged market for doctor-directed clear aligners.

The law states that you should consider Align's conduct as a whole but only with respect to conduct that you find to be anticompetitive. Unless you find that an act is anticompetitive as described above, you should not consider the act as a basis for finding that Align willfully maintained monopoly power.

Let's talk about procompetitive justification.

If you find that ClearCorrect has shown that Align maintained monopoly power in a relevant market through anticompetitive acts in the marketplace, you must consider whether Align had a legitimate procompetitive justification for its conduct.

Align, not ClearCorrect, must demonstrate to you by a preponderance of the evidence that there is a legitimate procompetitive business justification.

For conduct to be procompetitive, it must be a form of competition on the merits because it involves, for example, conduct that increased efficiency or benefitted competition.

To be a legitimate justification, the justification must not be pretextual. In other words, if you find that the business justification offered by Align was not the real reason for its conduct but, rather, that Align was motivated primarily by anticompetitive intent, then you should disregard that justification as pretextual.

If you find that any of Align's conduct was anticompetitive and Align has not advanced a legitimate procompetitive justification for its conduct, then ClearCorrect has established the anticompetitive conduct element of the monopolization claim.

If you find Align presented evidence of a legitimate procompetitive justification for its conduct, you must determine whether the anticompetitive effect of Align's conduct outweighed the procompetitive benefits of that conduct.

ClearCorrect bears the burden of demonstrating to you by a preponderance of the evidence that the anticompetitive effects of the conduct outweigh the procompetitive justifications.

When you evaluate this balance, you may consider whether less restrictive means were available to Align to accomplish the alleged procompetitive benefits of its conduct and whether those other means would have been less harmful to competition.

If the anticompetitive effect of Align's conduct in a relevant market outweighs the procompetitive benefit, then ClearCorrect has established the anticompetitive conduct element of its monopolization claim.

But if the procompetitive benefit outweighs the anticompetitive effects in the relevant market, then you must find that ClearCorrect has failed to establish the anticompetitive conduct element of its monopolization claim.

What are antitrust injuries and

causation?

If you find that ClearCorrect has proven the first three elements of its monopolization claim, to conclude that Align is liable for monopolization, ClearCorrect must prove that it was injured in business by Align's anticompetitive conduct.

ClearCorrect is entitled to recover damages for an injury to its business or property if it can establish three elements of injury and causation:

First, ClearCorrect was in fact injured as a result of Align's alleged violation of antitrust laws;

Second, Align's alleged illegal conduct was a material cause of ClearCorrect's injury; and

Third, ClearCorrect's injury is an injury of the type that the antitrust laws were intended to prevent.

The first element is sometimes referred to as an injury in fact or the fact of damages. For ClearCorrect to establish that it is entitled to recover damages, it must prove it was injured as a result of Align's alleged violation of the antitrust laws.

Proving the fact of damages does not require ClearCorrect to prove the dollar value of its

injury. It requires only that ClearCorrect prove that it was in fact injured by Align's alleged antitrust violation.

If you find ClearCorrect has established that it was replaced -- that -- establishes it was injured, you may then consider the amount of ClearCorrect's damages.

It is important to understand, however, the injury and amount of damages are different concepts, and you cannot consider the amount of damages unless you have concluded that ClearCorrect has established that it was in fact injured.

Second, ClearCorrect must also offer evidence that establishes by a preponderance of the evidence that Align's alleged illegal conduct was a material cause of ClearCorrect's injury.

This means that ClearCorrect must prove that some damage occurred to it as a result of Align's alleged antitrust violation and that there was not some other cause.

ClearCorrect is not required to prove that Align's alleged antitrust violation was the sole injury of its -- sole cause of its injury, nor need ClearCorrect eliminate all other possible causes of injury. It is enough that ClearCorrect has proven that

the alleged antitrust violation was a material cause of injury.

Third, ClearCorrect must establish that its injury is the type of injury that the antitrust laws were intended to prevent. This is sometimes referred to as antitrust injury.

If ClearCorrect's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers, then ClearCorrect's injuries are antitrust injuries.

Examples of reduction in competition include increased prices, decreased output, and reduced quality in the relevant market.

If ClearCorrect's injuries were caused by heightened competition, the competitive process, or by acts that benefit consumers, then ClearCorrect's injuries are not antitrust injuries, and ClearCorrect may not recover damages for those injuries under antitrust law.

You should bear in mind that businesses may incur losses for many reasons that the antitrust laws were never designed to prohibit or protect against, such as where a competitor offers a better product or better services, or where a competitor is

more efficient and can charge lower prices and still earn the profit it desires.

The antitrust laws do not permit ClearCorrect to recover the damages for losses that were caused by the competitive process or conduct that benefits consumers.

In summary, if ClearCorrect can establish that it was in fact injured by Align's conduct, then -- or that Align's conduct was a material cause of ClearCorrect's injury and that ClearCorrect's injury is the type that the antitrust laws were intended to prevent, then ClearCorrect is entitled to recover damages for injuries to its business.

Attempted monopolization. ClearCorrect alleges that it was injured by Align's attempted monopolization of the product market at issue in the case in violation of Section 2 of the Sherman Act.

To prevail on the claim, ClearCorrect must prove by a preponderance of the evidence the following:

First, Align engaged in anticompetitive conduct;

Second, Align had specific intent to achieve monopoly power in a relevant antitrust market;

Third, that there was a dangerous

probability that Align would achieve monopoly power in the relevant market;

And fourth, ClearCorrect was injured in its business or property by Align's anticompetitive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for Align and against ClearCorrect on its claim of attempted monopolization.

If you find that the evidence is sufficient to prove all four elements, then you must find for ClearCorrect and against Align on ClearCorrect's claim of attempted monopolization.

You should rely on the instructions given to you in the previous sections concerning the relevant markets and competitive conduct and antitrust injury and causation in deciding whether Align engaged in anticompetitive conduct with a specific intent to monopolize a relevant market.

A specific intent to accomplish the forbidden monopoly, as opposed to the mere intent to perform the alleged competitive conduct, is required for a successful claim of attempted monopolization.

ClearCorrect must prove that Align had a specific intent to monopolize a relevant market. The

Court has already instructed you on what the relevant market is.

The Court will now discuss specific intent.

If ClearCorrect proves that Align had a specific intent to monopolize a relevant market, in this case, doctor-directed clear aligners, you must find that ClearCorrect has proven this element of the attempted monopolization claim and you should consider the other elements of the claim.

If you find that ClearCorrect has failed to prove this element, then you must find for Align on the attempted monopolization claim.

There's several ways in which ClearCorrect may prove Align had the specific intent to monopolize. There may be evidence of direct statements of Align's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of Align at or about the time of the conduct in question or by testimony concerning statements made.

I'm sorry, I lost my place.

Such proof of specific intent may be established by documents prepared by responsible

officers or employees of Align at or about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of Align.

You must be careful, however, to distinguish between Align's lawful intent to compete aggressively, which may be accompanied by aggressive language, and a true intent to acquire monopoly power by using anticompetitive means.

Even if you decide that the evidence does not prove directly that Align had actually intended to obtain a monopoly in the relevant market, specific intent may be inferred from what Align did.

For example, if the evidence shows that Align lacked a legitimate business justification and the natural and probable consequence of Align's conduct in a relevant market was to give Align control over prices and to exclude or destroy competition, and that this was plainly foreseeable by Align, then you may, but are not required to, infer that Align specifically intended to acquire monopoly power in the relevant market.

ClearCorrect must prove by a preponderance to the evidence there was a dangerous probability that Align would sooner or later succeed in

achieving its intended monopoly if it continued to engage in anticompetitive conduct that is the same or similar to that charged.

In order to prove this element, ClearCorrect does not have to prove that success was nearly certain. What ClearCorrect must prove is that the chance of success was substantial and real, that there was a reasonable likelihood that Align would ultimately achieve its goal of monopoly power.

Thus, even if you find Align intended to create a monopoly, you may not find that Align attempted to monopolize if you find that it was not possible for Align to achieve its goal.

In determining whether there was a dangerous probability of success, you should consider the following factors:

The size and power of Align in the market as compared with its competitors;

Whether the barriers to entry into the market made it difficult for competitors to enter the market;

Align's share of the relevant market and whether it was increasing or decreasing; and

The likely effect of any anticompetitive conduct on Align's share of the market.

Again, the purpose of looking at these and other factors is to determine whether there's a dangerous probability that defendant would ultimately acquire monopoly power.

A dangerous probability of success need not mean that success was nearly certain, but it does mean that there's a substantial and real likelihood that the defendant would ultimately acquire monopoly power.

If you should find by a preponderance of the evidence that ClearCorrect has proven that Align is liable for monopolization or attempted monopolization on both -- or both, the law provides that ClearCorrect is to be fairly compensated for all damages, if any, to ClearCorrect's business or property caused by the conduct of Align.

In arriving at the amount of the award, you should include any damages suffered by ClearCorrect because of lost profits, meaning profits that ClearCorrect would have made but for the unlawful conduct of Align, or fees or costs that it incurred in defending against any patent that you may find to have been procured from the Patent Office by fraud.

You must not award damages for losses resulting from lawful competition, normal market

forces, or any other independent cause. The law does not require mathematical precision, but it does require a reasonable nonspeculative basis for attributing damages to the unlawful conduct.

If you should find by a preponderance of the evidence that damage to ClearCorrect's business or property, such as loss -- a loss of profits was caused by Align's illegal conduct complained of, then the fact that the precise amount of damages may be difficult to ascertain should not affect ClearCorrect's recovery, particularly if Align's wrongdoings have caused the difficulty in determining the precise amount.

You must not award ClearCorrect purely speculative damages. An allowance for lost profits may be included in the damages award only when there's some reasonable basis in the evidence in this case for determining that ClearCorrect suffered a loss of profits, even though the amount of such loss may be difficult to ascertain.

In arriving at the amount of any loss of profits sustained by ClearCorrect, then you are entitled to consider any past earnings of ClearCorrect in the business in question as well as any other evidence bearing on the issue. You should calculate any damages that you may award on the patent claims,

any damages that you may award on the antitrust claims separately.

You should not offset or reduce the damages that you provide on one of these sets of claims based on damages you award on the other set of claims.

Antitrust damages are only compensatory, meaning their purpose is to put an injured plaintiff as nearly as possible into the position in which it would have been had the alleged antitrust violation not occurred.

The law does not permit you to award damages to punish anyone, what we sometimes refer to as punitive damages, or to deter particular conduct in the future.

ClearCorrect alleges that Align also violated a state antitrust law called the Texas Free Enterprise and Antitrust Act. The law follows the federal Sherman Act.

Accordingly, to prove a violation of Texas law, ClearCorrect must prove by a preponderance of the evidence one of the foregoing claims that Align violated federal antitrust law and that the unlawful conduct took place within the state of Texas or affected transactions taking place wholly or partly within the state of Texas.

