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

3 ALIGN TECHNOLOGY, INC. *
* July 1, 2026
4 VS. *
* CIVIL ACTION NO. 6:24-CV-187
5 CLEARCORRECT OPERATING, *
LLC, ET AL. *
6

BEFORE THE HONORABLE ALAN D ALBRIGHT
7 JURY TRIAL PROCEEDINGS
Volume 6 of 7
8

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ALIGN – EXHIBIT 2046
ClearCorrect Operating, LLC. v. Align Technology, Inc. IPR2025-00820

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17 Proceedings recorded by mechanical stenography,

18 transcript produced by computer-aided transcription.

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08:57 1 (Hearing begins.)
08:58 2 THE BAILIFF: All rise.
08:58 3 THE COURT: Please remain standing for
08:58 4 the jury.
08:58 5 (Jury entered the courtroom.)
08:58 6 THE COURT: Thank you. You may be
7 seated.
08:58 8 Mr. Mueller, as I recall, you rested
08:58 9 yesterday, correct?
08:58 10 MR. MUELLER: That's correct, Your Honor.
08:58 11 THE COURT: Okay. Does the plaintiff
08:58 12 have any witness?
08:58 13 MR. TUBACH: Oh, yes, Your Honor. I
08:58 14 think we were in the middle of an examination before we
08:58 15 got to break for the day.
08:58 16 DIRECT EXAMINATION CONTINUED
08:58 17 BY MR. TUBACH:
08:59 18 Q. Good morning, Dr. Knittel.
08:59 19 A. Good morning.
08:59 20 Q. Welcome back. Just to reorient us to where we
08:59 21 were when we stopped, we had been through the discount
08:59 22 programs that Dr. Perryman had talked about. We had
08:59 23 been through the contracts that Dr. Perryman talked
08:59 24 about.
08:59 25 And again, I believe your testimony was, and

08:59 1 you heard this from Dr. Perryman, that Straumann and
08:59 2 ClearCorrect are not seeking any damages relating to
08:59 3 either of those, either of that conduct, correct?
08:59 4 A. Correct.
08:59 5 Q. So I want to turn to the iTero scanner now,
08:59 6 which is the third --
08:59 7 MR. TUBACH: If we could pull up
08:59 8 PDX-9.16, please.
08:59 9 BY MR. TUBACH:
08:59 10 Q. So the first two we talked about. We talked
11 about those yesterday.
08:59 12 So today I want to focus on the iTero scanner.
08:59 13 Now, we've heard a lot about the iTero scanner. I want
08:59 14 to ask you a question about that.
08:59 15 First, did you hear Dr. Perryman testify that
09:00 16 Align does not accept scans from other scanner
09:00 17 companies?
09:00 18 A. I did.
09:00 19 Q. Okay. And what did you conclude, if anything,
09:00 20 about how Align's scan policy accepts -- impacts other
09:00 21 aligner companies?
09:00 22 A. Well, Align's scanner policy actually leads to
09:00 23 orders of other aligners. Yes, orders of other
09:00 24 aligners.
09:00 25 Q. Okay. And are there any procompetitive

09:00 1 reasons why Align would accept scans from its own
09:00 2 scanner but not accept scans from any other scanners
09:00 3 potentially?
09:00 4 A. There are.
09:00 5 Q. And what would -- give -- explain that to us.
09:00 6 A. Well, there's at least two.
09:00 7 The first is that it would take resources away
09:00 8 from Align. So they have to qualify other scanners.
09:00 9 They could use those resources for other potential uses
09:00 10 that are better for the consumer. For example, they
09:00 11 could apply those resources to making their own scanner
09:00 12 better or making the process of ordering Invisalign
09:01 13 from their own scanner easier.
09:01 14 The second is that if you're going to accept
09:01 15 scans from another scanner, you're kind of forced to
09:01 16 accept the quality of those scans. So if that other
09:01 17 scanner doesn't have as high a quality as your own
09:01 18 scanner, what that might lead to is you build some
09:01 19 clear aligners based on a poor scan. That is going to
09:01 20 negatively affect the consumer.
09:01 21 And that's especially important in this case
09:01 22 because the consumer likely only remembers the brand
09:01 23 name of the aligner and not the scanner. They're not
09:01 24 going to go back in time and blame an Ormco scanner for
09:01 25 their poor experience. They're going to see that they

09:01 1 are putting an Invisalign in their mouth and blame
09:01 2 Invisalign.
09:01 3 So the reputation risk associated with
09:01 4 accepting scans from other scanners can be quite large.
09:01 5 Q. So -- and have we heard -- you've sat through
09:02 6 some of this trial. Have you heard any evidence of any
09:02 7 poor-quality scanners out there?
09:02 8 A. I have.
09:02 9 Q. And who's that?
09:02 10 A. Well, we heard evidence that the --
09:02 11 Straumann's Virtuo Vivos scanner led to poor-quality
09:02 12 scans.
09:02 13 Q. And does it make business sense for Align to
09:02 14 accept digital scans only from the iTero?
09:02 15 A. It certainly does because of that reputational
09:02 16 risk that I just discussed and the -- and the resources
09:02 17 that would be required to accept or qualify another
09:02 18 scanner.
09:02 19 Q. Well, so if Align is concerned potentially
09:02 20 about quality of scans, why does it still accept -- why
09:02 21 would it still accept PVS impressions, which it does,
09:02 22 right?
09:02 23 A. It does accept PVS impressions. You know,
09:02 24 that had been the gold standard for decades in the
09:02 25 industry.

09:02 1 I think another reason they continue to accept
09:02 2 those is in -- you know, for very small practices, it
09:02 3 might not make sense to buy a scanner, especially in
09:03 4 rural communities where you're only seeing a few
09:03 5 patients a year. So leaving open the PVS option
09:03 6 benefits those smaller practices.
09:03 7 Q. So -- and do other companies have -- that sell
09:03 8 aligners also make scanners, some?
09:03 9 A. Many of them.
09:03 10 Q. And you've heard -- we've heard testimony that
09:03 11 some of them accept scans from other companies?
09:03 12 A. Yes.
09:03 13 Q. And so what does that tell you about whether
09:03 14 Align should or shouldn't have to accept a scan from
09:03 15 another company?
09:03 16 A. Well, Align -- Align has their business
09:03 17 strategy. Other companies have a different business
09:03 18 strategy. It's kind of how we like markets to provide
09:03 19 options to the consumer.
09:03 20 Q. Okay. So we've now been talking about the
09:03 21 process of how Align decides what scans to accept to
09:03 22 make its own product. I want to now turn to something
09:03 23 different, which is -- of the iTero, the iTero system
09:03 24 itself.
09:03 25 We've heard testimony about moats, many photos

09:04 1 of a moat here in the trial. And I want to ask you, as
09:04 2 an economist, what does a moat mean to you?
09:04 3 A. Yeah. A moat is a classic business school
09:04 4 term. A moat literally means any business advantage.
09:04 5 Anything that gives one product an advantage over their
09:04 6 competitors.
09:04 7 Q. And do you know who is at least reputed to
09:04 8 have first coined the term "moat" in connection with
09:04 9 businesses?
09:04 10 A. I do. Yeah.
09:04 11 Q. Who's that?
09:04 12 A. The term "moat" -- the person widely credited
09:04 13 with coming up with that term or using that term in a
09:04 14 business context is Warren Buffett, the famous
09:04 15 investor. What is he called, the Oracle of Omaha.
09:04 16 He used it first in 1986. So in a shareholder
09:04 17 letter, he was first to use the term "moat." And he
09:04 18 actually used it in connection to GEICO, the insurance
09:04 19 company. And the context was that their moat was their
09:05 20 cost advantage.
09:05 21 So they had lower costs than other insurance
09:05 22 companies, and he said that that created a moat around
09:05 23 GEICO.
09:05 24 Q. So we've also seen here in court a 2013
09:05 25 document that says an iTero customer is a locked in

09:05 1 Invisalign customer. They put this document up on the
09:05 2 screen many times.
09:05 3 Do you recall that document?
09:05 4 A. I do.
09:05 5 Q. Did you analyze iTero data to figure out
09:05 6 whether iTero's customers are in fact locked into
09:05 7 Invisalign?
09:05 8 A. I did.
09:05 9 Q. And what did you find?
09:05 10 A. Yeah. So we actually have data on whether or
09:05 11 not iTero customers are ordering third-party aligners,
09:05 12 in particular ClearCorrect. And we find that they do.
09:05 13 So.
09:05 14 MR. TUBACH: Let's look at PDX-9.17.
15 BY MR. TUBACH:
09:05 16 Q. And so what is this graphic telling us?
09:05 17 A. Well, this cartoon just is underscoring the
09:05 18 point that if you own an iTero scanner, you can use
09:05 19 that scanner to order other clear aligners including
09:06 20 ClearCorrect but any of the others as well.
09:06 21 Q. And did you look to see whether doctors in
09:06 22 fact use this iTero -- not this one but the iTero -- to
09:06 23 order ClearCorrect aligners?
09:06 24 A. I did.
09:06 25 Q. And what did you find?

09:06 1 A. Yeah. So we find that --
09:06 2 MR. TUBACH: Why don't we put up the
09:06 3 Document 9.18?
4 BY MR. TUBACH:
09:06 5 Q. Sorry to interrupt, Dr. Knittel. Please go
09:06 6 ahead.
09:06 7 A. Yeah. So this is another line graph tracking
09:06 8 the percentage of ClearCorrect digital orders coming
09:06 9 from an iTero. So you take all the ClearCorrect orders
09:06 10 coming from a scanner and what percentage of those
09:06 11 orders used an iTero.
09:06 12 So you see in 2020, that percentage was a
09:06 13 little bit less than 10 percent. But by 2025, the last
09:06 14 year we have data, over 20 percent of all ClearCorrect
09:06 15 digital orders are coming from an iTero.
09:06 16 Q. Now, what data did you construct to create
09:07 17 this chart? Was this data that came from -- that came
09:07 18 from Straumann and ClearCorrect?
09:07 19 A. Yeah. This is data that they created and
09:07 20 provided for this case.
09:07 21 MR. TUBACH: Let's look at PTX-694, if we
09:07 22 could, Mr. Smith.
23 BY MR. TUBACH:
09:07 24 Q. What is this?
09:07 25 A. It's a spreadsheet. So this has the year.

09:07 1 You can see the year starts at 2015, ends in 2025.
09:07 2 The middle column is the number of submissions
09:07 3 in that year.
09:07 4 And then the third column is the important
09:07 5 one. That's the -- what's the scanner attributed to
09:07 6 that -- those -- those submissions. So that first
09:07 7 line, for example, is saying in 2015, 2,499 submissions
09:07 8 were created by the CEREC scanner.
09:07 9 Q. And so you can see that happens for 2016, '17,
09:07 10 all the way to 2025 there in the middle.
09:08 11 Those are all for CEREC, right?
09:08 12 A. Correct.
09:08 13 MR. TUBACH: And then if you scroll up to
09:08 14 the -- yeah. Thank you. Right there.
15 BY MR. TUBACH:
09:08 16 Q. So then the next line is 2015 to 2025, and
09:08 17 those are all for iTero?
09:08 18 A. That's correct.
09:08 19 Q. I see.
09:08 20 And then if you scroll down further, this is
09:08 21 repeated, basically, for other scanners and for PVS
09:08 22 impressions?
09:08 23 A. Yes.
09:08 24 MR. TUBACH: Move to admit PTX-694.
09:08 25 MR. MUELLER: No objection, Your Honor.

09:08 1 THE COURT: Admitted.
09:08 2 MR. TUBACH: So back to PDX-9.18.
09:08 3 Actually, no. Let's go to another exhibit. JTX-060.
09:08 4 Let's put that up, please.
09:08 5 BY MR. TUBACH:
09:08 6 Q. Now, we've seen this document in court a few
09:08 7 times. Mr. Straumann's counsel has put it up.
09:08 8 You had this document, right, as part of
09:08 9 your -- part of the work that you did here?
09:08 10 A. Yes.
09:08 11 Q. Why did you not use this chart to help create
09:09 12 the graph that we saw?
09:09 13 A. Yeah. So a few reasons. First, a few reasons
09:09 14 why this is -- would be unreliable. I think the -- one
09:09 15 of the biggest is if you look at that first row,
09:09 16 there's not even a name associated with that. So we
09:09 17 don't know what generated those. Should I give them to
09:09 18 iTero? Should I give them to some other scanner? And
09:09 19 that's a large number. So it's hard to ignore that
09:09 20 fact.
09:09 21 Another reason is if you looked at -- now go
09:09 22 to the bottom row. It just says "existing model."
09:09 23 Again, I don't know. Is that the iTero? Is that
09:09 24 another scanner?
09:09 25 And then less important but certainly pointing

09:09 1 to unreliability, there's something called a Stone
09:09 2 model, and I've certainly never seen that scanner in
09:09 3 the record.
09:09 4 Q. Okay. And what about, say -- let's look up
09:09 5 and down. If you look at the total number of scans
09:10 6 here, let's say for 2023, does this chart say that
09:10 7 there are 169,336 scans?
09:10 8 A. Yeah. That's another red flag. So this is
09:10 9 supposed to represent the number of orders from
09:10 10 ClearCorrect. Right? And we know in 2023,
09:10 11 ClearCorrect only had 26,000 orders. So that's such a
09:10 12 large disconnect between the number of orders and the
09:10 13 number of scans.
09:10 14 Q. So it's your conclusion that this document,
09:10 15 JTX-060, was not reliable?
09:10 16 A. Correct.
09:10 17 Q. That's why you relied on PTX-694?
09:10 18 A. That's right.
09:10 19 Q. Okay. Now, let's go --
09:10 20 MR. TUBACH: The graph that we've seen,
09:10 21 PDX-9.18, if we can pull that up.
22 BY MR. TUBACH:
09:10 23 Q. Did you -- this is data that came from
09:10 24 ClearCorrect and Straumann, right?
09:10 25 A. That's correct.

09:11 1 Q. Okay. And did you look at any internal Align
09:11 2 data to see whether this was consistent or inconsistent
09:11 3 with what we were seeing internally within Align?
09:11 4 A. We did.
09:11 5 Q. And what did you find?
09:11 6 A. So for Align, we actually see for every doctor
09:11 7 that has an iTero, the number of scans used to order
09:11 8 Invisalign directly, the number of scans that create
09:11 9 what's called an iRecord scan. And the iRecord scan
09:11 10 contains the STL file. And then the number of scans
09:11 11 that are used to do restorative care.
09:11 12 And a third of all scans that come out of an
09:11 13 iTero are iRecord scans. So that's consistent with the
09:11 14 fact that the doctor is creating an iRecord scan to
09:11 15 order another clear aligner.
09:11 16 Q. Let's make sure we understand this. So you
09:11 17 looked at all the scans that happened with an iTero
09:11 18 over time?
09:11 19 A. That's right.
09:12 20 Q. And of all of those, 33 percent were scans
09:12 21 that resulted in an STL file?
09:12 22 A. Correct.
09:12 23 Q. Now, based on this data and the other data
09:12 24 that you looked at, would you consider the iTero to be
09:12 25 an open system or a closed system?

09:12 1 A. Well, it's obviously an open system.
09:12 2 Q. Do you have any opinion about whether the
09:12 3 process for ordering other aligners using the iTero is
09:12 4 blocking competition?
09:12 5 A. Well, the data tells us it's obviously not.
09:12 6 MR. TUBACH: All right. Let's look at
09:12 7 PDX-9.9 just to reorient ourselves.
8 BY MR. TUBACH
09:12 9 Q. So we've now looked at all three buckets of
09:12 10 conduct here. And I'd like to ask you some opinions
09:12 11 about Dr. Perryman's view that Straumann has suffered
09:12 12 injury and damages.
09:12 13 MR. TUBACH: Let's look at PDX-9.20, if
09:12 14 we could.
09:12 15 BY MR. TUBACH:
09:13 16 Q. And is it your -- you heard Dr. Perryman
09:13 17 testify, correct?
09:13 18 A. Yes.
09:13 19 Q. Do you agree with his opinion that
09:13 20 ClearCorrect and Straumann have been injured or
09:13 21 suffered damages from anything Align has done?
09:13 22 A. I do not.
09:13 23 Q. I'd like to turn to Dr. Perryman's analysis
09:13 24 here. All of Dr. Perryman's damages, as I understand
09:13 25 his testimony, you correct me if I got this wrong, are

09:13 1 based on the -- what he views as a difficulty of
09:13 2 exporting scans from an iTero to order other clear
09:13 3 aligners; is that right?
09:13 4 A. That's correct.
09:13 5 MR. TUBACH: Now, let's pull up DDX-8.78,
09:13 6 if we could, sir.
09:13 7 BY MR. TUBACH:
09:13 8 Q. Now, this is a slide that Straumann used
09:13 9 during Dr. Perryman's direct examination, right?
09:13 10 A. It is.
09:13 11 Q. And I'd like to look at that first bucket, the
09:13 12 doctors who previously purchased ClearCorrect and
09:14 13 Invisalign.
09:14 14 And who are the doctors in that first bucket?
09:14 15 So it explains it somewhat, but who are those?
09:14 16 A. Yeah. Those are doctors that -- where he sees
09:14 17 that they're ordering both ClearCorrect and Invisalign.
09:14 18 Q. Okay. And let's start with some basics.
09:14 19 MR. TUBACH: And we can take this slide
09:14 20 down.
21 BY MR. TUBACH:
09:14 22 Q. Let's start with some basics. For the doctors
09:14 23 who bought both Invisalign and ClearCorrect, did they
09:14 24 buy relatively more Invisalign than ClearCorrect after
09:14 25 they got an iTero scanner?

09:14 1 A. They did.
09:14 2 Q. Okay. And do you agree with Dr. Perryman that
09:14 3 the export process is the reason why they bought
09:14 4 relatively more Invisalign than ClearCorrect?
09:14 5 A. I do not.
09:14 6 Q. Why not?
09:14 7 A. So Dr. Perryman establishes that for that
09:14 8 group, for doctors that were -- are ordering Invisalign
09:14 9 and ClearCorrect, they get an iTero, and it's certainly
09:14 10 the case that after they get an iTero, they start to
09:15 11 order more Invisalign.
09:15 12 But Dr. Perryman just attributes that increase
09:15 13 to the export process. He doesn't have data to suggest
09:15 14 or tell us that that's the export process. And I can
09:15 15 think of at least two other reasons why we would see
09:15 16 that increase in the data that is -- that is not the
09:15 17 export process.
09:15 18 MR. TUBACH: Well, let's look at PDX-. --
09:15 19 9-22.
20 BY MR. TUBACH:
09:15 21 Q. Here's a cartoon we have.
09:15 22 Can you explain to us, using this cartoon,
09:15 23 what you mean?
09:15 24 A. Yeah. So the first -- the first thing an
09:15 25 industrial organization economist would do with that

09:15 1 fact, right -- so I've learned this fact, that doctors
09:15 2 that previously order both clear aligners order more
09:15 3 after the iTero. The first thing I would ask is, well,
09:15 4 why did they buy the iTero, right? That's information.
09:15 5 And the first thing comes to mind is that the
09:16 6 doctor planned to order more iTero (sic) for a
09:16 7 legitimate reason. For example, you could imagine a
09:16 8 doctor has spent -- spends six months testing different
09:16 9 clear aligners, and then after that testing, they
09:16 10 determine Invisalign is the best.
09:16 11 So if they determine that Invisalign was the
09:16 12 best, then they would want to order more Invisalign in
09:16 13 the future. How would they make that as seamless as
09:16 14 possible? They would order it or buy an iTero scanner.
09:16 15 So it's not the export process. It was that
09:16 16 determination prior to buying the scanner that iTero
09:16 17 and Invisalign was the best system.
09:16 18 Q. So you talked about two. So that was one
09:16 19 possibility.
09:16 20 MR. TUBACH: Let's put up PDX-9.23.
21 BY MR. TUBACH:
09:16 22 Q. What's another possibility why we might see
09:16 23 that after the doctor buys an iTero, their purchases of
09:16 24 Invisalign go up relative to ClearCorrect?
09:17 25 A. Yeah. Another reason is something about the

09:17 1 scanner itself. So a doctor buys an iTero scanner, and
09:17 2 then they learn, after they've purchased that scanner,
09:17 3 that the outcome simulator that we heard about in the
09:17 4 treatment planning software is really good.
09:17 5 So they learn it's really good. They're going
09:17 6 to start ordering more Invisalign. That has nothing to
09:17 7 do with the export process. That's the actual software
09:17 8 in the scanner itself that makes Invisalign more
09:17 9 effective for their patients.
09:17 10 Q. And did Dr. Perryman do anything -- did
09:17 11 Dr. Perryman do anything to try to figure out which of
09:17 12 any of these possible explanations might explain why it
09:17 13 is that when you buy an iTero, you end up ordering more
09:17 14 Invisalign and relatively less ClearCorrect?
09:17 15 A. No. He just assumes it's the export process.
09:17 16 Q. So do you agree with his conclusion that this
09:17 17 export process on the iTero is what has caused damages
09:18 18 to Align -- to Straumann and ClearCorrect?
09:18 19 A. I do not.
09:18 20 MR. TUBACH: All right. Let's look at
09:18 21 that second bucket. If we could pull up again --
09:18 22 that's the one. Thank you.
23 BY MR. TUBACH:
09:18 24 Q. Let's look at that second bucket. Doctors who
09:18 25 previously purchased only Invisalign.

09:18 1 So is this a group of doctors who -- has this
09:18 2 group of doctors ever bought a ClearCorrect?
09:18 3 A. No.
09:18 4 Q. And I believe -- so I believe he divided this
09:18 5 group into two buckets; is that correct?
09:18 6 A. Yes.
09:18 7 Q. And what are those two buckets, if you can
09:18 8 explain them?
09:18 9 A. These are doctors that, well, just never
09:18 10 ordered ClearCorrect and then doctors that only order
09:18 11 Invisalign.
09:18 12 Q. Okay. So they've never ordered Invisalign --
09:18 13 sorry. They've never ordered ClearCorrect, and some of
09:18 14 these doctors ordered Invisalign before they got the
09:19 15 iTero?
09:19 16 A. Correct.
09:19 17 Q. And then they buy an iTero?
09:19 18 A. Yes.
09:19 19 Q. And then they keep ordering Invisalign?
09:19 20 A. Correct.
09:19 21 Q. These are the -- these are the Dr. -- the
09:19 22 Dr. Pepper group?
09:19 23 A. That was your analogy.
09:19 24 Q. Okay. And do you agree with his conclusion --
09:19 25 MR. TUBACH: We can take this slide down.

09:19 1 Thank you.
2 BY MR. TUBACH:
09:19 3 Q. Do you agree with his conclusion that
09:19 4 Straumann and ClearCorrect have been injured because
09:19 5 those doctors didn't buy ClearCorrect -- didn't buy
09:19 6 ClearCorrect aligners?
09:19 7 A. I do not.
09:19 8 Q. Why not?
09:19 9 A. Well, the first thing to think about is that
09:19 10 15 percent number that Dr. Perryman and I agree with,
09:19 11 that was estimated using doctors that ordered both
09:19 12 prior to the iTero.
09:19 13 Q. Let's reorient the jury to what that
09:19 14 15 percent is, just so we're all clear.
09:19 15 A. Yeah. So that's after -- after those doctors
09:19 16 buy an iTero scanner, they order 15 percent more,
09:19 17 relatively more Invisalign.
09:19 18 But those are doctors that were ordering both
09:20 19 before. Doctors that never ordered ClearCorrect prior
09:20 20 to buying an iTero, there's no statistical reason to
09:20 21 apply that 15 percent number to that group.
09:20 22 Those doctors that never ordered ClearCorrect
09:20 23 are telling us in the data that they -- they are loyal
09:20 24 to ClearCorrect (sic). There's -- there's just no
09:20 25 statistical justification to apply a result that comes

09:20 1 from a very different group of doctors to that group.
09:20 2 Q. Is there anything you saw in the data that
09:20 3 suggested that that group of doctors, the ones who had
09:20 4 never ordered anything but Invisalign, would have
09:20 5 bought ClearCorrect aligners?
09:20 6 A. No.
09:20 7 Q. Now, are there any other reasons other than
09:20 8 the export process for why a doctor might not want to
09:20 9 buy ClearCorrect?
09:20 10 MR TUBACH: Let's put up PDX-9.24.
09:20 11 Oh, and for this, can we not publish this
09:20 12 to the gallery, please?
13 BY MR. TUBACH:
09:20 14 Q. So what is this -- what is this chart showing
09:21 15 us?
09:21 16 A. So this is data showing us the change in
09:21 17 annual revenues across six different clear aligner
09:21 18 companies.
09:21 19 So we talked about Dentsply Sirona and Ormco
09:21 20 earlier. But now we also have ClearArc, Clarity, and
09:21 21 Angel Aligner. So over the time period of 2019 to
09:21 22 2023, [redacted]
09:21 23 [redacted]
09:21 24 [redacted].
09:21 25 Q. So let me -- let me take a quick detour.

09:21 1 MR. TUBACH: And let's pull up JTX-21, if
09:21 2 we could.
3 BY MR TUBACH:
09:21 4 Q. And is this the chart -- this is a previously
09:21 5 admitted exhibit. Is this a chart that is the basis
09:21 6 for this graph that we were just looking at?
09:21 7 A. Yeah. You're straining my eyes, but yes, this
09:21 8 is -- this is -- there we go.
09:21 9 MR. TUBACH: Okay. And if we could
09:21 10 enlarge just that very first column there that starts
09:22 11 2017 September.
12 BY MR. TUBACH:
09:22 13 Q. The one on -- that we're seeing on the very
09:22 14 right there.
09:22 15 Do you see that?
09:22 16 A. Yes.
09:22 17 Q. So is that --
09:22 18 MR. TUBACH: Can we go back to that?
09:22 19 Thank you.
20 BY MR. TUBACH:
09:22 21 Q. Is this the data that Straumann and
09:22 22 ClearCorrect produced in this case?
09:22 23 A. That's correct.
09:22 24 Q. And what is the first month in 2017 for which
09:22 25 they produced data?

09:22 1 A. September.
09:22 2 Q. September 2017. So we don't have data from
09:22 3 Straumann and ClearCorrect for any months in 2017 other
09:22 4 than from September on?
09:22 5 A. Correct.
09:22 6 MR. TUBACH: Okay. We can take that
09:22 7 down. So let's go back to the -- let's go back to the
09:22 8 chart PDX-9.24.
9 BY MR. TUBACH:
09:22 10 Q. So these companies, these five companies that
09:22 11 are listed on the left, did they have to compete
09:22 12 against Align, the same Align discount programs that
09:22 13 we've heard so much about?
09:22 14 A. Of course.
09:22 15 Q. And did they have to compete against those
09:23 16 Align contract provisions that we've heard about?
09:23 17 A. Yes.
09:23 18 Q. Did they face the same issues, whatever
09:23 19 they've come up with, with respect to the iTero scan
09:23 20 process?
09:23 21 A. Yes. They did.
09:23 22 Q. [redacted]
09:23 23 [redacted]
09:23 24 [redacted]
09:23 25 Q. And what about ClearCorrect?

09:23 1 A. They could not.
09:23 2 Q. Now, what does that tell you as an economist,
09:23 3 sir?
09:23 4 A. Well, they're all facing the same behavior
09:23 5 that ClearCorrect alleges is anticompetitive, [redacted]
09:23 6 [redacted] It
09:23 7 suggests that there's something else going on with
09:23 8 ClearCorrect.
09:23 9 Q. So after all the work you've done in this
09:23 10 case, Dr. Knittel, all the work, what is your view
09:23 11 about whether ClearCorrect and Straumann have suffered
09:23 12 any injury or damages?
09:24 13 A. They have not.
09:24 14 MR TUBACH: Thank you, Your Honor. Pass
15 the witness.
09:24 16 CROSS-EXAMINATION
09:24 17 BY MR. MUELLER:
09:26 18 Q. Good morning, ladies and gentlemen of the
09:26 19 jury. And good morning, Dr. Knittel. Nice to meet
09:26 20 you.
09:26 21 My name is Joe Mueller. May I ask you a few
09:26 22 questions, sir?
09:26 23 A. Of course.
09:26 24 MR. MUELLER: And, Your Honor, may I
09:26 25 approach the witness so that I can use the placard?

09:26 1 THE COURT: Sure.

09:26 2 BY MR. MUELLER:

09:26 3 Q. Dr. Knittel, you just showed this jury this

09:26 4 chart, correct?

09:26 5 A. Yes.

09:26 6 Q. And here, we have change in annual revenues

09:26 7 from 2019 to 2023, correct, sir?

09:26 8 A. Correct.

09:26 9 Q. And in that time period, that four-year time

09:26 10 period, you show [redacted]

09:26 11 [redacted]

09:26 12 [redacted], true?

09:26 13 A. True.

09:26 14 Q. Over here, you have ClearCorrect, and you show

09:26 15 ClearCorrect as having a negative result, or negative

09:26 16 change, I should say, in revenue in this 2019 to 2023

09:27 17 time period, correct?

09:27 18 A. Correct.

09:27 19 Q. Now, we can agree, sir, there's one company

09:27 20 not listed here, and that's Align, right?

09:27 21 A. That's correct.

09:27 22 Q. And Align also was selling clear aligners in

09:27 23 this time period, 2019 to 2023, right?

09:27 24 A. Yes.

09:27 25 Q. So can we add Align to this chart, sir?

09:27 1 A. Sure.
09:27 2 Q. And, sir, the amount that Align's revenues
09:27 3 changed in this time period was over half a billion
09:27 4 dollars, $530 million in total.
09:27 5 You have no reason to dispute that, true?
09:27 6 A. Not at all.
09:27 7 MR. MUELLER: And, Your Honor, may we add
09:27 8 this bar graph to reflect their revenue change?
09:27 9 THE COURT: Sure.
09:27 10 BY MR. MUELLER:
09:27 11 Q. This, Dr. Knittel, is to scale. It's the same
09:27 12 scale as your chart. We've added Align's change in
09:27 13 annual revenues from 2019 to 2023.
09:27 14 And you have no reason to dispute that this is
09:27 15 to scale, do you, Dr. Knittel?
09:28 16 A. No reason.
09:28 17 Q. And so in fact, in that same time period,
09:28 18 Align's revenues were literally off the chart, true?
09:28 19 A. That's fair.
09:28 20 Q. Now, let's go over to this market share chart
09:28 21 that we've looked at a few times over the course of
09:28 22 this trial. And here, we have Dr. Perryman's analysis
09:28 23 of Invisalign versus other clear aligner competitors,
09:28 24 correct?
09:28 25 A. Yes.

09:28 1 Q. Now, sir, Dr. Perryman's conclusion after his
09:28 2 work in this case is that the relevant antitrust market
09:28 3 is doctor-directed clear aligners in the U.S., right?
09:28 4 A. That's correct.
09:28 5 Q. And to be clear, you're not here to contest
09:28 6 the market definition. That's for Dr. Jena, who's
09:28 7 coming next, correct?
09:28 8 A. That's correct.
09:28 9 Q. You're here to say that Align, even if this is
09:28 10 the market, has done nothing anticompetitive, correct?
09:29 11 A. That's correct.
09:29 12 Q. Now, Dr. Perryman's position is that there are
09:29 13 various things that Align is doing -- and let me go
09:29 14 through them -- that are foreclosing competition within
09:29 15 the U.S. market for doctor-directed clear aligners.
09:29 16 That's his position, right?
09:29 17 A. That's his position.
09:29 18 Q. His position is that there's various
09:29 19 activities that Align is using to suppress and
09:29 20 foreclose competition in the U.S. market for
09:29 21 doctor-directed clear aligners, correct?
09:29 22 A. That's his position.
09:29 23 Q. His position is that the what he calls the
09:29 24 iTero lock-in effects, the iTero closed system is one
09:29 25 of those factors. It's his opinion?

09:29 1 A. That's his opinion.
09:29 2 Q. He also takes a view that the exclusivity
09:29 3 provisions in thousands of Align contracts with various
09:29 4 dental service organizations and others are
09:29 5 exacerbating the suppression of competition, right?
09:30 6 A. That's his position. Yes.
09:30 7 Q. He also takes the position that the loyalty
09:30 8 program in this context, as deployed by monopolists, is
09:30 9 helping to maintain their monopoly.
09:30 10 That's his position, right?
09:30 11 A. That's his position.
09:30 12 Q. Okay. You're here to say there's nothing
09:30 13 wrong here, right?
09:30 14 A. I'm here to say that Align's behavior has been
09:30 15 procompetitive.
09:30 16 Q. You're here to say that in fact Align is
09:30 17 acting procompetitively?
09:30 18 A. That's correct.
09:30 19 Q. You're here to say that doctors -- I think you
09:30 20 showed a graphic to the jury -- love it?
09:30 21 A. I didn't have a love graph. I --
09:30 22 Q. Well, let's take a look.
09:30 23 MR. MUELLER: PDX-9.22.
24 BY MR. MUELLER:
09:30 25 Q. Testing options. Doctor on the left. Loves

09:30 1 Invisalign.
09:30 2 And then the next graphic shows the doctor
09:30 3 smiling and buying iTero, and there's a little bubble
4 there.
09:30 5 Do you see what it says?
09:30 6 A. Yes.
09:30 7 MR. MUELLER: Let's blow that up.
8 BY MR. MUELLER:
09:31 9 Q. What's it say?
09:31 10 A. Well, it says, "I love Invisalign." Yes.
09:31 11 Q. "I love Invisalign" with a heart, and "I'm
09:31 12 ordering an iTero 2." Right?
09:31 13 A. Correct.
09:31 14 Q. So here, we have what appears to be a
09:31 15 love-struck doctor who loves Invisalign and is ordering
09:31 16 an iTero 2, right?
09:31 17 A. That's correct.
09:31 18 Q. And then if we go back, orders more Invisalign
09:31 19 and less ClearCorrect, true?
09:31 20 A. Yes. That's the cartoon. Yes.
09:31 21 Q. And so in the cartoon you showed the jury a
09:31 22 few minutes ago, everyone loves what's happening here,
09:31 23 true?
09:31 24 A. Well, there's one doctor in the cartoon. Yes.
09:31 25 Q. Dr. Knittel, that's what you showed the jury

09:31 1 just a few moments ago, right?
09:31 2 A. Well, I'm just confused with "everyone."
09:31 3 Q. Okay. You're saying that there are a
09:31 4 significant number of doctors that have emotions you
09:31 5 showed the jury just a few moments ago?
09:31 6 A. Yes.
09:31 7 Q. Okay. So you're saying a significant number
09:31 8 of doctors love this situation and think it's just
09:31 9 fine, correct?
09:31 10 A. I think that that term is consistent with the
09:32 11 data.
09:32 12 Q. And, Dr. Knittel, your opinion to this jury is
09:32 13 what we see here on this chart is a healthy,
09:32 14 well-functioning market, true?
09:32 15 A. I didn't provide that opinion.
09:32 16 Q. And so you're not willing to go so far as to
09:32 17 say this is a healthy, well-functioning market because,
09:32 18 Dr. Knittel, the truth is it's not?
09:32 19 A. That's not fair.
09:32 20 Q. All right. Well, let's get into it.
09:32 21 The first type of misconduct or
09:32 22 anticompetitive activity that Dr. Perryman identified
09:32 23 was Align's activities with respect to the iTero
09:32 24 scanner, correct?
09:32 25 A. That's a different order. But yes. Sure.

09:32 1 Q. And, sir, you would agree with me that today,
09:32 2 today, the only digital scanner for intraoral scanners
09:32 3 accepted by Align is iTero?
09:32 4 A. There's two legacy scanners that they still
09:33 5 accept, but --
09:33 6 Q. And those are legacy, meaning old. They've
09:33 7 been either decommissioned or they soon will be, true?
09:33 8 A. That's correct.
09:33 9 Q. And so of the scanners that are currently
09:33 10 being sold on the market, the only digital scanner, the
09:33 11 only one accepted by Align is iTero, correct?
09:33 12 A. That's accurate.
09:33 13 Q. Now, that has led to, led to the vast majority
09:33 14 of doctors who prescribe clear aligners purchasing an
09:33 15 iTero, right?
09:33 16 A. I'm trying to -- I'm sorry. I'm just trying
09:33 17 to think through the data. You used the term "vast
09:33 18 majority."
09:33 19 Q. Let's put it this way -- we'll start with
09:33 20 this. A substantial majority of the doctors who
09:33 21 prescribe clear aligners today have an iTero, right?
09:33 22 A. I believe that's the case. Yes.
09:33 23 Q. And they do because Align says you need to
09:33 24 have an iTero if you want access to Invisalign, true?
09:34 25 A. That's not correct.