Ladies and gentlemen, I will read the last couple of pages after the closing arguments because it makes more sense.

It is 3:18. We'll take a recess. Please remember my instructions not to discuss the case. We will resume at 3:30 with the closing arguments.

THE BAILIFF: All rise.

(Jury exited the courtroom.)

THE COURT: Thank you. You may be seated.

I'll just say if I weren't going to quit before --

(Laughter.)

THE COURT: So I apologize for how hard. Any -- anyone -- go on and just read any part of this for 30 minutes, and then think you've got another hour and a half to go.

So we'll go -- we'll get started at 3:30. Is there anything we need to take up?

MR. MUELLER: Just two quick things, Your Honor.

THE COURT: Yes, sir.

MR. MUELLER: We had just a handful of exhibits before they go back to the jury that had some redactions for compliance with the in limine orders.

The parties have been discussing them. I'm not sure what Your Honor's preference is on how to effectuate those.

Also, I understand that Align had been disputing some of the redactions. And I'll just say if they want the document that says -- and I'll quote this -- "Align is greedy and litigious and overly aggressive" to go back unredacted, then we're fine with no redactions. But we do think that if we're going to be careful about this, we should be careful about this on both sides and make sure they go back in the right way.

So whatever Your Honor's preference is, we're happy to do it.

MR. NASH: Your Honor, I think the dispute relates to one document that happens to be an e-mail that I don't happen to have on me because I believe the evidence closed. And so I didn't bring that back with me.

But we do have several issues with that. The evidence did get submitted without any redactions being done. The evidence was submitted in Dr. Mishra's testimony, Your Honor, and it was submitted by plaintiff. Now they're wanting to go back and redact aspects of that, and they used that with the witness.

The e-mail in question that they're trying to redact, if it were to be redacted, destroys any context for the portion that they used to cross-examine Dr. Mishra with that aspect.

So it would remove any context for it, so we would sort of oppose that type of redaction, Your Honor.

Also, as we already saw, the portion that Mr. Mueller just mentioned on the other documents where the word "greedy" appears, he already used in cross-examination with a witness earlier today. And so he effectively already had violated that MIL that he's now saying he wants to go back and redact it to try and save.

MR. MUELLER: Again, Your Honor, first of all, that's not true. Okay? And the version that I showed to the jury was redacted. Okay. That's just not true.

The second thing is what they want to unredact, to be clear, or what they don't want to redact is a reference to the 3Shape litigation which Your Honor's kept out over and over and over and over again. This is the Rule 37 issue.

All we're asking is that Your Honor's orders be effectuated in this small handful of

documents before they go back to the jury. That's it.

THE COURT: I'm going to -- go ahead, Mr. Nash.

MR. NASH: Only that, Your Honor, he did -- I mean, we were here when he questioned the witness on the specific word "greedy." He redacted the word "litigious" but did not remove the word "greedy," which is obviously part of Your Honor's standard MIL 9.

I'm happy to answer other questions about the document that I think is the primary cause of this issue, but I don't happen to have it on me.

It's our position that the documents have been submitted, Your Honor, that the documents that are in question were submitted by the defendants. And so he brought those in without these redactions. I think that the evidence is in and should rest.

MR. MUELLER: Again, Your Honor, our position is we're fine with not redacting any of these, including the "greedy/litigious" document. We think it would be better to redact the three and make them compliant with Your Honor's in limine rulings. We've been fastidious about those rulings.

Your Honor may recall that before I used the "greedy/litigious" document, I raised it in the morning, and I showed it to Your Honor in a redacted

form to be careful about it.

THE COURT: Well, I'm going to allow it in an unredacted fashion.

Now, let me tell you something. Jen just let me know -- I may just dismiss them when we're done with the closing arguments because it's --

(Off-the-record discussion.)

THE COURT: Never mind. So what I intend to do after you all finish your closing arguments and I read the two pages I have left is ask the jury whether or not they want to stay and get started or whether they want to come back tomorrow. And whatever they do, I'm going to allow them to do.

Now, my plan, which is not in concrete but just so you have some idea, if they decide to stay tonight, I'm not going to tell them that we're quitting at 7:00, but we're going to quit at 7:00 if they haven't finished. So that is, generally speaking, my plan.

So if you all will get ready for closing arguments.

Yes, sir.

MR. MUELLER: And this is the very last thing, Your Honor. I just wanted to note before we end this, the parties have agreed that for the inequitable

conduct issues, we're both going to rest on the evidentiary record here and brief it, argue it to Your Honor at an appropriate time that's convenient for you.

THE COURT: Sounds good.

MS. DURIE: And I just want to note, Your Honor, I think from our point of view, the jury's finding with respect to Walker process will be conclusive as to inequitable conduct. So I'm not sure there will actually be anything left to brief if we get a verdict from the jury.

THE COURT: I think -- just off the top of my head, I think you are correct if they -- if it's negative. I'm not sure that if it's positive, meaning they find that you violated that, that I would be bound to also find -- and I don't think you would want me to be bound to find that there's inequitable conduct.

MS. DURIE: I agree that it wouldn't. And that's fine. I just wanted to --

THE COURT: I think -- I do think -- my sense would be -- I'm telling you as a person finding inequitable conduct that if the jury were to rule in your favor on the issue of Walker process, it would be very damaging to their case of inequitable conduct on the part of the inventor.

But if the jury were to make the determination of a violation of a Walker process, I would still make an independent decision whether or not there was inequitable conduct on the part of your inventor.

MS. DURIE: Understood. Thank you.

MR. MUELLER: Nothing further, Your Honor. Thank you.

THE COURT: Okay.

THE BAILIFF: All rise.

(Recess taken.)

THE BAILIFF: All rise.

THE COURT: Yes, sir.

MR. MUELLER: Yes, Your Honor. I have one question before I start based on the exchange we had right before break. This is the document. May I pass one up, Your Honor?

This is the document that I referred to which we had offered to redact, and Align doesn't want to redact this handful of documents.

I understood Your Honor's ruling to be this document is not going to be redacted and, therefore, I'm free to refer to the unredacted version. I just want to confirm that.

THE COURT: They're the ones who don't

want it redacted.

MR. MUELLER: Okay. So I am free to refer to it.

THE COURT: They're the ones who don't want it redacted. Yes.

MR. MUELLER: Okay. Thank you, Your Honor. That's all I had, Your Honor.

MS. DURIE: Your Honor, we are amenable to the redaction across the board.

MR. MUELLER: That's fine, Your Honor. That's fine. That's what we had proposed originally. So we'll use the redacted version of that. But we'd expect the same on the redactions that we proposed.

Do we have that agreement?

MS. DURIE: Yeah.

THE COURT: So you understand that -- you need to get us a copy of the redacted version. The jury won't have it for four hours. So, I mean, that's not -- physically it will take four hours for us to upload it. So with that being said, are you all ready to do closing arguments?

MR. MUELLER: We are, Your Honor.

MR. DURST: We are, Your Honor.

(Recess taken.)

THE BAILIFF: All rise.

THE COURT: Please remain standing for the jury.

(Jury entered the courtroom.)

THE COURT: Thank you so much for coming back. You may be seated.

(Laughter.)

THE COURT: Mr. Durst, about how long will you go in the first half, and would you like a warning of any kind?

MR. DURST: Your Honor, I would like a warning with 15 minutes left.

THE COURT: Okay.

MR. DURST: 15 minutes remaining.

THE COURT: And how long are you going to go?

MR. DURST: I'm going to try to hit about that number.

THE COURT: You're going to go about 15 minutes?

MR. DURST: 15 to -- no. I'm going to go about 30 to 35 minutes.

THE COURT: That's what I meant. So I will -- at 20 minutes I will give you a warning. That way --

MR. DURST: 20 minutes remaining. Yes.

THE COURT: No. Ten minutes remaining. I'll do whatever you want. If you say 30 or 35 minutes, I'm not sure how to give you that warning. So if you tell me how many minutes you think you'll go, I can give you a warning, or I can just give you a warning in 20 minutes, if you'd like, or whatever you want.

MR. DURST: Let's do this: Why don't you give me a warning with 20 minutes remaining.

THE COURT: Okay.

MR. DURST: Okay.

THE COURT: I'll do it.

MR. DURST: Thank you. Thank you, Your Honor.

OPENING ARGUMENT ON BEHALF OF THE PLAINTIFF

MR. DURST: May it please the Court.

THE COURT: Please.

MR. DURST: Ladies and gentlemen of the jury, as you've learned these last two weeks, this case is about two companies, one company that innovated, made its way through struggles with scrappy grit, invested heavily, often at a loss, sometimes investing more money in research and development and promotion of their brand than they actually had.

They competed hard and fair and earned a

loyal customer following and a dentist following. It earned its place in the world of medical products technology by improving patients' lives.

In 1997, five employees in a small duplex started Align Technology and created a whole new product line for teeth straightening. It wasn't easy. They were at it alone, the only people out there taking on what has for decades and decades and decades been the dominant force in teeth-straightening braces.

They built it from scratch. They worked hard to attract smart scientists, partnered with dentists, and tiredly worked to get the message out to doctors and patients: There is a better way to straighten teeth.

Ladies and gentlemen, on behalf of the good people at Align, I thank you for your time and attention and the coming attention that we ask that you give to the details of this case and to the actual evidence in the case.

Thank you very much. Your service is incredibly important to our country and to the parties in this courtroom.

Now, here we are 25 years later. Align has found success for sure. We've won customers in head-to-head competition with braces, and we did it

with technology and better products.

Align has now changed the lives of 24 million people who have worn their aligners. That's about the population, ladies and gentlemen, of all the largest cities in Texas combined.

But the work is not done. Braces still dominate. 75 percent of the market is still owned by wires and brackets, by braces, and Align's continuing to work hard. Still investing heavily in people and technology to make better products, still trying to reach doctors and patients, and still busting it to help those dentists and those patients.

Years have passed. Align's success has inspired other companies to follow. There's been a steady drumbeat of other companies following Align's lead in making aligners to compete with braces.

And braces are changing too. We now have transparent braces and hidden braces behind your teeth. Align welcomes that competition.

Remember Matt Miller, Align's vice president? He told you how Align impacts patients. He mentioned Patrick Mahomes and showed you that little video, and he said competition is healthy. It makes them stronger.

Now, today, competition is coming from

everywhere. U.S. companies are chasing the market. Others from overseas, from Europe and from China, are working to get in the game. And they're making some progress, finding success for themselves, many of them.

But the other company in this courtroom in this case is different. As Ms. Sterling, Straumann's corporate representative, told you from that stand right up there, quote, there's something up with ClearCorrect, unquote.

Well, you've heard what that is. ClearCorrect and Straumann have crossed the line. Their business is struggling. That left them to try shortcuts, to skirt the rules, to try to catch up with Align and compete with braces and the other competitors.

And in one of their shortcuts, the one that's in issue in this case, they are using Align's inventions. They are using Dr. Li's patented inventions without permission.

That's what started this legal fight. Straumann and ClearCorrect are infringing our patents, and we don't have to put up with that. We shouldn't have to.

It's unfair. It's against the law in this country, and laws happily in our country don't

tolerate someone else taking your property. We're asking you to call them on that.

Their response when we caught them infringing? Come in this courtroom and claim to be a victim. Blame others. And worst of all, try to take away what Align has worked so hard to achieve.

Their approach in this case has been to divert your attention, a sleight of hand, trying to get you to focus on everything other than the facts. And they counterattack to avoid the truth.

Please pay close attention to what they're telling you, including this afternoon. They claim they don't infringe. But if that isn't right, they say Align's patents can't be valid. The Patent Office made a mistake, they say. And if those two don't work, they say Dr. Li intentionally lied to the Patent Office.

They're asking you, asking you to call her a liar and take away her patents.

And then they came up with these antitrust counterclaims. At the same time their internal documents over in Switzerland were all focused on problems of their own making, self-inflicted wounds, their CEO called them, at that same time they came to this courthouse in this town and tried to tell a

different story, to say that it's all Align's fault. The evidence shows you that's just -- it's just not true.

So what we're asking you to do is look at what's really going on. Did Align want to compete and compete hard and try to win? Well, sure we did. And some of our e-mails reflect that, sometimes with sharp language.

They've used incomplete documents and statements out of context repeatedly. We're asking you to look deeper. What do the facts really tell you?

Now, we've already asked a lot of you as jurors, and we need to ask a little more. Your role as jurors here is to assess what has really happened. What is the real story?

Align wants to win and worked hard to do that. No one, not Straumann's witnesses from the stand nor the instructions you've received from the Court, are telling you that there's anything wrong with working hard to win.

When you look carefully at the facts, you'll see that only one party in this courtroom has crossed the line, has done something that the law doesn't allow. And it's Straumann.

So let's start there. Straumann has

infringed Align's patents.

Now, you've heard the instructions on the burden of proof. This is a little hokey draw-up of the scales of justice. The burden of proof for Align to prove that Straumann has infringed our patents is preponderance of the evidence.

And what does that mean? That means if there is a feather of more evidence in favor of Align's position on infringement, then the verdict should come our way.

Let's start with one of the biggest sleights of hand of all. How much time, ladies and gentlemen -- I lost track -- did Straumann spend talking about the '691 patent, the soft-hard-soft claims? You remember that. A good part of that first week was spent focusing on this patent.

That patent's not asserted. We have not sued them for infringing this claim. These are the patents that they have infringed. These are the material patents that Dr. Li and others invented. There are multiple claims in these patents. All have a little different features. But there's only one thing disputed in all of them, and it's that elongation at break element.

Here is -- let's put the board up. Here

is a -- here's a sample claim representative of all the claims in the lawsuit. This is from the '091 patent, Claim 1. If you're looking at your notebook, it's JTX-04 and it's the next to the last page in that patent.

It's highlighted this way for a particular purpose, to show you an easy way to dissect the claims of this patent. All of those blue are depending on -- looks like it's blue. All of those blue colors talk to you about the first layer and give you the specifications for elongation at break of that first layer.

And then there's the second layer shown here in purple. The second layer has a different elongation at break requirement. And then there's the third layer, and notice there are no specifications with respect to the third layer.

Now, you all remember Dr. Reitman. She came and testified twice. This is how she described the patent. All of the patents have this or a similar claim. There has to be three layers, two types of materials, one hard and one soft, and the third one you get to pick.

This is like the dealer's choice. The third one is the dealer's choice. If it has three

layers, one that's hard and one that's soft, and the third one, whatever it might be, that product infringes all of these patents.

Dr. Reitman, I trust as you saw in her testimony, is a straight shooter. She's very knowledgeable. She's been in this business a long time.

So when you look at the elements of this claim -- this is very important -- all of the elements except one are admitted by Straumann. There's only one patent infringement issue in this case, and it is the elongation at break requirement of the hard layer.

Now, let's look at that. There it is, elongation of break at greater than 200 percent.

This is another way of looking at that claim. You see the blue, the first layer; the purple, the second layer; and then the third layer, as Dr. Reitman had said, dealer's choice.

So what did she do? She tested the individual layers of the material. She tested the individual layers of Straumann's material to see if they satisfy the requirements of the claim.

And it makes sense that you test the individual layers. If you look at the claim, there's a requirement for elongation at break in the first

element, in the first layer, and there is a separate one in the second layer. The elongation at break requirements are different. If this was to be considered as a whole, that language wouldn't make any sense at all. You wouldn't have two different standards for elongation at break.

What Straumann tries to do is get you to focus on the multi-layer sheet and test the whole sheet at once. The claim language itself tells you that the first layer has to have this property, and the second layer has to have this property, and they're individually specified.

So Dr. Reitman appropriately tested the different layers, which as she points out here, is what the patent tells you to do.

Now, Straumann's own documents admitted this as well. This is a document from Bay Materials, and it tells you that their material that they put in Zendura FLX for Straumann has an elongation at break of [redacted] percent. An elongation of break of [redacted] percent. Satisfies that claim element.

That's the last element, the only one they haven't admitted, and their own internal documents from Bay Materials shows you that that element is satisfied as well.

03:55 A moment about Align's damages in this case. You heard about this sort of interesting structure that the law puts on us.

03:55 THE COURT: Counsel, 20 minutes.

03:55 MR. DURST: Puts on you for -- puts on us for considering damages in this case. You have to take yourself back in time and imagine before Straumann started infringing this patent, what would the parties have agreed to?

03:56 Under that construct, it is a requirement that Straumann had to take a license. They were infringing a valid patent, and you have to imagine what would have happened in that negotiation. How much would Align have demanded and how much would Straumann have been willing to pay in that environment back before Straumann launched its infringing product and Align was being required to give a license to what our CEO calls our best competitor.

03:56 Now, Mr. Lasinski took the stand, and he testified about what an appropriate damages number should be. And it's $73.5 million. You didn't really hear a number in competition to $73.5 million from Straumann.

03:56 Dr. Perryman took the stand and said he really hadn't made an opinion, given an opinion about

what would have happened at that hypothetical negotiation.

Now, I want to show you one thing that is on this verdict form. This is a picture of the verdict form that you're going to get when you begin deliberations.

And this is an important element, ladies and gentlemen. This damage number, $73.4 million, are Align's damages to date. You will have an option on that verdict form of selecting damages to date. It's called a running royalty for past damages, or a lump sum that gives Straumann a license forever to our patents.

This amount, Dr. -- Mr. Lasinski's calculation, is for past damages up to now, past damages, not lump sum.

So you'll see that on the verdict form, and we're going to ask that you return a verdict that is for $73.4 million with a running royalty for past damages.

Now, let me move on to the validity of our patents.

So the burdens of proof here, and you've heard this from Judge Albright as well, the burden of proof with respect to validity is different. The

burden of proof here is clear and convincing evidence. Again, a little hokey with the scales of justice, but they have to tip the scales heavily in their favor to invalidate Dr. Li's patents.

You will see in the jury instructions that in order to prove to you that Dr. Li's patents are invalid, they must have given you enough evidence that you now have an abiding conviction as to the truth of the matter that they're asserting, that the patents are invalid.

Now, let's look at what this is about. These four patents-in-suit, they've all been through the Patent Office. They've all been looked at by a highly qualified examiner, and they've all been certified as genuine inventions by the United States government, by the Patent and Trademark Office. And the certification says that all the requirements of law have been complied with, and the patented invention is being granted.

Now, what is Straumann's invalidity challenge? Straumann's challenge is called enablement. And you will see this on the jury form. And the question is: Do the patents tell you how to make the materials to make the aligners? That's the question for validity.

And ladies and gentlemen, we have in this case as straightforward evidence of an enablement as you can imagine. The test for judging enablement is the entire patent. They may focus you on snippets here and there. Again, incomplete documents, out of context. You have to focus on the interior -- on the entire patent.

Now, how do we know that the patent is enabled? We have a very simple approach to that. We know the patent is enabled because John Lahlouh -- looking to see if he is in the courtroom. I don't see him here. John Lahlouh and his boss at Bay Materials looked at our patent and built SmartTrack simulate constructions.

They looked at our patent. The patent told them enough that they knew how to build what are called simulates, which are replicas or very similar layers of materials. And they learned that from a patent.

So the question on enablement is very straightforward. Does the patent teach enough that someone could build the invention from its language, and Bay Materials themselves tells us that it has.

Now, their next argument is that Dr. Li -- Dr. Li, would you stand up?

Dr. Li, that she didn't tell the truth, that she didn't tell the truth to the Patent Office, and they're also -- they're calling her a liar. And they're saying she lied to the Patent Office and that she took that stand and looked all of you in the eyes and lied.

Dr. Li told the truth, and they cannot meet their burden of taking her patent away by trumped-up claims of incomplete submissions.

She worked eight long years on these inventions, and she got all four of these patents. And Straumann is trying to take them away.

Now, here's her oath. She gave this statement under oath, when she was involved in prosecuting these patents or applying for these patents. She submitted everything that was required.

And this declaration, ladies and gentlemen, is her 2019 declaration. You've heard a fair amount about declarations. It's not a revision to a prior declaration. So don't be fooled if Straumann puts up that redline of the two declarations together.

That's a lawyer-created redline. That's a comparison of her 2016 declaration to her 2019 declaration. Dr. Li told you from that stand that the 2019 declaration was for a new invention, a new set of

claims. It was a new declaration.

When they show you that redline that suggests that she was amending something she had already said, that's not what happened. She filed a new declaration directed to a new set of claims.

Now, here is the questions you're going to be asked on this. I'd like you to focus on that language. In order for Straumann to prove -- and by the way, as you know from Judge Albright's instructions, ClearCorrect is the shorthand name for all of the defendants together, including Straumann.

They have to show that Dr. Li deliberately falsified or withheld information from the Patent Office, and they also have to show that she had the specific intent to deceive. They have to show that Dr. Li set out to lie and then lied to the Patent Office. They can't show it, ladies and gentlemen. The verdict on those should be no.

Now, Align earned its place in the market. As Dr. Perryman said from the stand -- you remember him. He's the Baylor professor, the local economist. He invoked the Fourth of July, as I recall, and said there's no guarantee of success, but there is a guarantee of an opportunity to try.

What Straumann and ClearCorrect are doing

in this case is they're trying to convince you to require Align to help them succeed, to help them succeed.

There is no guarantee of success in the marketplace. We talked about that even playing field. And Mr. Coss told us from the stand even in -- in an even playing field, there are winners and losers. And you remember we talked about sports teams. His favorite were the hockey team from Montreal, as I recall.

The first question with respect to these antitrust claims is the most important perhaps. This is the relevant market question: Do the products, according to the actual behavior of customers and markets and marketing efforts, that products need not be identical or precisely interchangeable as long as they are -- and this is important -- reasonable substitutes.