09:34 1 Q. Okay. Well, let's see what -- we're going to
09:34 2 get into what Align intended through this policy.
09:34 3 But we can agree the majority of the scanners
09:34 4 used for clear aligners in the U.S. today, today, are
09:34 5 iTeros, correct?
09:34 6 A. I believe that's the case.
09:34 7 Q. Now, Dr. Knittel, you have no opinion on
09:34 8 whether Align's scan acceptance policy has caused it to
09:34 9 sell more iTero scanners than it would have without
09:34 10 that policy, right?
09:34 11 A. Could you repeat that? I'm sorry.
09:34 12 Q. Sure. You do not have an opinion
09:34 13 affirmatively that Align's policy of not accepting
09:34 14 third-party STL scans has caused sales of the iTero to
09:34 15 increase. You have no such opinion, right?
09:34 16 A. That's correct.
09:34 17 Q. And so because you have no opinion, you don't
09:34 18 know the extent to which doctors are buying these
09:34 19 iTeros because they need to to have access to
09:35 20 Invisalign. You haven't studied that, have you?
09:35 21 A. Yeah. I discussed the three reasons, and we
09:35 22 can't differentiate those three reasons.
09:35 23 Q. And you say in fact this is a procompetitive
09:35 24 policy.
09:35 25 Do I have that right?

09:35 1 A. Their policy to only accept scans from the
09:35 2 iTero is a procompetitive.
09:35 3 Q. And you understand there's a number of other
09:35 4 scanners in the field, correct?
09:35 5 A. Yes.
09:35 6 Q. Including the Straumann SIRIOS scanner, right?
09:35 7 A. Correct.
09:35 8 Q. Including others as well, correct?
09:35 9 A. Yes.
09:35 10 Q. Some of those scanners are made by companies
09:35 11 that have been in the dental industry for many decades,
09:35 12 correct?
09:35 13 A. Yes.
09:35 14 Q. Including Straumann, right?
09:35 15 A. Yes.
09:35 16 Q. And your testimony to this jury is that none
09:35 17 of those scanners are good enough from a quality
09:35 18 perspective for Align to use.
09:35 19 Do I have that right?
09:35 20 A. That's not the only reason.
09:35 21 MR. MUELLER: Let's take a look at
09:35 22 DTX-143.
23 BY MR. MUELLER:
09:35 24 Q. It's at Tab 5 in your binder. And take your
09:35 25 time and let me know when you're there, sir.

09:36 1 Are you there, sir?
09:36 2 A. Yes.
09:36 3 Q. This is an e-mail among some Align executives
09:36 4 that we've seen correspondence from over the course of
09:36 5 this trial, including Daniel Stubbs.
09:36 6 MR. MUELLER: This is DTX-143 and,
09:36 7 Your Honor, I offer it.
09:36 8 MR. TUBACH: No objection.
09:36 9 THE COURT: Admitted.
09:36 10 BY MR. MUELLER:
09:36 11 Q. Let's take a look at Mr. Stubbs' e-mail --
09:36 12 MR. MUELLER: I'm sorry, Your Honor. May
13 I help the witness?
09:36 14 (Interruption.)
09:36 15 BY MR. MUELLER:
09:36 16 Q. Take your time, Dr. Knittel. Let me know when
09:36 17 you're there.
09:36 18 THE COURT: I don't think I've ever seen
09:36 19 anyone do that.
09:36 20 (Laughter.)
09:36 21 BY MR. MUELLER:
09:36 22 Q. All right, sir. Do you see this is an e-mail
09:36 23 among Daniel Stubbs, Mu Li, and Daniel Diederich,
09:36 24 right?
09:36 25 A. That's correct.

09:36 1 Q. These are top executives at Align, and we've
09:36 2 seen various e-mails among them over the course of this
09:36 3 trial, correct?
09:36 4 A. Yes.
09:36 5 Q. Let's take a look at what Daniel Stubbs said
09:36 6 on February 23rd, 2020. He said: Between us, between
09:37 7 us, this is all about complacent R&D, NIH, and poor
09:37 8 portfolio/roadmap decisions. It's what I saw in Israel
09:37 9 when I first got here and still has not changed. iTero
09:37 10 has never had to stand on its own and compete in the
09:37 11 real marketplace because it has been protected and
09:37 12 sells primarily because of Invisalign.
09:37 13 Do you see that?
09:37 14 A. Yes.
09:37 15 Q. This was internal executives, right?
09:37 16 A. That's correct.
09:37 17 Q. Writing to each other long before Align filed
09:37 18 this lawsuit, correct?
09:37 19 A. Correct.
09:37 20 MR. MUELLER: Now, let's take a look at
09:37 21 DTX-159.
22 BY MR. MUELLER:
09:37 23 Q. And I want to take you -- this is a Align
09:37 24 strategy, global business strategy team document. And
09:37 25 I want to take you to Page 2, DTX-0159. It's Tab 14 in

09:37 1 your binder. Tab -- sorry. Page 2. And I want to
09:38 2 take you to the section that says "The technology has
09:38 3 progressed" in Paragraph 8, top of the page,
09:38 4 "proliferation of scanners."
09:38 5 MR. MUELLER: I'm sorry. The paragraph
09:38 6 right above that. No. 8. There we go.
7 BY MR. MUELLER:
09:38 8 Q. The number of scanners is growing quickly with
09:38 9 new scanners being launched monthly. Many of the big
09:38 10 dental companies have or are developing their own
09:38 11 scanner, and new companies are building scanners. The
09:38 12 technology has progressed to the point that there is
09:38 13 now a very accurate scanner, Medit, that is low initial
09:38 14 cost and has no ongoing service subscription. It is
09:38 15 quickly gaining market share.
09:38 16 Right?
09:38 17 A. That's what it says. Yes, sir.
09:38 18 Q. Now, this is seven years ago, and at that
09:38 19 time, Align was recognizing new scanners were being
09:38 20 introduced, some by big dental companies, and there was
09:38 21 a very accurate scanner even then, true?
09:38 22 A. Yes.
09:38 23 Q. And yet now, seven years later, Align refuses
09:39 24 to accept scans from any other scanner in the
09:39 25 marketplace other than iTero, correct?

09:39 1 A. That's correct.
09:39 2 Q. Now, they still accept PVS, the putty, right?
09:39 3 A. Yes.
09:39 4 Q. And, sir, you know digital scanners are far
09:39 5 more accurate than putty?
09:39 6 A. Some are.
09:39 7 Q. Sir, digital scanners are far more accurate
09:39 8 than putty, true?
09:39 9 A. Some are.
09:39 10 Q. Some are. At least some are, right?
09:39 11 A. Correct.
09:39 12 MR. MUELLER: Let's take a look at 8.43.
09:39 13 PDX-8.43. This is a slide that Dr. Perryman showed.
14 BY MR. MUELLER:
09:39 15 Q. And you don't contest this data, that
09:39 16 Invisalign's orders by source, iTero has skyrocketed
09:39 17 and putty has plummeted, right?
09:39 18 A. iTeros has gone up and PVS has gone down.
09:39 19 Q. And that's consistent with the industrywide
09:40 20 trend away from putty, right?
09:40 21 A. Yes.
09:40 22 Q. Doctors nationwide have decided to use
09:40 23 intraoral scanners rather than putty, correct?
09:40 24 A. I'm only pausing because you used the term
09:40 25 "nationwide." If we split the nation into rural versus

09:40 1 urban, I wouldn't know if that's the case.
09:40 2 Q. Well, Dr. Knittel, folks in rural areas still
09:40 3 have intraoral scanners. They're not all using putty,
09:40 4 right?
09:40 5 A. Many of them do.
09:40 6 Q. And where intraoral scanners are available,
09:40 7 they are being chosen overwhelmingly by patients and
09:40 8 doctors over putty, correct?
09:40 9 A. That's certainly the case.
09:40 10 Q. And yet today, yet today, Align's policy is
09:40 11 we'll accept the putty and we'll accept our intraoral
09:40 12 scanner but no others, true?
09:40 13 A. That's true.
09:40 14 Q. Now, let's see what the reason for that is.
09:40 15 And first, you agree that as a general matter,
09:40 16 there's a concept in economics called contractual or
09:40 17 operational friction, right?
09:41 18 A. I know what those words would mean. We don't
09:41 19 use that term in economics.
09:41 20 Q. Well, you used -- you certainly used the term
09:41 21 "contractual" -- or let's go to your report, actually.
09:41 22 Pages 28 to 29, Paragraph 52.
09:41 23 You submitted an expert report in this case?
09:41 24 A. I did.
09:41 25 Q. Let's go to Paragraph 52. All right. I'm

09:41 1 sorry. There we go. 52.
09:41 2 In evaluating whether the conduct is capable
09:41 3 of substantial foreclosure.
09:41 4 Do you see that?
09:41 5 A. Yes.
09:41 6 Q. And you understand Dr. Perryman in here saying
09:41 7 there is substantial foreclosure shown in this
09:41 8 marketplace. That's his position?
09:41 9 A. That's his position.
09:41 10 Q. His position is that all these folks in the
09:41 11 basement, every other clear aligner company confined to
09:41 12 the basement area down here is being foreclosed by
09:41 13 Align.
09:41 14 That's his position, right?
09:41 15 A. That's his position.
09:41 16 Q. Now, let's see what you said about what can
09:41 17 cause substantial foreclosure. And by the way,
09:42 18 foreclosure for a case like this doesn't require
09:42 19 100 percent foreclosure, does it?
09:42 20 A. No.
09:42 21 Q. And that means that ClearCorrect doesn't show
09:42 22 they've never made a sale to have an antitrust claim,
09:42 23 correct?
09:42 24 A. That's fair.
09:42 25 Q. Well, and so any suggestion that if some

09:42 1 doctor or dentist somewhere is selling ClearCorrect
09:42 2 means there's no problem here, you know that's wrong?
09:42 3 A. That's fair.
09:42 4 Q. And it's fair because substantial foreclosure,
09:42 5 as Dr. Perryman has articulated it, can be shown where
09:42 6 that companies down here in the basement are being
09:42 7 foreclosed from a substantial segment of the market,
09:42 8 right?
09:42 9 A. They have to be foreclosed.
09:42 10 Q. Foreclosed. And in fact, he has said: And
09:42 11 it's not a small section that these folks in the
09:42 12 basement are being foreclosed from. It's pretty much
09:42 13 the whole clear aligner doctor-directed market in the
14 U.S.
09:42 15 Right?
09:42 16 A. That's what he says.
09:42 17 Q. Okay. Let's see what you said in Paragraph 52
09:42 18 about what conduct is capable of substantial
09:43 19 foreclosure. And I want to go to the bullet point
09:43 20 where you had "Duration, commitment and practical
09:43 21 ability."
09:43 22 So here, this is your own expert report, your
09:43 23 words, true?
09:43 24 A. Yes.
09:43 25 Q. Duration, commitment, and practical ability to

09:43 1 access competing options. The question an economist
09:43 2 like you asks, how long are the restrictions in place,
09:43 3 how easily can customers terminate or bypass them, and
09:43 4 do contractual or operational frictions materially
09:43 5 impede customers' ability to access competing options.
09:43 6 Do you see that, sir?
09:43 7 A. Yes.
09:43 8 Q. And so here, you're saying if there are --
09:43 9 you're asking the question: If there are contractual
09:43 10 or operational frictions -- as you put it, those are
09:43 11 your, your words?
09:43 12 A. Yes.
09:43 13 Q. -- that can materially impede customers'
09:43 14 ability to access competing options.
09:43 15 Right?
09:43 16 A. That's correct.
09:43 17 Q. And so here, what Dr. Perryman is saying is as
09:43 18 an operational matter, the iTero scanner policy, having
09:44 19 difficulty in using those scanners with other competing
09:44 20 options, is creating friction, right?
09:44 21 A. That's what he assumes.
09:44 22 Q. He's saying that the iTero policy is
09:44 23 suppressing competition, foreclosing it, by making it
09:44 24 harder, creating friction in accessing other options
09:44 25 like ClearCorrect, correct?

09:44 1 A. That's his opinion.
09:44 2 Q. Now, his position is in fact consistent with
09:44 3 what Align itself said in internal documents among the
09:44 4 top executives before this lawsuit began, true?
09:44 5 A. I wouldn't agree with that.
09:44 6 Q. Well, let's take a look, DTX-185.
09:44 7 This is an e-mail chain between Joe Hogan, the
09:44 8 top of the food chain, chief executive officer at
09:44 9 Align, right?
09:44 10 A. Yes.
09:44 11 Q. Raj Pudipeddi, the chief of marketing,
09:44 12 correct?
09:44 13 A. I believe that's the case.
09:44 14 Q. April 10th, 2023, right?
09:44 15 A. Yes.
09:44 16 Q. Let's go down to Mr. Pudipeddi's e-mail,
09:45 17 second paragraph: My point is that iTero and
09:45 18 Invisalign are in a closed ecosystem and hence tightly
09:45 19 coupled. If we delink them by offering
09:45 20 interoperability on other scanners, it dilutes our
09:45 21 unique position in my view.
09:45 22 Right?
09:45 23 A. That's what he writes.
09:45 24 Q. Mr. Pudipeddi said, "This is a closed
09:45 25 ecosystem," correct?

09:45 1 A. That's what he writes.
09:45 2 Q. Then Mr. Hogan responded: I have slowly come
09:45 3 to this conclusion too Raj. Thanks. We both cannot be
09:45 4 wrong.
09:45 5 Right?
09:45 6 A. Yes.
09:45 7 Q. Now, you've heard a few witnesses take the
09:45 8 stand and then some folks from the table over here use
09:45 9 the word "open" to describe the iTero system, right?
09:45 10 A. Correct.
09:45 11 Q. But behind closed doors in communications
09:45 12 among themselves before this lawsuit was filed, the CEO
09:45 13 and the chief marketing officer called it a closed
09:45 14 ecosystem, correct?
09:45 15 A. They called the iTero and Invisalign a closed
09:45 16 ecosystem.
09:45 17 Q. And do you agree with the chief executive
09:45 18 officer and the head of marketing that the iTero and
09:46 19 Invisalign are a closed ecosystem?
09:46 20 Yes or no, do you agree with the chief
09:46 21 executive officer and the head of marketing at Align?
09:46 22 A. I disagree.
09:46 23 Q. Let's go to -- so you -- just to be clear, you
09:46 24 disagree with what the CEO and the chief of marketing
09:46 25 said themselves. Do I have that right?

09:46 1 A. Correct.
09:46 2 Q. All right.
09:46 3 MR. MUELLER: Let's go to DTX-1421.
4 BY MR. MUELLER:
09:46 5 Q. Once the majority of doctors had the iTero, I
09:46 6 want to turn to the question of how easy or hard it was
09:46 7 to use it with other clear aligners other than
09:46 8 Invisalign, okay?
09:46 9 Have that question in mind?
09:46 10 A. Yes.
09:46 11 Q. All right. Let's go to DTX-1421. This is an
09:46 12 e-mail chain again among top executives including Joe
09:46 13 Hogan, right?
09:46 14 A. Yes.
09:46 15 Q. Let's go to Page 2, the e-mail from Raphael
09:46 16 Pascaud. It says, "A couple of things," to Joe Hogan
09:47 17 and Chris Puco.
09:47 18 And I want to focus you on the second
09:47 19 paragraph: Whilst customers could potentially use
09:47 20 iTero for submitting a scan to any company today, the
09:47 21 workflow is not simple and we would of course not
09:47 22 support it, facilitate it.
09:47 23 Do you see that?
09:47 24 A. Yes.
09:47 25 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

09:48 1 Invisalign, correct?
09:48 2 A. That's correct.
09:48 3 Q. For Invisalign, you press a button and you're
09:48 4 done, correct?
09:48 5 A. Well, I don't know if I could characterize it
09:48 6 that way.
09:48 7 Q. You don't know one way or the other?
09:48 8 A. Well, you obviously have to do a scan.
09:48 9 There's a more -- there's obviously more steps.
09:48 10 Q. And the point is there's more steps to doing
09:48 11 it with something other than Invisalign, correct?
09:48 12 A. Yes.
09:49 13 Q. Now, you said, No big deal. The doctors can
09:49 14 still use it for STL export, right?
09:49 15 A. That's not a quote, but...
09:49 16 Q. That's your testimony, This is not hard,
09:49 17 correct?
09:49 18 A. Sure.
09:49 19 Q. And let's take a look at how many doctors are
09:49 20 actually doing this.
09:49 21 MR. MUELLER: DTX-208.
22 BY MR. MUELLER:
09:49 23 Q. Here's Mr. Pudipeddi, Mu Li. These are again
09:49 24 top executives at Align, correct?
09:49 25 A. Yes.

09:49 1 MR. MUELLER: Let's go down to the
09:49 2 analytic section, a little bit lower in this e-mail.
09:49 3 Second page. There we go. Analytics.
4 BY MR. MUELLER:
09:49 5 Q. STL export data. I want to focus your
09:49 6 attention on that, and just let's have in mind these
09:49 7 are top Align executives behind closed doors
09:49 8 confidentially discussing how often this STL export is
09:49 9 actually used.
09:49 10 Do you have that in mind, sir?
09:49 11 A. Yes. I do.
09:49 12 Q. So with that in mind, what this says is
09:49 13 "Around," that's that squiggly mark, means around,
09:50 14 correct?
09:50 15 A. Commonly. Yes.
09:50 16 Q. Around .5 percent of doctors use STL feature
09:50 17 globally and in the USA, correct?
09:50 18 A. That's what it says. It's inconsistent with
09:50 19 the data.
09:50 20 Q. Well, it's -- so you're, again, contesting
09:50 21 what the top executives said behind closed doors,
09:50 22 right?
09:50 23 A. Yes.
09:50 24 Q. And how much are you being paid per hour, sir?
09:50 25 A. $1,000.

09:50 1 Q. Now, here, in the document among the
09:50 2 executives, they are saying .5 percent. If you'd help
09:50 3 us with the math, what does .5 percent translate into
09:50 4 doctors, out of 200?
09:50 5 A. That would be one doctor.
09:50 6 Q. One doctor out of 200 is actually using this
09:50 7 STL export process, according to the top executives in
09:50 8 correspondence among them before this litigation,
09:50 9 correct?
09:50 10 A. That's what the e-mail says.
09:50 11 Q. Now, you say -- let's take a look at your
09:50 12 slide, the one in five orders.
09:50 13 MR. MUELLER: It is PDX-9.19. You say --
09:51 14 I'm sorry, I think I had that wrong.
09:51 15 There we go.
16 BY MR. MUELLER:
09:51 17 Q. One in five ClearCorrect digital orders come
09:51 18 from iTeros, right?
09:51 19 A. Correct.
09:51 20 Q. Now, sir, in fact, you looked at data about
09:51 21 submissions, correct?
09:51 22 A. That's correct.
09:51 23 Q. Submissions are not the same thing as an
09:51 24 order, right?
09:51 25 A. That's correct.

09:51 1 Q. An order is when there's an order for a clear
09:51 2 aligner treatment program, correct?
09:51 3 A. Correct.
09:51 4 Q. That's going to result in multiple submissions
09:51 5 over time, true?
09:51 6 A. Usually. Yes.
09:51 7 Q. And so you showed the jury this slide and said
09:51 8 one in five orders come from iTeros, but you had
09:51 9 actually looked at data about submissions, not orders,
09:51 10 correct?
09:51 11 A. Well, that's the data that we have. Yes.
09:51 12 Q. Well, in fact, you have not done an analysis
09:51 13 to try to estimate the number of orders ClearCorrect
09:51 14 obtained from an iTero, correct?
09:51 15 A. No. This is a valid estimate of --
09:51 16 Q. Well, let's take a look at your deposition.
09:51 17 If you could take a look at Page 230, Line 20 to 24.
09:52 18 230 Line 20 to Line 24.
09:52 19 Question: Have you done an analysis to try to
09:52 20 estimate the number of orders ClearCorrect obtained
09:52 21 from an iTero?
09:52 22 Answer: I don't think so.
09:52 23 Were you asked that question, did you give
09:52 24 that answer?
09:52 25 A. Yes.

09:52 1 Q. Let's go back to your slide.
09:52 2 Having not done that analysis, you showed this
09:52 3 jury a slide that said one in five orders come from an
09:52 4 iTero, correct?
09:52 5 A. Correct.
09:52 6 Q. So you showed the jury a slide of an analysis
09:52 7 you hadn't done, true?
09:52 8 A. That's not true.
09:52 9 Q. All right. Let's go to -- well, let me ask
09:52 10 you one more question.
09:52 11 Even under this, this would be 20 percent,
09:52 12 21 percent you say of the orders come from an iTero?
09:52 13 A. Yes.
09:52 14 Q. But over half the scanning equipment are
09:52 15 iTeros, correct?
09:52 16 A. That's correct.
09:52 17 Q. So if in fact the iTero scanning equipment
09:52 18 were an open system that allowed for fair competition,
09:52 19 over half the ClearCorrect orders would come from an
09:53 20 iTero, true?
09:53 21 A. That's not true.
09:53 22 Q. Even though over more than half of the
09:53 23 scanning equipment are iTeros, even under your own
09:53 24 analysis, or I should say your own slide, 21 percent
09:53 25 are coming from an iTero, correct?

09:53 1 A. That's correct.
09:53 2 Q. And, sir, the reason why there's the gap, even
09:53 3 under your own slide, is because the iTero is so much
09:53 4 harder to use with ClearCorrect and every other clear
09:53 5 aligner on the market aside from Invisalign, true?
09:53 6 A. That's not true.
09:53 7 Q. Let's turn to -- oh, one more thing. You know
09:53 8 Dr. Perryman did an event study to quantify the effects
09:53 9 of the iTero -- what he calls the iTero lock-in policy,
09:53 10 right?
09:53 11 A. He did.
09:53 12 Q. He did an event study to quantify the effects
09:53 13 of the iTero study in foreclosing the competition in
09:53 14 the market that we see on this slide right there or
09:53 15 that placard right there, right?
09:53 16 A. That's not correct.
09:53 17 Q. Sir, he did an event study to quantify the
09:54 18 number of sales that ClearCorrect had lost as a
09:54 19 function of the closed system iTero scanner policy,
09:54 20 true?
09:54 21 A. That is not true.
09:54 22 Q. Okay. Dr. Perryman's testimony will stand for
09:54 23 itself.
09:54 24 He did an event study, right?
09:54 25 A. He did an event study.

09:54 1 Q. And, Dr. Knittel, you didn't?
09:54 2 A. I did not.
09:54 3 Q. You did not conduct an event study?
09:54 4 A. I agree with his event study.
09:54 5 Q. Sir, you did not conduct your own event study,
09:54 6 true?
09:54 7 A. Well, we replicated his event study.
09:54 8 THE COURT: Just answer his question.
09:54 9 THE WITNESS: Okay. Sorry.
09:54 10 BY MR. MUELLER:
09:54 11 Q. You did not conduct your own event study,
09:54 12 true?
09:54 13 A. Well, that's untrue because...
09:54 14 Q. You tried to correct, as you put it,
09:54 15 Dr. Perryman's study. You didn't do your own?
09:54 16 A. I would disagree with that.
09:54 17 Q. Okay. Now, Dr. Perryman provided a damages
09:54 18 estimate for the effects of the iTero system on the
09:54 19 number of sales that he says ClearCorrect lost,
09:54 20 correct?
09:54 21 A. That's correct.
09:55 22 Q. You have not provided any alternative to this
09:55 23 jury, true?
09:55 24 A. My alternative is zero.
09:55 25 Q. Right. The only thing you told this jury is:

09:55 1 Nothing to see here. This is just fine. It's a
09:55 2 healthy marketplace, and ClearCorrect should receive
09:55 3 zero. Right?
09:55 4 A. That's correct.
09:55 5 Q. You haven't provided this jury with any
09:55 6 assistance if they conclude this is not fine, this is
09:55 7 not fine, that there's foreclosure happening,
09:55 8 anticompetitive effects by Align.
09:55 9 The only number they have in that
09:55 10 circumstance, if they reach that conclusion, is
09:55 11 Dr. Perryman's, correct?
09:55 12 A. That's fair.
09:55 13 Q. Now, Dr. Perryman said: The harm doesn't end
09:55 14 there. He said: In addition to the effect of the
09:55 15 iTero policy, there's exclusionary contracts.
09:55 16 Correct?
09:55 17 A. That's what he says.
09:55 18 Q. And he said those have harmed ClearCorrect,
09:55 19 right?
09:55 20 A. He does.
09:55 21 Q. He said to be conservative, he's only
09:55 22 quantified iTero, but there is additional harm from the
09:55 23 contracts, true?
09:55 24 A. That's what he says.
09:55 25 Q. And I want -- you said that these contracts

09:56 1 are justifiable because they help prevent bait and
09:56 2 switch.
09:56 3 Do I have that right?
09:56 4 A. Yes.
09:56 5 MR. MUELLER: Let's take a look at
09:56 6 Tab 23, DTX-210. And I want to go to Page 3 of this
09:56 7 document.
8 BY MR. MUELLER:
09:56 9 Q. This is DTX-210. It's Tab 23 in your binder.
09:56 10 If you want to look at the hard copy, whatever's
09:56 11 easier.
09:56 12 Okay. Here, again, we have some -- an e-mail
09:56 13 correspondence of Mr. Hogan and Brad Jergenson, again,
09:56 14 CEO and an executive from Align, right?
09:56 15 A. I don't know who Brad is, but I'll take your
09:56 16 word for it.
09:56 17 Q. Let's go to Page 2. And there's a blog post
09:56 18 which they're e-mailing each other about, and I want to
09:56 19 start with the blog post.
09:56 20 This is a dentist. Do you see? Chad Foster,
09:56 21 right?
09:56 22 A. Yes.
09:56 23 Q. It says: It seems like new clear aligner
09:56 24 alternatives exploded on the market, AAO in Washington,
09:57 25 D.C. I've enjoyed using the big name aligner

09:57 1 product --
09:57 2 And of course that's Invisalign, right, sir?
09:57 3 A. I think that's fair.
09:57 4 Q. -- for many years and still do, but wanted to
09:57 5 explore other options for better value and performance.
09:57 6 Our office currently has about 20 cases going with
09:57 7 Orthocaps from Rocky Mountain Orthodontics --
09:57 8 THE COURT: Mr. Mueller, if you could
09:57 9 slow down just a bit.
09:57 10 MR. MUELLER: I'm sorry, sir.
09:57 11 THE COURT: When you're reading, you go a
09:57 12 little fast.
09:57 13 MR. MUELLER: I apologize.
09:57 14 BY MR. MUELLER.
09:57 15 Q. -- and we have enjoyed the results we have
09:57 16 seen thus far.
09:57 17 Do you see that, sir?
09:57 18 A. I do.
09:57 19 Q. Okay. So here's a doctor saying, I've used
09:57 20 Invisalign and still do but want to explore other
09:57 21 options for better value and performance, right?
09:57 22 A. Yes.
09:57 23 Q. Let's see what Mr. Hogan said about this. And
09:57 24 let's go up the chain here, if we go to the previous
09:57 25 page. And he said: Brad, please let me know if this

09:57 1 doc uses our product and is on Doc locator. If he's on
09:58 2 doc locator, then we should take him off right away.
09:58 3 Let me know what you think.
09:58 4 Do you see that?
09:58 5 A. Yes.
09:58 6 Q. Now, there's no evidence of bait and switch in
09:58 7 that blog post that we just looked at, right?
09:58 8 A. That's fair.
09:58 9 Q. It's a doctor saying, I like Invisalign, I'm
09:58 10 going to continue to use it, but I want to explore some
09:58 11 other options, found one, seems pretty good, right?
09:58 12 A. Yes.
09:58 13 Q. Mr. Hogan's saying, let's get him off doc
09:58 14 locator, right?
09:58 15 A. Yes.
09:58 16 Q. Let's go a little bit further up this e-mail.
09:58 17 Brad Jergenson says: I will have him removed
09:58 18 and ask the team to follow up with him; perhaps we can
09:58 19 help to adjust his thinking.
09:58 20 Do you see that, sir?
09:58 21 A. Yes.
09:58 22 Q. That sounds a bit like a threat, doesn't it?
09:58 23 A. No.
09:58 24 Q. Well, let's keep going. Let's go a little bit
09:58 25 further up. Mr. Hogan says: That would be a good

09:58 1 first move. If not, let's get him off the list. I
09:58 2 think we have to begin to be more active in removing
09:59 3 these docs. Many will say they offer Invisalign if
09:59 4 asked, but these are the same bait-and-switch orthos
09:59 5 that have been stealing patients for years.
09:59 6 Do you see that?
09:59 7 A. Yes.
09:59 8 Q. And, Dr. Knittel, as we just discussed
09:59 9 30 seconds ago, there was no bait or switch here.
09:59 10 There was a doctor exploring another option.
09:59 11 And Align labeled that bait and switch at the
09:59 12 CEO level, right?
09:59 13 A. We don't know that.
09:59 14 Q. Dr. Knittel, you just told me, we agreed
09:59 15 30 seconds ago, that doctor's blog post showed no
09:59 16 evidence of bait and switch, true?
09:59 17 A. What he wrote doesn't.
09:59 18 Q. Dr. Knittel, the blog post showed no evidence
09:59 19 of bait and switch, true?
09:59 20 A. What he wrote does not.
09:59 21 Q. And immediately Joe Hogan says get him off the
09:59 22 doctor finder and starts to lob around accusations of
09:59 23 bait and switch.
09:59 24 That's what the e-mail says, correct?
09:59 25 A. Yes.

09:59 1 MR. MUELLER: All right. Let's take this
09:59 2 down.
3 BY MR. MUELLER:
10:00 4 Q. Next issue. The discount program. You've
10:00 5 heard references to that throughout this trial?
10:00 6 A. Yes.
10:00 7 Q. And Dr. Perryman said that's yet another way,
10:00 8 in addition to iTero, in addition to the thousands of
10:00 9 exclusionary contracts, that Align is trying to
10:00 10 maintain its monopoly position in the market.
10:00 11 That's his position, right, sir?
10:00 12 A. That's his position.
10:00 13 Q. And he says that the Advantage Program is a
10:00 14 barrier to switch and is protecting Align from
10:00 15 competition, correct?
10:00 16 A. That's correct.
10:00 17 Q. His testimony is it's not just an ordinary
10:00 18 discount program offered in a competitive market. We
10:00 19 have here a monopolist trying to maintain a monopoly
10:00 20 and do so by creating a barrier to switch that protects
10:00 21 from competition.
10:00 22 That's his view, right?
10:00 23 A. That's his view.
10:00 24 Q. And it's not just his view; it's Align's view,
10:00 25 isn't it?

10:00 1 A. I don't know about that.
10:00 2 Q. Well, let's take a look. This is DTX-1483.
10:00 3 Global Advantage Reboot, Project Update & Review.
10:00 4 Do you see that?
10:00 5 A. Yes.
10:00 6 Q. Let's go to Page 4. Align project objectives.
10:01 7 So what they were seeking to do with the Advantage
10:01 8 Program, right?
10:01 9 A. Yes.
10:01 10 Q. Third bullet from the bottom: Create a
10:01 11 "barrier to switch" - protect from competition.
10:01 12 Correct?
10:01 13 A. Correct.
10:01 14 Q. Internal document, never meant for this
10:01 15 audience in court. This is ClearCorrect's -- I'm
10:01 16 sorry. This is Align, Align, behind closed doors
10:01 17 saying the Advantage Program is a barrier to switch,
10:01 18 protects from competition, true?
10:01 19 A. It's a barrier to switch, yes.
10:01 20 MR. MUELLER: Let's take this down.
21 BY MR. MUELLER:
10:01 22 Q. A few more questions for you, if we could,
10:01 23 Dr. Knittel.
10:01 24 You say that in addition to everything Align
10:01 25 is doing being okay in your view, right?

10:01 1 A. Yes.
10:01 2 Q. You also say down here in the basement,
10:01 3 ClearCorrect is doing a bad job of fighting for market
10:01 4 share down here in the basement.
10:01 5 True?
10:01 6 A. I don't use the term "basement."
10:02 7 Q. You say ClearCorrect is doing a bad job, and
10:02 8 that's why you showed the jury the graph right next to
10:02 9 you, right?
10:02 10 A. That's fair.
10:02 11 Q. Now, you say that ClearCorrect is not as good
10:02 12 on product quality and service and other
10:02 13 characteristics of a quality competitor, true?
10:02 14 A. I don't know if I ever listed those. I might
10:02 15 have but...
10:02 16 Q. Well, Dr. Knittel, you've been here for the
10:02 17 whole trial?
10:02 18 A. I was not here the first day.
10:02 19 Q. Fair enough.
10:02 20 But you've been here for most of the trial?
10:02 21 A. Yes.
10:02 22 Q. Did you see Mr. Kossol testify?
10:02 23 A. I may have.
10:02 24 Q. He works down the road in Round Rock, and he
10:02 25 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 1 Q. Now, sir, what you're really saying is ignore
10:03 2 this. You're saying let's get a magnifying glass out
10:03 3 and look at the basement and see who's doing better and
10:03 4 worse in the basement.
10:04 5 That's your chart over there, correct?
10:04 6 A. That chart is mine.
10:04 7 Q. And did you hear Dr. Perryman say that the
10:04 8 positions Align is taking in this case is that
10:04 9 ClearCorrect is really less effective, as he put it,
10:04 10 fighting for the scraps down here, right?
10:04 11 A. I heard him say that. Yes.
10:04 12 Q. And what he said is if these anticompetitive
10:04 13 practices were removed, all of these companies in the
10:04 14 basement could compete more effectively, could achieve
10:04 15 scale, right?
10:04 16 A. I believe he said that.
10:04 17 Q. Now, by the way, there was a reference
10:04 18 yesterday to Align cutting their prices somewhat. Did
19 you hear that?
10:04 20 In fact, you said that.
10:04 21 A. Yes.
10:04 22 Q. And you know, sir, you know as a matter of
10:04 23 basic economics, a monopolist will sometimes cut
10:04 24 prices, right?
10:04 25 A. Yes.

10:04 1 Q. And the fact that a monopolist cuts prices
10:04 2 doesn't mean it's not a monopolist, as a matter of
10:04 3 basic economics?
10:04 4 A. As a matter of basic economics, yes.
10:04 5 Q. Okay. Now, a few more things about how good
10:04 6 ClearCorrect is.
10:04 7 MR. MUELLER: Let's take a look at
10:05 8 DTX-0299.
9 BY MR. MUELLER:
10:05 10 Q. I want to -- this is a document that is in
10:05 11 evidence, and I want to go to Page 23.
10:05 12 This is an Align document. See the Align code
10:05 13 at the bottom of the page?
10:05 14 A. Yes. I do.
10:05 15 Q. And do you see it says: User data,
10:05 16 ClearCorrect...came back eerily similar to Invisalign
10:05 17 (March 2017).
10:05 18 Right?
10:05 19 A. Yes.
10:05 20 Q. And it goes on to say that ClearCorrect, in
10:05 21 terms of customer reactions, stacked up very well to
10:05 22 Invisalign.
10:05 23 Do you see that table there in the bottom?
10:05 24 A. Yeah. I'm just orienting myself.
10:05 25 Q. And look at what -- the questions that were

10:05 1 posed in this internal Align presentation: Does this
10:05 2 mean we are a slave to what a doctor recommends?
10:05 3 Do you see that?
10:05 4 A. I do.
10:05 5 Q. And the next line down, the second question
10:06 6 is: How can we when we don't own the patient?
10:06 7 Right?
10:06 8 A. Okay.
10:06 9 Q. So here, we have an internal Align document
10:06 10 showing ClearCorrect is doing extremely well, even as
10:06 11 of then.
10:06 12 And by the way, this is before they introduced
10:06 13 that top quality Zendura FLX material with the
10:06 14 hard-soft-hard. But even before that back in 2017,
10:06 15 Align, Align's own data was showing ClearCorrect
10:06 16 stacked up extremely well with Invisalign, right?
10:06 17 A. That's -- do they use "extremely well"?
10:06 18 Q. And the question they said: Does this mean
10:06 19 we're a slave to what a doctor recommends?
10:06 20 Do you see that?
10:06 21 A. Yes.
10:06 22 Q. Do you think that's appropriate? Don't you
10:06 23 think a company like this should be saying, If a doctor
10:06 24 recommends that a patient use a particular option,
10:06 25 that's up to them?