You've heard a lot in this case about how braces and aligners do the same thing. They are reasonable substitutes.

Now, what does this mean? So we didn't come up with the notion on our own. The lawyers didn't come up with the notion that the relevant market here is the teeth-straightening market. That's ripped right

from Straumann's annual report, where they call it a teeth-straightening market.

Now, in this courtroom you've heard evidence that over and over again, all the time in dentists' office all across the country, patients and doctors are choosing between braces and aligners. Those are reasonable substitutes. Dr. Taylor, their dentist from here in town, agreed with that.

And we talked about what's happening in the local market. You may remember Dr. Taylor said this is -- this is -- this is advertising from Bear Braces, which has that billboard up on 35.

And here are more examples: Dr. Taylor's own website. There's a Bear Braces again. And substitute aligners are offered or aligners and braces are offered by these other local dentists.

And then Dr. Cohanim took the stand yesterday. He is the orthodontist from Seattle. He's the one who did the 45-second video, and he gave us this direct testimony.

Are braces and clear aligners reasonable substitutes for the other?

The answer to that is yes.

So you will get a question on your verdict form that looks like this: Did ClearCorrect

prove by a preponderance of the evidence that the relevant market is -- listen to this -- the relevant market is the market for doctor-directed clear aligners? If that language sounds tortured, it is. Very few times in the last two weeks have those words been spoken. Doctor-directed clear aligners.

Now, that's a definition that Straumann chose. And I'll be direct with you about why they chose it. They want this market to be defined as narrow as it can possibly be defined so that our market share looks larger.

A narrower market makes Align's market share look larger, and that's why they chose this tortured language to define the market.

When Ms. Sterling was on the stand, she asked -- we asked her about the proper definition of the market, and she said it would include direct to consumers.

Now, why does that matter? Because in Dr. Perryman's view, in Straumann's view and what they're asking you to find, is that direct-to-consumer aligners are outside of the market, are outside of the market.

Dr. Perryman took that evidence -- that definition. Straumann has taken it out of their market

definition. Ms. Sterling says that's wrong. That is wrong. It's the wrong definition.

Now, here is the importance of this: If Straumann fails to convince you that the market is narrower than teeth straightening, if the market is this contorted doctor-directed clear aligners, if they fail to prove that to you, your work as jurors is over. They haven't even made it to first base on their antitrust claims. That is the importance of this market definition instruction.

Now, they're also going to talk about monopoly power. If you go -- if you find a relevant market, then you will have to address monopoly power, and that is the power to control prices or exclude competition. Control prices or exclude competition.

Now, what Straumann wants you to believe is that big is bad, that big is bad. That's a little like the pot calling the kettle black in this case a little bit, because we know that Straumann itself is a very large dental implant company. This is not a case of David versus Goliath.

But more importantly, here in Texas, we know better than to say big is bad. Big can be really good. Big can be really good. And it has been here for Align. It's led to better technology, better

products, lower prices, and most importantly, better for patients. It has been better for dentists and patients, what Align has done.

So I'm just going to just go now to the two touchpoints of this monopoly power definition. The first is that prices have dropped. Remember, to be a monopolist, you have to have the power to control prices. Prices have come down. Prices have come down.

If Align were a monopolist, would the prices be going down? No. The prices are coming down.

Second, competition has flourished. And you've heard a lot about this. But competition has flourished. These are all competitors that are in the marketplace. You've seen something like this -- this or something like this before. Every one of these companies competes with Align.

If Align were a monopolist, able to exclude competitors, this would not be happening. This would not be happening.

Now, a monopolist, in order to -- even having a large market share and even if you conclude -- you were to conclude that Align is a monopolist, then your test becomes did they do anticompetitive actions to maintain that monopoly power?

Anticompetitive actions are defined on --

in your instructions as I've noted here. And they exclude if you are supplying better products or services, possessing superior business skills, or just because of luck, none of those things are unlawful.

So if Align's actions fall in that category, there is no willful maintenance of monopoly power.

I want to talk about -- quickly about their principal charge here. This is the only charge of anticompetitive behavior for which they seek damages, this one right here, that somehow Align -- Align's iTero scanner device is not available to the marketplace.

But, ladies and gentlemen, look at the facts, and you know that's not true. All of these companies receive scans from iTero scanners. And it's not that hard.

Dr. Cohanim took the stand yesterday and showed you that 45-second video. Ladies and gentlemen, they are seeking $289 million because it takes 45 seconds to upload a file.

We asked Dr. Taylor if 45 seconds is too long, how fast would be fast enough? Of course it's a rhetorical question. He doesn't have an answer to that. 45 seconds is no barrier to competition.

And then the answer to this lies as well in the files of Straumann where you've heard testimony that one out of every five scans that's used to build a ClearCorrect aligner comes from that iTero machine. One out of every five. Yet they're in this courtroom telling you that they're blocked from that technology.

The other piece of their scanner argument is this: That we do not take incoming scans, that we do not take incoming scans to build Invisalign. Mr. Miller talked to you about that.

The witnesses here have told you that bad scans lead to bad aligners, lead to bad patient experiences. Our products -- this is kind of a bad picture, but our products are out in the marketplace with our name on them.

We send them out in the marketplace to patients who trust us. Some of whom are parents who put these in the mouths of their kids, and they have our name on them. Mr. Coss told us it's a reasonable thing to be worried about the quality of scans that go out into the marketplace.

This, ladies and gentlemen, is why Align is very careful about the inputs that are made to build Invisalign. It's like building a foundation to a house. If you build it on a rock, you're going to be

fine. If you build it on sand, you're going to have problems. Scans are the foundation for building aligners.

Ladies and gentlemen, I'm going to come back up and talk to you in just a few minutes. I would like to ask that you listen carefully to what comes next.

Is he going to talk about the patent claims that are really at issue here, or is he going to talk about something else? And will he talk about what's really going on in the marketplace, what's really happening out there, prices going down, competitors coming in, or is he going to talk more about e-mails?

We'll be listening. I'll talk to you again in a few minutes.

MR. MUELLER: Your Honor, may we have a couple minutes to set up?

THE COURT: Surely.

(Pause in proceedings.)

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. MUELLER: May I please have a five-minute-left warning and a two-minute-left warning?

THE COURT: You bet.

MR. MUELLER: May I proceed, Your Honor?

04:19 Good afternoon, ladies and gentlemen. This is my last chance to speak with you, and I want to start by thanking all of you for your careful time and attention over the course of this case.

04:19 Ladies and gentlemen, this is a case about competition. About what you see on the board right here in the U.S. market for doctor-directed clear aligners.

04:19 Now, the case began, the lawsuit was filed with allegations of patent infringement made against ClearCorrect and Straumann.

04:19 Those allegations were false, and remarkably they were known to be false based on internal testing data within Align's own files. And we're going to come back to that in a bit.

04:20 Those allegations, ladies and gentlemen, were the latest in years and years of anticompetitive conduct by Align designed to suppress competition from all of the other clear aligner companies in this market that you see right here.

04:20 And, ladies and gentlemen, we are here to say, enough. We are here to say, enough of the baseless patent allegations. We are here to say, enough of misrepresentations to the Patent Office. And we are here to say, enough of the anticompetitive

conduct that has confined every other clear aligner supplier in the U.S., not just ClearCorrect, every one of them to the region of the chart at the bottom of this placard. They are there because of anticompetitive conduct by Align, and we are here to ask you to hold them accountable.

Now, I said in my opening statement that Invisalign is a good product. I said credit where credit is due. I told you we weren't going to criticize that product over the course of the trial, and we haven't. It's a good product.

But Align has been a bad actor in this industry for years and years, and we are here to ask you to hold them accountable for that misconduct.

So let's get into the details of the evidence, and I'd like to begin with Align's patent misconduct.

As context, this is a technology area making multi-layer aligners out of several polymers that involves unpredictable technology, as Dr. Li acknowledged. The ways in which the materials interact with each other is unpredictable.

Now, Dr. Li and her colleagues, starting in the mid-2000s and continuing for about eight years, did over 260 experiments in an effort to develop a new

multi-layer aligner for a next-generation version of Invisalign. This was intended to replace a single-layer aligner that they had released in the early 2000s.

And in those 260 experiments that Dr. Li and her colleagues conducted, many of them were rejected. The samples that they created were rejected. And that's common. This is trial and error in an area of unpredictable technology.

And so they kept working, and that's the right thing to do. They kept trying to find one that would work, and eventually they did. They found a soft-hard-soft configuration, which you heard a lot about last week and you've heard a bit about this week as well, that was successful in meeting the criteria that Align itself had developed to measure what would be a successful dental aligner material.

They identified soft-hard-soft that in their view was the best, and they sought patent protection for the ideas that they had come up with. They sought patent protection, and they told the Patent Office that the invention was a hard copolyester layer between two soft layers of thermoplastic polyurethane elastomer.

Now, ladies and gentlemen, you have the

four patents that are for your consideration in a notebook. And they all have the same -- we call it the written description or the specification. It's the body of the patent. They have different claims at the end, but the body of the patent is the same.

And let me take you to just one example. If you were to go, ladies and gentlemen, to the '613 patent application -- I'm sorry, patent, '613 patent, and we'll put it up here, and go to the cover page, this is the patent issued to Dr. Li and her colleagues.

Go to the abstract on the first page. It says: The appliance includes a hard polymer layer having a hard polymer layer elastic modulus disposed between a first soft polymer layer having a first soft polymer layer elastic modulus, and a second soft polymer layer having a second soft polymer layer elastic modulus.

The abstract of the patent and the examples in the patent speak of this soft-hard-soft.

Now, I'm showing you one of the patents that are in your notebooks, but those are based on the very same filings done when they originally completed the work that led to SmartTrack.

So the invention that Dr. Li and her colleagues had conceived in those eight years of

04:24 experiments that led to the discovery of the
04:24 soft-hard-soft, that invention didn't change.
04:24 And if you look at the patents in your
04:24 notebook, you're going to see examples of
04:24 soft-hard-soft, which makes good sense because that's
04:24 where this came from.
04:24 What you won't see is any example in your
04:25 notebooks in those patents of hard-soft-hard. The
04:25 invention back then was soft-hard-soft, and Dr. Li and
04:25 her colleagues received patents other than the ones in
04:25 your notebooks. They received some earlier ones.
04:25 Mr. Durst mentioned the '691. That's an earlier patent
04:25 that was expressly directed to soft-hard-soft.
04:25 But something changed later where they
04:25 tried to expand the invention, and we're going to come
04:25 back to that in a bit.
04:25 Go back to the deck, Mr. Lee.
04:25 Okay. So they went to the Patent Office
04:25 after having run those experiments and said we have two
04:25 soft layers and one hard layer. And they told the
04:25 Patent Office, and Dr. Li, in particular, personally
04:25 told the Patent Office in a sworn declaration -- this
04:25 is right here -- that from 2016, that only, only the
04:25 materials of the instant claims -- and there's no
04:25 dispute that those claims were soft-hard-soft -- only

04:26 the materials of the instant claims met Align's development criteria.