10:06 1 A. I'm not sure what they even mean by that.
10:07 2 Q. Well, let's go back to the happy doctor you
10:07 3 showed the jury one last time.
10:07 4 A. Yes.
10:07 5 MR. MUELLER: This is PDX -- I'm sorry,
10:07 6 9.21 or 23.
7 BY MR. MUELLER:
10:07 8 Q. This is what you showed the jury, right?
10:07 9 A. Yes.
10:07 10 MR. MUELLER: Let's go to actual
10:07 11 information of what doctors really thought, DTX-309,
10:07 12 competitive metaanalysis, Page 2.
13 BY MR. MUELLER:
10:07 14 Q. Doctor experiences with competitive clear
10:07 15 aligner brands.
10:07 16 Do you see that?
10:07 17 A. Yes.
10:07 18 MR. MUELLER: Let's go to Slide 12.
19 BY MR. MUELLER
10:07 20 Q. And do you see where it says: Relative to
10:07 21 competitors -- middle of the page, right there --
10:07 22 relative to competitors, doctors' views of the Align,
10:07 23 the company, are quite negative, driven by perceptions
10:07 24 that Align cares more about itself than doctors.
10:08 25 Do you see that?

10:08 1 A. I do.
10:08 2 Q. Doctors also still have lingering negative
10:08 3 feelings about the Smile Direct Club relationship,
4 right?
10:08 5 Do you see that?
10:08 6 A. Yes.
10:08 7 Q. Now, by the way, we've heard a little bit of
10:08 8 testimony about the Smile Direct Club, correct?
10:08 9 A. Yes.
10:08 10 Q. That went bankrupt, right?
10:08 11 A. I don't know if I know that.
10:08 12 Q. Did you know Align was an investor in that
10:08 13 company?
10:08 14 A. I might have known that.
10:08 15 MR. MUELLER: Now, let's go to Page 14.
10:08 16 It says at the bottom of the page -- I'm sorry, Slide
10:08 17 13. I misspoke, the one right before.
18 BY MR. MUELLER:
10:08 19 Q. And let's look at Align's status frustration.
10:08 20 This is referring to the Advantage Program.
10:08 21 Do you see that?
10:08 22 A. Yes.
10:08 23 Q. And let's go look at the second sentence:
10:08 24 Some doctors also grow tired of chasing status from
10:08 25 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 1 A. Yes.

10:09 2 MR. MUELLER: Let's go to DTX-308.

3 BY MR. MUELLER:

10:09 4 Q. And again, you showed the jury the smiling

10:10 5 doctor, but actual surveys of doctors within Align's

10:10 6 own files show that doctor perceptions were quite

10:10 7 negative of Align, correct?

10:10 8 A. Well, what you just showed me is of Align.

10:10 9 Yes.

10:10 10 Q. Right.

10:10 11 MR. MUELLER: Let's go to DTX-308.

12 BY MR. MUELLER:

10:10 13 Q. Here's another competitive intelligence update

10:10 14 within Align, correct?

10:10 15 A. Yes.

10:10 16 MR. MUELLER: Let's go to Slide 27,

10:10 17 please.

18 BY MR. MUELLER:

10:10 19 Q. ClearCorrect. This is ClearCorrect's

10:10 20 strengths and weaknesses, right?

10:10 21 A. I would assume so. Yes.

10:10 22 Q. Now, this is from 2020, right?

10:10 23 A. I missed the date when you flashed it. But --

10:10 24 Q. Well, let me show you. There's the date,

10:10 25 March 2020. Let's go back to the other page.

10:10 1 One of the weaknesses -- this is aligner
10:10 2 materials, right?
10:10 3 A. Yes.
10:10 4 Q. That was before Zendura FLX and the
10:10 5 hard-soft-hard was introduced, true?
10:10 6 A. I believe so. Yes.
10:10 7 Q. On the left-hand side, we have attractive
10:11 8 pricing as a strength?
10:11 9 A. Yes.
10:11 10 Q. Efficacy on low stage cases as a strength?
10:11 11 A. Yes.
10:11 12 Q. Easy company to deal with as a strength?
10:11 13 A. Yes.
10:11 14 Q. Made in the USA as a strength?
10:11 15 A. Correct.
10:11 16 Q. And at the bottom, it says: In addition to
10:11 17 the strengths above, many felt an advantage of
10:11 18 ClearCorrect was that it was not Align. These doctors
10:11 19 felt Align had become a greedy and overly aggressive
10:11 20 company that did not care very much about its doctor
10:11 21 providers.
10:11 22 Do you see that, sir?
10:11 23 A. I see that.
10:11 24 Q. And that's from within Align's own files,
10:11 25 correct?

10:11 1 A. Yes.
10:11 2 Q. Align's own analysis, right?
10:11 3 A. Yes.
10:11 4 Q. And, sir, that Align analysis is precisely
10:11 5 consistent with the foreclosure described by
10:11 6 Dr. Perryman, true?
10:11 7 A. Not true.
10:11 8 MR. MUELLER: Your Honor, I have nothing
10:11 9 further for the witness. I pass the witness.
10:11 10 REDIRECT EXAMINATION
10:11 11 BY MR. TUBACH:
10:12 12 Q. Dr. Knittel, I have just a few follow-up
10:12 13 questions for you here.
10:12 14 This chart that Mr. Mueller showed you, it
10:12 15 suggests that Align's market share is going up from 84
10:12 16 to 92 percent.
10:12 17 Do you see that?
10:12 18 A. Yes.
10:12 19 Q. Is that accurate?
10:12 20 A. No.
10:12 21 Q. What has been happening with Align's market
10:12 22 share from 2017 all the way to 2024?
10:12 23 A. Those numbers should be reversed. It went
10:12 24 from 92 to 84.
10:12 25 Q. And in fact, has Align's market share gone

10:12 1 down every single year since 2017?
10:12 2 A. Yes.
10:12 3 MR. TUBACH: Now, let's put up PDX-9.22,
10:12 4 if we could.
5 BY MR. TUBACH:
10:12 6 Q. This is the "I love Invisalign."
10:12 7 A. Correct.
10:12 8 Q. Right?
10:12 9 This is a cartoon that we created, right?
10:12 10 A. Yes.
10:12 11 Q. Is that in fact consistent with the document
10:12 12 that Mr. Mueller just showed you about how doctors feel
10:12 13 about the product Invisalign?
10:12 14 A. It is.
10:12 15 Q. And to be clear, you -- this was just a
10:13 16 possibility about why it is that doctors might order
10:13 17 relatively more Invisalign than ClearCorrect after
10:13 18 buying an iTero, right?
10:13 19 A. Exactly.
10:13 20 Q. And did you -- you weren't suggesting that you
10:13 21 had done analysis to prove that this was why they were
10:13 22 doing it, right?
10:13 23 A. That's right. What was misleading about that
10:13 24 discussion is that this was used to hammer home the
10:13 25 point that the fact that we see an increase in

10:13 1 Invisalign sales after a doctor buys an iTero might
10:13 2 actually be because the doctor has learned something
10:13 3 about the material or about the clear aligners.
10:13 4 Q. And so your testimony providing other possible
10:13 5 reasons, other than just this export process, is to
10:13 6 show that Dr. Perryman hadn't really analyzed why it
10:13 7 was; is that fair?
10:13 8 MR. MUELLER: Objection. Leading,
10:13 9 Your Honor.
10:13 10 THE COURT: Sustained.
10:13 11 BY MR. TUBACH:
10:13 12 Q. Why is it that you provided the jury with this
10:13 13 cartoon and with other explanations -- possible
10:14 14 explanations for why the -- we see a shift towards
10:14 15 Invisalign after a doctor buys iTero?
10:14 16 A. Yeah. And some of that was muddled in our
10:14 17 previous discussion. You know, I do not take issue
10:14 18 with the fact that a doctor that had previously ordered
10:14 19 ClearCorrect and Invisalign, after they buy an iTero,
10:14 20 orders relatively more Invisalign.
10:14 21 The issue at stake is why. And Dr. Perryman
10:14 22 assumes that it's the export process, but there's
10:14 23 nothing in the record to show that. And in fact,
10:14 24 there's at least two other reasons why we might see
10:14 25 that in the data that is not linked to the export

10:14 1 process.

10:14 2 MR. TUBACH: So let's look at DTX-185.

3 BY MR. TUBACH:

10:14 4 Q. Mr. Mueller showed you that document also.

10:14 5 And in particular, the --

10:14 6 MR. TUBACH: If we could go down to

10:14 7 the -- sorry -- up at the first page. My apologies.

8 BY MR. TUBACH:

10:15 9 Q. That -- my point is that iTero and Invisalign

10:15 10 are a closed system. It's in the second e-mail.

10:15 11 He asked you some questions about iTero and

10:15 12 Invisalign as a closed ecosystem and hence slightly

13 coupled.

10:15 14 What is the relation -- how would you explain

10:15 15 this relative to Align accepting policy, accepting

10:15 16 scans from other companies, versus using the iTero to

10:15 17 order other aligners?

10:15 18 A. Yeah. So we talked. You know, Align does not

10:15 19 accept scans from other scanners. But that -- but the

10:15 20 iTero itself, we showed with data, that is used -- that

10:15 21 iTero's used to order other clear aligners.

10:15 22 Q. And in fact, is that the outbound, ordering

10:15 23 other aligners from the iTero, is that what's being

10:15 24 discussed in DTX-185?

10:15 25 A. No.

10:16 1 MR. TUBACH: Let's look at DTX-1483. We
10:16 2 can go to the slide talking about the barriers to
10:16 3 switch that Mr. Mueller talked about.
4 BY MR. TUBACH:
10:16 5 Q. Now, if you could look above all that, what is
10:16 6 that -- what is that all telling us about what the
10:16 7 Advantage Program does?
10:16 8 A. These are points that I was making yesterday
10:16 9 about how these are procompetitive points or
10:16 10 procompetitive attributes of the program.
10:16 11 Q. And when -- you disagreed with counsel for
10:16 12 Straumann that barrier to switch was anticompetitive in
10:16 13 some way?
10:16 14 A. That's right. It's being -- he was trying to
10:16 15 use it as an anticompetitive term. It's similar to
10:16 16 moat. The term "moat," the term "barrier" can be
10:16 17 procompetitive too. If you have a good product, that's
10:16 18 a barrier to switch.
10:16 19 Q. Is that sort of like the GEICO example?
10:17 20 A. Exactly.
10:17 21 Q. And what was GEICO's moat or barrier to try to
10:17 22 stop their customers from going elsewhere?
10:17 23 A. They had lower costs. So they could charge
10:17 24 lower premiums.
10:17 25 Q. So lower prices was the barrier?

10:17 1 A. Effectively. To be completely fair, Warren
10:17 2 Buffett was just talking about their cost structure,
10:17 3 but the implication is they'll pass some of those lower
10:17 4 costs to consumers.
5 Q. Got it.
10:17 6 MR. TUBACH: Let's look at DTX-208.
10:17 7 And this is the chart that refers to the 0.5 percent.
10:17 8 If we could go to that, I believe that's on Page 2
10:17 9 perhaps.
10 BY MR. TUBACH:
10:17 11 Q. Mr. Mueller kept talking about everyone.
10:17 12 Apparently every e-mail written by the company is by a
10:17 13 top executive.
10:17 14 Do you have any idea whether this person named
10:17 15 Jyoti is a top executive or even an executive at all at
10:17 16 Align?
10:17 17 A. I do not.
10:17 18 Q. Now, is this -- wherever -- wherever this came
10:17 19 from, is this consistent with the data you actually
10:18 20 looked at from Align?
10:18 21 A. I have the actual data. This is entirely
10:18 22 inconsistent.
10:18 23 MR. TUBACH: Okay. Let's look at
10:18 24 PTX-3066.
25 BY MR. TUBACH:

10:18 1 Q. Mr. Mueller challenged whether this was a
10:18 2 valid chart, and you suggested it was a valid chart.
10:18 3 And you didn't get an opportunity to explain that on
10:18 4 cross-examination.
10:18 5 So I want to ask you, sir, why do you believe
10:18 6 this is a valid chart?
10:18 7 A. Yeah. So it's true we have data of scans. So
10:18 8 the scans get submitted. Scans create orders.
10:18 9 Multiple scans typically create one order.
10:18 10 This is still an estimate of the number of
10:18 11 orders that come from iTero, and the reason why is as
10:18 12 long as the rejection rate of scans is not appreciably
10:18 13 different across scanners, then -- you know, for
10:19 14 example, suppose for every scanner, five scans creates
10:19 15 one order.
10:19 16 Well, if that was the case, then if you knew
10:19 17 the number of scans, you would know the number of
10:19 18 orders, right? Everybody has the same ratio, so to
10:19 19 speak.
10:19 20 So unless there's a vastly different ratio
10:19 21 across scanners, this is still a valid estimate of the
10:19 22 number of orders. And I've seen nothing in the record
10:19 23 to suggest that that's the case.
10:19 24 Q. And so when you looked at the number of scans,
10:19 25 your best judgment, based on all the data you had, was

10:19 1 that this would also reflect the number of orders --
10:19 2 A. Correct.
10:19 3 Q. -- of ClearCorrect aligners?
10:19 4 A. Correct.
10:19 5 MR. TUBACH: Let's look at DTX-210.
10:19 6 Actually, we don't need to pull up the document.
7 BY MR. TUBACH:
10:19 8 Q. I'll just ask you about it.
10:19 9 You heard some questions from Mr. Mueller
10:19 10 about taking a doctor potentially off doc locator?
10:19 11 Do you recall that?
10:19 12 A. Yes.
10:19 13 Q. What is doc locator?
10:19 14 A. Doc locator is a website that Align runs to
10:20 15 advertise doctors.
10:20 16 Q. And in that document, he showed you a concern
10:20 17 that Align had about bait and switch.
10:20 18 Do you recall that?
10:20 19 A. Correct.
10:20 20 Q. And do you think as a company, Align should be
10:20 21 required to allow doctors to advertise on their own
10:20 22 website if they're engaging in bait and switch
10:20 23 proceedings?
10:20 24 A. Not at all.
10:20 25 Q. Now, the document that -- another document

10:20 1 that he showed you suggested that they'd done surveys
10:20 2 to -- that the doctors loved Invisalign, right?
10:20 3 A. Yes.
10:20 4 Q. We saw that, right?
10:20 5 And the fact that doctors love Invisalign,
10:20 6 would that explain why, when they buy an iTero, they
10:20 7 buy Invisalign?
10:20 8 A. Obviously.
10:20 9 MR. TUBACH: I have no further questions.
10:20 10 Thank you.
10:20 11 RECROSS-EXAMINATION
10:20 12 BY MR. MUELLER:
10:21 13 Q. Just a couple more questions, Dr. Knittel.
10:21 14 You were asked about bait and switch one more
10:21 15 time, right?
10:21 16 A. Yes.
10:21 17 MR. MUELLER: Let's take a look at
10:21 18 DTX-2019.
19 BY MR. MUELLER:
10:21 20 Q. And this is another internal Align document.
10:21 21 Do you see it's titled Global White Paper?
10:21 22 A. I don't know if it's an Align document, but
10:21 23 I'll take your word for it.
10:21 24 Q. And do you see it says: This -- these are the
10:21 25 key customer experiences we must address.

10:21 1 Do you see that?
10:21 2 A. Yes.
10:21 3 Q. And then below that, in the last sentence in
10:21 4 that paragraph, it says: Details and rationale are
10:21 5 included for each later in the paper, right?
10:21 6 A. Yes.
10:21 7 MR. MUELLER: Let's go to Page 9.
10:21 8 MR. TUBACH: Sorry. Can you tell him the
10:21 9 tab number?
10:21 10 MR. MUELLER: Tab 24.
10:21 11 BY MR. MUELLER:
10:21 12 Q. And the second bullet says: Tone has
10:21 13 reverted -- second big bullet right below there: Tone
10:22 14 has reverted to pre-2014. Internal, there is more of a
10:22 15 sense that we are entitled to our customers' business
10:22 16 and they are a barrier to be overcome.
10:22 17 Right?
10:22 18 A. That's what it says.
10:22 19 Q. And then the next one says: Blaming
10:22 20 customers -- this is Align talking about itself:
10:22 21 Blaming customers for not using more of Invisalign
10:22 22 versus it's our responsibility. Very little respect or
10:22 23 appreciation for our customers except for the top
10:22 24 volume customers.
10:22 25 Do you see that?

10:22 1 A. I see that.
10:22 2 Q. And then it goes on to say: Bait and switch
10:22 3 is frequently used which insinuates, insinuates, our
10:22 4 customers have negative intentions of switching
10:22 5 customers versus legitimate reasons for their behavior.
10:22 6 Right? Do you see that, sir?
10:22 7 A. Yeah. I'm -- I agree with the words. I'm
10:22 8 just trying to --
10:22 9 Q. Right. And not only the words, sir, we saw an
10:23 10 example of this in the e-mail exchange earlier between
10:23 11 Mr. Hogan, the CEO, and Mr. Jergenson. They
10:23 12 characterized a legitimate decision to switch -- or not
10:23 13 even switch, bring on another clear aligner option as
10:23 14 baiting and switching, right?
10:23 15 A. We did not see that.
10:23 16 Q. And then right below this, read further: It
10:23 17 feels like we've resorted to how we can force our
10:23 18 customers to do more cases versus how we can make it so
10:23 19 they want to do more Invisalign.
10:23 20 Right, sir?
10:23 21 A. That's what it says.
10:23 22 Q. So again, once more in your back-and-forth
10:23 23 just now, you said that doctors really like it, right?
10:23 24 A. I thought we both agreed to that.
10:23 25 Q. Sir, you showed the doctors loving it and the

10:23 1 hearts, the heart emoji, right, in your cartoon?
10:23 2 A. Yes.
10:23 3 Q. And here's Align in an internal self-analysis
10:23 4 saying: It feels like we've resorted to how we can
10:23 5 force our customers to do more cases, correct?
10:23 6 A. That's what they write.
10:23 7 Q. Including by insinuating they were engaged in
10:23 8 baiting and switching by considering other options,
10:24 9 true?
10:24 10 A. I'm just rereading the other bullet.
10:24 11 MR. MUELLER: Well, we'll let the
10:24 12 document speak for itself, Your Honor.
10:24 13 I withdraw the question and pass the
10:24 14 witness.
10:24 15 FURTHER REDIRECT EXAMINATION
10:24 16 BY MR. TUBACH:
10:24 17 Q. This document that he just put up, DTX-2019,
10:24 18 this is a 23-page document; is that right?
10:24 19 And you probably -- you have it in your
10:24 20 binder, but I'll just tell you it's a 23-page document.
10:24 21 A. Okay.
10:24 22 Q. Have you had a chance to review this at all?
10:24 23 A. No.
10:24 24 Q. Okay. And this is -- if it's an internal
10:24 25 document critiquing how people, the company, Align,

10:24 1 itself doesn't have anything to do with Invisalign, the
10:24 2 product?
10:24 3 A. No. Mr. Mueller and I were actually
10:24 4 establishing the product itself was great.
10:24 5 Q. And if they're being self-critical and trying
10:24 6 to improve their business and how people perceive the
10:24 7 company versus the product itself, is that a good thing
10:24 8 or a bad thing?
10:24 9 A. I would imagine that's a good thing.
10:24 10 MR. TUBACH: Thank you. No further
10:24 11 questions.
10:24 12 MR. MUELLER: Nothing further for
10:25 13 Dr. Knittel. Thank you, Your Honor.
10:25 14 THE COURT: You may step down, sir.
15 Thank you.
16 THE WITNESS: Thank you.
10:25 17 THE COURT: Ladies and gentlemen of the
10:25 18 jury, we're going to take our morning recess, and then
10:25 19 we'll come back in about ten minutes.
10:25 20 Please don't discuss the case with
10:25 21 yourselves.
10:25 22 THE BAILIFF: All rise.
10:25 23 (Jury exited the courtroom.)
10:25 24 THE COURT: Thank you. You may be
10:25 25 seated.

10:25 1 I assume we got -- after the conference
10:25 2 yesterday that the parties were able to work out the
10:25 3 minor disagreements we had after the charge conference,
10:25 4 or is there anything you all need to take up?
10:25 5 MR. TUBACH: I'll have to defer to
10:25 6 others. They're coming forward, Your Honor.
10:26 7 MR. FORD: Good morning, Your Honor.
10:26 8 Mark Ford. Ian Simmons and I and our teams discussed
10:26 9 last night some of the remaining issues. And I'm happy
10:26 10 to report --
10:26 11 THE COURT: Move up just a little.
10:26 12 MR. FORD: And I'm happy to report we're
10:26 13 going to present to you a jury instruction form that
10:26 14 requires no more decisions on your behalf.
10:26 15 THE COURT: That's great.
10:26 16 MR. FORD: We resolved everything. The
10:26 17 parties -- I believe Align may be reserving some
10:26 18 objections, but we're all done.
10:26 19 THE COURT: Oh, of course.
10:26 20 MR. SIMMONS: Thank you, Your Honor. Ian
21 Simmons for Align.
10:26 22 That's correct. We'll provide a binder
10:26 23 to the Court in the right font size, no staples, no
10:26 24 clips. And at the lunch hour, we'd like to just put on
10:26 25 the record some objections.

10:26 1 THE COURT: Okay. About how long do we
10:26 2 anticipate the next witness is going to take?
10:26 3 MR. TUBACH: Your Honor, just for our
10:26 4 side, we'll need less than -- I would expect less than
10:26 5 an hour.
10:26 6 THE COURT: Well --
10:26 7 MR. MUELLER: And may I ask, Your Honor,
10:26 8 if we could just -- he's the last witness -- get the
10:26 9 Court's countdown for our remaining time, because that
10:26 10 will dictate how long we'll cross.
10:26 11 THE COURT: I'm going to let -- I've
10:26 12 stopped the -- I'm not -- I don't have a clock going.
10:26 13 MR. MUELLER: Okay.
10:26 14 THE COURT: But we need to get done.
10:27 15 MR. MUELLER: We'll do it in a very
10:27 16 reasonable time.
10:27 17 THE COURT: Okay. We just need to get
10:27 18 done as close -- for your sake, look, I'm agnostic.
10:27 19 You know, the time is what the time is. I'm going to
10:27 20 let you finish this last witness but keeping in mind
10:27 21 that everything else is -- now, my plan is --
10:27 22 We don't need to be on the record for
10:27 23 this.
10:27 24 (Off-the-record discussion.)
10:28 25 MR. MUELLER: Your Honor, the remaining

10:28 1 verdict form issue has to do with the infringement and
10:28 2 validity questions. And we have offered, Your Honor,
10:28 3 just to make this a little bit more streamlined for the
10:28 4 jury, to dismiss without prejudice our counterclaim to
10:28 5 allow for the conditionality Your Honor suggested
10:28 6 yesterday, which would allow that if the jury finds no
10:28 7 infringement, to move on.
10:28 8 So we move to dismiss without prejudice
10:28 9 our counterclaim to allow for that conditional
10:28 10 structure.
10:28 11 THE COURT: And do you oppose that?
10:28 12 MR. TUBACH: I can't imagine we would,
10:28 13 Your Honor, but I honestly haven't been involved in
10:28 14 that process. So I would prefer to -- well, we have
10:28 15 someone to ask. I'll step aside.
10:28 16 MR. NASH: We do oppose that, Your Honor,
10:28 17 it's my understanding. They have -- we've -- we had
10:28 18 asked them to stipulate to a non-assertion in the
10:29 19 future on invalidity. They are not able to do that.
10:29 20 So we believe that this has already been teed up for
10:29 21 the jury to decide validity now.
10:29 22 THE COURT: Okay. Since it has been
10:29 23 tried and since it was a counterclaim when it started,
10:29 24 I will allow the jury to answer it.
10:29 25 MR. MUELLER: Understood, Your Honor.

10:29 1 THE COURT: Anything else?
10:29 2 MR. MUELLER: Nothing from defendants,
10:29 3 Your Honor. Thank you.
10:29 4 MR. TUBACH: No. Thank you, Your Honor.
10:29 5 THE COURT: Okay. I'll be back in about
10:29 6 ten minutes.
10:29 7 (Recess taken.)
10:41 8 THE BAILIFF: All rise.
10:41 9 THE COURT: Please remain standing for
10:41 10 the jury.
10:41 11 (Jury entered the courtroom.)
10:41 12 THE COURT: Thank you. You may be
10:41 13 seated.
10:41 14 MR. TUBACH: Align Technology calls its
10:41 15 next and last witness, Dr. Jena.
10:42 16 (The witness was sworn.)
10:42 17 DIRECT EXAMINATION
10:42 18 BY MR. TUBACH:
10:42 19 Q. Good morning, Dr. Jena.
10:42 20 A. Good morning.
10:42 21 Q. Could you introduce yourself to the ladies and
10:42 22 gentlemen of the jury?
10:42 23 A. Sure.
10:42 24 Good morning, everybody. My name is Anupam
10:42 25 Jena. I go by Bapu.

10:42 1 Q. What do you do for a living, Dr. Jena?
10:42 2 A. I do a few things. I'm a professor at Harvard
10:42 3 University in Boston. I'm a medical doctor. I work at
10:42 4 a hospital called Massachusetts General Hospital, which
10:42 5 is the big teaching hospital in Boston.
10:42 6 I teach. I do research, and I'm also an
10:43 7 economist. So I do a few things.
10:43 8 Q. Can you tell us just a little bit about your
10:43 9 family?
10:43 10 A. Sure. I met my wife when we were both in
10:43 11 medical school. She grew up in a town called Round
10:43 12 Rock, which has a lot of prominence, it sounds like.
10:43 13 And she went to Pflugerville High School, which is the
10:43 14 sort of name that you don't forget after the first or
10:43 15 second date.
10:43 16 Our life started there. We moved to Boston.
10:43 17 Had two children. Our daughter's 11. She's going to
10:43 18 middle school next year. And our son Aiden is 8.
10:43 19 And an interesting fact about our family is
10:43 20 Aiden was born deaf. So we use American Sign Language
10:43 21 in our home, and that's something that I'm incredibly
10:43 22 proud of.
10:43 23 Q. Can you briefly describe your educational
10:43 24 background for us?
10:43 25 A. Sure. I grew up in Richmond, Virginia.

10:43 1 That's where I went to school initially. Moved to
10:43 2 Boston for college. I went to Massachusetts Institute
10:43 3 of Technology, or MIT. I studied economics and biology
10:43 4 there.
10:43 5 Then I moved to Chicago in 2000. Spent eight
10:43 6 years there. Went to medical school. That's an M.D.
10:43 7 degree. And then I did my Ph.D. in economics also at
10:44 8 the University of Chicago.
10:44 9 Then I moved back to Boston to train in
10:44 10 residency.
10:44 11 Q. So you've got an M.D., you're a doctor, and
10:44 12 you're a Ph.D. in economics?
10:44 13 A. That's correct. I have an M.D. and a Ph.D. in
10:44 14 economics.
10:44 15 Q. How common is that?
10:44 16 A. It's not very common, maybe 10 or 15 of us in
10:44 17 the world, which is either a really good thing or it's
10:44 18 a really bad thing. We'll see.
10:44 19 Q. Did you focus on any specific studies during
10:44 20 your Ph.D.?
10:44 21 A. I did. I studied a few different areas.
10:44 22 Labor economics is one of the areas, industrial
10:44 23 organization. And then because I'm a medical doctor
10:44 24 and an economist, I spend a lot of my time and did
10:44 25 spend a lot of my time doing something called health

10:44 1 economics, which is the intersection between medicine
10:44 2 and health in economics.
10:44 3 Q. What is industrial economics?
10:44 4 A. You can think about it as the study of how
10:44 5 industries are organized. So how is it that companies
10:44 6 compete with one another through lower prices, more
10:44 7 innovation, and what happens to customers when
10:44 8 companies don't compete.
10:44 9 Q. How long have you been -- how long have you
10:44 10 been a professor at Harvard?
10:44 11 A. I've been at Harvard for about 15 years now.
10:45 12 Q. Now, in your academic work, can you give us
10:45 13 some examples of some of the research you've done?
10:45 14 A. Yeah. I work on a few different areas. I
10:45 15 study healthcare markets broadly, so what makes
10:45 16 healthcare work and what makes it not work.
10:45 17 I study the economics of innovation, and then
10:45 18 I work on a lot of different areas which people
10:45 19 sometimes find interesting. And I'll give an example,
10:45 20 if I can.
10:45 21 Q. Sure. Yeah. Please.
10:45 22 A. All right. So we had a study a couple years
10:45 23 ago which looked at all deaths in the United States
10:45 24 where we've been able to link it to the occupation of
10:45 25 the person who died. And what we found was that it

10:45 1 crossed 500 occupations. The occupation with the
10:45 2 lowest likelihood of dying from Alzheimer's disease was
10:45 3 taxi drivers.
10:45 4 Q. What?
10:45 5 A. So think about why that might be. Taxi
10:45 6 drivers use a specific part of their brain to get
10:45 7 around. They have to know routes, right?
10:45 8 It's different now with Google maps, but you
10:45 9 have to know how to get from place A, to B, to C. And
10:45 10 that part of your brain is called the hippocampus.
10:45 11 That part of your brain is also involved in memory
10:46 12 formation.
10:46 13 And so taxi drivers strengthen that part of
10:46 14 their brain because they use it day in and day out.
10:46 15 And across 500 occupations is the least likely to die
10:46 16 from Alzheimer's.
10:46 17 So I love my work because I get to work on
18 lots of different things like that.
10:46 19 Q. Are you suggesting that perhaps we should stop
10:46 20 using those GPS things to help us get around?
10:46 21 A. I'm not offering an expert opinion on that
10:46 22 today, but maybe. I do that.
10:46 23 Q. How else do you spend your time, sir?
10:46 24 A. So I teach. I do research. I see patients at
10:46 25 Mass General on the general medicine service there, and

10:46 1 I also do a lot of writing for the public.
10:46 2 I have a few books. I write a column for Time
10:46 3 Magazine. I write a lot for the New York Times and
10:46 4 Wall Street Journal. And I used to have a podcast
10:46 5 called Freakonomics MD. If you've heard of the
10:46 6 Freakonomics books, it was with them. I did that for
10:46 7 about two years.
10:46 8 Q. Do you also do consulting on litigation like
10:46 9 we're doing here?
10:46 10 A. Yes. I've been doing that for about seven or
10:46 11 eight years.
10:46 12 Q. And how much time -- you've talked about your
10:46 13 sort of medical/clinical work. You've talked about
10:46 14 your research. You've talked about -- now about this
10:46 15 litigation work.
10:46 16 How would you estimate you'd spend your time
10:47 17 on that?
10:47 18 A. I'd say about 80 percent -- 80 to 85 percent
10:47 19 of my time is spent doing academic work, meaning
10:47 20 teaching, doing research, seeing patients. I have a
10:47 21 family also, which takes up a lot of my time in a good
10:47 22 way. And then I probably spend about 10 to 15 percent
10:47 23 of my time doing work like this, testifying in
10:47 24 litigation.
10:47 25 Q. What are you here to testify about today?

10:47 1 A. I'm here to talk about two things. The first
10:47 2 is whether or not aligners that you get from your
10:47 3 doctor, which are called doctor-directed aligners,
10:47 4 whether those are sort of in a market with themselves
10:47 5 or do they compete with other products. Like aligners
10:47 6 you might get direct to consumer or braces. That's the
10:47 7 first thing.
10:47 8 And the second thing relates to the first
10:47 9 question, which is, does Align have monopoly power?
10:47 10 Those are the two questions.
10:47 11 Q. Now, outside of your academic work, have you
10:47 12 done any work related to antitrust?
10:47 13 A. I have. I've testified in probably 50 cases
10:47 14 or so in the healthcare space, 10 of which have been in
10:47 15 antitrust.
10:47 16 Q. Are you getting paid for your work today?
10:48 17 A. I am. My hourly rate is $1,600 per hour.
10:48 18 Q. And again, does your rate depend at all, at
10:48 19 all, on the outcome of this case?
10:48 20 A. No, sir. It does not.
10:48 21 Q. How much time do you estimate you've spent
10:48 22 working on this case to date?
10:48 23 A. Total, I'd say probably 100 to 120 hours,
10:48 24 something in that range.
10:48 25 Q. Okay.

10:48 1 MR. TUBACH: Your Honor, we tender
10:48 2 Dr. Jena as an expert in the field of economics.
10:48 3 MR. MUELLER: No objection, Your Honor.
10:48 4 THE COURT: Admitted.
10:48 5 (Clarification by Reporter.)
10:48 6 MR. TUBACH: Okay. I'll slow down. I'll
10:48 7 slow down.
10:48 8 BY MR. TUBACH:
10:48 9 Q. This is a monopolization case, Dr. Jena. So I
10:48 10 thought maybe I'd start with an obvious question.
10:48 11 What is a monopoly?
10:48 12 A. So the way I think you can think about a
10:48 13 monopoly -- and I have these slides, which I just want
10:48 14 you to see the question. Then you know what I'm
10:48 15 talking about.
10:48 16 What is a monopoly?
10:48 17 You can think of a monopoly as a company that
10:48 18 owns a product that doesn't face competition from
10:48 19 alternatives.
10:48 20 And as a result of that, because it doesn't
10:49 21 face that competition, it can do or it tends to do a
10:49 22 few things. It raises its prices because it doesn't
10:49 23 have the fear of losing customers to other sellers of
10:49 24 other alternatives.
10:49 25 It can tend to lower the quality of its

10:49 1 products because it doesn't have to compete with other
10:49 2 alternatives. It may invest less in innovation. Those
10:49 3 are the things you tend to see with a monopoly.
10:49 4 Q. And to be a monopolist, do you have to be
10:49 5 literally the only game in town?
10:49 6 A. No. You may have heard the phrase "only game
10:49 7 in town." You don't have to literally be the only game
10:49 8 in town, but effectively, you behave like you're the
10:49 9 only game in town.
10:49 10 Q. Now, you heard Dr. Perryman say that Align has
10:49 11 monopoly power in a market he calls the doctor-directed
10:49 12 clear aligner market, right?
10:49 13 A. Yes, sir.
10:49 14 Q. And you were here. You heard his testimony?
10:49 15 A. I was.
10:49 16 Q. Okay. You agree with that?
10:49 17 A. No. I disagree with that definition.
10:49 18 Q. Now, are there questions that you as an
10:49 19 economist would want to ask and answer in order to
10:49 20 arrive at a conclusion?
10:49 21 A. Yeah. I think there's two ways to think about
10:49 22 this. The first is -- and they're related. The first
10:50 23 is what are the alternatives to Invisalign? So does
10:50 24 Invisalign -- is it the only product? Are there other
10:50 25 aligners people can use either from a doctor or that

10:50 1 you can get direct to consumer? Are there braces?
10:50 2 That's the first question you have to answer.
10:50 3 And the second one is related to that, which
10:50 4 is, can Align raise the price of Invisalign without
10:50 5 worrying about losing sales to other aligners, whether
10:50 6 doctor directed, direct to consumer, or braces? Those
10:50 7 are the two questions to think about.
10:50 8 Q. And after you did your analysis, did you come
10:50 9 to any conclusions?
10:50 10 A. I did.
10:50 11 Q. Go ahead, please.
10:50 12 We see them. What are they?
10:50 13 A. So the two conclusions -- and I'll go through
10:50 14 these in more detail with all of you, but the two
10:50 15 conclusions is that Invisalign faces a lot of
10:50 16 alternatives. I'll walk you through how I think about
10:50 17 those issues.
10:50 18 And the second is that Align does not have
10:50 19 monopoly power.
10:50 20 Q. All right. Let's talk about your first
10:50 21 conclusion, your Invisalign competes with braces and
10:50 22 other clear aligners.
10:51 23 Can you help us understand how you arrived at
10:51 24 that conclusion?
10:51 25 A. Sure. I think that -- and I asked myself a

10:51 1 few questions. So I'll start with that, and we can
10:51 2 think about this framework together.
10:51 3 So the first is what. What is it that
10:51 4 Invisalign and these other products do? They
10:51 5 straighten teeth. So Invisalign, other aligners that
10:51 6 you get from your doctor, direct to consumer, braces,
10:51 7 they all straighten teeth. So that's the what.
10:51 8 The next is maybe the who. Who is purchasing
10:51 9 these things? Are they different sets of patients?
10:51 10 This is the same set of patients who need (sic) teeth
10:51 11 that need to be aligned. Who provides them? Are they
10:51 12 different doctors?
10:51 13 Orthodontists provide both braces and
10:51 14 aligners. You walk into the office. You have a
10:51 15 medical problem, which is misaligned teeth. They offer
10:51 16 you something, and you can choose between them.
10:51 17 And the last sort of question is sort of how
10:51 18 much. So how much do these products cost to the
10:51 19 patient?
10:51 20 So if you go into a orthodontist's office, how
10:51 21 much do you pay? And I'll talk about the fact that you
10:51 22 pay similar prices for braces or aligners.
10:52 23 Q. Now, you heard Dr. Perryman use the term
10:52 24 "relevant market," right?
10:52 25 A. Yes, sir.