So this is what Dr. Li said under oath to the Patent Office in 2016, nearly a decade ago.

Now, in 2018, Bay Materials announced the Zendura FLX material. This was hard-soft-hard. It had resulted from 16 years of development and work by John Lahlouh, who testified to you, and his colleagues at Bay Materials.

Now, Mr. Durst, like Ms. Durie in her opening statement last week, referred to a shortcut. This took 16 years and over 800 experiments by the four engineers at Bay Materials, including Mr. Lahlouh, who created this. That's no shortcut. It took 16 years and over 800 experiments to create this.

But in 2018, they released it, and it was totally different from SmartTrack. Mr. Lahlouh was familiar with SmartTrack. He had done benchmarking. He had read Align's patents to stay clear of them. He knew exactly what SmartTrack was and what Align's technology was, soft-hard-soft. And he did something different. He struck his own path, and he, Mr. Lahlouh, came up with something that was totally different composed of a hard outer layer and a soft inner layer.

Now, Dr. Li and Align, after Zendura FLX was released, started to study it. And to be clear, there's nothing wrong with that. You can do benchmarking or competitive analysis. It's sometimes called reverse engineering. What you can't do is to falsely claim that you have patents and inventions that would cover the work of other folks, but you certainly can do benchmarking to see what else is in the marketplace.

Dr. Li obtained a sample, and she did reverse engineering. Now, she told you under oath just last week:

Question: But you and your colleagues did reverse engineering on Zendura FLX, correct?

And her answer was no.

She was asked: You and your colleagues did reverse engineering on Zendura FLX, correct?

And her answer was no.

And that was a curious answer for two reasons. Number one, there's nothing wrong with reverse engineering. There's nothing to run away from. You can do reverse engineering.

But the second thing is she had done reverse engineering. Here's an e-mail on the right which talks about reverse engineering of Zendura FLX.

They had done reverse engineering of Zendura FLX with Covestro, the supplier they used for SmartTrack.

So it's abundantly clear from the documents and the record -- and we put the exhibit stamps on these in case you need to refer to any of them. This is DTX-95, for example -- that they did reverse engineering. Here's another document. Trial Plan Reverse Engineered Zendura FLX.

Now, again, there's nothing wrong with that, but what happened next is wrong. So first, they realized how good the material was, and this is the CEO, Joe Hogan, talking to an area sales manager. And the correspondence which you saw last week said that they had conducted extensive testing. It's the best material we've seen so far.

The executive management committee in an April 2019 meeting, the year after it was released, said: Bay Materials hard-soft-hard structure big threat to superiority of SmartTrack.

Now, they didn't say in that document Bay Materials, using the structure that Dr. Li had come up with, because they couldn't say that. Dr. Li had soft-hard-soft, and Bay Materials had come up with a hard-soft-hard structure. And it was a big threat to

04:29 the superiority of SmartTrack.

04:29 Here's Joe Hogan again corresponding with the director of marketing, Raj Pudipeddi. And he's referring to when Straumann acquired Bay Materials. And he referred to Straumann as "the best competitor we have." And he further said that the Bay Materials: As to Bay Materials, I just wanted to get the asset off the market.

04:30 He's regretting not having purchased the company himself.

04:30 Further correspondence from Mr. Hogan, the CEO, this is with the vice president of research and development, Srini Kaza. He said: I'm really worried about marginalizing SmartTrack.

04:30 And look at the first sentence. He said: Chunhua sent a previous note to me on the material.

04:30 That's Dr. Li.

04:30 Dr. Li was corresponding with the top executives including Joe Hogan in this time period: Chunhua sent a previous note to me on the material so I know it will be better than EX30. I'm really worried about marginalizing SmartTrack. I am just looking for any area of leverage for SmartTrack versus this material.

04:30 And Mr. Kaza candidly acknowledged:

Unless we can stop with IP -- including patents, that's a form of intellectual property -- they will keep coming.

And that's what they did. They tried to get patents that would stop Zendura FLX. They went back to the Patent Office, and Dr. Li, under oath here in court, said: I submitted this declaration to expand, expand our invention to the Patent Office.

Well, you don't get to do that. His Honor instructed you that you are allowed to go back to seek claims on a competitor product. That's permissible. But you need to be honest with the Patent Office, and you can't try to expand something that you came up with before. You're confined to the scope of what you invented in the first place.

And here, the way the expansion was attempted was through a new declaration in 2019. And you saw the changes. I won't go through all of them, but you saw that there were changes that went from narrowly tailoring the statements of the Patent Office to SmartTrack in soft-hard-soft. They changed it to broaden it out, broaden it out to get new claims to stop Bay Materials and Zendura FLX.

And one of the most telling changes was in Paragraph 5. It originally said only the materials

of the instant claims which were soft-hard-soft met Align's development criteria. They changed it to say, well, only the materials of the current claims, the new ones they were trying to expand. That's a material change.

And it worked. They were able to get some broader claims. Now, not broad enough. Not broad enough such as Zendura FLX would actually infringe. It doesn't. It didn't stretch far enough. But they did get broader claims, and they did so in part because of that affidavit, that declaration.

This is the patent examiner. The applicant's affidavit, that's Dr. Li's declaration, was also found persuasive. In particular, attention to the statement of the appliances recited in the claims, unexpectedly positive results over previously known appliances.

So the examiner's saying there's unexpectedly positive results of what's now being claimed in this new set of claims, the broader claims.

But in fact, as Dr. Spiegelberg explained, the data didn't support that. That was a misrepresentation. He was asked: Can you think of any technical or scientific reason that would justify the change from the text in 2016 to 2019?

04:33 And he said: No.

He noted that the new language would cover 23 additional materials that they had tested in those 260 tests way back when. And of those 23 materials, he was asked how many of them were superior to EX30, which is what Dr. Li said they were in the declaration. The answer is none of them.

As a scientific matter, as Dr. Spiegelberg explained, the declaration wasn't true.

Now, His Honor instructed you that for this type of claim, we need to show that there was a misrepresentation or an omission. And here, there was both. There was a misrepresentation in the changes to the declaration, and there was an omission. And the omission was they did not provide the backup testing.

Now, you don't always need to provide testing to the Patent Office, but you do, you do when it would be material or important to the Patent Office in assessing what you're saying to the Patent Office.

Here, Dr. Li went from saying in 2016 only soft-hard-soft, only the materials of the instant claims, which were soft-hard-soft. Dr. Li changed the language after having the back-and-forth with the CEO and after the CEO had identified Zendura FLX as a competitive threat, changed it to say: We actually had

broader testing results and greater success. But they hadn't. And that would have been apparent to the Patent Office if they had provided the backup data.

Dr. Spiegelberg was asked: Having reviewed the actual testing data that wasn't submitted to the Patent Office, what, if anything, did you conclude about the accuracy of the statement we're looking at in the revised declaration?

And he says: It's not accurate.

Despite those misrepresentations -- and to be clear, the statements in the declaration were false. I can't get into Dr. Li's head as to why she said what she said, whether it was pressure from the CEO or some other reason, but what was said to the Patent Office was false. And in addition, the backup testing wasn't provided, and it should have been.

But despite all that, these patents don't cover Zendura FLX. They don't cover ClearCorrect's aligners.

Now, let me start with one issue, which is, after reviewing all the material in this case, as Dr. Reitman acknowledged yesterday, she has offered no opinion that Mr. Lahlouh had set out to intentionally copy the Align patents or SmartTrack.

Answer: I have not offered that opinion.

Now, Mr. Durst gets to speak again. I don't get a chance to go after him. So he's going to get a chance to make some statements that I won't respond to. And he may try to convince you that somehow, somewhere, Mr. Lahlouh or his colleagues copied the Align patents or SmartTrack.

We saw a good example of this yesterday, where there's a document used with Dr. Reitman that used the term "knockoff," and there was an insinuation, I think, that Mr. Lahlouh had somehow knocked off SmartTrack. But if you looked at that document, it was from 2019. Zendura FLX was released in 2018.

And tellingly, when Mr. Lahlouh was on that stand for hours, they didn't ask him a single question about that, nor did they ask Dr. Spiegelberg a single question.

So I have no idea what they're going to come up with now in their final argument to you, but whatever they do, I'd like you to remember this: Dr. Reitman, who's willing to say many things on the stand to you, wasn't willing, wasn't willing to accuse Mr. Lahlouh of copying. And the reason was he didn't do it. Not once. Not ever.

It's a false insinuation to suggest he did. And when asked point blank, Dr. Reitman has not

offered an opinion that he copied because he didn't. Mr. Lahlouh took the stand and asked -- answered every question that Align had for him, and he made clear that Zendura FLX was invented by himself and his colleagues at Bay Materials.

Dr. Spiegelberg was asked: Are you aware of any evidence that Mr. Lahlouh or ClearCorrect copied?

And he said: No. I'm not.

Because there's none.

Is it a copy? It's not.

In fact, it's based on 16 years of research and development that go back to 2002, 10 years before SmartTrack was released.

Ten years before that, Mr. Lahlouh in his lab notebook talked about a multi-layer construction, three layers with hard layers on the outside and the inside.

You will not see any document. There is no such document in which anyone from Align came up with what Mr. Lahlouh did back in 2002. SmartTrack was a decade later.

In 2010, he had a second document, this is two years before SmartTrack, in which he had a hard-soft-hard configuration. And he got a patent.

That alone is not proof of noninfringement. You can infringe even if you have your own patent, as His Honor instructed you, but this is his patent on hard-soft-hard; two hard layers, one soft.

And unlike Dr. Li, Mr. Lahlouh was forthcoming to the Patent Office and provided his benchmarking data against SmartTrack. He had done benchmarking, and he told the Patent Office about it. He told the Patent Office about his simulates. And they granted him his patent on hard-soft-hard.

Now, why does that matter? It matters because even though they tried to stretch and stretch and stretch to get to Zendura FLX and ClearCorrect's products, they can't stretch far enough. The elongation at break requirement in all the claims is not met and, frankly, it's not even close to met.

It requires an elongation at break of greater than 200 percent. Dr. Li admitted that to test for elongation at break, you develop the material, the multi-layer material, then do testing.

The claims -- and here's one example -- talk about three or more layers in a sheet. Dr. Reitman admits that if you do the multi-layer testing, the requirement's not met.

Align's own testing before this case

shows that Zendura FLX, which is what they were testing, was at somewhere between 123 and 139 for elongation at break, way below 200.

That's what I meant when they filed this case despite knowing the patents aren't infringed. They had data in their files showing the elongation at break wasn't met, and they filed the lawsuit anyway.

Bay Materials did their own testing long before this case, and elongation at break was way below 200. Dr. Spiegelberg tested after this case. He found the same. The only one who didn't was Dr. Reitman, and the only way she found that was by making two mistakes.

Number one, she tested raw ingredients instead of the multi-layer material once it had been composed.