10:52 1 Q. And before I ask you to define that term, did
10:52 2 Dr. Perryman say that economists have sort of a special
10:52 3 meaning for relevant market different than the rest of
10:52 4 us?
10:52 5 A. He did. And I would agree. When I use the
10:52 6 term "relevant market," and I think when Dr. Perryman
10:52 7 used the term "relevant market," we mean a very -- I'll
10:52 8 slow down. We mean a very specific thing, which is
10:52 9 different than what other people might use that term to
10:52 10 mean.
10:52 11 MR. TUBACH: All right. Let's look at
10:52 12 PDX-8.6. Thank you.
13 BY MR. TUBACH:
10:52 14 Q. So here's the question: To an economist, what
10:52 15 is a relevant market, and why does it matter here?
10:52 16 A. So a relevant market is the set of products
10:52 17 that are reasonable substitutes to one another.
10:52 18 They're the products that compete with one another.
10:52 19 Another way to think about it is that it's the
10:52 20 set of products that keep companies from just
10:52 21 increasing prices and prices and just keep going,
10:52 22 because it constrains the ability of a company to do
10:52 23 that.
10:52 24 Q. And can you give us some examples, an everyday
10:53 25 example you might know?

10:53 1 A. Maybe pain medications would be a good
10:53 2 example. If you go to the store, Tylenol, Aleve,
10:53 3 ibuprofen, Naproxen, different types of pain
10:53 4 medications solve the same problem. You have pain.
10:53 5 They might even come in liquid form, tablet form,
10:53 6 chewable, but they're all sort of competing with one
10:53 7 another.
10:53 8 Q. And do the products need to be identical to be
10:53 9 in the same market?
10:53 10 A. They -- no. They definitely do not need to be
10:53 11 in -- in that case, as a medical doctor, I'll tell you
10:53 12 that they actually work in different ways.
10:53 13 Tylenol works in a different way than
10:53 14 ibuprofen, even slightly different than Naproxen. So
10:53 15 the things can work in different ways and still be
10:53 16 reasonable substitutes to one another.
10:53 17 Q. Do you have an opinion about whether
10:53 18 Dr. Perryman is correct that the relevant market here
10:53 19 is limited to doctor-directed clear aligners?
10:53 20 A. I think that he's wrong on that. So that's
10:53 21 something that we disagree about.
10:53 22 Q. Which relevant market do you believe
10:53 23 Invisalign competes in?
10:53 24 A. Short answer, I think the overall market is
10:54 25 products that straighten your teeth. That's how I

10:54 1 would describe it.
10:54 2 Q. And does that include direct-to-consumer
10:54 3 aligners?
10:54 4 A. It does.
10:54 5 Q. And is it your conclusion that
10:54 6 direct-to-consumer aligners compete with Invisalign?
10:54 7 A. Yes, sir.
10:54 8 Q. Now, why do you believe that braces and
10:54 9 aligners compete in a teeth-straightening market?
10:54 10 A. Well, because they're doing the same thing.
11 Now, they get there in different ways. Aligners and
10:54 12 braces are different. We all understand that.
10:54 13 But they serve the same purpose, which is to
10:54 14 straighten teeth. They're used by similar people.
10:54 15 They are provided by similar types of providers, in
10:54 16 this case orthodontists. So those are the reasons why.
10:54 17 Q. Let's take a look at the next slide.
10:54 18 What are the factors that you look at to
10:54 19 determine whether braces and aligners are reasonable
10:54 20 substitutes?
10:54 21 A. So I'll just list them out for you quickly
10:54 22 here because we'll spend more time on them in the next
10:54 23 few minutes.
10:54 24 But they're reasonable substitutes for a few
25 reasons. One is that they effectively have the same

10:54 1 use. They get there differently, but they have the
10:54 2 same use.
10:54 3 Customers, the same customers are choosing
10:55 4 between them. These are people who want their teeth
10:55 5 straightened. If you look at what the industry views
10:55 6 these products as, they view them as substitutes.
10:55 7 And the last thing is the prices are similar.
10:55 8 And I already alluded to that earlier, but we'll talk
10:55 9 more about that.
10:55 10 Q. Yeah. Let's go through each of these. Let's
10:55 11 turn to the next slide.
10:55 12 The first thing that you were looking at was
10:55 13 same uses. So help us understand how this affects your
10:55 14 conclusion that we're in the teeth-straightening market
10:55 15 here?
10:55 16 A. So on the left of this slide, you have braces.
10:55 17 On the right, you have aligners.
10:55 18 So these are -- first of all, these are both
10:55 19 products that are straightening your teeth, which is
10:55 20 what the title says. And it's also the case that with
10:55 21 braces, you can do everything with braces -- everything
10:55 22 that aligners can do, braces can do.
10:55 23 That's really important. Everything that
10:55 24 aligners can do, braces can do. And everything that
10:55 25 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 1 the analogy quite works here.
10:56 2 Q. Why not?
10:56 3 A. Well, trucks and cars aren't the same
10:56 4 obviously, right? They're obviously not the same.
10:56 5 Their only purpose is not to get you from Point A to
10:57 6 Point B.
10:57 7 If you're purchasing a truck, you might be
10:57 8 doing it for other reasons. You might want to put
10:57 9 things in the back, cargo. You might want to haul
10:57 10 things. You might want to go off road, do things that
10:57 11 would be difficult to do in a car.
10:57 12 So the notion that cars and trucks are in the
10:57 13 same market, nobody, nobody here should think that
10:57 14 that's true.
10:57 15 What we are disagreeing about is whether
10:57 16 braces and aligners or direct-to-consumer and
10:57 17 doctor-directed aligners are in the same market.
10:57 18 That's where the disagreement is.
10:57 19 Q. Now, let's talk about -- let's turn to the
10:57 20 industry views. How does --
10:57 21 MR. TUBACH: If we go to the next slide.
22 BY MR. TUBACH:
10:57 23 Q. How does the industry look at this?
10:57 24 A. So I think of the industry as a few things.
10:57 25 So one is -- well, maybe -- think about two

10:57 1 things. One is when a person that has teeth that need
10:57 2 to be straightened, how do they solve that? They go to
10:57 3 their dentist or their orthodontist.
10:57 4 And orthodontists who offer both braces or --
10:57 5 either offer braces or aligners, if you look at survey
10:57 6 data, for example, from Straumann, 65 percent of those
10:58 7 orthodontists will offer both braces and aligners. So
10:58 8 that's very useful information to know.
10:58 9 The second thing is who pays for these things?
10:58 10 So you as a customer will obviously pay. If you're
10:58 11 fortunate, you might have dental insurance. Dental
10:58 12 insurers will sometimes cover some of the cost. And if
10:58 13 you look at dental insurance policies, they actually
10:58 14 tell you something very interesting about braces versus
10:58 15 aligners.
10:58 16 Q. What is that?
10:58 17 A. Well, they cover both. They don't distinguish
10:58 18 between them. They cover both, and they don't
10:58 19 distinguish between them. And more -- sorry, go ahead.
10:58 20 Q. No, go ahead. As a doctor, how do you go
10:58 21 about getting reimbursed for that?
10:58 22 A. So if you're a doctor -- so when you go to
10:58 23 your doctor, for example, for an outpatient visit, when
10:58 24 they see you, they send the bill to your insurer.
10:58 25 That's called a billing code.

10:58 1 The same billing code applies for aligners
10:58 2 versus braces, meaning the insurer does not distinguish
10:58 3 between them. Does not distinguish between them.
10:58 4 Q. Now, let's take a look at the -- let's take a
10:58 5 look at the next slide.
10:59 6 Did you also look at how the industry more
10:59 7 broadly looks at braces and clear aligners?
10:59 8 A. I did.
10:59 9 Q. And what do we have here?
10:59 10 A. So this is from the American Association of
10:59 11 Orthodontists. This is a professional organization
10:59 12 that captures -- roughly 18,000 orthodontists in the
10:59 13 U.S. and abroad are part of this organization. And
10:59 14 here's what they say about these products. They say:
10:59 15 Braces and clear aligners are the two most common
10:59 16 treatments to adjust crooked teeth.
10:59 17 Q. How's that relevant to your findings?
10:59 18 A. It's relevant because this is a society that
10:59 19 carries a lot of weight. It's the professional
10:59 20 organization for orthodontists. And what they're
10:59 21 describing here is that braces and aligners are
10:59 22 alternatives.
10:59 23 Q. Now, Align and Straumann are also selling
10:59 24 aligners. And did you look at any statements by them
10:59 25 to see what -- how they describe what kind of market

10:59 1 they're in?
10:59 2 A. I did. I looked at documents produced by both
10:59 3 of these companies.
10:59 4 MR. TUBACH: Let's take a look at the
10:59 5 next exhibit, if we could.
11:00 6 Sorry. I'm sorry. Take that down.
11:00 7 Let's go to PTX-1615. My apologies.
11:00 8 There we go.
9 BY MR. TUBACH:
11:00 10 Q. What is this document?
11:00 11 A. This is an annual report from Straumann from
11:00 12 the year 2024.
11:00 13 Q. Okay. And what's an annual report?
11:00 14 A. An annual report is a report that a company
11:00 15 provides to its investors to tell them about the
11:00 16 performance of the business.
11:00 17 MR. TUBACH: So let's take a look at
11:00 18 Page 27 of this report. Now, let's blow up the
11:00 19 "Becoming a leader" paragraph right there.
11:00 20 There we go.
21 BY MR. TUBACH:
11:00 22 Q. And what is this? This is something that
11:00 23 Straumann has said to its investors, correct?
11:00 24 A. Yes.
11:00 25 Q. Can you just help us -- walk us through this,

11:00 1 if you would.

11:00 2 A. Sure. I'll just read the first part. We can

11:00 3 certainly read more of it if you'd like. But, A

11:00 4 person's smile plays a significant role in social

11:00 5 perceptions, influencing how they are viewed in terms

11:00 6 of attractiveness, success, and kindness.

11:00 7 And this is the part I'd like us to focus on:

11:00 8 Clear aligners, a discreet alternative to traditional

11:01 9 braces, offer effective teeth straightening while

11:01 10 enhancing aesthetic appeal. Digital workflows reduce

11:01 11 the need for in-person visits, providing greater

11:01 12 convenience for patients. Such innovations have

11:01 13 broadened the teeth-straightening market.

11:01 14 And it goes on.

11:01 15 Q. Okay. And how is this opinion -- how is this

11:01 16 statement here from Straumann's annual report relevant

11:01 17 to this question that we're answering here today?

11:01 18 A. It's primarily relevant because it very

11:01 19 explicitly describes braces and aligners as being

11:01 20 discreet alternatives to one another. They literally

11:01 21 say that.

11:01 22 They also reference the term, quote/unquote,

11:01 23 teeth-straightening market. Now, just to be clear, to

11:01 24 reinforce what Dr. Perryman and I agree on, that term

11:01 25 is not the way that we would use it as an economist,

11:01 1 but they call it that.
11:01 2 Q. And you've also seen documents where actually
11:01 3 both ClearCorrect and Align have referred to an aligner
11:01 4 market?
11:02 5 A. Correct. In fact, if you go further down --
11:02 6 we may not have time -- but it says "aligner market" in
11:02 7 this document as well.
11:02 8 Q. And does that suggest to you that the market
11:02 9 is limited to aligners?
11:02 10 A. No.
11:02 11 Q. As an economist?
11:02 12 A. As an economist, we have to think about the,
11:02 13 quote/unquote, relevant market.
11:02 14 And I will bore you with some of those details
11:02 15 in a little bit, but the way that we use it is not the
11:02 16 same as others might use it.
11:02 17 Q. So the last question that you -- the last of
11:02 18 those four topics that you were looking at was prices.
11:02 19 And did you do -- we get a little preview by accident
11:02 20 of what you found.
11:02 21 Did you look at what the prices were of
11:02 22 aligners versus braces?
11:02 23 A. There are no accidents in the courtroom. No.
11:02 24 Yeah. I did. So let me -- let me tell you
11:02 25 what I did. So here, the thought experiment, the way

11:02 1 to think about it is you're a patient. You need your
11:02 2 teeth fixed. You go to the orthodontist. How much are
11:02 3 they going to charge you?
11:02 4 We already heard testimony yesterday from
11:02 5 Dr. Cohanim that he charges roughly in the same
11:02 6 ballpark. What I also did was look -- did sort of a
11:02 7 survey of the marketplace to try to understand from
11:02 8 doctors' websites, industry research reports, how much
11:03 9 can patients expect to pay for braces and aligners for
11:03 10 the purpose of understanding are these widely different
11:03 11 prices or are they in the same ballpark.
11:03 12 Q. And so what do we have up here on the chart?
11:03 13 A. So what you have here is an industry report
11:03 14 average. Braces are on the left, $6,024 on average.
11:03 15 Aligners are on the right, $5,960 on average. And the
11:03 16 prices here are very similar from the patient
11:03 17 perspective.
11:03 18 Q. Now, you say these are average prices. Does
11:03 19 that mean everyone who goes to get either aligners or
11:03 20 braces is going to pay $6,000?
11:03 21 A. No, sir. It's an average. So there's a
11:03 22 range. You might get higher prices for one from one
11:03 23 doctor, lower prices for the other from another doctor.
11:03 24 But it's on average the same.
11:03 25 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

11:04 1 choosing? Where is the competition occurring? You
11:04 2 have misaligned teeth. You go to the doctor. You're
11:04 3 choosing as a patient, as a customer, between aligners
11:04 4 and braces.
11:04 5 That is the price that is relevant to make the
11:05 6 comparison between.
11:05 7 Q. And we've been talking here about braces and
11:05 8 aligners. Does Dr. Perryman include in his relevant
11:05 9 market all aligners?
11:05 10 A. He just includes what are called doctor-direct
11:05 11 aligners. Aligners that you get from your doctor.
11:05 12 Q. And do you agree with his decision to exclude
11:05 13 direct-to-consumer aligners?
11:05 14 A. No. I think he's incorrect to exclude
11:05 15 direct-to-consumer aligners.
11:05 16 MR. TUBACH: Let's look at the next --
11:05 17 PDX-8.12, please.
11:05 18 There we go.
11:05 19 BY MR. TUBACH:
11:05 20 Q. What are we seeing here?
11:05 21 A. So you're seeing two very happy people. The
11:05 22 left is an advertisement for direct to consumer, and
11:05 23 the right is an advertisement from Invisalign for
11:05 24 doctor directed.
11:05 25 Q. And so what is the business model for direct

11:05 1 to consumer?
11:05 2 A. The business model for direct to consumer is
11:05 3 that you want to bypass the doctor. So maybe you do an
11:05 4 impression kit at home. You mail it. You get your
11:05 5 retainers mailed directly to you, literally direct to
11:06 6 consumer. Maybe you go to a storefront itself and then
11:06 7 get the aligners sent to you, but you're essentially
11:06 8 bypassing the doctor.
11:06 9 Q. So is there any difference between the product
11:06 10 itself between direct to consumer and doctor directed?
11:06 11 A. The products themselves are the same. It's
11:06 12 just how you get them. Do you go through the doctor or
11:06 13 do you bypass the doctor? That's the distinction.
11:06 14 Q. So how do we know that direct to consumer
11:06 15 competes with doctor-directed aligners? How do we know
11:06 16 that?
11:06 17 A. Well, you can look at what the companies do.
11:06 18 Direct-to-consumer companies, they are literally trying
11:06 19 to target people who would otherwise think about
11:06 20 getting an aligner from their doctor. You can look at
11:06 21 what aligner companies like Align have done.
11:06 22 When direct to consumer came sort of into
11:06 23 vogue, Align was trying to compete, offering cheaper
11:06 24 products that are for those patients who have less
11:06 25 severe misalignment of their teeth.

11:06 1 Q. Are you aware the companies -- some DTC
11:06 2 companies, like Smile Direct Club, have gone out of
11:06 3 business?
11:06 4 A. Yes.
11:06 5 Q. Does that change your conclusion about what
11:07 6 the relevant market is here?
11:07 7 A. No. This is a company that I think entered
11:07 8 around 2014, went out of business in 2023, had hundreds
11:07 9 of millions of dollars worth of sales for the period
11:07 10 that it was around.
11:07 11 But it went out of business in 2023, and
11:07 12 that's what you expect to see when there's competition.
11:07 13 Companies come. Companies go. The notion that there
11:07 14 are winners and losers, that's what it means to
11:07 15 compete.
11:07 16 Q. Now, you saw -- you were in court yesterday;
11:07 17 is that right?
11:07 18 A. Yes, sir.
11:07 19 Q. And did you see this photograph of the Ford
11:07 20 dealership?
11:07 21 A. I did. Yeah.
11:07 22 Q. And was there something about this that struck
11:07 23 you that might be relevant to the direct-to-consumer
11:07 24 market -- the direct-to-consumer aligners?
11:07 25 A. There is. Yeah. Can I walk you through it?

11:07 1 Q. Yeah, please.
11:07 2 A. Can I walk us through it?
11:07 3 Q. Yeah. Go ahead.
11:07 4 A. So I want you to -- so this is a very big
11:07 5 dealership. I want you to look at the bottom left of
11:07 6 the screen there. Maybe we could blow that up, that
11:07 7 yellow banner. It says: We'll beat any CarMax offer.
11:07 8 Q. How does that -- how does that relate to
11:08 9 direct-to-consumer aligners?
11:08 10 A. So CarMax is like DTC, right? CarMax, you go
11:08 11 online. There's sometimes storefronts, but you can go
11:08 12 online, you can bypass the dealer and have a car sent
11:08 13 to you.
11:08 14 And nobody would ever say that you -- I
11:08 15 shouldn't say "nobody." I wouldn't say that a used car
11:08 16 that you could get from CarMax would be in a,
11:08 17 quote/unquote, different market or not compete with a
11:08 18 used car that you would get at your dealer. It could
11:08 19 be actually the same car. You're just getting it in
11:08 20 different ways.
11:08 21 In one case, you're bypassing the dealer. For
11:08 22 DTC aligners, you're bypassing the doctor. And
11:08 23 clearly, this Ford dealership is saying they're
11:08 24 competing. We'll beat any CarMax offer.
11:08 25 MR. TUBACH: We can take that down.

1 BY MR. TUBACH:
11:08 2 Q. So what's your conclusion about whether DTC
11:08 3 aligners compete in the same market as doctor-directed
11:08 4 aligners?
11:08 5 A. So I want to say this -- I'll say this slowly
11:08 6 for our court reporter, but it's also because it's
11:08 7 really important.
11:08 8 I mean, these are products that look the same,
11:08 9 they do the same thing. For a person who can get a DTC
11:09 10 aligner because of their teeth, the cost is going to be
11:09 11 about the same. So they're both aligners. Why
11:09 12 wouldn't they be in the same market?
11:09 13 Q. I'm going to shift gears now, Dr. Jena, and
11:09 14 ask you about the hypothetical monopolist test.
11:09 15 You're familiar with that term?
11:09 16 A. I was hoping you weren't going to ask me
11:09 17 questions about that, but please, go ahead.
11:09 18 Q. Can you remind the jury what a hypothetical
11:09 19 monopolist test is?
11:09 20 A. Sure. The hypothetical monopolist test -- and
11:09 21 let me say, Dr. Perryman presented this very nicely
11:09 22 yesterday, but I'll recap what he spoke about.
11:09 23 The hypothetical monopolist test is a tool
11:09 24 that economists use to try to identify what are the
11:09 25 products that compete with one another. What are the

11:09 1 products that are reasonably substitutable with one
11:09 2 another for the purpose ultimately of identifying the
11:09 3 relevant market?
11:09 4 Q. And is the same hypothetical monopolist test
11:09 5 used for any industry that you're looking at?
11:09 6 A. No. It varies. It has to be used on a
11:10 7 case-by-case basis. You have to have, if you do have
11:10 8 it, the right data, the right statistical approach.
11:10 9 That's how it works.
11:10 10 Q. And as a -- as an economist, does -- do you
11:10 11 understand that the hypothetical monopolist test has to
11:10 12 sort of match up with the real world?
11:10 13 A. Absolutely. Yeah.
11:10 14 Q. So -- and we'll get to this in more detail,
11:10 15 but does Dr. Perryman's hypothetical monopolist test
11:10 16 match up in the real world?
11:10 17 A. No. It doesn't. And the way to think about
11:10 18 the hypothetical monopolist test is that it's a tool.
11:10 19 It has to match reality. Anytime a tool does not match
11:10 20 reality, you have to ask yourself, is there something
11:10 21 wrong in how the tool is being used?
11:10 22 And maybe a good example would be a weather
11:10 23 app. Suppose that you download a weather app on your
11:10 24 phone, and the weather app tells you that it's using
11:10 25 statistics and new data to predict weather.

11:10 1 And you say, well, I really want to know what
11:10 2 the weather is going to be tomorrow or the day after.
11:10 3 And so you open up the weather app. The weather app
11:11 4 says it's raining outside. And I look outside and it's
11:11 5 sunny.
11:11 6 Are you going to rely on that app in the
11:11 7 future? You're not going to because it got wrong what
11:11 8 it should have gotten right. It did not match reality.
11:11 9 Q. Now, let's walk through Dr. Perryman's slides.
11:11 10 This was a slide that he used during his examination,
11:11 11 right?
11:11 12 A. Yes.
11:11 13 Q. And do you agree with him that the first step
11:11 14 of the HMT is to look at the -- look at one particular
11:11 15 brand?
11:11 16 A. That's correct. So you see one brand of Ford
11:11 17 trucks here. To do the hypothetical monopolist test,
11:11 18 you start with one product.
11:11 19 Q. And that's what Dr. Perryman -- that's how he
11:11 20 described how one does a proper hypothetical monopolist
11:11 21 test?
11:11 22 A. Correct.
11:11 23 Q. And did he in fact do that in his own
11:11 24 analysis?
11:11 25 A. No. He did not.

11:11 1 MR. TUBACH: Let's go to the next slide.
2 BY MR. TUBACH:
11:11 3 Q. How did he do his test?
11:11 4 A. So the way to do the -- the rules to follow
11:11 5 when you're doing a hypothetical monopolist test is you
11:12 6 start with one product. You ask yourself if that
11:12 7 product's prices went up, would customers switch to
11:12 8 other products or not? And if they keep on switching,
11:12 9 at some point they stop, and that is the,
11:12 10 quote/unquote, relevant market. So you always start
11:12 11 with the smallest set of products.
11:12 12 And if you look at the slide here and read the
11:12 13 first step, it says: Identify the smallest set of
11:12 14 products owned and sold by a single hypothetical
11:12 15 monopolist.
11:12 16 You see four products there, not one. The way
11:12 17 to do this would be to start with one product, not four
11:12 18 products.
11:12 19 Q. And in his -- when he was describing generally
11:12 20 how this test worked, what's the one product or brand
11:12 21 that he put up in the trucks?
11:12 22 A. There's a -- looked like a Ford truck.
11:12 23 Q. So it was a Ford truck. So if he's then
11:12 24 translating that to here, what should he have done?
11:12 25 A. He should have just picked one of these things

11:12 1 and started with it and then iterated forward to
11:12 2 finally get to the relevant market.
11:13 3 Q. And did you in fact do the analysis to take
11:13 4 one company and do the hypothetical monopolist model
11:13 5 that he had created? Did you do that?
11:13 6 A. I did do that.
11:13 7 Q. And what was the result of that?
11:13 8 A. So if you follow the rules of the hypothetical
11:13 9 monopolist test, here's what you see.
11:13 10 So let's suppose you start with just one
11:13 11 product, like one Ford truck. And let's say that
11:13 12 that's ClearCorrect. So I use the same statistical
11:13 13 approach that Dr. Perryman used, the same data. I just
11:13 14 use it from ClearCorrect. You put that into his model.
11:13 15 And what does his model tell you? It tells
11:13 16 you that ClearCorrect does not compete with any other
11:13 17 doctor-directed aligner. It tells you that
11:13 18 ClearCorrect is in its, quote/unquote, own relevant
11:13 19 market. It tells you that ClearCorrect is a
11:13 20 monopolist.
11:13 21 Now, we know that's not true, right? Going
11:13 22 back to the weather analogy, we know that that's not
11:13 23 true. We know that ClearCorrect does compete with, at
11:13 24 a very minimum, these other doctor-directed aligners.
11:14 25 So when you do the model and it tells you

11:14 1 something that's not right -- I think Dr. Perryman
11:14 2 agreed to this yesterday. If your model's telling you
11:14 3 something that doesn't make sense, meaning that with
11:14 4 ClearCorrect alone, it would say that it faces no
11:14 5 competition and is a monopolist, then you know
11:14 6 something's not right with the model itself, it doesn't
11:14 7 match reality.
11:14 8 Q. So what are the realities here?
11:14 9 MR. TUBACH: Go to the next slide.
11:14 10 A. I think the realities are based on what I've
11:14 11 described, is that there's a number of ways to fix your
11:14 12 teeth if they're misaligned.
11:14 13 So you have aligners that you can get from
11:14 14 your doctor. Those are doctor-directed aligners. You
11:14 15 have aligners that you can get direct to consumer.
11:14 16 Those are direct-to-consumer aligners. And you have
11:14 17 braces.
11:14 18 Braces do work differently than aligners, but
11:14 19 they're serving the same purpose. They cost the same
11:14 20 amount. The doctors who are providing them charge
11:14 21 similar amounts. So they are all part of a broader
11:14 22 market, which is products that straighten your teeth.
11:14 23 BY MR. TUBACH:
11:14 24 Q. Thank you.
11:14 25 Let's -- I think we've now covered your

11:15 1 first -- the first opinion.
11:15 2 MR. TUBACH: If you could pull up the
11:15 3 next slide.
4 BY MR. TUBACH:
11:15 5 Q. That Invisalign competes with braces and other
11:15 6 clear aligners.
11:15 7 Let's turn to the second opinion that you
11:15 8 have, that Align does not have a monopoly power.
11:15 9 Can you remind us what is monopoly power?
11:15 10 A. So monopoly power, it means the ability to
11:15 11 either exclude competitors from competing with you to
11:15 12 not face competition from other alternatives and, as a
11:15 13 result, to be able to increase your price. Maybe you
11:15 14 don't innovate as much, the quality's lower.
11:15 15 That's what it means to have power.
11:15 16 Q. I think we've got these on the next slide.
11:15 17 Why don't we just walk through these briefly, and then
11:15 18 we'll go through them in more detail.
11:15 19 What is this -- what is this showing us?
11:15 20 A. So this is a slide just to orient you to what
11:15 21 it means to be in competition versus to be a monopoly.
11:15 22 So if you have a monopoly and if you define
11:15 23 the market correctly, a monopoly will often have high
11:15 24 market share. A monopoly will often have high prices
11:15 25 or increase its prices. A monopoly will restrict

11:15 1 production. It'll not produce as much to keep the
11:15 2 prices high.
11:15 3 A monopoly environment doesn't have a lot of
11:16 4 entry and exit of new companies. You often see limited
11:16 5 innovation. You see the opposite of that when you see
11:16 6 competition.
11:16 7 And I think Dr. Perryman did a good job also
11:16 8 previewing some of these features yesterday of what a
11:16 9 monopoly market looks like and a competitive market
11:16 10 looks like.
11:16 11 Q. And are these just a checklist where you have
11:16 12 to sort of just -- you have to get four out of five or
11:16 13 three out of five?
11:16 14 Is that -- is that the way it works?
11:16 15 A. No. You shouldn't think about it as a
11:16 16 checklist. You should think about it as these are some
11:16 17 features that you need to consider and think about.
11:16 18 Q. All right. Let's take these -- let's take
11:16 19 these and apply them to the teeth-straightening market.
11:16 20 What did you observe in the
11:16 21 teeth-straightening market about the first fact? Let's
11:16 22 go to that now.
11:16 23 A. So if you think about the products that
11:16 24 straighten your teeth, doctor aligners, DTC aligners,
11:16 25 braces, and you ask yourself what is Align's market

11:16 1 share there, it's about 25 percent.
11:16 2 And what do I mean by market share? You take
11:16 3 all those products and ask what percentage of those,
11:17 4 either in units or patients helped or sales, come from
11:17 5 Align. It's about 25 percent.
11:17 6 Q. Now, you say it's "about 25 percent." How did
11:17 7 you arrive at that?
11:17 8 A. I looked at a lot of different surveys, many
11:17 9 conducted by Straumann and other companies that
11:17 10 quantify the share of aligners, and Invisalign is part
11:17 11 of that, in this broader set of products that
11:17 12 straighten teeth.
11:17 13 Q. And why can't you be more precise about
11:17 14 exactly what Align's share is of the overall
11:17 15 teeth-straightening market?
11:17 16 A. We can't be more precise because the data just
11:17 17 doesn't exist. You need to know how many people are
11:17 18 getting braces, how many people are getting
11:17 19 direct-to-consumer aligners, how many people are
11:17 20 getting doctor-directed aligners.
11:17 21 That's the only way you can be precise.
11:17 22 Q. And so how did you arrive at the 25 percent?
11:17 23 A. I looked at the data that's been produced by
11:17 24 different companies and surveys.
11:17 25 Q. And so what is the threshold that's generally

11:17 1 accepted for when someone might begin to have monopoly
11:17 2 power?
11:17 3 A. I'd say at a minimum, it's about 50 percent.
11:17 4 Yesterday Dr. Perryman said 60 to 70 percent. I think
11:18 5 above 50 would be a place where you start to be
11:18 6 concerned about the possibility of monopoly power.
11:18 7 Q. Okay. And what about the other aligner
11:18 8 companies, are they -- they have lower market share in
11:18 9 the teeth-straightening market?
11:18 10 A. They do.
11:18 11 Q. And what explains Align's higher share of the
11:18 12 teeth-straightening market compared to the other
11:18 13 aligner companies?
11:18 14 A. I think the single word answer is time. I
11:18 15 mean, this is a company that's been around for a long
11:18 16 time. They spend a lot on research and development,
11:18 17 marketing. It's educated the market, meaning customers
11:18 18 as patients, doctors. It's developed a lot of
11:18 19 products. It's time.
11:18 20 Q. Now, we've been talking about how Invisalign
11:18 21 competes with braces and other aligner companies.
11:18 22 Did you consider how many people are out there
11:18 23 that potentially could get their teeth straightened?
11:18 24 A. Yeah. That's an -- that's an interesting
11:18 25 question. If you -- you know, you may not know this,

11:18 1 but most people who have misaligned teeth don't
11:18 2 actually get them fixed. It's a minority of people who
11:19 3 actually get them fixed.
11:19 4 And that's important because when I talk to
11:19 5 you about alternatives, I said there's doctor aligners,
11:19 6 direct-to-consumer aligners, braces. Guess what,
11:19 7 there's a fourth alternative which is not to do
11:19 8 anything, which is what most people do.
11:19 9 So if you think about companies as they're
11:19 10 investing in this space trying to get business, not
11:19 11 only are they sort of competing with these groups of
11:19 12 patients who are getting something done, but they're
11:19 13 also trying to bring those people who aren't doing
11:19 14 anything into the fold to get them treated.
11:19 15 Q. Now, looking just at companies, Dr. Perryman's
11:19 16 doctor-directed clear aligner market, is it still your
11:19 17 opinion that Align does not have monopoly power,
11:19 18 notwithstanding its high market share in that limited
11:19 19 market?
11:19 20 A. Yes.
11:19 21 Q. And why is that?
11:19 22 A. Well, it's because you have to look at those
11:19 23 factors that I described to you earlier.
11:19 24 Q. The other ones. We're going to go through
11:19 25 those now.

11:19 1 Okay. Now, let's -- let's discuss those. The
11:19 2 first thing I think you talked about was price.
11:19 3 Let's -- let's talk about that now.
11:20 4 What do we see happening to Align's prices
11:20 5 over time?
11:20 6 A. So what you see here, this -- these are the
11:20 7 prices to doctors, and this is the actual price that
11:20 8 they pay.
11:20 9 And I'm showing you here a line chart that
11:20 10 goes from 2017 until 2024. And what you can see is
11:20 11 that the prices that doctors are actually paying is
11:20 12 falling. It's falling by about 11 percent over this
11:20 13 time period.
11:20 14 Q. And what -- prices of which product are we
11:20 15 talking about here?
11:20 16 A. This is a product Invisalign Comprehensive.
11:20 17 It's about 70 to 75 percent of Align's aligners.
11:20 18 Q. So from 2017 to 2024, Invisalign's prices
11:20 19 dropped by 11 percent?
11:20 20 A. Correct. They dropped by 11 percent.
11:20 21 Q. Now, what was happening out there? We've
11:20 22 heard this, I think, before. Out there in the economy,
11:20 23 prices are doing what?
11:20 24 A. They're going up.
11:20 25 Q. By roughly how much, do you know?

11:20 1 A. 30, 31 percent over this time period.
11:20 2 Q. Now, you also mentioned the next thing on the
11:21 3 slide, which is that often monopolists result in --
11:21 4 monopoly power results in reduced sales or reduced
11:21 5 output, right?
11:21 6 A. Correct.
11:21 7 Q. Why is that?
11:21 8 A. Well, the reason why is because a monopolist,
11:21 9 one way they keep their prices high is they restrict
11:21 10 production. They don't sell to everybody who might
11:21 11 want to pay for that product at a competitive price.
11:21 12 They restrict the production.
11:21 13 Q. And what have we seen in the sale of aligners,
11:21 14 just looking at Dr. Perryman's subset of aligner
11:21 15 companies that he looked at?
11:21 16 A. So if you look at the -- I'm looking at seven
11:21 17 big companies here that sell aligners, and I'm looking
11:21 18 at how much production is changing over time.
11:21 19 So are we seeing a decline in sales? No,
11:21 20 we're seeing an increase in sales. Sales more than
11:21 21 doubled. If you look from 2017 until 2023, sales more
11:21 22 than doubled of aligners.
11:21 23 Q. And is this -- what we're seeing here, is this
11:21 24 consistent, in your view, with a company having
11:21 25 monopoly power?

11:21 1 A. No. When you think about a market that is
11:22 2 monopolized, one of the things that you think about is
11:22 3 restricted production. You are not seeing that here.
11:22 4 You are not seeing that here.
11:22 5 Q. Now, you also testified that in a -- in a
11:22 6 monopoly, you generally wouldn't see a company coming
11:22 7 in and out of that -- of that -- of selling that
11:22 8 product.
11:22 9 And did you take a look at whether there are
11:22 10 new companies that have come in and started selling
11:22 11 aligners or any other teeth-straightening mechanisms?
11:22 12 A. Yes, sir. I did.
11:22 13 Q. Let's look at the next slide.
11:22 14 What are we seeing here?
11:22 15 A. You see a very busy slide with a lot of
11:22 16 companies.
11:22 17 Let me start with the left. The left goes
11:22 18 back many years when we had just braces. So there are
11:22 19 companies like 3M, American Orthodontics, Henry Schein,
11:22 20 Ormco, some of those companies now actually sell
11:22 21 aligners.
11:22 22 1999, Invisalign was introduced. And since
11:22 23 then -- 40 is the number I want you to remember. 40
11:22 24 companies have entered -- actually, more than 40 but
11:23 25 I'm showing you 40 here. 40 companies have entered and

11:23 1 are selling aligners or braces. So it's an immense
11:23 2 amount of entry.
11:23 3 Q. Now, some of these companies on here, are
11:23 4 they -- they're sort of small start-ups?
11:23 5 A. Yeah. Some of them are -- most of them are
11:23 6 actually smaller, but some of them are actually quite
11:23 7 large. I mean, billion-dollar-plus parent companies.
11:23 8 Q. And what does that tell you about their
11:23 9 expectation of how they're going to do when they enter
11:23 10 this -- if they enter this market, why would they be
11:23 11 doing that?
11:23 12 A. Well, they expect to be profitable. Whether
11:23 13 they are or not is the result of competition, but they
11:23 14 certainly expect that.
11:23 15 Q. Now, among those large well-resourced
11:23 16 companies, you would put Dentsply Sirona?
11:23 17 A. Yes.
11:23 18 Q. You'd put Ormco?
11:23 19 A. Yes.
11:23 20 Q. And would you put Straumann in that category?
11:23 21 A. I would.
11:23 22 Q. Now, in a competitive market, would you expect
11:23 23 all of these companies to succeed?
11:23 24 A. No. And when there's competition, I mean,
11:23 25 again, to compete means to win or lose. It's one of

11:23 1 those two outcomes. So you will see winners and you
11:23 2 will see losers.
11:23 3 Q. Now, you're familiar with the term "barriers
11:24 4 to entry"?
11:24 5 A. Yes, sir.
11:24 6 Q. What does that mean to you as an economist?
11:24 7 A. It -- well, let me give you by example,
11:24 8 actually.
9 Q. Sure.
11:24 10 A. So let's say that to sell a product you need a
11:24 11 huge manufacturing plant and you need enough scale to
11:24 12 be able to sell that product. That might be a barrier
11:24 13 to entry because it makes it harder for you to enter
11:24 14 into that market, if you will.
11:24 15 Q. And does this chart tell you anything about
11:24 16 whether there are barriers to entry getting in to start
11:24 17 competing with Align?
11:24 18 A. It suggests that there's not because there's
11:24 19 so much entry. And we heard the discussion yesterday
11:24 20 about companies making new manufacturing facilities
11:24 21 across the U.S.
11:24 22 So that's what I'm talking about here. We're
11:24 23 seeing entry into this place, and not just a little bit
11:24 24 but a lot.
11:24 25 Q. Now, Dr. Jena, you testified in a competitive

11:24 1 market you would expect to see innovation.
11:24 2 Do you recall that?
11:24 3 A. Yes.
11:24 4 Q. And in a monopoly market, you would expect to
11:24 5 see less innovation?
11:24 6 A. Correct.
11:24 7 Q. So help us understand what you concluded about
11:24 8 that.
11:24 9 A. I mean, this is a market where there's been --
11:24 10 it's good for patients, really good for patients, a lot
11:25 11 of innovation.
11:25 12 You see that aligners are improving. The
11:25 13 technology, the offerings are improving. You even see
11:25 14 that braces, which are these old stodgy things from the
11:25 15 1900s, even braces are becoming digital and they're
11:25 16 improving. The scanning technology is improving.
11:25 17 And that's important for aligners because as
11:25 18 you make scanning better, more efficient, more
11:25 19 effective, you improve the quality of the product, the
11:25 20 ultimate product. I don't care about a scan when I go
11:25 21 into someone's room. I care about the actual aligner.
11:25 22 And so those things are all linked, and they're
11:25 23 improving.
11:25 24 Q. Now, the fact that aligners and braces have
11:25 25 both been improving recently, does that tell you

11:25 1 anything about whether there's competition here?
11:25 2 A. They have to compete with each other. That's
11:25 3 the whole idea.
11:25 4 Q. So what does all this innovation tell you
11:25 5 about the teeth-straightening market? Is there
11:25 6 monopoly power, or is there no monopoly power?
11:25 7 A. It's a check in the competitive column,
11:25 8 because that's what you expect to see, companies
11:25 9 innovate. They innovative to compete.
11:25 10 Q. Now, let's focus just on Align.
11:26 11 How is it that Align has been able to innovate
11:26 12 over the course of time that we've been talking about
11:26 13 here?
11:26 14 Let's look at the next slide.
11:26 15 A. You know, innovation sometimes happens by
11:26 16 accident, and there's nice examples of that in history.
11:26 17 But most of the time, new ideas, innovative ideas,
11:26 18 don't happen by accident. They happen by investment.
11:26 19 And if you just look at Align from 2017
11:26 20 onwards, it's not even looking before 2017, they've
11:26 21 invested about $2.2 billion in research and
11:26 22 development.
11:26 23 Q. And has the amount that Align has invested
11:26 24 each year gone up or down?
11:26 25 A. It's gone up.

11:26 1 Q. So when we look, for example, at 2021, it says
11:26 2 $250,300,000. Is that the amount that they invested
11:26 3 just in 2021 on research and development?
11:26 4 A. Yes, sir. That's correct.
11:26 5 Q. And then there was another 305 million in the
11:26 6 following year?
11:26 7 A. Yes, sir.
11:26 8 Q. Okay. Is this what you would expect a
11:27 9 monopolist to do?
11:27 10 A. Not typically, no. Monopolists can innovate,
11:27 11 but typically when you see -- you're concerned about a
11:27 12 monopolized market, you're concerned about low
11:27 13 innovation, not this kind of innovation.
11:27 14 Q. Okay. Now, companies sometimes engage in
11:27 15 marketing as well, correct?
11:27 16 A. Yes, sir.
11:27 17 Q. And would you expect a monopolist to do a lot
11:27 18 of investment and spending in marketing and education?
11:27 19 A. They can, but that's not what you expect to
11:27 20 see.
11:27 21 Q. And why not?
11:27 22 A. Well, because marketing is a form of
11:27 23 competition, you know, why -- why does -- why do
11:27 24 companies market? They market because they're trying
11:27 25 to compete with other companies.

11:27 1 So when you see a lot of marketing, you think
11:27 2 to yourself -- the first reaction you should have is:
11:27 3 All right. They're trying to compete.
11:27 4 Q. And let's look at this chart.
11:27 5 What does this chart tell us?
11:27 6 A. This is the marketing and education spending
11:27 7 from 2017 until 2025, and what you can see, that it's
11:27 8 been quite large, about $1.6 billion.
11:27 9 Q. So why would a company that is supposedly a
11:27 10 monopolist spend over 1 and a half billion dollars in
11:28 11 less than ten years on marketing and education?
11:28 12 A. Because it's trying to compete. It's trying
11:28 13 to compete with people who want their teeth
11:28 14 straightened, and it, like other companies, are also
11:28 15 trying to compete for those people who do not yet know
11:28 16 or want their teeth straightened, but those are people
11:28 17 we're trying to bring in.
11:28 18 Q. Let's go to the next slide.
11:28 19 I want to end, Dr. Jena, where we began, which
11:28 20 is the question: Does Align have monopoly power?
11:28 21 What is your answer to that question as an
11:28 22 economist?
11:28 23 A. It's an important question, and you've spent a
11:28 24 lot of time thinking about it, and you will spend more
11:28 25 time about it. And my answer to that question is no.

11:28 1 And the reason why is if you think about what
11:28 2 it means to have monopoly power, at a very minimum, at
11:28 3 the start, you have to think about what are the
11:28 4 products that that monopolist, quote/unquote, is
11:28 5 competing with.
11:28 6 If the market includes direct-to-consumer
11:28 7 aligners, braces, and doctor-directed aligners, Align's
11:29 8 share is low. It's not something you'd be worried
11:29 9 about from a monopoly perspective.
11:29 10 But even putting that aside, to have monopoly
11:29 11 power means to exercise that power, to charge higher
11:29 12 prices, to limit innovation, to limit the amount that
11:29 13 you sell, to not face entry and exit from other
11:29 14 companies. And that is not what we are seeing here.
11:29 15 Q. And what are we seeing happening to prices?
11:29 16 A. They're falling.
11:29 17 Q. And innovation, we've seen increased
11:29 18 innovation?
11:29 19 A. Yes, sir.
11:29 20 Q. And so at the end of all this, what's your
11:29 21 conclusion as an economist about whether Align has
11:29 22 monopoly power?
11:29 23 A. The answer is no, in my opinion.
11:29 24 MR. TUBACH: Thank you.
11:29 25 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 1 Q. And a discount program as well, right?
11:32 2 A. Yes, sir.
11:32 3 Q. Now, he has also said -- he has also said that
11:32 4 it is inappropriate to define this market more broadly
11:32 5 to include things like braces, right?
11:32 6 A. Yes, sir.
11:32 7 Q. And Dr. Taylor, an orthodontist, took the
11:32 8 stand as well, right?
11:32 9 A. Yes, sir. And I saw him testify.
11:32 10 Q. And he also said that he views braces as
11:33 11 different in important respects than clear aligners.
11:33 12 You heard him say that too?
11:33 13 A. Yes, sir.
11:33 14 Q. All right. And, Dr. Jena, you're not here to
11:33 15 discuss the activities that Dr. Perryman has
11:33 16 highlighted, the iTero scanner policy, the exclusionary
11:33 17 contracts, the Advantage Program? You're not here to
11:33 18 address those, right?
11:33 19 A. That is correct, sir.
11:33 20 Q. Nor are you here to criticize the quality of
11:33 21 ClearCorrect's products, right?
11:33 22 A. That is also correct.
11:33 23 Q. And you heard me say to Dr. Knittel that he
11:33 24 was sort of putting a microscope under these companies
11:33 25 down here at the bottom and asking the question whether

11:33 1 ClearCorrect was competing effectively or not.
11:33 2 You're not here to talk about that, are you?
11:33 3 A. No, sir. I'm not here to talk about that.
11:33 4 Q. You are here to say that this market is
11:33 5 actually much broader and includes braces and
11:33 6 direct-to-consumer clear aligners, correct?
11:33 7 A. That's correct.
11:33 8 Q. And so you're here to say that even though
11:33 9 these numbers here look like Invisalign and Align have
11:34 10 a large market share, the market's actually much bigger
11:34 11 such that Align's share is smaller.
11:34 12 Do I have that right?
11:34 13 A. That was part of my testimony, sir.
11:34 14 Q. Okay. And so you're here to say that rather
11:34 15 than the magnifying glass that Dr. Knittel took us
11:34 16 through of these companies down here, you're looking at
11:34 17 more of a big picture and saying the actual market is
11:34 18 much bigger, includes braces, includes direct to
11:34 19 consumer.
11:34 20 Do I have that right?
11:34 21 A. I think that's correct.
11:34 22 Q. Okay. Now, if the ladies and gentlemen of the
11:34 23 jury conclude that direct to consumer is not fairly
11:34 24 treated as part of the market -- are you with me so
11:34 25 far?

11:34 1 A. Yes, sir.
11:34 2 Q. And if the ladies and gentlemen of the jury
11:34 3 conclude that there are significant differences,
11:34 4 meaningful differences, for this case between braces
11:34 5 and clear aligners -- are you still with me?
11:34 6 A. I'm staying with you.
11:34 7 Q. -- you're not here to criticize the actual
11:34 8 numbers that Dr. Perryman presented to the jury as
11:34 9 reflected here, right?
11:34 10 A. Not the shares, no.
11:35 11 Q. So you're not here to contest what he has
11:35 12 depicted here as the revenue numbers for Align, right?
11:35 13 A. No.
11:35 14 Q. Nor the revenue numbers for the other
11:35 15 companies, correct?
11:35 16 A. No, sir.
11:35 17 Q. Nor his calculation of the market share in the
11:35 18 market as he's defined it, correct?
11:35 19 A. Correct.
11:35 20 Q. He's calculated for the market, as he's
11:35 21 defined it, 84 to 92 percent of market share for Align.
11:35 22 And again, just based on the numbers, you're
11:35 23 not here to contest what he's presented here, true?
11:35 24 A. I would say I'm not here to contest his
11:35 25 calculation of the shares in his defined market.

11:35 1 Q. Fair enough.
11:35 2 You're here to say that we should be including
11:35 3 other things like braces and DTC, or direct to
11:35 4 consumer, but if the ladies and gentlemen of the jury
11:35 5 agree with Dr. Perryman, those shouldn't be included.
11:35 6 You're not here to contest the math shown on this
11:35 7 board, true?
11:35 8 A. I would say generally no.
11:35 9 Q. No, you're not here to contest the math.
11:35 10 Right?
11:35 11 A. Correct.
11:35 12 Q. So I just want to make sure the record's
13 perfectly clear.
11:36 14 You're not here to say Dr. Perryman's numbers
11:36 15 are wrong. You have no reason to dispute the numbers
11:36 16 themselves presented on this placard, correct?
11:36 17 A. I haven't looked at the bottom numbers. I
11:36 18 would not take issue with the share in the market that
11:36 19 he defines it to be.
11:36 20 Q. In the market as he's defined it, you are not
11:36 21 taking issue, and you have no quarrel with the numbers
11:36 22 here, right, in the market as he's defined it?
11:36 23 A. I think that's correct, but I think my answer
11:36 24 before is hopefully clear.
11:36 25 Q. All right. Now, I'm going to come back to DTC

11:36 1 in a moment. But -- well, let me ask you one quick
11:36 2 question about DTC.
11:36 3 MR. MUELLER: Could we pull up 8.12? I'm
11:36 4 sorry, PDX-8.12.
11:36 5 BY MR. MUELLER:
11:36 6 Q. This is a slide that you showed the jury a
11:36 7 little while ago; is that right, sir?
11:36 8 A. Yes, sir.
11:36 9 Q. And you showed two young women, each of whom
11:37 10 have clear aligners in their hands?
11:37 11 A. Yes, sir.
11:37 12 Q. And they're both smiling, and they both look
11:37 13 like satisfied patients; is that fair?
11:37 14 A. They're both smiling. I don't know whether
11:37 15 they're satisfied, but they're both smiling.
11:37 16 Q. Now, you understand, sir, that the industry --
11:37 17 and when I say "the industry," I mean orthodontists and
11:37 18 dentists -- have actually found that there's something
11:37 19 quite dangerous about DTC, right?
11:37 20 A. I haven't studied that.
11:37 21 Q. Well, sir, did you know it's illegal in the
11:37 22 state of Texas?
11:37 23 A. I heard some testimony about that yesterday,
11:37 24 but I haven't studied it specifically.
11:37 25 Q. You may not have studied it, but it's illegal

11:37 1 to provide clear aligners to someone here in Texas
11:37 2 under Texas state law unless they first see a doctor,
11:37 3 right?
11:37 4 A. I don't know one way or the other.
11:37 5 Q. And so this young lady on the left-hand side,
11:37 6 unless she had seen a doctor, a doctor, what happened
11:37 7 to her would be illegal right here in Texas.
11:37 8 A. I'm not a lawyer, and I haven't studied that
11:37 9 question. So I wish I could tell you, but I can't.
11:38 10 MR. MUELLER: Let's go to DDX-8.1 --
11:38 11 8.23, please.
11:38 12 BY MR. MUELLER:
11:38 13 Q. This is a slide that Dr. Perryman showed to
11:38 14 the jury, right?
11:38 15 A. Yes, sir.
11:38 16 Q. And, Dr. Jena, on the left-hand side, we have
11:38 17 Dr. Perryman providing an example of a market that was
11:38 18 too narrowly defined. And as he explained, that would
11:38 19 be just one pickup truck model and one clear aligner,
11:38 20 right?
11:38 21 A. Correct.
11:38 22 Q. On the left-hand side, he gave an example of a
11:38 23 market that was too broadly defined. And as he
11:38 24 explained, it included all vehicles available for
11:38 25 purchase on the top, and then various types of

11:38 1 teeth-straightening equipment, including both braces
11:38 2 and aligners, on the bottom.
11:38 3 Do you see that, sir?
11:38 4 A. I do. You just said left-hand side, but it's
11:38 5 the right-hand side. But I'm still with you.
11:38 6 Q. Okay. I apologize if I got the direction
11:39 7 wrong.
11:39 8 But the right-hand side, he had the all
11:39 9 vehicles on the top and braces and aligners on the
11:39 10 bottom, right?
11:39 11 A. Correct.
11:39 12 Q. And he said that those were examples of too
11:39 13 broad, including too many different types of things,
11:39 14 right?
11:39 15 A. Yes, sir.
11:39 16 Q. In the middle, he said here's a good example
11:39 17 of how to draw an appropriate or relevant antitrust
11:39 18 market.
11:39 19 He had pickup trucks of various types on the
11:39 20 top, right?
11:39 21 A. Yes, sir.
11:39 22 Q. And clear aligners of various types below
11:39 23 that.
11:39 24 Do you see that, sir?
11:39 25 A. Doctor-directed clear aligners of various

11:39 1 types.
11:39 2 Q. Right. And he said that this is a good
11:39 3 example of an appropriate definition of a relevant
11:39 4 antitrust market, right?
11:39 5 A. Correct.
11:39 6 Q. Now, let's talk about braces first.
11:39 7 And you would certainly agree with me, sir,
11:39 8 that there are some very obvious differences between
11:39 9 braces on the one hand and aligners on the other,
11:39 10 right?
11:39 11 A. Yes, sir.
11:39 12 Q. And just to give you one example, are you able
11:39 13 to take -- is a patient able to take out of his or her
11:40 14 mouth braces?
11:40 15 A. No, sir.
11:40 16 Q. Are braces invisible?
11:40 17 A. They are less visible but not invisible.
11:40 18 Q. And they're not invisible because they have
11:40 19 wires, right?
11:40 20 A. There are ceramic and clear braces and lingual
11:40 21 braces that can be, quote/unquote, invisible. But less
11:40 22 visible.
11:40 23 Q. Less visible.
11:40 24 And even those ones, the examples you gave do
11:40 25 have wires, right?

11:40 1 A. Yes, sir.
11:40 2 Q. Now, those types of differences, the fact that
11:40 3 they can be removed, the fact that they're invisible,
11:40 4 make a huge difference to many patients in the United
11:40 5 States, correct?
11:40 6 A. They can definitely make a difference to
11:40 7 patients who are choosing between those.
11:40 8 Q. And, sir, have you ever had braces or clear
11:40 9 aligners yourself?
11:40 10 A. No, but our daughter has braces. She was
11:40 11 offered aligners. And our son just got evaluated.
11:40 12 Q. Well, I want to ask you. You right now today,
11:40 13 if today, if today your dentist were to say to you,
11:40 14 "Dr. Jena, I think you would benefit from some teeth
15 straightening."
11:40 16 This is a hypothetical, okay?
11:41 17 A. It's not a hypothetical, it's true. But go
11:41 18 ahead, please.
11:41 19 Q. If you -- if your dentist were to say that to
11:41 20 you today, sir, would you want clear aligners or braces
11:41 21 as an adult sitting here right now?
11:41 22 A. I don't know. I haven't thought about it.
11:41 23 Q. Okay. So you yourself right now don't see a
11:41 24 difference for the adult population between braces on
11:41 25 the one hand and clear aligners on the other?

11:41 1 A. I'm speaking for myself. I'm not talking
11:41 2 about all adults in this country.
11:41 3 Q. Well, sir, you understand this is a very
11:41 4 important question for this case whether adults, who
11:41 5 make up a huge percentage of the market as Dr. Perryman
11:41 6 has defined it, whether adults would consider braces to
11:41 7 be a legitimate alternative to clear aligners.
11:41 8 That's a major question in this case, isn't
11:41 9 it?
11:41 10 A. I hadn't heard it talked about yesterday. But
11:41 11 if you're saying it's a major question, I'm happy to
11:41 12 answer it.
11:41 13 Q. And, sir, have you studied that question at
11:41 14 all, whether adults would consider switching to braces
11:41 15 to be a reasonable alternative to clear aligners for
11:41 16 adults?
11:41 17 A. In part, yes. In my expert report, you could
11:41 18 maybe see some discussion of that.
11:42 19 Q. And, sir, you know that the truth is there's
11:42 20 hundreds of millions, hundreds of millions of patients,
11:42 21 both adults and younger folks as well, there's hundreds
11:42 22 of millions of patients that want orthodontic
11:42 23 treatment, okay? They want it, but they want it
11:42 24 digitally with plastics, clear aligners. They want the
11:42 25 removable option and the invisible option. There's

11:42 1 hundreds of millions of folks like that, and those
11:42 2 folks would never, never go with old analog
11:42 3 wire-and-bracket systems.
11:42 4 You know that to be true?
11:42 5 A. I don't know that to be true.
11:42 6 Q. Well, let's put up some testimony the jury has
11:42 7 heard, and let me use this other board here.
11:42 8 MR. MUELLER: Your Honor, may I set up a
11:42 9 board here?
11:42 10 BY MR. MUELLER:
11:42 11 Q. Dr. Jena, were you here when we played some
11:43 12 excerpts of interviews that a chief executive officer,
11:43 13 Joe Hogan, of Align gave?
11:43 14 A. This was the same day as Dr. Taylor?
11:43 15 Q. It was the same day. Were you here for that?
11:43 16 A. Yeah. I was there for Dr. Taylor so...
11:43 17 Q. Okay. Let me make sure the jury can see this
11:43 18 too.
11:43 19 And did you hear him say -- this is Mr. Hogan,
11:43 20 the CEO: We go with those 65,000 doctors really
11:43 21 beyond, beyond the wires and brackets market.
11:43 22 And he said: Hundreds of millions of
11:43 23 additional patients that would want orthodontic
11:43 24 treatment, but they want it digitally with plastics.
11:43 25 They would never go with the old analog

11:43 1 wires-and-bracket systems in order to get it.
11:43 2 Do you see that, sir?
11:43 3 A. Yes, sir.
11:43 4 Q. And so what Mr. Hogan, the CEO of Align, was
11:43 5 saying is that for hundreds of millions of patients,
11:43 6 they're not going to be choosing between wire braces
11:43 7 and clear aligners. In fact, he was very explicit
11:43 8 about this: They would never go with the old analog
11:44 9 wires-and-bracket systems in order to get it.
11:44 10 He said that, right?
11:44 11 A. He did.
11:44 12 Can I ask a clarifying question?
11:44 13 Q. Sure, Dr. Jena. What's your clarifying
11:44 14 question?
11:44 15 A. There's 280 million people in the U.S. Was he
11:44 16 referring to the U.S. or the world?
11:44 17 Q. Well, I'd say whatever he's referring to is
11:44 18 hundreds of millions of patients, right?
11:44 19 A. I can see that.
11:44 20 Q. And he said: Hundreds of millions of patients
11:44 21 would never go with the old analog wires-and-bracket
11:44 22 systems.
11:44 23 Right, sir?
11:44 24 A. I see that. Yes.
11:44 25 Q. And so the CEO of Align is telling us that for

11:44 1 hundreds of millions of persons, Dr. Perryman has
11:44 2 defined the market in exactly the right way by not
11:44 3 including braces because for those hundreds of millions
11:44 4 of folks, they would never go with braces.
11:44 5 That's what Mr. Hogan said publicly in an
11:44 6 interview, correct?
11:44 7 A. I think there was two questions as part of
11:44 8 that. Can you break those questions out, if you don't
11:44 9 mind?
11:44 10 Q. Sure. Dr. Perryman, in his definition of the
11:44 11 relevant antitrust market, defined it to be clear
11:45 12 aligners, doctor-directed, in the U.S., right?
11:45 13 A. That is correct.
11:45 14 Q. He didn't include braces, correct?
11:45 15 A. Correct.
11:45 16 Q. His market is entirely consistent with what
11:45 17 Joe Hogan, the CEO of Align, said when he said hundreds
11:45 18 of millions of patients would never go with braces,
11:45 19 right?
11:45 20 A. I would not draw that connection.
11:45 21 Q. Okay. Now, let's take a look at --
11:45 22 MR. TUBACH: Can you take that down so I
11:45 23 can see the witness?
11:45 24 MR. MUELLER: Sure. Sure.
11:45 25 MR. TUBACH: Thank you very much.

11:45 1 MR. MUELLER: Now, let's take a look at
11:45 2 PDX-8.11.
3 BY MR. MUELLER:
11:45 4 Q. This is a slide that you showed the jury with
11:45 5 the prices between the two.
11:45 6 Do you see that, sir?
11:45 7 A. Yes, sir.
11:45 8 Q. Now, first of all, you didn't yourself do a
11:45 9 price analysis. You found the data on a website,
11:45 10 correct?
11:45 11 A. This is from a report from the Levin Group.
11:45 12 Q. It's from a March 29, 2023, article, correct?
11:45 13 A. It was -- I don't remember the specific date.
11:45 14 But 2023 from Roger Levin of the Levin Group.
11:46 15 Q. And fair to say you yourself didn't conduct
11:46 16 the pricing survey, right?
11:46 17 A. Yes, sir. That's correct.
11:46 18 Q. Okay. Now, here, we have some price
11:46 19 information. 6,024 on the right -- on the left for
11:46 20 braces, 5,960 on the right.
11:46 21 Do you see that?
11:46 22 A. Yes, sir.
11:46 23 Q. Now, this is the price to customers, not the
11:46 24 price to doctors, right?
11:46 25 A. Yes, sir.

11:46 1 Q. So in this case what we're talking about is
11:46 2 the price to doctors because the doctors are the
11:46 3 customers for Align and the doctors are the customers
11:46 4 for ClearCorrect, right?
11:46 5 A. Disagree.
11:46 6 Q. All right. Well, these are patient prices.
11:46 7 We can agree on that?
11:46 8 A. Agreed.
11:46 9 Q. So let's just take these patient prices for a
11:46 10 moment. And you mentioned this hypothetical monopolist
11:46 11 test, right?
11:46 12 A. Yes, sir.
11:46 13 Q. And then ask the question if one company owned
11:46 14 an entire area of products, let's take clear aligners,
11:46 15 one company owned it -- with me?
11:46 16 A. Yes, sir.
11:46 17 Q. So in this example, instead of a line up here
11:46 18 and these other companies down here, in my example just
11:47 19 Align has 100 percent -- are you with me?
11:47 20 A. Yes.
11:47 21 Q. And even if we take the price to customers as
11:47 22 opposed to the price of doctors, this hypothetical
11:47 23 monopolist test wants us to say if the prices were
11:47 24 increased by 5 percent, could the monopolist still
11:47 25 maintain the same profit level, true?

11:47 1 A. Correct. Well, not quite right. No.
11:47 2 Q. 5 percent profitably, correct?
11:47 3 A. Thank you. That's correct.
11:47 4 Q. There we go.
11:47 5 Now, here, if we take just 5 percent of the
11:47 6 numbers we see here -- and again, these are patient
11:47 7 prices -- that would be about $300 for the aligner
11:47 8 prices, correct?
11:47 9 A. Can you restate that question?
11:47 10 Q. Sure. 5 percent of about 6,000 is about $300,
11:47 11 true?
11:47 12 A. Correct.
11:47 13 Q. Now, under this test, even if we take the
11:47 14 customer prices, what we're basically asking is if
11:47 15 aligners went up to $6,200, would enough people leave
11:48 16 for braces to make the aligner manufacturer less
11:48 17 profitable or unprofitable, true?
11:48 18 A. Can you -- can you ask that again? I'm not
11:48 19 sure that's correct.
11:48 20 Q. Sure. If one company had all aligners -- you
11:48 21 with me, sir?
11:48 22 A. Yes.
11:48 23 Q. And they raised the prices we see here on your
11:48 24 slide by 5 percent -- still with me?
11:48 25 A. Yes, sir.

11:48 1 Q. That'd be about a $300 increase, right?
11:48 2 A. Correct.
11:48 3 Q. And so under this test, we're asking the
11:48 4 question: Would enough people say, $300 more? I'm
11:48 5 going to switch over to braces.
11:48 6 Right?
11:48 7 A. Correct.
11:48 8 Q. And, sir, you've done absolutely no analysis
11:48 9 to establish that that would happen, have you?
11:48 10 A. This is 1.5 percent difference.
11:48 11 Q. Sir, you did no study in which you attempted
11:48 12 to determine whether folks who bought clear aligners
11:48 13 would leave for braces if the price went up by that
11:48 14 amount. You did absolutely no study on that issue, did
11:48 15 you?
11:48 16 A. I think that's right. You're describing a
11:48 17 switching analysis, which I did not do.
11:48 18 Q. You did not do that analysis, right?
11:48 19 A. The specific one you described, no.
11:48 20 Q. Okay. And you were here when Dr. Taylor
11:49 21 testified. He's an orthodontist, correct?
11:49 22 A. Yes.
11:49 23 Q. And he said that for many of his patients, in
11:49 24 his decades of work as an orthodontist, they wouldn't
11:49 25 consider braces, right?

11:49 1 A. I heard that testimony.
11:49 2 Q. That's exactly what Mr. Hogan said, the CEO of
11:49 3 Align, that for many patients, he said hundreds of
11:49 4 millions, they wouldn't consider braces, right?
11:49 5 A. Okay.
11:49 6 Q. Sir, you're not an orthodontist, true?
11:49 7 A. Correct.
11:49 8 Q. You're not a dentist, right?
11:49 9 A. Also correct.
11:49 10 Q. You're a medical doctor, correct?
11:49 11 A. Correct.
11:49 12 Q. And an economist?
11:49 13 A. I thought you were going to forget that. Yes,
11:49 14 also an economist.
11:49 15 Q. But not -- you do not have the experience of
11:49 16 Dr. Taylor as an orthodontist, true?
11:49 17 A. Absolutely not.
11:49 18 Q. And so you mentioned a few times Dr. Perryman.
11:49 19 Dr. Taylor also offered an opinion to this jury, right?
11:49 20 A. He did.
11:49 21 Q. And his opinion was entirely consistent with
11:49 22 what the chief executive officer of Align said. Many
11:49 23 folks will not consider braces as an alternative to
11:49 24 clear aligners, correct?
11:49 25 A. I'm not sure if they're completely consistent,

11:50 1 but I understand both of those testimonies -- or one
11:50 2 testimony in this statement.
11:50 3 MR. MUELLER: Let's go to PDX -- or
11:50 4 DDX-14.3.
11:50 5 BY MR. MUELLER:
11:50 6 Q. I'll represent to you these are just two
11:50 7 prices for the Ford dealership in town. We have a Ford
11:50 8 F-150 on the right and a Ford Mustang, looks like an
11:50 9 electric vehicle, on the right.
11:50 10 Do you see that?
11:50 11 A. Yes, sir.
11:50 12 Q. And they're relatively close in price, 40,000
11:50 13 and 41,000, right?
11:50 14 A. Yes.
11:50 15 Q. But you know, sir, that for many folks,
11:50 16 they're never going to consider the electric Mustang as
11:50 17 an alternative to that pickup truck, correct?
11:50 18 A. I 100 percent agree with you.
11:50 19 Q. Both are vehicles, true?
11:50 20 A. Correct.
11:50 21 Q. Both take you from Point A to Point B, right?
11:50 22 A. Also correct.
11:50 23 Q. But for many people, they prefer the pickup
11:50 24 truck, correct?
11:50 25 A. Absolutely.

11:50 1 Q. And then for dental appliances, braces and
11:50 2 clear aligners both straighten teeth, right?
11:50 3 A. Correct.
11:50 4 Q. They move teeth from Point A to Point B,
11:50 5 right?
11:50 6 A. Also correct.
11:50 7 Q. But for some folks, the fact that braces are
11:51 8 not removable and are visible makes them very, very
11:51 9 different from clear aligners, correct?
11:51 10 A. Also correct.
11:51 11 MR. MUELLER: Let's go to DTC, the
11:51 12 direct-to-consumer issue. And let's go to DTX-2883.
11:51 13 BY MR. MUELLER:
11:51 14 Q. This is an article that you cited in your
11:51 15 expert report.
11:51 16 MR. MUELLER: I'm sorry. 2886. I
11:51 17 misspoke. DTX-2886.
11:51 18 MR. TUBACH: Could we get a tab number?
11:51 19 MR. MUELLER: Sure. It's Tab 3.
11:51 20 A. That's in this binder here?
11:51 21 BY MR. MUELLER:
11:51 22 Q. It is. Yes. Tab 3. Whatever is easier for
11:51 23 you, sir. We'll put it on the screen as well.
11:51 24 A. It doesn't hurt to do both. I'll open it up.
11:51 25 Thank you.

11:51 1 Q. This is the American Association of
2 Orthodontists.
11:52 3 Do you see that, sir?
11:52 4 A. Yes.
11:52 5 Q. And this is an article or materials that you
11:52 6 relied on in your own report, correct?
11:52 7 A. I believe so.
11:52 8 MR. MUELLER: Your Honor, I offer it.
11:52 9 MR. TUBACH: No objection.
11:52 10 THE COURT: Admitted.
11:52 11 BY MR. MUELLER:
11:52 12 Q. Let's look at Page 1. It says: Moving teeth
11:52 13 is a complex biological process. Midway down the page.
11:52 14 Do you see that, sir?
11:52 15 A. Yes, sir.
11:52 16 Q. It's not just a cosmetic procedure.
11:52 17 Do you see that?
11:52 18 A. Yes.
11:52 19 Q. And then if we go a bit further down, it says:
11:52 20 The complexity of the process of moving teeth requires
11:52 21 that a trained expert, dentist, or orthodontist have
11:52 22 all necessary information at their disposal which can
11:52 23 only be gained through an in-person examination before
11:52 24 starting treatment.
11:52 25 Do you see that?

11:52 1 A. I see that.
11:52 2 Q. And so here, sir, we have, we have -- if you
11:52 3 go to the top of the page, the American Association of
11:53 4 Orthodontists providing public guidance -- go back down
11:53 5 again -- that the complexity of straightening teeth
11:53 6 requires a trained expert.
11:53 7 Do you see that, sir?
11:53 8 A. Yes, sir.
11:53 9 Q. And again, Dr. Perryman has accounted for this
11:53 10 by defining his relevant antitrust market to be clear
11:53 11 aligners doctor-directed, right?
11:53 12 A. That's how he's defined it. I don't know that
11:53 13 you can connect it to this article, though.
11:53 14 Q. Well, what you've said, sir, is the market
11:53 15 should be broader and should include where there is no
11:53 16 doctor involved, right?
11:53 17 A. That's not quite correct.
11:53 18 Q. Dr. Jena, you analogized it to CarMax and said
11:53 19 that the DTC was like CarMax, right?
11:53 20 A. That's correct. But there's braces where a
11:53 21 doctor is involved, and DTC, where you bypass the
11:53 22 doctor. I want to make sure your question was clear.
11:53 23 Q. Dr. Jena, Dr. Jena, you understand that,
11:53 24 again, right here in this state, it's illegal to do DTC
11:53 25 unless you have doctor direction, right?

11:53 1 A. I take your representation for that. I don't
11:54 2 know one way or the other, unfortunately.
11:54 3 Q. And in fact, it's illegal because it's
11:54 4 dangerous, true?
11:54 5 A. I definitely don't have an opinion on that.
11:54 6 MR. MUELLER: Well, let's take a look at
11:54 7 DTX-2884.
11:54 8 MR. TUBACH: Can we get a tab number?
11:54 9 MR. MUELLER: This is Tab 2.
10 BY MR. MUELLER:
11:54 11 Q. And take your time, Dr. Jena. Let me know
11:54 12 when you're there. I want to go to your expert report
11:54 13 at Page 186 (sic), Paragraph 133 -- 131. Note 352.
11:54 14 A. Did you say Paragraph 86?
11:54 15 Q. Page 86.
11:54 16 A. Oh, Page 86. I apologize. Yes.
11:54 17 Q. Paragraph 131, Note 352.
11:54 18 MR. MUELLER: A little bit lower on the
11:54 19 page. There we go.
20 BY MR. MUELLER:
11:54 21 Q. And do you see you cited an article that's
11:54 22 titled Cheapest Ways to Straighten Teeth in 2025?
11:55 23 A. Yes. You're talking about Footnote 352. I
11:55 24 see that.
11:55 25 Q. Right. Let's go to that article. This is

11:55 1 DTX-2884. There's that very same article. Cheapest
11:55 2 Ways to Straighten Teeth in 2026. Right, sir?
11:55 3 A. I see here it says March 27, 2026. And the
11:55 4 Footnote 352, it says October 9, 2025. Is this the
11:55 5 same article or a different article?
11:55 6 Q. Well, do you see the same title, same author?
11:56 7 A. That's incorrect. It's a different title. It
11:56 8 says 2026. If you look at Footnote 352 of my report,
11:56 9 it says 2025. So that's incorrect.
11:56 10 Q. Well, let me show you a piece of this, and
11:56 11 let's see if this refreshes your memory on this.
11:56 12 MR. MUELLER: And if we could go to
11:56 13 Page 2.
11:56 14 A. Page 2 of what? This here?
11:56 15 BY MR. MUELLER:
11:56 16 Q. Of this article right there. It's on the
11:56 17 screen too.
11:56 18 A. Is that a tab in my --
11:56 19 Q. It's Tab 5. And you can also look on the
11:56 20 screen, whatever's easier.
11:56 21 A. I'll do both. Thank you.
11:56 22 MR. MUELLER: And if we go to What to
11:56 23 Know on Page 2. A little bit further down.
24 BY MR. MUELLER:
11:56 25 Q. It says: Supervised treatments follow the

11:56 1 diagnostic standard.
11:56 2 That means doctor directed, right?
11:56 3 A. You left out "in office or hybrid."
11:56 4 Q. And do you see it says: Reported DTC injuries
11:56 5 include bite changes, pain, and gum damage?
11:56 6 Do you see that?
11:56 7 A. Yes, sir. I see that.
11:56 8 Q. And that's a fact, that DTC has led to
11:56 9 injuries, and that's part of the reason why it's
11:57 10 illegal here, correct?
11:57 11 A. I don't know that one way or the other.
11:57 12 MR. MUELLER: Let's go to PDX-8.20.
13 BY MR. MUELLER:
11:57 14 Q. These are some of the companies that you say
11:57 15 are part of the market as you define it, correct?
11:57 16 A. Correct.
11:57 17 Q. Now, you say this is -- the market as you
11:57 18 describe it is vibrant, new entrants, lots of
11:57 19 competition, true?
11:57 20 A. Correct. Not all of these companies are still
11:57 21 here, just so you know.
11:57 22 Q. Well, that's an important point. Not all the
11:57 23 companies that you showed this jury on this slide are
11:57 24 even in existence today, true?
11:57 25 A. Which is what I told them.