Number two, she used the wrong testing speed. As Dr. Spiegelberg told you, it matters how fast or slow you pull these layers apart. She made two mistakes.

Dr. Spiegelberg made no such mistake. It was the head of the standards committee that developed the standard for the testing. He did it the right way. Bay Materials did it the right way. Align, before the litigation, had done it the right way. And under the right way, there's no infringement. And, frankly, it's

not even close.

And Mr. Lahlouh had personally tested the product, and it was less than 200 percent.

How could this happen? How could we be here with that sort of information in their files?

Dr. Spiegelberg said: I don't know. It doesn't make any sense.

And, frankly, the only explanation was it was an attempt to hurt a competitor, part of many attempts to hurt competitors by Align.

And just finally, the enablement issue is this: They had soft-hard-soft in the patent. And if you read your patents, the only examples you'll see are soft-hard-soft. If you stretch the fence in the way that they did, they stretched it so far, it's no longer enabled.

Mr. Durst said dealer's choice. The claim covers anything you want. That's not the way this works. Okay? It's not the way this works. You have to enable and teach the coverage of your claims, and if you don't, the claims are invalid. They didn't. These claims are invalid.

And Dr. Li herself acknowledged that this is an unpredictable field, and you don't know what's going to happen unless you do the trial and error.

04:41 So at the end of this section of the case, ladies and gentlemen, this is not about promoting the progress of science as the patent clause was designed for. This is about trying to hurt a competitor with patents that were obtained by misrepresentations to the Patent Office that are not infringed and, frankly, not even close to infringed even with those misrepresentations and that have had enablement problems on top of all that.

So let's turn to the competition issues, and you've seen this graph over and over again. It speaks for itself. In the doctor-directed market for clear aligners, Align has a dominant market share.

There's no challenge to the math here, and you heard Dr. Knittel and Dr. Jena acknowledge that there's no quarrel with the math on this slide. Dr. Perryman's math is correct.

So what is the issue? Well, let's go through it. First is what's the relevant market. And as Dr. Perryman told you, you can -- you can't be too narrow. You can't define a market as a single model of pickup truck or a single model of dental aligners.

Likewise, you can't be too broad. You can't define the market for vehicles to be all vehicles, nor can you define the market to be all

04:42 models and structures for teeth straightening. Those
04:42 are too broad.
04:42 The appropriate and relevant antitrust
04:42 market would be pickup trucks for pickup trucks, and
04:42 dental aligners, clear dental aligners, doctor-directed
04:42 aligners in the U.S. market. That is the relevant
04:42 antitrust market.
04:42 The issues here are quite
04:42 straightforward. One question is should we include
04:42 braces. And the reason why Align wants to include
04:43 braces is to lower its market share by broadening the
04:43 market. But there's obvious differences between the
04:43 two. Braces are not invisible, and braces don't come
04:43 out. You can't remove them. And for a lot of folks,
04:43 that makes a huge difference.
04:43 Some of the folks for whom it makes a
04:43 difference are adults but also kids, and Joe Hogan
04:43 himself in testimony that you saw said hundreds of
04:43 millions of patients would never go with analog wires
04:43 and brackets.
04:43 So if you agree with Align's own CEO,
04:43 then one of the arguments you heard throughout this
04:43 trial can be rejected based on the CEO's own words.
04:43 Now, Align has shown you a few times this
04:43 annual report that talks about -- Straumann annual

report that uses the term "teeth-straightening market." But if you look a little bit further down the page, it talks about ClearCorrect in the clear aligner market.

So if you read the whole document, and this is an issue that's come up over and over again in this trial, you will see the whole document contradicts the claim they're making.

And here's the testimony or the interview excerpt from Mr. Hogan that you've seen before. And if he's right, their first argument can be rejected.

The second argument is direct-to-consumer. Now, you were shown by Mr. Durst just now some testimony from Ms. Sterling. To be clear, when she was being asked those questions, it was about a 2020 document.

Since then, something important happened. The direct-to-consumer market essentially, to quote Mr. Hogan, blew itself apart through Smile Direct Club obviously and other companies all around the world. Mr. Hogan said you need a doctor in that process.

So again, if he's right, you can reject their second argument on market definition.

Now, Mr. Durst said just now this is a "tortured phrase," doctor-directed aligner marketing. "Tortured phrase," he said a couple times. In fact, I

asked Mr. Miller:

So, sir, if I could, have you ever seen or heard the term "doctor-directed aligner market" in your time at Align?

Yes.

You've also seen an e-mail -- this is DTX-136 -- from Dan Diederich, top executive at Align. In 2020, Invisalign had an 88 percent share of the doctor-directed aligner market.

So that tortured phrase was used by Align in their own files, and Mr. Miller on the stand acknowledged it. And it's not a tortured phrase. It makes all the sense in the world.

"Doctor-directed" means you should go to a doctor, which is what Texas has said by making DTC illegal. You need to go to a doctor for good reason. This is something that requires a dentist or an orthodontist to take a look at you before you get a prescription.

That's all "doctor-directed means." Go see a doctor, an orthodontist or a dentist before the prescription.

And clear aligners is the appropriate market because braces are different. That's all this means. It means going to see a doctor, and it means

clear aligners. It's very simple, very straightforward, and it's a term that Align itself has used.

So that's the market definition. And if you accept that braces are different, if you accept that DTC has, in Mr. Hogan's word, "blown itself apart" and is no longer a viable option and that doctors are required, here's the math. There's no dispute on this. 84 to 92 percent. That's way above the standard for a monopoly. Way above the standard for a monopoly.

And the fact that Align's market share has gone down a little bit from 92 to 84, they're still at 84, which is way above the standard for a monopoly.

So let's turn more to their monopoly power. Align has acknowledged in e-mails for years they have a huge share of this market. And it's really uncontested. If you find that the appropriate market is doctor-directed clear aligners, their market share is overwhelming.

Did they engage in anticompetitive conduct? Well, they did, and Dr. Perryman showed it to you in their own documents. Document after document after document show you that they planned to engage in anticompetitive conduct and did just that.

Years ago -- this is a 2013 e-mail --

they said: As we're preparing for serious competition in three to five years, an iTero customer is a locked-in Invisalign customer. We should be locking in every Invisalign customer now.

And, Your Honor, may we approach this?

We're going to show you something, ladies and gentlemen, that I hadn't expected we would need to do, but there's been a fair amount of pushback from Align witnesses on this issue of a moat.

So what we're going to try to do is to illustrate exactly what the moat is and what the mechanics of it were. And as you can see here, we have set up a diagram which shows various companies, Spark, SureSmile, ClearCorrect, others that you've heard about and seen evidence about over the course of this case.

They are on their own technology pathways towards the marketplace. And here, we have doctors, dentists, and orthodontists in the center. The way this should work is on a level playing field, they all come together and compete on product quality and price.

But what Align wanted to do and has done is to create a moat. And so what they have done over a period of years is to use the iTero scanner to create a moat. And again, I didn't expect to have to illustrate what a moat is, but they have fought this in this

trial.

So here's iTero and here's the moat. That's an iTero, by the way. The moat prevents every other company from having fair access to the marketplace except for Align.

So how does it work? Well, it works in two steps. The first step is Invisalign -- Align refuses to accept scans from any other scanner in the industry, any of them, any of them. And you've seen document after document recognizing the high quality of scanners like Medit and others as well including SIRIOS, Straumann's scanner.

They refuse to accept any scanner except for their own scanner, the iTero. That's Step 1.

Step 2 is the iTero doesn't work as well as other scanners.

So this moat, which you saw and we're now depicting, was a moat that they announced at a 2019 kickoff meeting of their entire sales force, they told all their salespeople the iTero scanner builds a moat. The iTero digital scanner builds a moat. The iTero scanner will block competition from gaining business in your accounts and help your doctors keep and grow treatment with Invisalign rather than seeking out another option.

They couldn't have been more clear. They were using iTero to build a moat.

Dan Stubbs: If you want to do Invisalign, you're forced to buy iTero and live with it.

I think that pretty much sums it up, Dan.

How does this work in detail? Well, with Invisalign, you just press a button. You take the scan using this iTero scanner, and you press a button and off goes the order to Align for Invisalign. Very easy to use. That's why the moat doesn't restrict access to Align. One touch.

In contrast, and Mr. Miller acknowledged this: Just so we're crystal clear with this jury, the iTero scanner can send data directly to Invisalign, correct?

In contrast, everybody else has to go through this cumbersome process. They can't just send it from the scanner. They have to go to a separate computer, log into myitero.com.

And as Dr. Taylor took you through this process, there's a number of steps. Now, they say it's 45 seconds per scan. It could be two minutes or three minutes. Whatever it is, it's a lot more than it is for Invisalign. And there's no good reason they had to

do it that way except to create the moat.

And again, it's not my words. They called it a moat.

They also acknowledge what they were doing. This is the vice president of product and design for iTero. It's highly manual and time consuming -- referring to the STL export for other companies' aligners -- and thus will never be widely adopted.

They wanted it to be hard to use. They wanted it to be hard to use and hard to adopt. That's the whole point of the moat.

The workflow is not simple, said Raphael Pascaud to Joe Hogan. The workflow is not simple, and we would of course not support it or facilitate it.

.5 percent of doctors, according to their own statistic, use the STL export feature. 99.5, according to their statistic, don't. 99.5 are using the Invisalign one touch, one click. .5 are using the cumbersome STL feature.

This is the closed ecosystem. They have closed the system, locked out other companies through this moat. And these are their own documents. If you want to do Invisalign, you're forced to buy iTero and live with it. And the only alternative they offer

these days is the putty, the putty in your mouth, which is less precise, as you heard today on the stand from Dr. Knittel, than the scanners.

So all this talk about "we're doing this for quality for the patients," if that were true, why do they still accept putty? Why do they still accept putty and don't accept digital scanners from other companies that are way beyond putty?

It's not about product quality or patient care. It's about locking out competitors and suppressing competition, foreclosing other folks from being in the marketplace.

That's not all. They also have exclusivity contracts which are designed to lock out DSOs -- or lock in DSOs and lock out competitors. These are their words, "Lock in DSOs."

You saw there's thousands of these agreements that have language like this. And the language precludes these DSOs from diversion of patients into non-Invisalign treatment; that is to say, you can't prescribe the competitor.

Now, they say this is to prevent bait and switch, but you know the truth. The internal documents that we looked at today with Dr. Knittel made crystal clear that was a pretext. A pretext.

They said, Bait and switch is frequently used. This is someone within Align being reflective and self-criticizing: Bait and switch is frequently used, which insinuates our customers have negative intentions of switching customers versus legitimate reasons for their behavior.

This document, which is DTX-2019, is truly revealing. It goes on to say: It feels like we've resorted to how we can force our customers to do more cases versus how we can make it so they want to do more Invisalign.