11:57 1 Q. Now, Dr. Perryman again defines the
11:57 2 doctor-directed clear aligner market for the U.S.,
11:57 3 right?
11:57 4 Right, sir?
11:57 5 A. He defines that for the U.S.
11:57 6 Q. And he noted that there's been some new
11:57 7 entrants into that market over the years, right?
11:57 8 A. I haven't looked at that portion there. So I
11:57 9 can't tell.
11:57 10 Q. And, sir, if you could -- we can blow it up if
11:57 11 you need to -- but do you see how all the other new
11:57 12 entrants in the clear aligner doctor-directed market in
11:57 13 the U.S. are right there in the basement?
11:58 14 Do you see that, sir?
11:58 15 A. I can see his chart.
11:58 16 Q. And as we talked about earlier, you're not
11:58 17 contesting the numbers in this chart, correct?
11:58 18 A. I'm not even talking about any of the numbers
11:58 19 at the bottom of the chart. So I'm not contesting them
11:58 20 one way or the other.
11:58 21 Q. And, Dr. Jena, which of the new entrants in
11:58 22 the market as Dr. Perryman has defined it, clear
11:58 23 aligners under the direction of a doctor in the U.S.,
11:58 24 which of those new entrants has escaped the basement?
11:58 25 A. I can't even see what you're calling the

11:58 1 basement from here. So I definitely don't have an
11:58 2 opinion on that.
11:58 3 Q. And, Dr. Jena, that's the problem, it's that
11:58 4 you can't even see the companies down here. You can
11:58 5 see Align up here, right?
11:58 6 A. Well, part of the problem is that the slides
11:58 7 are not in front of me but --
11:58 8 Q. Well, I'm happy to move it over.
11:58 9 A. Yeah. Please do.
11:58 10 Q. Dr. Jena, you can see Align up here, right?
11:58 11 A. Yes. I can see that.
11:58 12 Q. Can you see Align's growth in the time period
11:58 13 that Align showed the jury, 2019 to 2023?
11:58 14 A. Yes, sir. That's hard to miss.
11:58 15 Q. It's hard to miss because it's so much greater
11:58 16 than all of the other clear aligner companies, right?
11:58 17 A. And it's also bright blue, but yes.
11:59 18 Q. It's bright blue and much, much, much, much,
11:59 19 much larger, right?
11:59 20 A. Yes, sir.
11:59 21 Q. And you're here to say that what we see right
11:59 22 here is a well-functioning market, true?
11:59 23 A. I haven't said that, no.
11:59 24 What I'm saying -- well.
11:59 25 Q. Well, you haven't said that because actually,

11:59 1 if the market is as Dr. Perryman defined it, you have
11:59 2 no opinion, true?
11:59 3 A. That's incorrect.
11:59 4 Q. Your opinion is Dr. Perryman should have
11:59 5 included braces, right?
11:59 6 A. That is correct.
11:59 7 Q. Your opinion is Dr. Perryman should have
11:59 8 included DTC, right?
11:59 9 A. Also correct.
11:59 10 Q. But in the doctor-directed clear aligner
11:59 11 market in the U.S., Align is way up here. And every
11:59 12 other company, new entrant and old, is in the basement,
11:59 13 correct?
11:59 14 A. I would disagree.
11:59 15 Q. And over here in the clear aligner
11:59 16 doctor-directed market in the U.S., Align's revenue
11:59 17 growth is off the charts, and everyone else is far,
11:59 18 far, far below, true?
12:00 19 A. I haven't studied that graph, but it is what
12:00 20 it is.
12:00 21 Q. And many of the companies that you showed the
12:00 22 jury, which include braces, right?
12:00 23 A. Say that again.
12:00 24 Q. Over here on PDX-8.19, many of those companies
12:00 25 you showed the jury in your market include braces,

12:00 1 correct?
12:00 2 A. Correct.
12:00 3 Q. Include direct-to-consumer companies that have
12:00 4 gone out of business, right?
12:00 5 A. Some have gone out, and some have come back
12:00 6 in.
12:00 7 Q. Smile Direct Club, for example, is gone, true?
12:00 8 A. Let's see. Yeah. 2014, Smile Direct Club
12:00 9 went out; 2023, Smilist is in; 2Usmiles is in, and
12:00 10 Smilese is in.
12:00 11 Q. And the truth is, sir, the truth is, sir, that
12:00 12 the direct-to-consumer market blew itself apart through
12:00 13 Smile Direct Club, right?
12:00 14 A. Smile Direct Club left in 2023.
12:00 15 Q. Here's some more Joe Hogan testimony, the
12:00 16 chief executive officer of Align.
12:00 17 He said: I don't see it as a
12:01 18 direct-to-consumer market. That market blew itself
12:01 19 apart through Smile Direct Club obviously and other
12:01 20 companies all around the world to try that.
12:01 21 He said you need a doctor in the process,
12:01 22 right?
12:01 23 A. I see those words.
12:01 24 Q. And so again, we have the chief executive
12:01 25 officer of Align saying, I don't see it as a

12:01 1 direct-to-consumer market.
12:01 2 But, sir, you do?
12:01 3 A. Correct.
12:01 4 Q. He said: That market blew itself apart
12:01 5 through Smile Direct Club obviously and other companies
12:01 6 all around the world to try that.
12:01 7 You don't agree that the market's been blown
12:01 8 apart, do you?
12:01 9 A. No.
12:01 10 Q. He said that you need a doctor in this
12:01 11 process. And you don't agree, do you?
12:01 12 A. I don't have an opinion on whether you need a
12:01 13 doctor in the process.
12:01 14 Q. So you don't agree with the CEO, and you don't
12:01 15 agree with the law right here in Texas that requires a
12:01 16 doctor to be part of the process.
12:01 17 You disagree with all that. Do I have that
12:01 18 right?
12:01 19 A. Why would I agree or disagree with the law?
12:01 20 I'm not a lawyer. I have no opinions on that.
12:01 21 Q. Now, with respect to pricing in the clear
12:02 22 aligner market in the U.S. --
12:02 23 MR. TUBACH: Your Honor, can we just take
12:02 24 down the chart?
12:02 25 MR. MUELLER: Sure. I'm sorry. Sorry.

12:02 1 BY MR. MUELLER:
12:02 2 Q. I'd like to take you, sir, to Tab 15,
12:02 3 DTX-2892.
12:02 4 This is a conference, and the participants
12:02 5 included Joseph Hogan, chief executive officer, and
12:02 6 John Morici, chief financial officer.
12:02 7 Do you see that, sir?
12:02 8 A. I see that.
12:02 9 Q. And I want to take you to Page 3. And let me
12:02 10 just show you a little what Mr. Hogan said. He said:
12:02 11 I mean, we have pricing power in the market. I think
12:02 12 we show that every year.
12:02 13 Do you see that, sir?
12:02 14 A. Yes, sir.
12:02 15 Q. Now, you said that the prices that Align has
12:02 16 charged have gone down a bit over time, right?
12:02 17 A. 11 percent. Yes, sir.
12:02 18 Q. But you would agree with Dr. Knittel that it's
12:02 19 basic economics that a monopolist may in certain
12:03 20 circumstances cut prices and still be a monopolist?
12:03 21 A. Not commonly.
12:03 22 Q. Sir, you would agree that as a matter of basic
12:03 23 economics, it is absolutely possible for a monopolist
12:03 24 to cut prices and still be a monopolist, true?
12:03 25 A. Yes. But not commonly.

12:03 1 Q. Sir, is it possible for a monopolist to cut
12:03 2 prices and still be a monopolist?
12:03 3 A. Yes. That's possible.
12:03 4 Q. Okay. Now, just a few more questions, sir.
12:03 5 Again, you're not here to defend the
12:03 6 activities that Dr. Perryman described as foreclosing
12:03 7 competition in the market as he defined it, correct?
12:03 8 A. Correct.
12:03 9 Q. And you're the last witness of the case,
12:03 10 right?
12:03 11 A. That's what they tell me.
12:03 12 Q. And you're being paid $1,700 an hour, true?
12:03 13 A. Incorrect.
12:03 14 Q. Is it more than that?
12:03 15 A. It's less than that.
12:03 16 Q. How much is it?
12:03 17 A. $1,600 per hour.
12:03 18 Q. So it's $1,600 an hour; is that right?
12:03 19 A. Yes, sir.
12:03 20 Q. Now, you've been here for the witnesses that
12:04 21 Align has presented in rebuttal to our antitrust
12:04 22 claims, right?
12:04 23 A. Can you say that again?
12:04 24 Q. Sure. You've been here for the last two days?
12:04 25 A. That's a much better way to say it. Yes.

12:04 1 Q. We rested, and then Align had a second chance
12:04 2 to present witnesses to this jury, right?
12:04 3 A. Yes, sir.
12:04 4 Q. And to be fair, we called Mr. Miller. They
12:04 5 brought him here for questioning by us, okay?
12:04 6 Do you recall that, Mr. Miller (sic)?
12:04 7 A. I did see that testimony.
12:04 8 Q. Now, I want to talk about when Align had their
12:04 9 chance to say their piece. The witnesses that they
12:04 10 called when they had their chance to say their piece
12:04 11 were Dr. Reitman, being paid over $1,000 an hour, and a
12:04 12 multiple-time testifier for Align, correct?
12:04 13 A. I don't know.
12:04 14 Q. Dr. Cohanim, being paid $7,000 a day, and he's
12:04 15 also a multiple-time testifier for Align, correct?
12:04 16 A. Also don't know.
12:04 17 Q. Dr. Knittel, again, being paid over $1,000 an
12:04 18 hour. He testified today, right?
12:04 19 A. I think he said $1,000 an hour. So I think
12:04 20 you might have got it wrong.
12:04 21 Q. Everybody's over $1,000 an hour, and you're at
12:05 22 $1,600 an hour, right?
12:05 23 A. Yes, sir. That's correct.
12:05 24 Q. And they played a little snippet of video from
12:05 25 a ClearCorrect witness. Were you here for that?

12:05 1 A. The German gentleman?
12:05 2 Q. That's right.
12:05 3 A. Yes. I was here for that.
12:05 4 Q. Did Align, in putting on its case after we had
12:05 5 presented Dr. Perryman's testimony of 84 to 92 percent
12:05 6 market share foreclosure, every company confined to the
12:05 7 basement in this market, did they call to the stand one
12:05 8 fact witness from Align in rebuttal to what
12:05 9 Dr. Perryman, Dr. Taylor, and our other fact witnesses
12:05 10 said?
12:05 11 A. I don't know one way or the other. I mean,
12:05 12 I've been here for the last two days but...
12:05 13 Q. Did Mr. Hogan show up?
12:05 14 A. I haven't seen him, but I don't know him. So
12:05 15 I haven't seen him testify.
12:05 16 Q. Did Mr. Kaza show up?
12:05 17 A. I don't know who that is.
12:05 18 Q. Did Mr. Diederich show up?
12:05 19 A. I don't know who that is.
12:05 20 Q. Did any of the folks that we've seen on these
12:05 21 internal documents at Align saying precisely the
12:06 22 opposite of what witnesses and lawyers have said, did
12:06 23 any of those folks take the stand, take the oath, and
12:06 24 testify to this jury?
12:06 25 A. I saw testimony from Matt Miller, and he was

12:06 1 on an e-mail, was he not?
12:06 2 Q. Mr. Miller did show up.
12:06 3 A. Was he on an e-mail?
12:06 4 Q. Did anyone in their portion of the case show
12:06 5 up, take the stand, take the oath, and answer
12:06 6 questions?
12:06 7 A. I just saw Matt Miller. He was testifying
12:06 8 here I think a couple of days ago. He was on some
12:06 9 e-mails. He works at Align. That's all I remember.
12:06 10 MR. MUELLER: Thank you, sir.
12:06 11 Your Honor, I pass the witness.
12:06 12 REDIRECT EXAMINATION
12:06 13 BY MR. TUBACH:
12:06 14 Q. Dr. Jena, a few follow-up questions for you.
12:06 15 Straumann's counsel asked you some questions
12:06 16 about what's happening in Texas with regard to
12:06 17 direct-to-consumer aligners.
12:06 18 Do you recall that?
12:06 19 A. Yes, sir.
12:06 20 Q. Did he tell you that SmileSet -- do you know
12:06 21 SmileSet is a direct-to-consumer aligner?
12:06 22 A. It's actually one of the slides.
12:06 23 Q. Did he tell you that that's actually available
12:07 24 here in the state of Texas?
12:07 25 MR. MUELLER: I object to the leading.

12:07 1 THE COURT: Sustained.
12:07 2 Actually, I don't know how else you would
12:07 3 ask that. Overruled.
12:07 4 You -- if you'd repeat it, though.
5 MR. TUBACH: Sure.
12:07 6 BY MR. TUBACH:
12:07 7 Q. Did he tell you that SmileSet is available in
12:07 8 the state of Texas?
12:07 9 A. No, sir. He did not say that.
12:07 10 Q. And did he tell you that Straumann itself
12:07 11 bought a direct-to-consumer company called Dr. Smile?
12:07 12 A. No. We didn't hear that either.
12:07 13 Q. Okay. Now, he asked you about this chart and
12:07 14 how much higher Align's sales are compared to
12:07 15 ClearCorrect and the other aligner companies.
12:07 16 Do you see that?
12:07 17 A. Yes, sir.
12:07 18 Q. Is it surprising to you that Align sells more
12:08 19 aligners than these other companies?
12:08 20 A. No.
12:08 21 Q. Why not?
12:08 22 A. Because it's been around since 1999. It's
12:08 23 what people -- when people talk about aligners, they
12:08 24 often talk about Invisalign. So this is not at all
12:08 25 surprising to me.

12:08 1 Q. Now, you heard Dr. Taylor testify that he
12:08 2 would never make a decision based on economics,
12:08 3 right --
12:08 4 A. Yes.
12:08 5 Q. -- for a patient -- that -- when a patient's
12:08 6 health was at stake, right?
12:08 7 A. I remember something like that.
12:08 8 Q. And do you agree with that?
12:08 9 A. I would agree with that.
12:08 10 Q. As a medical doctor?
12:08 11 A. I would. Yeah.
12:08 12 Q. Why would a doctor not make a decision based
12:08 13 on economics when they're taking care of a patient?
12:08 14 A. I think a lot of reasons. I mean, my wife and
12:08 15 I both went to medical school. We did it because we
12:08 16 wanted to care for patients. So first and foremost,
12:08 17 there's that personal desire.
12:08 18 There's also a professional obligation that
12:08 19 dentists, orthodontists, medical doctors like myself
12:09 20 make. So I think that to expect to see something other
12:09 21 than that, it's not what I would expect to see.
12:09 22 Q. Now, you heard a lot of questions from
12:09 23 Straumann's counsel about who would and wouldn't choose
12:09 24 braces, right?
12:09 25 A. Yes, sir.

12:09 1 Q. In fact, he tried to pin you down on what you
12:09 2 would do, right?
12:09 3 A. He was trying to push one or the other. I
12:09 4 wasn't sure which one. But yeah.
12:09 5 Q. Okay. Are there people in this country who
12:09 6 will only drink Pepsi and they won't drink Coke?
12:09 7 A. I think so.
12:09 8 Q. Are there people in this country who will only
12:09 9 drink Dr. Pepper and they won't drink Pepsi?
12:09 10 A. Here, yes. For sure. I think so.
12:09 11 Q. And would anyone say that Dr. Pepsi (sic) and
12:09 12 Coke -- Dr. Pepsi -- Dr. Pepper and Coke and Pepsi are
12:09 13 not in the same relevant market?
12:09 14 A. I don't think they'd say that, sir.
12:09 15 Q. And why not?
12:09 16 A. Because they're sodas. They're sodas.
12:09 17 They're priced the same. People who drink them enjoy
12:09 18 them. It'd be a hard sell.
12:09 19 Q. Now, finally, counsel for Straumann was asking
12:10 20 you who did and didn't show up to testify in this
12:10 21 courtroom today or during the course of the trial,
12:10 22 right?
12:10 23 A. Yes, sir.
12:10 24 Q. Did Straumann bring in their CEO, Guillaume
12:10 25 Daniellot, from Switzerland to testify in this

12:10 1 courtroom?
12:10 2 A. I don't believe so.
12:10 3 Q. Now, what about Florian Kirsch? He didn't
12:10 4 come, did he?
12:10 5 A. I don't think so.
12:10 6 Q. That's the head of ClearCorrect here in the
12:10 7 United States; is that right?
12:10 8 A. I think so.
12:10 9 Q. And those folks didn't come in to explain --
12:10 10 THE COURT: Counsel, will you take that
12:10 11 down, please?
12:10 12 MR. TUBACH: I'm sorry.
12:10 13 THE COURT: You using that?
12:10 14 MR. TUBACH: Oh, no.
12:10 15 BY MR. TUBACH:
12:10 16 Q. And did the CEO of Straumann, the ClearCorrect
12:11 17 folks that are here trying to accuse us of monopoly --
12:11 18 monopolization, did they come in and explain why their
12:11 19 bar chart there is red and the competitors are doing
12:11 20 fine?
12:11 21 A. I don't believe so. No.
12:11 22 MR. TUBACH: I pass the witness. Thank
12:11 23 you. Thank you, Your Honor.
12:11 24 RECROSS-EXAMINATION
12:11 25 BY MR. MUELLER:

12:11 1 Q. Just a few final questions, Dr. Jena.
12:11 2 A. Sure.
12:11 3 Q. Ms. Sterling did show up, right?
12:11 4 A. I thought you were going to point to the
12:11 5 slide. Yes. She did show up. Yes, sir.
12:11 6 Q. She took the stand. She answered questions
12:11 7 about all aspects of the operations, right?
12:11 8 A. That's my understanding.
12:11 9 Q. Mr. Kossol did show up. He came, explained
12:11 10 the manufacturing facility in Round Rock to the jury,
12:11 11 explained how it works, explained what it does and who
12:11 12 does it, right?
12:11 13 A. I don't know. I read her testimony, so I
12:11 14 know. But I don't know this other gentleman.
12:11 15 Q. Mr. Coss did show up. He explained the
12:11 16 scanner market, Straumann's activities in that market,
12:11 17 and he explained how the iTero scanner policy is
12:11 18 harming competition.
12:11 19 You were here for that?
12:12 20 A. No, sir. I wasn't.
12:12 21 Q. Mr. Buitta did show up. He took the stand.
12:12 22 He explained sales of clear aligners and how those
12:12 23 sales were being impaired by Align's conduct, right?
12:12 24 A. I'm not familiar with that testimony.
12:12 25 Q. The CEO, Mr. Daniellot, his deposition was

12:12 1 played to the jury last week.
12:12 2 Were you here for that?
12:12 3 A. No. But I heard that.
12:12 4 Q. So we have, in actuality, a situation where
12:12 5 the CEO's deposition was played for the jury, and I
12:12 6 just listed four fact witnesses who took the stand,
12:12 7 took the oath, and testified to this jury, right?
12:12 8 A. I haven't seen one way or the other. So I
12:12 9 couldn't say.
12:12 10 Q. And the truth is all those folks showed up,
12:12 11 answered all the questions, and they told their side of
12:12 12 the story, and you have no reason to question those
12:12 13 folks told the truth?
12:12 14 A. I have no reason to question any of that.
12:12 15 MR. MUELLER: Thank you, sir. I have no
12:12 16 further questions.
12:12 17 MR. TUBACH: Nothing further, Your Honor.
12:12 18 Thank you.
12:12 19 THE COURT: Thank you, Doctor.
12:12 20 Any other witnesses for the defendant?
12:12 21 MR. TUBACH: No, Your Honor.
12:12 22 THE COURT: Do you rest?
12:12 23 MR. TUBACH: Yes.
12:12 24 THE COURT: Ladies and gentlemen of the
12:12 25 jury, we're done with the trial. We're done with the

12:13 1 evidence. So let me first point out that even though
12:13 2 later this afternoon we are going to hear the closing
12:13 3 arguments, which are my favorite part of the trial
12:13 4 because we'll have good lawyers doing the arguments --
12:13 5 Yes, sir.
12:13 6 MR. TUBACH: Please have the witness step
12:13 7 down.
12:13 8 THE WITNESS: I was enjoying this.
12:13 9 THE COURT: I thought I told you you
12:13 10 could -- please. Thank you for being here, Doctor.
12:13 11 The evidence is in. So when you hear the
12:13 12 arguments this afternoon, it's the lawyers' effort to
12:13 13 summarize for you what the best arguments were,
12:13 14 criticize the other side's arguments, all that, but the
12:13 15 evidence is in. And you may only consider the evidence
12:13 16 in your deliberations.
12:13 17 So it's 12:15. I'm going to release you
12:13 18 until --
12:13 19 Do we -- they have lunch here?
12:13 20 (Off-the-record discussion.)
12:13 21 THE COURT: So I'm going to release
12:13 22 everyone until 1:30. At 1:30 if you'll be back, I'll
12:14 23 read the jury charge. We'll then have the closing
12:14 24 arguments, and then you may begin your deliberations.
12:14 25 THE BAILIFF: All rise.

12:14 1 (Jury exited the courtroom.)
12:14 2 THE COURT: Thank you. You may be
12:14 3 seated.
12:14 4 Does the plaintiff --
12:14 5 Yes, sir.
12:14 6 MR. MUELLER: Yes. I'm sorry,
12:14 7 Your Honor. Very, very brief housekeeping issue.
12:14 8 There were two documents that I discussed
12:14 9 with the witness that I just wanted to make sure were
12:14 10 part of the record, DTX-2884 and DTX-2892. I'm not
12:14 11 sure if there was any objection to those.
12:14 12 MR. TUBACH: I thought the evidence was
12:14 13 closed, Your Honor.
12:14 14 THE COURT: I'm going to allow them in.
12:14 15 MR. MUELLER: And then the last one is
12:14 16 one of the exhibits that was entered yesterday, there's
12:14 17 a typo when it was read by us. JTX-66 should be
12:15 18 JTX-67.
12:15 19 THE COURT: Okay. That'll be admitted as
12:15 20 well.
12:15 21 I'm going to start with the plaintiff, if
12:15 22 the plaintiff has any Rule 50 motions to make or not.
12:15 23 And I'll also take up any objections to the jury
12:15 24 charge.
12:15 25 MR. TUBACH: Could I have the Court's

12:15 1 indulgence for just a minute?

12:15 2 THE COURT: Well, in fact, if you're okay

12:15 3 with it, why don't I take up the defense's Rule 50 and

12:15 4 do the same, and then you can collect your folks.

12:15 5 MR. TUBACH: Thank you.

12:15 6 THE COURT: So, Mr. Mueller, Rule 50

12:15 7 motions and objections to the charge.

12:15 8 MR. MUELLER: If I could do the Rule 50

12:15 9 motions first, Your Honor, and then some other folks

12:15 10 can raise the objections.

11 THE COURT: Sure.

12:15 12 MR. MUELLER: On the Rule 50 motions, we

12:15 13 renew our previous Rule 50 motions that we made at the

12:15 14 conclusion of the plaintiff's case as well as the

12:16 15 conclusion of our own case. So we would respectfully

12:16 16 renew all those motions, Your Honor, on the same

12:16 17 grounds.

12:16 18 The only one I would additionally like to

12:16 19 note again, Your Honor, or to note -- it's a previous

12:16 20 motion, but to make a little bit more of a point on it,

12:16 21 is we still think there's no evidence of intent, which

12:16 22 is not just for willfulness, it would also go to the

12:16 23 indirect infringement claims. We don't think a

12:16 24 reasonable juror on this record could find a requisite

12:16 25 intent.

12:16 1 THE COURT: I thought yesterday I'd
12:16 2 resolved the willfulness issue.
12:16 3 MR. MUELLER: Willfulness is resolved.
12:16 4 I'm speaking with respect to indirect infringement
12:16 5 only.
12:16 6 THE COURT: Okay. Is that all for you?
12:16 7 MR. MUELLER: That's all, Your Honor.
12:16 8 Otherwise, just the same as we had before.
12:16 9 THE COURT: I'll overrule those motions.
12:16 10 Objections to the jury charge, please?
12:16 11 MR. NASH: Your Honor, briefly, before
12:16 12 objections to the jury charge, we would renew the same
12:17 13 Rule 50 motions that we raised the other day at the
12:17 14 close of the --
12:17 15 THE COURT: Respectfully overruled.
12:17 16 MR. NASH: Thank you, Your Honor.
12:17 17 THE COURT: And jury charge objections?
12:17 18 MR. SIMMONS: Thank you, Your Honor. Ian
12:17 19 Simmons for Align.
12:17 20 We have several objections, Your Honor.
12:17 21 First, Align objects to the omission of
12:17 22 an infringement instruction on the '936 patent because
12:17 23 Align believes that there's sufficient evidence to
12:17 24 submit this question to the jury.
12:17 25 Second, Align objects to omission in its

12:17 1 proposed Instruction No. 25 on joint infringement for
12:17 2 the reasons stated in Footnote 19 of the proposed
12:17 3 instructions.
12:17 4 Third, Align objects to the omission of
12:17 5 its proposed Instruction No. 28 on willful infringement
12:17 6 because Align believes there is sufficient evidence to
12:17 7 submit this question to the jury.
12:17 8 Fourth, Align objects to including
12:17 9 Instruction 37. In Instruction 37, the following
12:18 10 sentence, quote: Irrespective of your findings with
12:18 11 respect to Align's patent claims, you must
12:18 12 independently evaluate ClearCorrect's antitrust claims,
12:18 13 closed quote.
12:18 14 For the reasons stated in Align's
12:18 15 opposition to ClearCorrect's motion on judgment of the
12:18 16 pleadings, Docket No. 462, Align believes that a
12:18 17 finding of patent infringement would foreclose
12:18 18 ClearCorrect's antitrust claims during the relevant
12:18 19 time period.
12:18 20 As a matter of law, antitrust lost
12:18 21 profits cannot be what would have been infringing
12:18 22 sales.
12:18 23 No. 5, Align objects to the admission of
12:18 24 its proposed Instruction No. 48 on unilateral refusal
12:18 25 to deal with a competitor for the reasons stated in

12:18 1 Footnote 99 of the proposed instructions.
12:18 2 This case at its core involves duty to
12:18 3 deal, namely with the inbound charges that Align is
12:18 4 accused of, require it to accept non-Align scan images,
12:19 5 and the outbound technical impediments charges
12:19 6 require -- impose upon Align a duty to make its iTero
12:19 7 product comply with some person's concept of friction.
12:19 8 That's -- those are the extent of the
12:19 9 objections.
12:19 10 Thank you, Your Honor.
12:19 11 THE COURT: Those will be overruled.
12:19 12 Yes, sir.
12:19 13 MR. SAUNDERS: Hello, Your Honor. Tom
12:19 14 Saunders for ClearCorrect.
12:19 15 We object on four grounds.
12:19 16 First, the failure to get proposed
12:19 17 Instruction No. 38 regarding damages, single recovery.
12:19 18 The full text of that instruction is at Docket 489-1,
12:19 19 Pages 59 through 60. And we would object for the
12:19 20 reasons stated in Footnote 29 of that document.
12:19 21 We also object to the inclusion of
12:19 22 extensive language from the inequitable conduct
12:19 23 instructions in Instruction 45 for the reasons given in
12:19 24 Footnote 107 and 108 of Docket 489-1.
12:20 25 We also object to instructing the jury on

12:20 1 all issues on which ClearCorrect moved for judgment as
2 a matter of law.
12:20 3 And finally for completeness, we would
12:20 4 renew our objection to failure to give the curative
12:20 5 instruction requested at Transcript 988 through 992
12:20 6 regarding the fact that the '936 patent is no longer in
12:20 7 the case.
12:20 8 THE COURT: Thank you, sir. Those are
12:20 9 overruled.
12:20 10 But let me put on the record since we did
12:20 11 it informally yesterday. I thought the lawyers were
12:20 12 exceptional yesterday during the jury charge
12:20 13 conference. Antitrust is not my forte, and you all
12:20 14 were extremely helpful and articulate in what you
12:20 15 were -- when you tried to help me with the jury charge.
12:20 16 So the Court is very grateful for the
12:20 17 lawyers who were involved yesterday and the job that
12:20 18 they did.
12:20 19 Is there anything we need to take up from
12:20 20 the plaintiff's side or defense side?
12:20 21 MR. TUBACH: Not for us, Your Honor.
12:21 22 Thank you.
12:21 23 MR. MUELLER: Just one tiny thing,
12:21 24 Your Honor. If we might, after the plaintiff finishes
12:21 25 their first closing argument, if we could just take a

12:21 1 two-minute break to set up some things.
12:21 2 THE COURT: Sure.
12:21 3 MR. MUELLER: Okay. Thank you, Your
12:21 4 Honor.
5 THE COURT: No problem.
12:21 6 And someone will have sufficient copies
12:21 7 of what I'm going to read for me. I think Judge Wolfe
12:21 8 is going to be here. If we could have one for him and
12:21 9 also for the jurors and ready to go.
12:21 10 MR. MUELLER: Absolutely.
12:21 11 THE COURT: And the verdict form is done,
12:21 12 and Jen can have it.
12:21 13 MR. SIMMONS: We have them ready for you,
12:21 14 Your Honor.
12:21 15 THE COURT: If you'll get the verdict
12:21 16 form to Jen, she's the one who gets it to the back.
12:21 17 MR. SIMMONS: We'll have them in a few
12:21 18 minutes.
12:21 19 THE COURT: Anything else we need to do?
12:21 20 MR. MUELLER: No, Your Honor.
12:21 21 MR. TUBACH: No. Thank you.
12:21 22 THE COURT: Okay. I will see you at
12:21 23 1:30.
12:21 24 THE BAILIFF: All rise.
12:21 25 (Recess taken.)

01:32 1 THE BAILIFF: All rise.
01:32 2 THE COURT: Please remain standing for
01:32 3 the jury.
01:32 4 (Jury entered the courtroom.)
01:32 5 THE COURT: Thank you. You may be
01:32 6 seated.
01:32 7 Ladies and gentlemen of the jury, I'm
01:32 8 about to read the charge to you. And at the end of me
01:32 9 reading the charge, I'm going to take a short bio break
01:32 10 and then we'll start with the closing arguments just
01:32 11 so -- if someone needs a break before then, if you'll
01:32 12 just let me know. So.
01:33 13 Members of the jury, it is my duty and
01:33 14 responsibility to instruct you on the law you are to
01:33 15 apply in this case. The law contained in these
01:33 16 instructions is the only law you may follow. It is
01:33 17 your duty to follow what I instruct you the law is
01:33 18 regardless of any opinion you might have as to what the
01:33 19 law ought to be.
01:33 20 Each of you has your own printed copy of
01:33 21 the following jury instructions.
01:33 22 (Off-the-record discussion.)
01:33 23 MR. TUBACH: If we could have a moment to
01:33 24 confer.
01:34 25 (Pause in proceedings.)

01:34 1 MR. TUBACH: I believe there was a
01:34 2 misunderstanding about whether the jurors were going to
01:34 3 have physical copies. We thought we were not going
01:34 4 to get them. It's possible we can collect them at the
01:34 5 end. Everyone here has lots of copies, if you'd like
01:34 6 us to do that, or would you --
01:34 7 THE COURT: And they each need a copy.
01:34 8 MR. TUBACH: Thank you, Your Honor.
01:35 9 THE COURT: And if I could have one
01:35 10 counsel up here from each side. I need to ask you
01:35 11 something.
01:35 12 (Bench conference.)
01:35 13 THE COURT: Following what the Delaware
01:35 14 judges do, I have stopped reading out loud all 15 of
01:35 15 the Georgia-Pacific factors. I'm just letting you
01:35 16 know. You can object if you want. I'm just going to
01:35 17 tell them here you had them during trial. I'm not
01:35 18 going to take the time to read all 15 factors.
01:35 19 MR. NASH: Understood, Your Honor. Thank
01:35 20 you, Your Honor.
01:35 21 MR. MUELLER: Thank you, Your Honor.
01:35 22 (Bench conference concludes.)
01:35 23 MR. TUBACH: My apologies again,
01:35 24 Your Honor.
01:35 25 THE COURT: No, no, no. No problem.

01:35 1 There's no problem.

01:35 2 A lot of times I think I'm clear, and my

01:36 3 wife lets me know I'm rarely clear. So it's...

01:36 4 Okay. Each of you has a copy.

01:36 5 If I've given you the impression during

01:36 6 the trial that I favor either party, disregard that

01:36 7 impression. If I've given you the impression during

01:36 8 trial I have any opinion with respect to the facts of

01:36 9 this case, disregard that impression because you are

01:36 10 the sole judges of the facts of this case.

01:36 11 Other than these instructions to you on

01:36 12 the law, disregard anything I may have said or done

01:36 13 during the trial when you arrive at your verdict.

01:36 14 Consider all the instructions about the

01:36 15 law as a whole; regard each instruction in light of the

01:36 16 others without isolating any particular statement or

17 paragraph.

01:36 18 The testimony of the witnesses and other

01:36 19 exhibits introduced by the parties constitute all of

01:36 20 the evidence. The statements of counsel are not

01:36 21 evidence. They are only arguments.

01:36 22 It is important for you to distinguish

01:37 23 between the arguments of counsel and the evidence on

01:37 24 which those arguments rest. What the lawyers say or do

01:37 25 is not evidence. You may, however, consider their

01:37 1 arguments in light of the evidence that I've admitted
01:37 2 and determine whether the evidence admitted in this
01:37 3 trial supports the arguments they make.
01:37 4 You must determine the facts from all of
01:37 5 the testimony that you heard and the other evidence
01:37 6 submitted.
01:37 7 You are the exclusive judges of the
01:37 8 facts. But in finding those facts, you must apply the
01:37 9 law that you're about to hear in this jury instruction
01:37 10 as I instruct you.
01:37 11 You've heard evidence submitted by
01:37 12 plaintiff and counterclaim defendant Align, and the
01:37 13 defendants and counter-plaintiffs ClearCorrect and
01:37 14 Straumann. I will refer to the defendants collectively
01:37 15 as ClearCorrect throughout these instructions.
01:37 16 You are required by law to decide this
01:37 17 case in a fair, impartial, and unbiased manner based
01:37 18 entirely on the law and on the evidence presented to
01:37 19 you in the courtroom.
01:37 20 You may not be influenced by passion,
01:38 21 prejudice, or sympathy you might have for either party
01:38 22 in arriving at your unanimous verdict.
01:38 23 After the remainder of these
01:38 24 instructions, you will hear closing arguments from the
01:38 25 lawyers. Statements and arguments of the lawyers, I

01:38 1 remind you, are not evidence, and they are not
01:38 2 instructions on the law. They're intended only to
01:38 3 assist you in understanding the evidence and the
01:38 4 parties' contentions.
01:38 5 A verdict form has been prepared for you.
01:38 6 At some point I'm going to fix this. You
01:38 7 are not going to take the verdict form back. The
01:38 8 verdict form will be brought back to you when you're in
01:38 9 the jury room.
01:38 10 When you've reached a unanimous decision
01:38 11 or agreement as to the verdict, your foreperson will
01:38 12 fill in the blanks in the verdict form. He or she will
01:38 13 date it and sign it. Answer each question in the
01:38 14 verdict form from the facts as you find them as judges
01:38 15 to be. Do not decide who you think should win the case
01:38 16 and answer any question to reach that result.
01:38 17 Your answers and your verdict must be
01:38 18 unanimous.
01:38 19 What is evidence? The evidence you are
01:39 20 allowed to consider consists of the testimony of the
01:39 21 witnesses here at trial, the testimony of the witnesses
01:39 22 whose depositions were presented to you, the documents
01:39 23 and exhibits that I admitted into evidence, and any
01:39 24 facts the parties agreed to stipulate to.
01:39 25 Were there any facts that you all

01:39 1 stipulated to? I don't remember any.
01:39 2 MR. MUELLER: I don't think so, Your
01:39 3 Honor.
01:39 4 THE COURT: Okay. You are to apply any
01:39 5 fair inference and reasonable conclusions you can draw
01:39 6 from the facts and circumstances that you believe have
01:39 7 been proven. Nothing else is evidence.
01:39 8 Statements, arguments, and questions by
01:39 9 the lawyers are not evidence. Objections that they
01:39 10 might have made to the questions are not evidence. Any
01:39 11 comments or questions made during the course of the
01:39 12 trial are not evidence. Any notes taken by you as the
01:39 13 jurors are not evidence.
01:39 14 The evidence -- the attorneys that are
01:39 15 seated in front of you may have objected during the
01:39 16 trial if they believe that documents or testimony that
01:39 17 were attempted to be offered into evidence were
01:39 18 improper under the rules of evidence.
01:39 19 During the trial, I may not have let you
01:40 20 hear the answers to some of the questions the lawyers
01:40 21 asked. I may have ruled that you could not see some of
01:40 22 the exhibits the lawyers wanted you to see. I may have
01:40 23 ordered you to disregard things that you saw or heard
01:40 24 or struck things from the record.
01:40 25 Whatever I ordered, you must follow. You

01:40 1 must follow my rulings, completely ignoring anything
01:40 2 that I did not permit to come into evidence. Don't
01:40 3 speculate about what a witness might have said or what
01:40 4 an exhibit might have shown. Those are not evidence,
01:40 5 and you're bound by your oath to not let them influence
01:40 6 your decision in any way.
01:40 7 Generally speaking, there are two types
01:40 8 of evidence. The first is direct evidence, such as the
01:40 9 testimony of an eyewitness. The other is indirect or
01:40 10 circumstantial evidence, which is evidence that proves
01:40 11 a fact from which you can logically conclude a separate
01:40 12 fact exists.
01:40 13 As a general rule, the law makes no
01:40 14 distinction between direct and circumstantial evidence.
01:40 15 It simply requires you, as the judges, to determine
01:41 16 from the facts all the evidence that you've heard in
01:41 17 the case, whether it be direct, circumstantial, or some
01:41 18 combination.
01:41 19 As you were instructed before the trial
01:41 20 began, in judging the facts, you must consider all the
01:41 21 evidence you heard, both direct and circumstantial.
01:41 22 But that does not mean that you have to believe or
01:41 23 accept all of the evidence you heard.
01:41 24 It is entirely up to you to give the
01:41 25 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

01:42 1 evidence.

01:42 2 The fact that ClearCorrect has arguments

01:42 3 against the patent claims asserted is not evidence that

01:42 4 ClearCorrect is entitled to a judgment on those claims.

01:42 5 The fact that Align has arguments against the antitrust

01:43 6 claims asserted is not evidence that Align is entitled

01:43 7 to a judgment on their claims.

01:43 8 The act of making assertions or arguments

01:43 9 by itself does not in any way tend to establish that

01:43 10 those arguments have merit and they are not evidence.

01:43 11 You may not conduct any independent

01:43 12 research or investigation during your deliberations.

01:43 13 You must make your decision based only on the evidence

01:43 14 as I've defined it here, nothing else.

01:43 15 I don't remember anything coming in for a

01:43 16 limited purpose. Did it?

01:43 17 MS. DURIE: I don't think so, Your Honor.

01:43 18 MR. MUELLER: Agreed.

01:43 19 THE COURT: Okay.

01:43 20 During the trial, you may have seen

01:43 21 documents where content had been redacted and replaced

01:43 22 with white spaces or blacked out. Those documents were

01:43 23 redacted to comply with my orders. Therefore, you

01:43 24 should not and may not guess or speculate about what

01:43 25 was redacted in any document or why the redaction was

01:43 1 made.

01:43 2 In the course of this case, the parties

01:43 3 entered an agreement that would protect each parties'

01:44 4 business information from disclosure to the public or

01:44 5 third parties. Under the agreement, the parties added

01:44 6 confidentiality labels to their documents and in some

01:44 7 cases redacted information, with my permission, from

01:44 8 documents to protect the confidential nature of the

01:44 9 information.

01:44 10 You may have seen documents with

01:44 11 confidentiality labels or redactions during the course

01:44 12 of trial. The use of those labels and/or redactions

01:44 13 has no bearing on them as evidence and should not be

01:44 14 construed in any way by you with respect to either

01:44 15 party.

01:44 16 There were charts and summaries that were

01:44 17 shown to you solely to help explain or summarize facts

01:44 18 disclosed by books, records, or maybe some other

01:44 19 document that were already in evidence. Charts and

01:44 20 summaries are not evidence or proof of any fact unless

01:44 21 I specifically admitted that chart or summary into

01:44 22 evidence.

01:44 23 You must determine the facts in this case

01:44 24 exclusively from the evidence.

01:44 25 Certain evidence -- I'm sorry. Certain

01:44 1 exhibits were shown to you such as PowerPoint
01:45 2 presentations, posters, or models, and they are
01:45 3 illustrations of evidence but are not themselves
01:45 4 evidence.
01:45 5 They may have been referred to during
01:45 6 trial as demonstrative or demonstrative exhibits. It's
01:45 7 a party's description, picture, or model used to
01:45 8 describe something that is involved in the trial. If
01:45 9 your recollection of the evidence differs from any
01:45 10 demonstrative you saw, rely on your recollection.
01:45 11 You alone determine the questions of
01:45 12 credibility or truthfulness of the witnesses that you
01:45 13 heard. In weighing their testimony, consider the
01:45 14 witness' manner and demeanor on the witness stand,
01:45 15 feelings or interest they might have in a case, any
01:45 16 prejudice or bias they may have, and the consistency or
01:45 17 inconsistency of the witness' testimony considered in
01:45 18 light of all the circumstances.
01:45 19 Ask yourself: Has the witness been
01:45 20 contradicted by other credible evidence? Has the
01:45 21 witness made statements at other times that are
01:46 22 contrary to those made here on the witness stand? Give
01:46 23 the testimony of each witness the credibility that you
01:46 24 as judges believe it deserves.
01:46 25 Even though a witness may have been a

01:46 1 party to the action and, therefore, is interested in
01:46 2 the outcome, you may still accept their testimony as
01:46 3 long as it was not contradicted by direct evidence or
01:46 4 by any inference that may be drawn from the evidence if
01:46 5 you believed the testimony.
01:46 6 You're not to decide this case by
01:46 7 counting the number of witnesses who testified for
01:46 8 either side. Witness testimony is weighed. Witnesses
01:46 9 are not counted.
01:46 10 The test is not the relative number of
01:46 11 witnesses but the relative convincing force of the
01:46 12 evidence I admitted. The testimony of but a single
01:46 13 witness is sufficient to prove any fact even if a
01:46 14 greater number of witnesses testified to the contrary
01:46 15 if, after you've considered all the evidence, you
01:46 16 elected to believe one single witness.
01:46 17 In determining the weight to give the
01:46 18 testimony of a witness, consider whether there was
01:47 19 evidence that at some time the witness said or did
01:47 20 something or failed to say or do something that was at
01:47 21 odds with the testimony you heard at trial.
01:47 22 A simple mistake by a witness does not
01:47 23 necessarily mean that witness was not being truthful as
01:47 24 the witness remembered it. People forget things. They
01:47 25 remember things inaccurately.

01:47 1 Consider whether misstatements were an
01:47 2 intentional falsehood or simply an innocent mistake.
01:47 3 The significance of the misstatement might depend on
01:47 4 whether it has to do with an important fact or an
01:47 5 unimportant detail. This instruction applies to the
01:47 6 testimony of all of the witnesses you heard, both fact
01:47 7 and expert.
01:47 8 Certain testimony was presented to you in
01:47 9 the form of video depositions. A deposition is the
01:47 10 sworn recorded answers to questions a witness was asked
01:47 11 in advance of trial. Under some circumstances, if a
01:47 12 witness cannot be present to testify from the witness
01:48 13 stand, the witness' testimony may be presented under
01:48 14 oath in the form of a deposition.
01:48 15 Sometime before this trial began,
01:48 16 attorneys representing all the parties in the case
01:48 17 questioned each of those witnesses, and they were under
01:48 18 oath. There was a court reporter present who recorded
01:48 19 the testimony. The questions and answers were shown to
01:48 20 you. The deposition testimony is entitled to the same
01:48 21 consideration and is to be weighed and considered by
01:48 22 you in the same way as if the witness had been present
01:48 23 and testified here in court from the witness stand.
01:48 24 In addition, some of the video recordings
01:48 25 that you may have seen might have been of lower quality

01:48 1 because we now have witnesses being taken remotely,
01:48 2 which the parties agree was permissible for the
01:48 3 convenience of the witness and/or the lawyer. Never
01:48 4 let the quality of the video or the location of the
01:48 5 witness weigh against any witness you saw.
01:48 6 You heard the testimony of experts.
01:48 7 Expert testimony is testimony from a person who has a
01:49 8 special skill or knowledge in some science, profession,
01:49 9 or business. That skill or knowledge is not common to
01:49 10 the average person but was acquired by the expert
01:49 11 through special study and/or experience.
01:49 12 In weighing expert testimony, consider
01:49 13 their qualifications, the reason for their opinions,
01:49 14 and the reliability of the information that support
01:49 15 their opinions, as well as all of the other factors
01:49 16 I've already mentioned for weighing testimony of any
01:49 17 witness in this case. Expert testimony should receive
01:49 18 whatever weight and credit you believe as judges to be
01:49 19 appropriate given all the evidence admitted in the
01:49 20 case.
01:49 21 You are not required to accept the
01:49 22 opinion of an expert. You are free to accept or reject
01:49 23 the testimony of experts just as you may do so with all
01:49 24 of the witnesses.
01:49 25 Were there stipulations?

01:49 1 MS. DURIE: No, Your Honor.
01:49 2 THE COURT: Okay.
01:49 3 Do not let bias, prejudice, or sympathy
01:50 4 play any part in your deliberations. A corporation and
01:50 5 all other persons are equal under the law and must be
01:50 6 treated as equals here in a federal court of justice.
01:50 7 A party's overall financial size, wealth, or executive
01:50 8 compensation may not have any impact on your
01:50 9 deliberations.
01:50 10 Now, let's turn to an important concept
01:50 11 called the burden of proof in this case.
01:50 12 In any legal action, facts must be proven
01:50 13 by a required amount of evidence known as the burden of
01:50 14 proof. The burden of proof in this case is on Align
01:50 15 for some issues and ClearCorrect for others.
01:50 16 There are two burdens of proof that will
01:50 17 apply in this case, two different burdens of proof.
01:50 18 The first is called the preponderance of the evidence.
01:50 19 The second is called clear and convincing evidence.
01:50 20 Let's start with an explanation of
01:50 21 preponderance of the evidence.
01:50 22 The burden of proof applicable to some of
01:51 23 the claims in this case is called preponderance of the
01:51 24 evidence. Align has the burden of proving patent
01:51 25 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

01:52 1 of the evidence standard as one that is slightly
01:52 2 greater than 50 percent.
01:52 3 Let's turn to the other burden of proof.
01:52 4 The burden of proof for invalidity applicable to
01:52 5 ClearCorrect's -- to ClearCorrect is known as clear and
01:52 6 convincing evidence.
01:52 7 ClearCorrect has the burden of proving
01:52 8 patent invalidity by -- I'm just repeating it.
01:52 9 ClearCorrect has the burden of proving that an alleged
01:52 10 product or publication is prior art by clear and
01:53 11 convincing evidence.
01:53 12 Clear and convincing evidence means
01:53 13 evidence that produces in the minds of the judges a
01:53 14 firm belief or abiding conviction as to the truth of
01:53 15 the matter in the dispute. It is evidence so clear,
01:53 16 direct, weighty, and convincing as to enable you to
01:53 17 come to a clear conviction without hesitancy.
01:53 18 Now, the standard is different from the
01:53 19 preponderance of the evidence standard which applies to
01:53 20 Align's burden of proving infringement and damages if
01:53 21 any are found.
01:53 22 These standards are different from what
01:53 23 you may have learned about on television, in criminal
01:53 24 proceedings, where a fact must be proven to the
01:53 25 standard of beyond a reasonable doubt. I'm sure you

01:53 1 all have heard that.
01:53 2 On a scale of the various burdens of
01:53 3 proof or standards of proof, the lowest is the
01:53 4 preponderance of the evidence where the proof need only
01:54 5 be sufficient to tip the scales in favor of the party
01:54 6 proving the fact.
01:54 7 The highest burden at the other end of
01:54 8 the scale is beyond a reasonable doubt, where the fact
01:54 9 must be proven to a very high degree of certainty.
01:54 10 Therefore, you may think of what we're
01:54 11 talking about, clear and convincing evidence, as
01:54 12 somewhere between the lower standard and highest
01:54 13 standard.
01:54 14 Now, I'm going to give you a summary of
01:54 15 each side's contentions on the patent issues in this
01:54 16 case. I will then provide you with detailed
01:54 17 instructions on what each side must prove to prevail on
01:54 18 each of their contentions.
01:54 19 First, whether Align has proved by a
01:54 20 preponderance of the evidence that ClearCorrect
01:54 21 infringes Claims 1, 12, 13, and/or 14 of the '613
01:54 22 patent; Claim 11 of the '384 patent; Claim 1, 3, and/or
01:54 23 10 of the '090 patent; and Claims 1, 10, and/or 11 of
01:55 24 the '091 patent.
01:55 25 What ClearCorrect has proven by clear and

01:55 1 convincing evidence that Claims 1, 12, 13, and/or 14 of
01:55 2 the '613 patent, Claim 11 of the '384 patent, Claims 1,
01:55 3 3, and/or 10 of the '090 patent, and Claims 1, 10,
01:55 4 and/or 11 of the '091 patent are invalid.
01:55 5 For the claims of the '613, '384, '090,
01:55 6 and '091 patents, Align accuses ClearCorrect of
01:55 7 directly infringing by making, using, selling, offering
01:55 8 for sale, or importing aligners made with Zendura F-L-X
01:55 9 or FLX, or indirectly infringing by inducing or
01:55 10 contributing to others making, using, selling, offering
01:55 11 for sale, or importing aligners made with Zendura FLX.
01:55 12 To prove infringement of a patent, Align
01:55 13 must prove that ClearCorrect infringes one or more of
01:55 14 the claims of the patent that are asserted by a
01:56 15 preponderance of the evidence. That means that Align
01:56 16 must show it is more likely that ClearCorrect infringes
01:56 17 than that ClearCorrect does not infringe.
01:56 18 To determine this question of
01:56 19 infringement, you must compare the technologies used or
01:56 20 functionalities of ClearCorrect's products to each
01:56 21 asserted claim of the relevant patents.
01:56 22 Some of the asserted claims recite
01:56 23 methods, and others recite systems. In order for a
01:56 24 method claim to be infringed, a party must prove by a
01:56 25 preponderance of the evidence that the other party

01:56 1 performed each and every step of the claimed method and
01:56 2 they did it in the United States.
01:56 3 In order for a system claim to be
01:56 4 infringed, a party must prove by a preponderance of the
01:56 5 evidence that the other party made or used a product
01:56 6 that performs each and every element in the United
01:56 7 States.
01:56 8 You must determine direct infringement
01:56 9 with respect to each asserted patent claim
01:56 10 individually.
01:56 11 You heard that there is more than one
01:57 12 claim asserted here. Therefore, you have to determine
01:57 13 for each of the claims asserted whether or not it is
01:57 14 infringed. You have to do that for each individual
01:57 15 claim.
01:57 16 ClearCorrect denies that it is infringing
01:57 17 any of the asserted claims. Noninfringement is,
01:57 18 therefore, a defense to Align's allegations or
01:57 19 assertions of asserted infringement.
01:57 20 ClearCorrect also contends that the
01:57 21 asserted patents are invalid. Invalidity of the
01:57 22 asserted patent claims is also a defense to
01:57 23 infringement. Therefore, even though the patent
01:57 24 examiner allowed each of the Align patent claims, you,
01:57 25 the jury, must decide whether each claim of the

01:57 1 asserted patents that is challenged by ClearCorrect is
01:57 2 in fact invalid.
01:57 3 ClearCorrect carries the burden of proof
01:57 4 on the subject. ClearCorrect must prove invalidity of
01:57 5 each challenged claim by clear and convincing evidence
01:57 6 in order to overcome the presumption of validity.
01:57 7 A patent may be invalid for a number of
01:58 8 reasons. Here, ClearCorrect alleges that the Align
01:58 9 patent claims are invalid for lack of enablement.
01:58 10 I will read you separate instructions
01:58 11 concerning these invalidity theories.
01:58 12 It is your job to consider the evidence
01:58 13 presented by all the parties and determine
01:58 14 independently whether or not ClearCorrect has proved
01:58 15 the patent is invalid by clear and convincing evidence
01:58 16 and do so on a claim-by-claim basis.
01:58 17 If you find that one or more of the
01:58 18 claims of Align's patents is infringed by ClearCorrect
01:58 19 and you also find that the claims that you found
01:58 20 infringing are not invalid, then you will need to
01:58 21 determine what amount of damages, if any, Align has
01:58 22 proven that will compensate it for ClearCorrect's
01:58 23 infringement.
01:58 24 As a reminder, patents are granted by the
01:58 25 United States Patent and Trademark Office, known as the

01:58 1 PTO, which gives a patentholder the right to prevent
01:59 2 others from making, using, offering to sell or selling
01:59 3 the patented invention here in the United States or
01:59 4 from importing it into the United States without the
01:59 5 patent owner's permission. A violation of the
01:59 6 patentholder's rights is called infringement.
01:59 7 Before you can decide many of the issues
01:59 8 in this case, you need to understand the role of patent
01:59 9 claims.
01:59 10 The claims of the patent are the numbered
01:59 11 sentences at the end of each of the patents asserted.
01:59 12 The claims define the patent owner's rights under the
01:59 13 law. The claims are important because it is the words
01:59 14 of the claims themselves that define what the patent
01:59 15 covers.
01:59 16 The figures and the text that are in the
01:59 17 rest of the patent provide a description or example of
01:59 18 the invention and provide a context for the claims, but
01:59 19 it is exclusively the claims that define the breadth of
01:59 20 the patent's coverage.
02:00 21 Therefore, what a patent covers depends
02:00 22 in turn on what each of the asserted claims covers.
02:00 23 To know what a claim covers, a claim sets
02:00 24 forth in words a set of requirements. Each claim sets
02:00 25 forth its requirements in a single sentence. The

02:00 1 requirements of a claim are often referred to as either
02:00 2 claim elements or limitations.
02:00 3 The coverage of a patent is asserted --
02:00 4 is assessed claim by claim. When a thing such as a
02:00 5 product or process meets all of the requirements of a
02:00 6 claim, it is said to cover that thing or that the thing
02:00 7 falls within the scope of that claim.
02:00 8 A claim covers a process where each of
02:00 9 the claimed steps is performed by the accused infringer
02:00 10 for method claims or covers a product where each of the
02:00 11 elements or limitations is present in the product for
02:00 12 system claims.
02:00 13 If a product or a process is missing even
02:00 14 one limitation or element of a claim, then the product
02:00 15 or process is not covered by that claim.
02:01 16 The first thing you need to understand is
02:01 17 what each claim covers in order to decide whether or
02:01 18 not there is infringement of it and to decide whether
02:01 19 or not the claim is invalid.
02:01 20 The first step is understanding the
02:01 21 meaning of the words used in the patent claim.
02:01 22 The law requires me to define the terms
02:01 23 of the claims, and it is up to you in your role to
02:01 24 apply my definitions of the terms as I've construed the
02:01 25 issues that you are asked to decide in this case.

02:01 1 If I have not defined the claim term or
02:01 2 the parties have not agreed to the definition of a
02:01 3 claim term, then you are to use what is known as the
02:01 4 plain and ordinary meaning of the limitations that
02:01 5 would be understood by what is called one of ordinary
02:01 6 skill in the art, which is to say, in the field of
02:01 7 technology of the patent at the time of the invention.
02:01 8 The meanings of the words of the patent
02:01 9 claim must be the same when deciding both the issue of
02:01 10 invalidity and infringement.
02:01 11 Let's start with the difference between
02:02 12 the claims. This case involves two types of patent
02:02 13 claims: independent and dependent.
02:02 14 An independent claim sets forth all the
02:02 15 requirements that must be met in order to be covered by
02:02 16 that claim. It is not necessary to look at any other
02:02 17 claim to determine what an independent claim covers.
02:02 18 And here, Claim 1 of the '613 patent,
02:02 19 Claim 11 of the '384, Claim 1 of the '090, and Claims 1
02:02 20 and 10 of the '091 patents are independent.
02:02 21 The remainder of the asserted claims of
02:02 22 the patents here are called dependent claims. What
02:02 23 does that mean?
02:02 24 A dependent claim does not itself recite
02:02 25 all of the requirements of the claim but refers to a

02:02 1 different claim for at least some of its requirements.
02:02 2 In this way, the claim depends on a separate and
02:02 3 different claim.
02:02 4 A dependent claim incorporates all the
02:02 5 requirements of the claim to which it refers. The
02:03 6 dependent claim then adds its own additional
02:03 7 requirement or requirements.
02:03 8 To determine what a dependent claim
02:03 9 covers, it is necessary to look at both the dependent
02:03 10 claim and any other claim to which it refers. A
02:03 11 product or process that meets all the requirements of
02:03 12 both the dependent claim and the claim to which it
02:03 13 refers is covered by the dependent claim.
02:03 14 If any requirement of the dependent claim
02:03 15 is not met or if any requirement of the independent
02:03 16 claim from which the dependent claim depends is not
02:03 17 met, then the product or process cannot infringe that
02:03 18 dependent claim.
02:03 19 On the other hand, if the requirements of
02:03 20 an independent claim are all met but a requirement of a
02:03 21 dependent claim is not met, then the independent claim
02:03 22 is still infringed.
02:03 23 The preamble to some of the asserted
02:03 24 claims of the Align patents uses the word "comprising."
02:03 25 For example, a phrase "a system comprising" or "a

02:03 1 method comprising."

02:04 2 What does "comprising" mean? It means

02:04 3 including the following but not excluding other. A

02:04 4 claim that includes the word "comprising" is not

02:04 5 limited to methods or systems having only the elements

02:04 6 recited in the claim but also covers methods and

02:04 7 systems that have the elements recited in the claim and

02:04 8 add additional elements.

02:04 9 For example, a claim to a table

02:04 10 comprising a tabletop, leg, and glue would cover a

02:04 11 tabletop that does include a tabletop, legs, and glue

02:04 12 even if it also includes wheels on the legs.

02:04 13 Let's turn to "consisting of" claims.

02:04 14 The phrase "consisting of," when used in

02:04 15 a claim, means including the following and excluding

02:04 16 others. If a claim limitation uses the words

02:04 17 "consisting of," and this is as opposed to

02:04 18 "comprising," you must determine whether the part of

02:04 19 the accused product that Align identifies as allegedly

02:04 20 satisfying that limitation includes only the element or

02:04 21 material to which the "consisting of" phrase refers.

02:05 22 If one or more additional elements or

02:05 23 materials are included, the limitation is not met.

02:05 24 Now, let's turn to the subject matter

02:05 25 that is the first one you will address.

02:05 1 I'm now going to instruct you as to the
02:05 2 rules you must follow when deciding whether Align has
02:05 3 proven that ClearCorrect infringed any of the claims of
02:05 4 the asserted patents.
02:05 5 Infringement is assessed on a
02:05 6 claim-by-claim basis. Therefore, there may be
02:05 7 infringement as to one claim but not as to another.
02:05 8 A patent owner has the right to stop
02:05 9 others from making or using within the United States
02:05 10 products or methods covered by the patent claims
02:05 11 without the patent owner's permission. There's nothing
02:05 12 legally improper in filing a patent application or
02:05 13 writing patent claims to cover an adverse party's
02:05 14 product.
02:05 15 Here, Align alleges that ClearCorrect
02:05 16 infringes Claims 1, 12, 13, and 14 of the '613 patent;
02:05 17 Claim 11 of the '384; Claims 1, 3, and 10 of the '090;
02:06 18 and Claims 1, 10, and 11 of the '091 patent. The
02:06 19 accused products for those patents are Zendura FLX and
02:06 20 aligners made from Zendura FLX.
02:06 21 In reaching your decision on
02:06 22 infringement, keep in mind that the only -- that only
02:06 23 the claims of a patent can be infringed. You must
02:06 24 compare the asserted patent claims to the accused
02:06 25 products and processes and determine whether or not

02:06 there's infringement.

02:06 You should not compare the accused
02:06 products and processes with any specific example that
02:06 might or might not be set out in the specification of
02:06 the patent, the patent owner's commercial product, or
02:06 the prior art in reaching your decision on
02:06 infringement. The only comparison allowed is with the
02:06 language of the claims themselves.

02:06 You must reach your decision as to each
02:06 assertion of infringement based on the meaning and
02:06 scope of the claims, the legal requirement for
02:06 infringement, and the evidence presented to you and
02:07 received by the Court here.

02:07 In deciding whether defendants' products
02:07 infringe Align's patents, do not compare Align's
02:07 products with the accused products. Again, you must
02:07 only compare the accused products with Align's patent
02:07 claims.

02:07 A claim of a patent may be infringed
02:07 directly or indirectly. Align has accused defendant of
02:07 both.

02:07 You may have heard evidence and arguments
02:07 in this case about ClearCorrect's own patents relating
02:07 to some of its products. However, owning a patent is
02:07 not a defense to claims of infringement of a different

02:07 1 patent. Whether ClearCorrect sought and obtained
02:07 2 patents has no bearing, and you may not consider
02:07 3 whether ClearCorrect -- consider that when deciding
02:07 4 whether ClearCorrect has infringed Align's patents.
02:07 5 A party can directly infringe a patent
02:07 6 without knowing of the patent or without knowing that
02:07 7 what the party is doing amounts to patent infringement.
02:07 8 There is no intent element to direct infringement.
02:08 9 Even if a party independently creates the accused
02:08 10 product or method, it can still infringe.
02:08 11 In order to -- let me start over. Sorry.
02:08 12 In order to prove direct infringement of
02:08 13 a patent claim by ClearCorrect, Align must prove by a
02:08 14 preponderance of the evidence that it is more likely
02:08 15 than not that a product or method that meets all the
02:08 16 requirements of an asserted claim was made, used, sold,
02:08 17 offered for sale within, imported into, or performed in
02:08 18 the United States by ClearCorrect during the time the
02:08 19 asserted patents were in force.
02:08 20 You must compare ClearCorrect's
02:08 21 activities with each and every one of the requirements
02:08 22 of an asserted claim to determine whether all the
02:08 23 requirements of the claim are met. A claim element is
02:08 24 present if it exists in ClearCorrect's products,
02:08 25 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 1 As with direct infringement, you must
02:10 2 determine whether there's been active inducement on a
02:10 3 claim-by-claim basis.
02:10 4 To prove induced infringement of a patent
02:10 5 claim, Align must prove by a preponderance of the
02:10 6 evidence that:
02:10 7 First, ClearCorrect aided, instructed, or
02:10 8 otherwise acted with the intent to cause acts by
02:10 9 another person that would constitute direct
02:10 10 infringement of the patent;
02:10 11 And ClearCorrect knew of the patent or
02:10 12 showed willful blindness to the existence of the patent
02:10 13 at that time and/or after the filing of the complaint
02:10 14 in this matter;
02:10 15 And ClearCorrect knew or showed willful
02:10 16 blindness that the actions of another person would
02:10 17 infringe at least one claim of the patent;
02:10 18 And the other person directly infringed
02:10 19 at least one patent claim.
02:10 20 Align must prove all four elements to
02:10 21 establish induced infringement.
02:10 22 Let's turn to contributory infringement.
02:10 23 Align alleges that ClearCorrect is liable
02:10 24 for contributory infringement by selling, offering to
02:10 25 sell, or importing the Zendura FLX for use in

02:11 1 third-party aligners, thereby contributing to the
02:11 2 direct infringement of the asserted claims of all four
02:11 3 patents by third-party aligner manufacturers. As with
02:11 4 direct infringement, you must determine contributory
02:11 5 infringement on a claim-by-claim basis.
02:11 6 ClearCorrect is liable for the
02:11 7 contributory infringement of a claim if Align proves by
02:11 8 a preponderance of the evidence that:
02:11 9 First, ClearCorrect sells, offers to
02:11 10 sell, or imports in the United States a component of a
02:11 11 patented product or a material or apparatus for use in
02:11 12 practicing a patented process during the time the
02:11 13 asserted patents were in force;
02:11 14 And the component, material, or apparatus
02:11 15 is not a staple article or a commodity of commerce
02:11 16 suitable for a substantial noninfringing use;
02:11 17 And the component, material, or apparatus
02:11 18 constitutes a material part of the invention;
02:11 19 And ClearCorrect is aware of the asserted
02:12 20 patents and knows the component, material, or apparatus
02:12 21 is made or adapted for use as an infringement of the
02:12 22 claim;
02:12 23 And ClearCorrect customers use the
02:12 24 component, material, or apparatus to directly infringe
02:12 25 a claim.

02:12 1 Align must prove all five elements to
02:12 2 establish contributory infringement.
02:12 3 Let's turn to the issue of invalidity.
02:12 4 We're moving from infringement and moving on to
02:12 5 invalidity.
02:12 6 I will now instruct you on the rules you
02:12 7 must follow in deciding whether or not ClearCorrect has
02:12 8 proven that the asserted claims are invalid.
02:12 9 The patent is presumed to be valid. The
02:12 10 burden of proof of establishing invalidity of a patent
02:12 11 are on -- or any claims rest solely in this case on
02:12 12 ClearCorrect because they are the party asserting
02:12 13 invalidity.
02:12 14 To prove that any claim of the patent is
02:12 15 invalid, ClearCorrect must persuade you by clear and
02:12 16 convincing evidence, that is, you must be left with a
02:12 17 clear conviction that the claim is invalid.
02:12 18 Even though the Patent Office examiners
02:12 19 allowed the asserted claims as valid, you as the judges
02:13 20 here have the responsibility for deciding whether
02:13 21 ClearCorrect has in fact met its burden of proof of
02:13 22 clear and convincing evidence that the claims of the
02:13 23 patent are invalid.
02:13 24 As with infringement, invalidity is also
02:13 25 assessed on a claim-by-claim basis.

02:13 1 Now, let's turn to enablement, which is
02:13 2 the argument of patent invalidity being asserted.
02:13 3 Another requirement contained in patent
02:13 4 law for the part of the patent called the specification
02:13 5 is called an enablement requirement.
02:13 6 ClearCorrect contends that the asserted
02:13 7 claims of the '613, '384, '090, and '091 patents are
02:13 8 invalid because the specifications of each does not
02:13 9 fully enable the full scope of the claimed invention as
02:13 10 of May 14th, 2012.
02:13 11 To succeed, ClearCorrect must show by
02:13 12 clear and convincing evidence that the asserted patent
02:13 13 specification does not contain sufficiently full and
02:14 14 clear descriptions to have allowed a person of ordinary
02:14 15 skill in the field of technology of the patent to make
02:14 16 and use the full scope of the claimed invention as of
02:14 17 the effective filing date without undue
02:14 18 experimentation.
02:14 19 If a patent claim is not enabled, it is
02:14 20 invalid.
02:14 21 Enablement serves a dual function of
02:14 22 ensuring adequate disclosure of the claimed invention
02:14 23 and preventing claims broader than what was disclosed
02:14 24 in the invention.
02:14 25 The enablement requirement prevents both

02:14 1 inadequate disclosure of an invention and overbroad
02:14 2 claiming that might otherwise attempt to cover more
02:14 3 than was actually invented.
02:14 4 The scope of the claims must be less than
02:14 5 or equal to the scope of the enablement to ensure that
02:14 6 the public knowledge is enriched by the patent
02:14 7 specification to a degree at least commensurate with
02:14 8 the scope of the claims.
02:14 9 Claims are invalid for the lack of
02:14 10 enablement if their broad scope is not reasonably
02:14 11 supported by the scope of enablement in the
02:15 12 specification.
02:15 13 Further, the enablement requirement does
02:15 14 not require the specification enable one of ordinary
02:15 15 skill in the art to make and use a perfected
02:15 16 commercially viable embodiment, absent a claim
02:15 17 limitation to that effect.
02:15 18 Further, the fact that a patent invention
02:15 19 requires further development to achieve commercial
02:15 20 success does not show non-enablement. The enablement
02:15 21 requirement does not require evidence that the patented
02:15 22 device could be manufactured commercially.
02:15 23 The question of undue experimentation is
02:15 24 a matter of degree, and what is required is that the
02:15 25 amount of experimentation must not be unduly excessive.