Last bullet: Unfortunately this mindset cascades throughout the organization and results in our customers feeling that we're arrogant -- that's Align -- we're arrogant and only interested in ourselves.

And you saw that one doctor had the audacity to say: I like Invisalign. I'm going to keep using it, but I found another good option and I'm going to explore that.

Word got to Joe Hogan, and he -- and Mr. Jergenson, and they said perhaps we can help to adjust his thinking. They took him off the doctor locator and started to make accusations of bait and switch.

It's awful behavior.

The loyalty program, this was analogized to the American Airlines loyalty program and others. Well, in fact, what it is is yet another attempt by a monopolist who's already created a moat and already created this thicket of thousands of exclusionary contract provisions to do yet more to lock in customers and create barriers to competition.

It's one thing for there to be a loyalty program in a healthy marketplace. When you're in the world of a monopolist, which is what we're dealing with here, you can't let the monopolist create further barriers to competition. And that's exactly what they wanted to do.

Don't take it from me. The objective of the program included creating barriers to switch protecting from competition.

So did all of this cause injury? Well, it's obvious it did.

They want to say ClearCorrect's not that effective or has quality problems, but look at everybody else. Everyone in this industry is in the basement. Everyone. Good, bad, old, new, hundreds of years of dental experience, brand-new entrant, every single company is down here. Everyone.

There's one common denominator. They're all suffering from the anticompetitive conduct and foreclosure activities of Align. Every single company. Certainly including ClearCorrect, also including every other clear aligner company trying to compete in this doctor-directed clear aligner market. Every one of them.

The causation speaks for itself. And their complaints or their attempts to say that ClearCorrect is somehow at fault don't withstand any scrutiny. They say that we receive too many complaints. Well, it turns out the complaint rate is virtually identical to Align.

Mr. Miller acknowledged that Align's received thousands and thousands of complaints themselves. Cherry-picking a few doesn't make a product a bad product. Invisalign's not a bad product and ClearCorrect's product is a good product.

They know it. This is their own internal document. ClearCorrect patient scores came back eerily similar to Invisalign. This is from 2017, before Zendura FLX was introduced and the hard-soft-hard material made the product even better.

They've known for years this is a good product. And, frankly, it's offensive to criticize,

like folks like the ones you've heard testify, and to analogize them to losers in a hockey game. These are not losers. These are smart, industrious, hard-working people who took the stand, answered every one of their questions, and who are ready, willing, and able to compete on a level playing field if given the chance.

And it's shown by the numbers. Where there's less anticompetitive conduct, including outside the U.S., ClearCorrect is doing very well. Within the U.S., where Align operates differently and anticompetitively, ClearCorrect is suffering and so is everyone else on this chart. Every other company trying to compete is down in that basement because of their anticompetitive conduct.

Pricing. Mr. Durst says, well, this can't be a monopoly. They've lowered the prices. Well, I'll give Mr. Durst a break because he wasn't here today.

Two economists called as witnesses by Align said the exact opposite. You can be a monopolist and still have lower prices at times, including to try to freeze out the growth of competition. There's a lot of reasons why a monopolist might cut prices a little bit and still be a monopolist.

The one thing we know is that

ClearCorrect offers lower prices today and has offered lower prices over the years than Align. So they're not winning on price. They're not winning on quality. They're winning on anticompetitive conduct. They know it.

Here's ClearCorrect's strengths in an internal Align document. Attractive pricing. Efficacy on low-stage cases. Easy company to deal with. Made in the USA at the plant in Round Rock.

And what else did they say in this very same document? In addition to the strengths above, many felt, many felt an advantage of ClearCorrect was that it was not Align. These doctors felt Align had become a greedy, overly aggressive company that did not care very much about its doctor providers.

Now, Align wants to put a happy face on this situation, and today we saw it. Dr. Knittel literally put a happy face on doctors and suggested that they were in love with what Align is doing. Well, they're not. They're not.

The evidence from Align's own files shows that they're not. This is a broken market. It is a broken market where competition is being foreclosed, foreclosed across the board through the anticompetitive activities of Align.

04:59 No one's happy with this situation, and that certainly includes doctors and patients. And calling a few folks to testify at over $1,000 an hour --

THE COURT: Counsel, five minutes.

MR. MUELLER: Thank you, Your Honor.

-- over $1,000 an hour, a number of whom have appeared in multiple litigations for Align, doesn't make it any different.

This situation is a situation in which doctors and patients are suffering from fewer options and higher prices because of their anticompetitive conduct. It is obvious from looking at the math here, which they don't contest. If you take braces off, as Joe Hogan said you should, if you recognize the DTC market blew itself up, as Joe Hogan said, this is the math. This is the math. There's no dispute.

That's a monopoly, it's foreclosure, and it's hurting all of us.

So what were the damages? Well, Dr. Perryman calculated damages in the conservative way. He did a quantification of the effects of the iTero moat, and he found that there would be a 15 percent shift or there has been a 15 percent shift of sales that Align would have -- that Align shouldn't

have made but did because of the moat.

Now, he also said there was harm from the exclusivity provisions in those contracts, those thousands of contracts. He also said there was harm in the Advantage Program that was designed as a barrier to competition. But to be conservative, he offered you his quantification of the moat effects. It was $289 million.

Now, you heard from Dr. Knittel today and Dr. Jena. They don't have an alternative number. Let me say that again. You have not heard an alternative number.

So if you conclude that this is the right market and they have done the wrong thing by engaging in anticompetitive conduct, you have one and only one number that's been given to you. It's by Dr. Perryman, this $289 million.

Now, the actual harm was greater because he didn't include any quantification of the exclusivity provisions in the contracts and the Advantage Program barriers, but to be conservative, he quantified the moat and the lockout effects of iTero to be $289 million.

And ladies and gentlemen, that is the only quantification of the harm that you've received in

this trial.

So if you were to conclude that Align has acted anticompetitively, as their documents say over and over and over again from the CEO level on down, the appropriate measure of damages, the only one that you've heard, is from Dr. Perryman.

Now, what would that mean? It means that if we look at this broken market, we asked the question. Here's where ClearCorrect has been. Where would they have been but for the lockout effects of iTero? They would have made many more sales, $289 million in lost profits over that period of time.

THE COURT: Counsel.

MR. MUELLER: Thank you, Your Honor.

What would that mean overall? Here's Invisalign. The dotted line would be where they would be if they'd paid the $289 million.

So again, this would give ClearCorrect the compensation for what it's lost and still leave Align in a commanding position in the market. This is not overreach. This is fair compensation for what ClearCorrect has suffered in this case.

Ladies and gentlemen, I'm at the end of my time, and I won't have a chance to respond to Mr. Durst. As you listen to his final words, I'd ask

you to keep a few things in mind.

First, are you being shown data that you know, you know to be out of context?

Second, are you hearing insinuations about people who had the -- when they had the chance to ask questions on the stand and didn't, like Mr. Lahlouh?

And third, are they now telling you things that are directly contradicted by the words of Joe Hogan and the other top executives?

Ladies and gentlemen, we are asking you for a verdict for ClearCorrect and Straumann. That would be the first step in fixing this broken marketplace. And if it were fixed and restored to a level playing field, at that point, it's up to ClearCorrect.

We have faith that Mr. Kossol, that Mr. Coss, that Mr. Buitta, Ms. Sterling and their colleagues on a level playing field will do just fine. And we have faith that in an open and fair marketplace where closed systems are opened, locked systems are unlocked, and the playing field is level, not only will ClearCorrect do better, we will do better, patients, doctors, consumers. More options, lower prices.

Ladies and gentlemen, Align started this

case, but we should end it by holding them accountable for their anticompetitive conduct over the course of many years. I'm not going to show you the verdict form. We trust your judgment.

The case will soon be in your hands, ladies and gentlemen. And we are confident you'll reach a just verdict.

Thank you very much.

THE COURT: Thank you, sir.

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

MR. DURST: May it please the Court.

Ladies and gentlemen, let's talk about the antitrust claims first. The gating issue here, the first thing, the requirement for them to even get first base -- to first base on their antitrust claims is the market definition.

You'll be instructed that you are to consider what is the appropriate market from the years 2020 to the present. What Mr. Mueller said about SDC, about direct to consumers going away is relevant to that market calculation.

The fact that they -- that that particular company is out of business now does not determine whether they were in the market during the time that you are to consider what is the market

definition. And Ms. Sterling told us it doesn't belong in the market. They don't get past first base.

Now, think about this. Reasonable substitutes. What have you heard? Braces and aligners. Same providers. Same function, moving teeth and bones the same way, the same price, the same consumers. The test is reasonable substitute. That's what you will be instructed in the jury instructions and as it relates to those verdict questions.

Now, we do have a quarrel with his board because he leaves braces off of there. Braces, according to Ms. Sterling, make up 75 percent of the market. So if you put that chart in scale and included the full market, it would look dramatically different than that board that they've shown you over and over again. They're excluding braces to make us look larger than we really are.

Notably, he skipped over monopoly power. Remember, for testing of monopoly power, being big alone is not enough. Big alone is not enough, and it is not illegal.

So what they have to show are anticompetitive acts. You will be asked to test whether four specific things are anticompetitive acts, meaning that they lack a legitimate business purpose.

So those acts are discounts and loyalty programs. Those programs are everywhere in our economy.

Is there a legitimate business purpose for having a loyalty program or a discount program? That's an easy answer. The answer to that will be no.

The second, contracts. Mr. Mueller made a big show of putting those boxes up there, but they've only shown you and focused on one clause. That's the good faith clause. And Mr. Matt Miller took the stand and told you why that is important. We have instances out there where people are being sold and paying for Invisalign and receiving other products, including ClearCorrect's products.

And that is a legitimate business reason for having that good standing clause. That's the clause that has the nondivert language that if you are a dentist using Invisalign and getting support from Align, you will not divert prospective patients into competitive products.

"Divert" means change direction. That means bait and switch. That is why that clause is there. It is a legitimate business purpose.

Let's pull up Slide 39.10. 39.10. That's not the one I'm looking for. I'm looking for --

05:10 1 oh, that's -- James, are you with me? 39.10. I have
05:10 2 39.30 something else.
05:10 3 39.10. There we go.
05:11 4 It happened more in closing. Mr. Mueller
05:11 5 didn't show you the full document. So this is the
05:11 6 document that has the moat in it. And just a couple
05:11 7 pages later, it tells you how we're going to build the
05:11 8 moat. There was nothing --
05:11 9 Go back.
05:11 10 There's nothing -- there's nothing
05:11 11 anticompetitive, nothing on this list, nothing in that
05:11 12 plan that lacks a legitimate business purpose.
05:11 13 Now, damages. The damages are an attempt
05:11 14 to get $289 million of market share that they have not
05:11 15 earned. $289 million of market share, and that's all
05:11 16 about the scanners. That's all about the scanners.
05:11 17 And there's zero dollars Dr. Perryman gave you for
05:11 18 contracts, zero dollars he gave you for loyalty
05:11 19 programs. It's all about scanners and the refusal to
05:12 20 accept scanners.
05:12 21 When you look at the scanner questions,
05:12 22 there was one question on the jury form, but there are
05:12 23 really two different issues here.
05:12 24 Should we have to -- should we be
05:12 25 required to accept someone else's scans to build our

products that go into the marketplace? Should we be required to do that?

The Align witnesses have told you, and Mr. Coss from Straumann admitted, that it's a reasonable thing to do to want to be sure that your scans are high quality. That is a legitimate business purpose for relying on our scanner to build our products.

That's half the scanner questions. The other half is do we allow our scans to go out? You really need to look no further than the fact that one out of every five of their aligners is built with our scans. Scans are going out.

Now, last, let's look at causation. So let's go to PDX-3664. This is the instruction that you will have on causation. Causation is the last element of your antitrust consideration or it is an element of the antitrust consideration. And this is the instruction that you've gotten from Judge Albright.

ClearCorrect must have proven that some damage occurred to it as a result of Align's alleged antitrust violation and not some other cause. Not some other cause.

Let's go to the next slide, Mr. Smith, please.

Ms. Sterling, she took the stand. She testified about all of these other companies that are facing the same Align competition as is ClearCorrect. ClearCorrect is the only one that is failing.

Now, Ms. Sterling came in here to testify, and you remember that there was a plan for her CEO to be here to testify. And she found out on the morning of her testimony that that man was not coming to Waco from Switzerland after all. They left her hanging. They left her hanging to answer questions on that stand, difficult questions that the CEO didn't want to face. They've also left her hanging in business too.

You remember she has $2 million in marketing and four people in the United States to support her marketing efforts in all of the United States.

We asked her: Has Straumann, your big parent with lots of resources, as Dr. Perryman said, have they provided support? Have they helped you out to get over your problems?

The answer was no. The answer was no.

Let's go to the next slide.

And there are lots of issues with Straumann, and you've heard about this. You heard

Mr. Daniellot testify in a deposition that many of the reasons for their shortfall are self-inflicted wounds. In order to prevail on their antitrust counterclaims, they have to show you that there was no other cause for their struggle, for their struggles in the marketplace. They simply cannot do that.

Let's go to PDX-3651, please.

Now, if all of these actions --

Maybe 39.51, James.

If all of these actions were as bad as they say they are, why is it, ladies and gentlemen, that the only orthodontists that came to testify, the only orthodontists that are prescribing Invisalign because they believe it is the best product, is Dr. Taylor, their own paid expert? He prescribes Invisalign. They don't prescribe ClearCorrect.

Where are all the other doctors and dentists out there saying they are locked out, that they wish they would be able to sell ClearCorrect but they just can't get in?

No one. The only doctors that testified in this case are Invisalign users who use -- Invisalign prescribers who use Invisalign and prescribe it to their patients because they trust the product.

No one told you they felt locked out.

Even Dr. Taylor admitted that he had done all of what he'd done and signed up for Invisalign, signed up for the loyalty program, all of that voluntarily.

The doctors' absence speaks volumes.

Now, let's go back to the core of the case, which is patent infringement. I think Mr. Mueller spent less than two minutes -- I had the benefit of his timer -- less than two minutes on this claim language. He did, as I thought he would do, he started with the patent that's not even in suit and never showed you the claim language of the patent in a way that walks through what has happened.

Now, the only challenge, the only defense he gave for infringement is that we did the wrong testing. This is the, this layer has these properties, and this layer has these properties. You'll remember in opening Ms. Durie said: Elongation at break means how long you can stretch it before it breaks.

This is the soft layer. This would represent the soft layer. This is how Dr. Reitman tested elongation at break. She tested it layer by layer by layer.

Now, what did Dr. Spiegelberg do? He took the two hard layers and put the soft layer between them. And lo and behold, they don't stretch to meet

the elongation at break standards.

It's as simple as that. That is their only defense to infringement, is that you test the layers together rather than separately.

You know, and we showed you, I showed you a moment ago, the papers from Dr. -- from Bay Materials about their own admission that their products meet the standards.

Now, let's turn to Dr. Li. You didn't hear anything about her submission of truthful statements in a way that focused on the language she actually submitted.

Now, she took the stand. She told you what she submitted. Dr. Reitman took the stand, said she had looked over all the files. All of the data had been submitted and everything that Dr. Li said was truthful.

His lead-up to say that Dr. Li was a liar was testimony from that stand about doing reverse engineering. But again, he didn't show you the full testimony.

He was asking her questions about reverse engineering for purposes of copying, and she said: No, we did not do that. He took that testimony out of context. It, of course, is irrelevant in any event to

whether Dr. Li lied to the Patent Office.

Remember, to invalidate the patent and to take it away from Dr. Li, you have to have an abiding conviction that she intentionally lied to the Patent Office. The evidence is just not there.

Now, as Dr. Perryman reminded us a few days ago, the Fourth --

THE COURT: Mr. Durst, if you can wrap up.

MR. DURST: I will.

The jury system is very important to our system, both to hold people accountable, which we ask that you do for Straumann, and also to clear the name of people who have done nothing wrong.

Align has competed fairly, and we ask that you return a verdict in favor of Align.

Thank you.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Durst.

Mr. Durst, could you take that down?

MR. DURST: I will.

THE COURT: Thank you, sir.

Ladies and gentlemen of the jury, I think what we're going to do is the following. I'd like you to retire to the jury room and do one thing before you

go home, which is please pick your jury foreperson and write it down on a note. I prefer it be someone whose handwriting is legible, but I don't control that.

So if you will pick your foreperson, hand the note to Bob, and then you'll be free to go for the day because you can't begin to deliberate tomorrow until you've picked a foreperson. And I'm worried some of you might get here and all that.

So here are the new instructions which, first, you still can't discuss the case with each other until tomorrow morning when you're back and when you get back tomorrow until all eight of you are in the room. Please don't discuss anything about the trial.

Number two, once you're back tomorrow, you will not have access -- you'll be sequestered. You won't have access to your phones.

So if one of you have a problem because of, you know, you need to get in touch with someone, again, if you'll let Bob or whoever's sitting outside know, we'll -- I'll bring you in the chambers or something and we'll take care of it if you really have to communicate with someone.

Oh, thank God I have great staff. I've not -- I've not finished the charge. Let me do that. It'll be very quick.

I'm on Page 93.

It is now your duty to deliberate, which you'll begin tomorrow morning, and consult with one another in an effort to reach a verdict.

Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.

During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong, but do not give up on your honest beliefs because others think differently or just to finish the case.

Remember at all times you are the judges of the facts.

You've been allowed to take notes during the trial. Any notes you took during the trial are not evidence. They are only aids to memory. If your memory differs from your notes, rely on your memory, not your notes. They are not evidence.

If you did not take notes, rely on your independent recollection of the evidence. Do not be unduly influenced by the notes of other jurors. Notes are not entitled to a greater weight than the recollection and impression of each of you about the evidence.

When you go -- I always ad-lib a little bit. You can take the charge with you. The verdict form will be waiting for you in the morning to begin working on. You're going to pick a foreperson as soon as we break.

Your verdict must be unanimous. Once you've reached a unanimous verdict, your jury foreperson must fill out the answers to the written questions on the verdict form, sign it, and date it.

Answer each question in the verdict form from the evidence and the facts as you find them. Do not decide who you think should win and answer questions to reach a result. Your answers must be unanimous.

After you've concluded your service and I've discharged you, I will discuss my -- how you can handle discussions about what happened in -- during the trial.

If you need to communicate with me during the deliberations, then the jury foreperson and only the jury foreperson is permitted to write a note and hand it to one of the CSOs, who will get it to me, and I will give you an answer to whatever question you might have written.

When you send a note, please do not in

any way indicate where you are at in terms of, like, say two of us feel one way or, you know, we're whatever. Until I get the final note from the jury foreperson that says "we have a unanimous verdict," the world should never have any idea where you're at on any issue as you deliberate. That's exclusively the eight of you's province.

And of course the same instructions apply tonight. Don't discuss the case. Don't do any research. And please don't go on social media about the case.

So with that, I will dismiss you to go back to the jury room. We will be bringing lunch in for you tomorrow. My understanding is it will be here around 11:00. So you are dismissed.

Please go pick a jury foreperson. Let -- hand the note to Bob with respect to who it is, and then you are free to go for the day.

THE BAILIFF: All rise.

(Jury exited the courtroom.)

THE COURT: Thank you. You may be seated.

Okay. Yes, sir.

MR. TUBACH: Just one logistical issue. In our haste to pass out the instructions, they had

included the verdict form. And so it would be good if maybe one of the marshals or someone could go in and remove those different verdict forms so that they don't all have different ones. We didn't realize that we were supposed to hand that out to the jury.

THE COURT: We will -- one of the clerks will do that once --

MR. TUBACH: Thank you very much. Appreciate that.

THE COURT: Yes, sir.

MR. NASH: I was just going to let you know one of the jurors just handed one of them to us. We didn't communicate other than that, but it's a verdict form.

THE COURT: Okay. Very good. You can just throw it away.

Now, what I'd like for the -- those of you who are the lawyers on this side of the bar, if you would just remain where you are until we get the note who the foreperson is, which hopefully will be quick. I certainly encouraged quick.

And then as soon as that's done, you'll be dismissed. The jury told me they would like to come back tomorrow morning at 9:00 -- start at 9:00. So for tomorrow --

05:26 This doesn't need to be on the record.

05:28 (Off-record discussion.)

05:28 THE COURT: I can go back on the record.

05:28 I thought that the closing arguments were outstanding. And so I didn't expect any less. I did not -- which is rare, I did not regret giving you the 45 minutes per side, which I usually do.

05:28 And so y'all have a good evening. Enjoy Waco. And you certainly deserve a break tonight. So we'll see you tomorrow.

05:29 (Recess taken.)

05:30 THE COURT: I have a Jury Note No. 1. The foreman is Charles Cox. I will sign it now.

05:30 I just want to make sure -- and this should be on the record because I just want to make sure with respect to the verdicts -- the verdict form, do -- was what you gave to Jen a perfect version of the verdict, or are we waiting -- do -- because they're not -- they won't have looked at it tonight. So make sure that we have -- y'all make sure that we have the verdict form you all will want them to have.

05:31 MR. DURST: Okay.

05:31 THE COURT: And we will have it -- they only get one. We'll take whatever's in their notebooks out. They only get one verdict form. So whatever you

05:31 give to us -- you can do it tonight or tomorrow morning, whatever, they just need to have it in there by 9 o'clock.

MR. DURST: Perfect.

THE COURT: Okay?

MR. MUELLER: Thank you, Your Honor.

(Hearing adjourned.)

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 12th day of July 2026.

/s/ Kristie M. Davis
KRISTIE M. DAVIS
Official Court Reporter
PO Box 20994
Waco, Texas 76702
(254) 666-0904
kmdaviscsr@yahoo.com

05:31