02:15 1 Some amount of experimentation to make and use the
02:15 2 invention is allowable.
02:15 3 In deciding whether a person having
02:15 4 ordinary skill would have to experiment unduly in order
02:15 5 to make and/or use the inventions asserted, consider
02:15 6 the following:
02:15 7 Time and cost of any necessary
02:16 8 experimentation;
02:16 9 How routine any necessary experimentation
02:16 10 is in the relevant field;
02:16 11 Whether the patent discloses specific
02:16 12 work examples of the claimed invention;
02:16 13 The amount of guidance presented in the
02:16 14 patent;
02:16 15 The nature and predicability of the
02:16 16 relevant field;
02:16 17 The level of ordinary skill in the
02:16 18 relevant field;
02:16 19 The nature and scope of the claimed
02:16 20 invention.
02:16 21 No one or more of these factors is alone
02:16 22 dispositive. Rather, you must make your decision about
02:16 23 whether or not the degree of experimentation required
02:16 24 is undue based on all the evidence presented to you.
02:16 25 You should weigh these factors and

02:16 1 determine whether or not, in the context of this
02:16 2 invention and the state of art at the time of the
02:16 3 effective filing date, a person having ordinary skill
02:16 4 would need to experiment unduly to make and use the
02:16 5 full scope of the claims in the invention.
02:16 6 Now, you've heard over and over "level of
02:16 7 ordinary skill." What does that mean?
02:16 8 In deciding what the level of ordinary
02:16 9 skill in the field of the invention is, consider all
02:17 10 the evidence introduced at the trial, including but not
02:17 11 limited to, one, the levels of education and experience
02:17 12 of the inventor and other persons actively working in
02:17 13 the field; the types of problems encountered in the
02:17 14 field; prior art solutions to them; the rapidity with
02:17 15 which innovations are made; and the sophistication of
02:17 16 the technology.
02:17 17 Now, ordinarily I'm very happy here
02:17 18 because we're nearly -- this would be the last section
02:17 19 of the charge. But we're just getting through the
02:17 20 patent part here. So don't get as excited as I
02:17 21 normally am when I see patent damages.
02:17 22 So damages for patent infringement are
02:17 23 only appropriate if you find that Align has proved that
02:17 24 ClearCorrect has infringed an asserted claim of the
02:17 25 asserted patents and that you determine that

02:17 1 ClearCorrect has not proven is invalid.
02:17 2 If patent damages are appropriate, you
02:17 3 must then consider what amount of damages to award
02:17 4 plaintiff for the infringement.
02:17 5 If you find that each of the asserted
02:18 6 claims is not infringed or that they are invalid or
02:18 7 both, then there are no damages for patent infringement
02:18 8 here.
02:18 9 Now, by instructing you on patent
02:18 10 damages, please do not take it as a suggestion who I
02:18 11 think should win the case or whether the damages are or
02:18 12 are not appropriate. That's up to you. You are the
02:18 13 judges in this case.
02:18 14 If you find that ClearCorrect has not
02:18 15 infringed any valid claim of the patent, then Align is
02:18 16 simply not entitled to damages.
02:18 17 But if you find that Align is entitled to
02:18 18 damages, then they must be adequate to compensate them
02:18 19 for the infringement but in no event less than what we
02:18 20 would call a reasonable royalty for the use made of the
02:18 21 invention by the infringer. There can be an award of
02:18 22 no damages -- there can be an award of no damages where
02:18 23 none were proven.
02:18 24 Damages are not meant to punish an
02:18 25 infringer. Your damage award, if you reach the issue

02:18 1 of damages, should put Align in approximately the same
02:19 2 financial position it would have been had the
02:19 3 infringement never occurred.
02:19 4 Align has the burden of proof in
02:19 5 establishing the amount of damages of a preponderance
02:19 6 of the evidence. You should award only the damages
02:19 7 that Align established that more likely than not that
02:19 8 it has suffered.
02:19 9 While Align is not required to prove the
02:19 10 amount of damages with mathematical precision, it must
02:19 11 prove them with reasonable certainty. You may not
02:19 12 award damages that are speculative, damages that are
02:19 13 only possible, or damages that are based on guesswork.
02:19 14 In this case, Align seeks what it claims
02:19 15 is a reasonable royalty. A reasonable royalty is
02:19 16 defined as the money amount Align and ClearCorrect
02:19 17 would have agreed upon as a fee for use of the
02:19 18 invention; in other words, a license at the time
02:19 19 immediately prior to when any infringement began.
02:19 20 You must be careful to ensure that any
02:19 21 award you make is no more but also no less than the
02:20 22 value of the patented invention.
02:20 23 Let's talk about reasonable royalty.
02:20 24 A royalty is a payment made to a patent
02:20 25 owner in exchange for the right to make, use, offer to

02:20 1 sell, sell, and/or import the claimed invention.
02:20 2 A reasonable royalty is the amount of
02:20 3 money that a patent owner and an alleged infringer
02:20 4 would have agreed to exchange for a license to the
02:20 5 patent during what you heard was a hypothetical
02:20 6 negotiation taking place at a time immediately prior to
02:20 7 when the infringement first began.
02:20 8 Align, the plaintiff, bears the burden of
02:20 9 proof proving the amount of a reasonable royalty by a
02:20 10 preponderance of the evidence.
02:20 11 In considering the hypothetical
02:20 12 negotiation to determine a reasonable royalty for a
02:20 13 license to a patent in this case, focus on what the
02:20 14 expectations of the patent owner and the alleged
02:20 15 infringer would have been had they entered into an
02:20 16 agreement at that time and had they acted reasonably in
02:20 17 their negotiations.
02:21 18 In determining this, assume that both
02:21 19 parties believed that the patent is valid and that it's
02:21 20 infringed and that they are both willing to enter into
02:21 21 some form of agreement.
02:21 22 Your role as judges is to determine what
02:21 23 the result of the negotiation would have been.
02:21 24 The reasonable royalty you determine must
02:21 25 be a royalty that would have on one hand -- I'm sorry,

02:21 1 must be a royalty that would have resulted from the
02:21 2 hypothetical negotiation. It may not be simply a
02:21 3 royalty that either party would have preferred.
02:21 4 Evidence of things that happened after
02:21 5 the infringement first began can be considered in
02:21 6 evaluating the reasonable royalty to the extent that
02:21 7 the evidence aids in assessing what royalty would have
02:21 8 resulted at the hypothetical negotiation.
02:21 9 A reasonable royalty award must be based
02:21 10 on the incremental value that the patented invention
02:21 11 adds to an accused system or process. Measuring this
02:21 12 value requires a determination of the value derived
02:21 13 from the patented invention and its use as
02:22 14 distinguished from other features, factors, or
02:22 15 contributions.
02:22 16 An appropriate combination of royalty
02:22 17 base and royalty rate must reflect the value
02:22 18 attributable to the infringing features of the accused
02:22 19 process or products, if any. No more.
02:22 20 Let's talk about apportionment.
02:22 21 Any amount of damages for patent
02:22 22 infringement must be based on the value attributable to
02:22 23 the patented invention as distinct from unpatented
02:22 24 features of the accused apparatus or other features,
02:22 25 factors, or contributions such as marketing or

02:22 1 advertising. A royalty compensating Align for damages
02:22 2 must reflect the value attributable to the infringing
02:22 3 feature of the accused apparatus. No more.
02:22 4 The process of separating the value
02:22 5 attributable to the allegedly infringing features from
02:22 6 the value of all other features, factors, or
02:22 7 contributions is what we call apportionment.
02:22 8 When the systems or method accused of
02:22 9 infringement have both patented and unpatented
02:23 10 features, your award must be apportioned so that it is
02:23 11 based solely on the value of the patented features and
02:23 12 no more.
02:23 13 Ladies and gentlemen, the damages experts
02:23 14 went over to you what the relevant factors are. So
02:23 15 with the agreement of the parties, you have these
02:23 16 factors. And you can just -- I'm not going to read
02:23 17 three pages of what you've -- you have. But you have
02:23 18 those in front of you in terms of the relevant factors
02:23 19 for a reasonable royalty.
02:23 20 And I'm turning to Page 53.
02:23 21 In determining the amount of damages, you
02:23 22 must determine when damages began. Damages commence on
02:23 23 the date that the alleged infringer both infringed and
02:23 24 was notified of its alleged infringement, or Align was
02:23 25 complying with the marking requirements provided under

02:23 1 35 United States Code Section 287.
02:23 2 For the '613 patent, the period began on
02:24 3 May 24th, 2021.
02:24 4 For the '090, it began on May 16th, 2023.
02:24 5 For the '384 patent and the '091 patent,
02:24 6 determine what -- you must determine what the damages
02:24 7 period or when the damages began.
02:24 8 If you find that a product has been sold
02:24 9 or licensed by Align that includes the claimed
02:24 10 inventions of either the '384 patent or the '091 patent
02:24 11 or both, determine -- you must determine whether the
02:24 12 product was marked with the patent number.
02:24 13 Marking is placing either the word
02:24 14 "patent" or the abbreviation "PAT" with a patent --
02:24 15 also with a patent number on all the products that
02:24 16 include the patented invention.
02:24 17 The marking requirement may also be
02:24 18 satisfied by including with the product an Internet
02:24 19 address to a posting that associates the patented
02:24 20 articles with the numbers of the applicable patents.
02:24 21 Align has the burden of establishing that
02:25 22 it substantially complied with all the necessary
02:25 23 marking requirements. That means Align must show that
02:25 24 substantially all the products made, offered for sale,
02:25 25 or sold under the '384 patent and '091 patent had been

02:25 1 marked and a reasonable effort was made to ensure the
02:25 2 licensees who made, offered for sale, or sold products
02:25 3 under the '384 or '091 patents marked the products.
02:25 4 If Align or any of its licensees have not
02:25 5 marked substantially all practicing products with the
02:25 6 patent number of the '384 and '091 patents, or if any
02:25 7 licensees were not required to mark practicing
02:25 8 products, then the date damages began for the '384
02:25 9 patent and the '091 patent is April 11th, 2024, because
02:25 10 that's the date the lawsuit was filed.
02:25 11 Reasonable royalty awards can also take
02:25 12 the form of what we call a lump-sum payment. A
02:25 13 lump-sum payment is equal to an amount that the alleged
02:26 14 infringer would have paid at the time of the
02:26 15 hypothetical negotiation for licensing covering all the
02:26 16 sales of the licensed product, both past and future.
02:26 17 When a lump sum is paid, the infringer
02:26 18 pays a single price for the license that covers all
02:26 19 past and all future infringing sales.
02:26 20 Reasonable royalty awards may also take
02:26 21 the form of a running royalty based on the revenues
02:26 22 from or the volume of sales of the licensed products.
02:26 23 A running royalty can be calculated, for example, by
02:26 24 multiplying a royalty base by a royalty rate.
02:26 25 It's exclusively up to you as the judges,

02:26 1 using only the evidence submitted, to decide what type
02:26 2 of royalty, if any, is appropriate in this case.
02:26 3 Okay. I'm now going to instruct you on
02:26 4 the law relating to ClearCorrect's antitrust claims
02:27 5 against Align.
6 Irrespective of your findings with
02:27 7 respect to Align's patent claims, you must
02:27 8 independently evaluate ClearCorrect's antitrust claims.
02:27 9 Those claims involve the Sherman Antitrust Act. The
02:27 10 purpose of that act is to preserve free and unfettered
02:27 11 competition in the marketplace. It rests on the
02:27 12 central premise that competition produces the best
02:27 13 allocation of our economic resources, lowest prices,
02:27 14 highest quality, and the greatest material progress.
02:27 15 Let me explain to you what the law is on
02:27 16 monopolization.
02:27 17 ClearCorrect alleges it was injured by
02:27 18 Align's unlawful monopolization of the market for
02:27 19 doctor-directed clear aligners in the United States in
02:27 20 violation of Section 2 of the Sherman Act.
02:27 21 To prevail on its claims, ClearCorrect
02:27 22 must prove the following elements:
02:27 23 First, the relevant market is what
02:27 24 ClearCorrect alleges it to be: The market for
02:27 25 doctor-directed clear aligners of the United States --

02:28 1 in the United States;
02:28 2 Second, that Align possesses monopoly
02:28 3 power in the relevant market;
02:28 4 Third, Align willfully maintained
02:28 5 monopoly power in the market -- in that market, the
02:28 6 relevant market, by engaging in anticompetitive
02:28 7 conduct; and
02:28 8 Fourth, such conduct caused damages to
02:28 9 the business or property of ClearCorrect.
02:28 10 The burden is exclusively on ClearCorrect
02:28 11 to establish each of those elements, and it must do so
02:28 12 by a burden of proof of a preponderance of the
02:28 13 evidence.
02:28 14 In order for you as judges to find that
02:28 15 Align is liable for monopolization, you must conclude
02:28 16 that ClearCorrect has established each of the four
02:28 17 elements of its claim by a preponderance of the
02:28 18 evidence. If they fail to establish any one or more of
02:28 19 these four elements, you must find that Align is not
02:28 20 liable for monopolization.
02:28 21 What is a relevant market?
02:28 22 ClearCorrect must prove by a
02:29 23 preponderance of the evidence that Align had monopoly
02:29 24 power in a relevant market. Defining a relevant market
02:29 25 is essential because you're required to make a judgment

02:29 1 about whether Align has monopoly power in a properly
02:29 2 defined economic market.
02:29 3 To make this judgment, you must be able
02:29 4 to determine what, if any, economic forces restrain
02:29 5 Align's freedom to set prices for or to restrict the
02:29 6 production level of the products and services it
02:29 7 provides.
02:29 8 The most likely and most important
02:29 9 restraining force will be actual and potential
02:29 10 competition from other firms and their products or
02:29 11 services. This includes all firms and products or
02:29 12 services that act or likely could act as restraints on
02:29 13 Align's power to set prices as it pleases because
02:29 14 customers could switch to them if Align sets it own
02:29 15 prices too high.
02:29 16 All the firms and products or services
02:29 17 that exert such restraining force are within what is
02:30 18 called the relevant market.
02:30 19 There are two aspects to consider in
02:30 20 determining whether ClearCorrect has met its burden to
02:30 21 prove the relevant market by a preponderance of the
02:30 22 evidence.
02:30 23 The first is the relevant product market.
02:30 24 The second is the relevant geographic market. The
02:30 25 parties agree that the relevant geographic market is

02:30 1 the United States, so my instructions will focus only
02:30 2 on the relevant product market.
02:30 3 The basic idea of a relevant product
02:30 4 market is the products within it are reasonable
02:30 5 substitutes for each other from the customer's point of
02:30 6 view; that is, the products compete with each other.
02:30 7 The relevant product market includes products that a
02:30 8 customer believes are reasonably interchangeable or
02:30 9 reasonably substitute for each other.
02:30 10 This is a practical test with reference
02:30 11 to the actual behavior of customers and marketing
02:30 12 efforts of sellers. Products need not be identical or
02:31 13 precisely interchangable so long as they're reasonable
02:31 14 substitutes.
02:31 15 To determine whether products are
02:31 16 reasonable substitutes for each other, you may consider
02:31 17 whether a small but significant and non-transitory
02:31 18 increase in the price of one product would result in
02:31 19 enough customers switching from that product to another
02:31 20 product such that the price increase would not be
02:31 21 profitable.
02:31 22 Will customers accept the price increase
02:31 23 or will so many customers switch to alternate products
02:31 24 that the price increase would be forced to be
02:31 25 withdrawn?

02:31 1 Generally speaking, a small but
02:31 2 significant and non-transitory increase in price is
02:31 3 approximately a 5 percent increase in price not due to
02:31 4 cost factors.
02:31 5 If you find that customers would switch
02:31 6 to alternative products and that the price increases
02:31 7 would not be profitable, then you may conclude that the
02:31 8 alternative products are in the product market.
02:31 9 On the other hand, if you find that
02:31 10 customers would not switch in sufficient numbers to the
02:31 11 alternative products and that price increase would be
02:32 12 profitable, then you may conclude that the alternative
02:32 13 products are not in the product market.
02:32 14 In evaluating whether various products
02:32 15 are reasonably interchangable or reasonable substitutes
16 for each other under the price increase test I have
17 given you, consider:
02:32 18 Customers' views on whether the products
02:32 19 are reasonably interchangeable;
02:32 20 The relationship between the price of one
02:32 21 product and sales of another;
02:32 22 The presence or absence of specialized
02:32 23 vendors;
02:32 24 The perception of either industry
02:32 25 participants or the public as to whether the products

02:32 1 are in separate markets; and
02:32 2 The views of ClearCorrect and Align
02:32 3 regarding who their respective competitors are; and
02:32 4 The existence or absence of different
02:32 5 customer groups or distribution channels.
02:32 6 Here, ClearCorrect contends a relevant
02:32 7 product market is all doctor-directed clear aligners.
02:32 8 In contrast, Align contends that
02:32 9 ClearCorrect's product market does not include all
02:33 10 reasonable substitutes and is not a valid antitrust
02:33 11 market because the relevant market is the market for
02:33 12 teeth straightening and includes doctor-directed clear
02:33 13 aligners, direct-to-consumer clear aligners, and
02:33 14 braces.
02:33 15 If you find that ClearCorrect has proven
02:33 16 a relevant market, then you should continue to evaluate
02:33 17 the remaining elements of ClearCorrect's monopolization
02:33 18 claims. However, if you find that ClearCorrect has
02:33 19 failed to prove such a market, then you must find in
02:33 20 Align's favor with respect to all claims.
02:33 21 To prove monopolization, ClearCorrect
02:33 22 must prove that Align has monopoly power and has a --
02:33 23 in a relative -- a relevant antitrust market. Monopoly
02:33 24 power is the power to control prices or exclude
02:33 25 competition in the relevant market.

02:33 1 Possession of monopoly power in itself is
02:33 2 not unlawful. It becomes unlawful where it is acquired
02:34 3 or maintained through anticompetitive or exclusionary
02:34 4 acts or conduct. There can be both direct and indirect
02:34 5 proof of the existence of monopoly power in a market.
02:34 6 Let's talk first about direct proof.
02:34 7 Monopoly power may be shown by direct
02:34 8 evidence in several ways.
02:34 9 Monopoly power may be shown by proving
02:34 10 that Align has the ability to raise or maintain the
02:34 11 prices that it charges for goods or services in the
02:34 12 relevant market above competitive levels for a
02:34 13 significant period of time.
02:34 14 ClearCorrect must prove that Align has
02:34 15 the power to do so by itself, that is, without the
02:34 16 assistance of and despite competition from any existing
02:34 17 or potential competitors.
02:34 18 If Align attempted to maintain prices
02:34 19 above competitive levels but will lose so much business
02:34 20 to other competitors in the relevant market that the
02:34 21 price increase would become unprofitable and would
02:35 22 later have to be withdrawn, then Align does not have
02:35 23 monopoly power.
02:35 24 Similarly, ClearCorrect may show that
02:35 25 Align has monopoly power by proving that Align has the

02:35 1 ability to exclude competition. For example, if Align
02:35 2 attempted to maintain prices above competition levels
02:35 3 but new competitors could enter the relevant market or
02:35 4 existing competitors could expand their sales and take
02:35 5 so much business that the price increase would become
02:35 6 unprofitable and would have to be withdrawn, then Align
02:35 7 does not have monopoly power.
02:35 8 The ability to earn high profit margins
02:35 9 or a high rate of return does not necessarily mean that
02:35 10 Align has monopoly power. There are other factors
02:35 11 which may enable a company without monopoly power to
02:35 12 sell at higher prices or earn higher profit margins
02:35 13 than its competitors, such as the ability to offer
02:35 14 superior products or services, the ability to maintain
02:35 15 an efficient business operation, or superior marketing.
02:36 16 An ability to sell at higher prices or
02:36 17 earn higher profit margins than other companies for
02:36 18 similar goods or services over a long period of time
02:36 19 might be elements of monopoly power.
20 By contrast, evidence that Align would
02:36 21 lose a substantial amount of sales in the market if it
02:36 22 raised prices substantially or that Align's profit
02:36 23 margins were low compared to its competitors, or that
02:36 24 Align's margins go up and down or are decreasing might
02:36 25 be evidence that Align does not have monopoly power.

02:36 1 Let's turn to indirect proof.
02:36 2 Monopoly power may be proven indirectly
02:36 3 by evidence of the structure of the market, market
02:36 4 share, market share trends, barriers to entry in the
02:36 5 market, entry and exit by other companies, and the
02:36 6 number and size of competitors.
02:36 7 If this evidence establishes that Align
02:36 8 has the power to control prices or exclude competition
02:37 9 in the relevant market, then you may conclude that
02:37 10 Align has monopoly power in the market.
02:37 11 Let's talk about market share.
02:37 12 The first factor you should consider is
02:37 13 Align's share in the relevant market.
02:37 14 Based on the evidence that you've heard
02:37 15 about Align's market share, you should determine
02:37 16 Align's market share as a percentage of total sales in
02:37 17 the relevant market.
02:37 18 Align must have a significant share of
02:37 19 the market in order to possess monopoly power. A
02:37 20 market share of about 50 percent may be sufficient to
02:37 21 support an inference that Align has monopoly power, but
02:37 22 in considering whether Align has monopoly power, it is
02:37 23 also important to consider other aspects of the market.
02:37 24 The likelihood that a company has
02:37 25 monopoly power is stronger the higher the company share

02:37 1 is above that threshold of 50 percent.
02:37 2 Along with Align's market share, there
02:37 3 are other factors that you may consider in determining
02:37 4 whether Align has monopoly power.
02:38 5 The trend in Align's market shares is
02:38 6 something you may consider. An increasing market share
02:38 7 may strengthen an inference that the company has
02:38 8 monopoly power, particularly whether the company has a
02:38 9 high market share, while a decreasing share might show
02:38 10 that the company does not have monopoly power.
02:38 11 You may also consider whether there are
02:38 12 barriers to entry into the relevant market. Barriers
02:38 13 to entry are long-run costs that were not incurred by
02:38 14 the existing companies in a relevant market but must be
02:38 15 incurred by new competitors to enter the market, or
02:38 16 other factors in a market that deter entry of new
02:38 17 competitors while permitting existing companies to earn
18 monopoly profits.
02:38 19 Barriers to entry make it difficult for
02:38 20 new competitors to enter in the relevant market in a
02:38 21 meaningful and timely way.
02:39 22 Evidence of low or no-entry barriers may
02:39 23 be evidence that Align does not have monopoly power
24 regardless of Align's market share because new
02:39 25 competitors could easily if Align attempted -- I'm

02:39 1 sorry; I misread that -- because new competitors could
02:39 2 enter easily if Align attempted to raise prices for a
02:39 3 substantial period of time.
02:39 4 By contrast, evidence of high barriers to
02:39 5 entry along with high market share may support an
6 inference that Align has monopoly power.
7 The history of entry and exit in the
02:39 8 relevant market may also be helpful to consider.
02:39 9 Effective entry of new competitors or expansion of
02:39 10 existing competitors may be evidence that Align lacks
11 monopoly power.
02:39 12 On the other hand, departure from the
02:39 13 market or the failure of firms to enter the market,
02:39 14 particularly if prices and profit margins are
02:39 15 relatively high, may support an inference that Align
16 does have monopoly power.
02:39 17 You may consider whether Align's
02:40 18 competitors are capable of effectively competing in the
02:40 19 relevant market. In other words, you should consider
02:40 20 whether the financial strength, market shares, and
02:40 21 number of competitors act as a check on Align's ability
02:40 22 to price its products.
02:40 23 If Align's competitors are vigorous or
02:40 24 have large or increasing market shares, this may be
02:40 25 evidence that Align lacks monopoly power.

02:40 1 On the other hand, if you determine that
02:40 2 Align's competitors are weak or have small or declining
02:40 3 market shares, this might support an inference that
02:40 4 Align does have monopoly power.
02:40 5 The next element, ClearCorrect must prove
02:40 6 that Align willfully maintained monopoly power in the
02:40 7 relevant market through anticompetitive acts or
02:40 8 practices.
02:40 9 Anticompetitive acts are acts, other than
02:40 10 competition on the merits, having the effect of
02:41 11 preventing or excluding competition or frustrating the
02:41 12 efforts of others -- of other companies to compete for
02:41 13 customers within the relevant market.
02:41 14 Harm to competition is to be
02:41 15 distinguished from harm to a single competitor or a
02:41 16 group of competitors, which does not necessarily
02:41 17 constitute harm to competition. Some examples of harm
02:41 18 to competition include increased prices, decreased
02:41 19 production levels, and reduced quality.
02:41 20 Mere possession of monopoly power, if
02:41 21 lawfully required, does not violate antitrust laws.
02:41 22 Therefore, you must distinguish the maintenance of
02:41 23 monopoly power through anticompetitive acts from the
02:41 24 maintenance of monopoly power by applying -- by
02:41 25 supplying better products or services, possessing

02:41 1 superior business skills, or because of luck, which is
02:41 2 not unlawful.
02:41 3 A monopolist may compete aggressively
02:41 4 without violating the antitrust laws. A monopolist's
02:41 5 conduct only becomes unlawful when it involves
02:42 6 anticompetitive acts.
02:42 7 The difference between anticompetitive
02:42 8 conduct and conduct that has a legitimate business
02:42 9 purpose can be difficult to determine. This is because
02:42 10 all companies have on the one hand a desire to increase
02:42 11 their products and increase their market share.
02:42 12 But these goals are -- and these goals
02:42 13 are an essential part of a competitive marketplace, and
02:42 14 the antitrust laws do not make these goals or the
02:42 15 achievements of these goals unlawful as long as a
02:42 16 company does not use anticompetitive means to achieve
02:42 17 these goals.
02:42 18 There are many ways in which a firm can
19 act anticompetitively. In determining whether Align's
02:42 20 conduct was anticompetitive or whether it was
02:42 21 legitimate business conduct, you should determine
02:42 22 whether the conduct is consistent with competition on
02:42 23 the merits, whether the conduct provides benefits to
02:42 24 customers and would make business sense apart from any
02:42 25 effect it has on excluding competition or harming

02:42 1 competitors.

02:43 2 The acts or practices that result in

02:43 3 maintenance of monopoly power must represent something

02:43 4 more than the conduct of business that is part of the

02:43 5 normal competitive process or commercial success. They

02:43 6 must represent conduct that has made it very difficult

02:43 7 or impossible for the competitors to compete.

02:43 8 You may not find that a company willfully

02:43 9 maintained monopoly power through anticompetitive means

02:43 10 if it has maintained that power solely through the

02:43 11 exercise of superior foresight and skill, or because of

02:43 12 economic or technological efficiency, including

02:43 13 efficiency resulting from scientific research, or by

02:43 14 obtaining one or more lawful patents, or because of the

02:43 15 changes in cost or consumer preference.

02:43 16 ClearCorrect alleges that Align has

02:43 17 engaged in four types of allegedly anticompetitive

02:44 18 acts.

02:44 19 First, refused to accept scans from

02:44 20 doctors using a third party, i.e., non-iTero, scanners

02:44 21 to get an Invisalign while erecting technical

02:44 22 impediments in connection with iTero which make it

02:44 23 unnecessarily difficult for doctors to use iTero

02:44 24 scanners to order non-Invisalign aligners.

02:44 25 Entered into contracts with exclusivity

1 provisions.

02:44 2 Three, offered loyalty pricing or

02:44 3 discount programs, including a program called the

02:44 4 Advantage Program.

02:44 5 Fourth, sought to enforce patents in this

02:44 6 case against ClearCorrect that Align had obtained by

02:44 7 defrauding the Patent Office.

02:44 8 The law states that you should consider

02:44 9 Align's conduct as a whole but only with respect to

02:44 10 conduct that you find to be anticompetitive.

02:45 11 In determining whether the first category

02:45 12 of conduct described above relating to the iTero is

02:45 13 anticompetitive, you should determine whether or not it

02:45 14 meets the definition of the anticompetitive acts I have

02:45 15 just described.

02:45 16 With respect to the remaining three

02:45 17 categories of conduct, you should determine whether

02:45 18 each meets the definition of anticompetitive acts that

02:45 19 follow.

02:45 20 The first act, let's talk about it.

02:45 21 With respect to the second and third

02:45 22 categories of conduct, exclusive contracts and the

02:45 23 discount and loyalty programs, you should evaluate

02:45 24 whether each of these constitutes an anticompetitive

02:45 25 exclusive dealing arrangement.

02:45 1 Exclusive dealing arrangements require a
02:45 2 buyer of a product or service to obtain that product or
02:46 3 service exclusively from one supplier for a period of
02:46 4 time. Such arrangements, however, may be
02:46 5 anticompetitive even if they do not require complete
02:46 6 exclusivity from each consumer or customer.
02:46 7 There are several forms of exclusive
02:46 8 dealing arrangements.
02:46 9 The arrangement may take the form of an
02:46 10 agreement forbidding the buyer from purchasing a
02:46 11 product or service from the supplier's competitors, or
02:46 12 requiring contracts committing the buyer to purchase
02:46 13 all or a significant portion of its requirements of
02:46 14 specific products or services from the supplier, or a
02:46 15 pricing policy that creates a substantial disincentive
02:46 16 to purchase from competitors.
02:46 17 The law does not prohibit a firm from
02:46 18 offering low prices that are profitable to it even if a
02:46 19 seller expects that all of its competitors will be
02:46 20 unable to meet that low price and that they will
02:46 21 eventually go out of business.
02:46 22 The fact that a defendant had financial
02:46 23 resources that would allow it to retain its business
02:47 24 while charging low prices does not show that the prices
02:47 25 were anticompetitive.

02:47 1 From the standpoint of either the buyer
02:47 2 or the seller, exclusive dealing arrangements may have
02:47 3 potential procompetitive effects that benefit consumers
02:47 4 and that need to be weighed against the potential
02:47 5 anticompetitive effects of substantially foreclosing
02:47 6 competing suppliers' access to the buyer and the
02:47 7 buyer's access to competing suppliers' products and
02:47 8 services.
02:47 9 In determining whether Align's alleged
02:47 10 exclusive deals had a substantially harmful effect on
02:47 11 competition in the relevant market, consider the
02:47 12 following:
02:47 13 The nature and history of the use of
02:47 14 exclusive dealing contracts in the industry;
02:47 15 Whether buyers of clear aligners have
02:47 16 independent reasons for entering into the exclusive
02:47 17 dealing contracts or were coerced into entering them;
02:47 18 Whether other competing suppliers also
02:47 19 offer exclusive dealing contracts;
02:47 20 The extent of the competition among
02:48 21 competing suppliers for exclusive dealing contracts
02:48 22 with buyers;
02:48 23 Align's position in the marketplace;
02:48 24 The competitive alternatives to Align's
02:48 25 products or services;

02:48 1 The reasons Align and buyers entered into
02:48 2 the exclusive dealing contacts at issue; and
02:48 3 The effect of the use of exclusive
02:48 4 dealing contracts on the ability of new firms to enter
02:48 5 the market and on price and other competition in the
02:48 6 market.
02:48 7 With respect to the allegations of
02:48 8 anticompetitive conduct that I just described,
02:48 9 ClearCorrect alleges that Align restricted doctors'
02:48 10 ability to purchase competing clear aligners, including
02:48 11 ClearCorrect's clear aligners.
02:48 12 Such conduct may violate the antitrust
02:48 13 laws when it forecloses competition in a substantial
02:48 14 share of the market.
02:48 15 It does not need to be impossible for a
02:48 16 competitor to sell to customers for the customer to be
02:49 17 foreclosed.
02:49 18 Competition is foreclosed if rivals'
02:49 19 sales to those customers are restricted by
02:49 20 anticompetitive conduct, including a contract or other
02:49 21 arrangement that makes it more difficult for rivals to
02:49 22 sell to those customers than would otherwise be the
02:49 23 case.
02:49 24 In deciding whether conduct has
02:49 25 foreclosed a substantial share of the market, you

02:49 1 should consider all the conduct that you found
02:49 2 foreclosed competition in the relevant market
02:49 3 altogether.
02:49 4 But unless you find that an act is
02:49 5 anticompetitive as described above, you should not
02:49 6 consider the act as a basis for finding substantial
02:49 7 foreclosure of competition.
02:49 8 In determining whether foreclosure is
02:49 9 substantial, you should take into account the relative
02:49 10 strength of Align within the relative -- relevant
02:49 11 market, the proportionate volume of commerce involved
02:49 12 in relation to the total volume of commerce in the
02:49 13 relevant market, and the probable immediate and future
02:50 14 effects of exclusion of competition from the market on
02:50 15 competition.
02:50 16 In determining the extent to which
02:50 17 Align's alleged conduct forecloses competition on the
02:50 18 merits, it is relevant to consider the percentage of
02:50 19 the market foreclosed. Similarly, the shorter the
02:50 20 duration of the alleged foreclosure, the less likely it
02:50 21 is to harm competition. The longer the duration of the
02:50 22 alleged foreclosure, the more likely that the harm to
02:50 23 competitors -- to competition will be greater.
02:50 24 You should also consider whether the
02:50 25 buyer is the final end user of the product. If the

02:50 1 buyer is the final end user, foreclosure of competitors
02:50 2 from that portion of the market represented by the
02:50 3 buyer's purchases makes it more likely that competition
02:50 4 may be harmed if the buyer represents a substantial
02:50 5 portion of the market.
02:50 6 If the buyer is a distributor or reseller
02:50 7 and there are other alternatives for competing sellers
02:50 8 to market their products to end users, then
02:51 9 competitors' access to the market may not be foreclosed
02:51 10 and thus not substantially harm competition.
02:51 11 By considering all these factors, you
02:51 12 should determine whether the anticompetitive acts,
02:51 13 including anticompetitive contracts or other
02:51 14 arrangements, adversely affected the price paid by
02:51 15 buyers, output, or the quality of products offered in
02:51 16 the relevant market.
02:51 17 Where a restraint does not adversely
02:51 18 affect price, output, or product quality in the
02:51 19 relevant market, it is unlikely to substantial -- to
02:51 20 substantially harm competition.
02:51 21 The final category of alleged
02:51 22 anticompetitive conduct in this case is ClearCorrect's
02:51 23 allegation that Align acquired its '613, '384, '090,
02:51 24 and '091 patents through fraud on the United States
02:51 25 Patent Office.

02:51 1 Align has sought to enforce each of those
02:52 2 patents against ClearCorrect in this case. To find
02:52 3 that Align's assertion of these patents constitutes
02:52 4 anticompetitive conduct, you must determine whether
02:52 5 Align obtained these patents through an act of fraud on
02:52 6 the Patent Office.
02:52 7 Fraudulently obtaining a patent is not by
02:52 8 itself a violation of Section 2 of the Sherman Act.
02:52 9 Rather, it is evidence that the acquisition or
02:52 10 maintenance of monopoly power through anticompetitive
02:52 11 conduct needed to prove a Sherman Act violation, about
02:52 12 which you've previously been instructed.
02:52 13 To evaluate ClearCorrect's contention,
02:52 14 you must first determine for each of the four patents
02:52 15 whether Align defrauded the Patent Office.
02:52 16 ClearCorrect must prove by clear and convincing
02:52 17 evidence that a specific individual associated with the
02:52 18 filing and prosecution of the relevant patent
02:53 19 application or applications intentionally withheld or
02:53 20 deliberately falsified material information that, had
02:53 21 the Patent Office known about it, would have resulted
02:53 22 in the PTO denying the patents to Align.
02:53 23 ClearCorrect alleges that Dr. Chunhua Li
02:53 24 committed fraud on the Patent Office. To prove fraud
02:53 25 on the Patent Office, ClearCorrect must prove by clear

02:53 1 and convincing evidence that Dr. Chunhua Li withheld
02:53 2 material information from the USPTO or submitted
02:53 3 materially false information or statements to the
02:53 4 United States Patent Office during the examination of
02:53 5 the '613 patent, and that Dr. Chunhua Li did so with
02:54 6 the specific intent to derive the examiner -- to
02:54 7 deceive the examiner into issuing one or more of the
02:54 8 patents.
02:54 9 Let me explain to you what is meant by
02:54 10 material and intent to deceive.
02:54 11 Material information is information that
02:54 12 was withheld from the PTO which is material if the
02:54 13 United States Patent Office would not have allowed the
02:54 14 claim had it been aware of the withheld information.
02:54 15 A false or misleading statement is
02:54 16 material when the USPTO allows a claim because the
02:54 17 statements were made.
02:54 18 You may only find information,
02:54 19 statements, or misconduct to be material if there's
02:54 20 clear and convincing evidence that they are material.
02:54 21 Next is intent to deceive. In order for
02:55 22 fraud on the Patent Office to have occurred,
02:55 23 ClearCorrect must establish that any failure to
02:55 24 disclose material information or false or misleading
02:55 25 statements was done with an intent to deceive the

02:55 1 patent examiner.
02:55 2 If the failure to disclose material
02:55 3 information or false or misleading information occurred
02:55 4 through negligence, oversight, carelessness, or an
02:55 5 error in judgment, even if it was grossly negligent,
02:55 6 then there was no intent to deceive.
02:55 7 With regard to the -- I'm sorry. Let me
02:55 8 start over on intent to deceive.
02:55 9 In order for fraud on the Patent Office
02:55 10 to have occurred, ClearCorrect must establish that any
02:55 11 failure to disclose material information or false or
02:55 12 misleading statement was done with an intent to deceive
02:55 13 the examiner.
02:56 14 If the failure to disclose material
02:56 15 information or false or misleading statements occurred
02:56 16 through negligence, oversight, carelessness, or an
02:56 17 error in judgment, even if it was grossly negligent,
02:56 18 then there was no intent to deceive and there's no
02:56 19 fraud on the Patent Office.
02:56 20 Intent may be shown through direct
02:56 21 evidence, such as documents or testimony from one's
02:56 22 intent to deceive -- about one's intent to deceive.
02:56 23 Intent also may be shown through indirect
02:56 24 evidence. It may be inferred from conduct. However,
02:56 25 an intent to deceive may be inferred only where it is

02:56 1 the single most reasonable inference that can be drawn
02:56 2 from the evidence. It's -- if it could be reasonable
02:56 3 to conclude that the failure to disclose material
02:56 4 information was an honest mistake, intent to deceive
02:56 5 cannot be found.
02:56 6 Materiality and intent to deceive are
02:56 7 separate issues. Proof of materiality does not give
02:56 8 rise to an intent to deceive, and proof of an intent to
02:56 9 deceive does not give rise to an inference of
02:56 10 materiality.
02:57 11 There must be clear and convincing
02:57 12 evidence that establishes materiality. And there must
02:57 13 be clear and convincing evidence that establishes an
02:57 14 intent to deceive. If clear and convincing evidence of
02:57 15 either or both is missing, there's no fraud on the
02:57 16 Patent Office.
02:57 17 If you find that one of the patents was
02:57 18 procured by fraud, you may find that other patents were
02:57 19 likewise procured by fraud if ClearCorrect establishes
02:57 20 that the fraudulently procured patent had a necessary
02:57 21 and immediate relationship to the grant of the other
02:57 22 patents.
02:57 23 Inadvertent errors or honest mistakes by
02:57 24 Align do not constitute fraud. By the same token, even
02:57 25 deliberate falsification of material information is not

02:57 1 sufficient to support a monopolization claim if you
02:58 2 determine that the Patent Office, knowing of the
02:58 3 falsification, would have issued that patent anyway.
02:58 4 If you find that ClearCorrect has not met
02:58 5 its burden in proving fraud on the Patent Office by
02:58 6 clear and convincing evidence, you must find for Align
02:58 7 and against ClearCorrect on ClearCorrect's contention
02:58 8 that Align's knowing enforcement of a fraudulently
02:58 9 procured patent was anticompetitive conduct.
02:58 10 If you find that ClearCorrect has proven
02:58 11 fraud on the Patent Office by the standard of clear and
02:58 12 convincing evidence and that the patent would not have
02:58 13 issued except for that fraud, you must determine
02:58 14 whether Align has enforced or attempted to enforce the
02:58 15 fraudulently obtained patents with knowledge of the
02:58 16 fraud.
02:58 17 If you find that Align was not aware of
02:58 18 the fraud when enforcing or attempting to enforce the
02:59 19 fraudulently obtained patents, then you must find for
02:59 20 Align on ClearCorrect's contention that Align's knowing
02:59 21 enforcement or attempt to enforce a fraudulently
02:59 22 procured patent was anticompetitive conduct.
02:59 23 If, having found from clear and
02:59 24 convincing evidence that Align fraudulently obtained a
02:59 25 patent, you also find that Align enforced or attempted

02:59 1 to enforce the patent knowing it had been fraudulently
02:59 2 obtained, then you must decide whether ClearCorrect has
02:59 3 proven the remaining elements of its monopolization
02:59 4 claim.
02:59 5 Fraudulently obtaining a patent and
02:59 6 knowingly enforcing the patent with knowledge of the
02:59 7 fraud is not by itself a violation of the antitrust
02:59 8 laws of the United States. Rather, it is evidence of
02:59 9 the willful maintenance of monopoly power through
03:00 10 anticompetitive conduct needed to prove a violation,
03:00 11 about which you were previously instructed.
03:00 12 See Instruction No. 42 if you need to.
03:00 13 ClearCorrect still must prove the
03:00 14 remaining elements of the claim for monopolization.
03:00 15 See Instruction No. 38.
03:00 16 If you find that ClearCorrect has proven
03:00 17 fraud by clear and convincing evidence, you may
03:00 18 consider that conduct as anticompetitive conduct
03:00 19 supporting ClearCorrect's monopolization claim along
03:00 20 with any other conduct by Align that you as judges have
03:00 21 found to be anticompetitive.
03:00 22 Even if you do not find that ClearCorrect
03:00 23 has proven fraud as to any of the '613, '384, '090, or
03:00 24 '091 patents, Align may still be liable for
03:00 25 monopolization based on the other anticompetitive

03:00 1 conduct.

03:00 2 Regardless of your decision regarding

03:01 3 ClearCorrect's claims for monopolization and its claim

03:01 4 for attempted monopolization, which I will discuss

03:01 5 next, you will be asked on the verdict form to decide

03:01 6 whether Align has acquired the '613, '384, '090, and

03:01 7 '091 patents through some form of fraud on the United

03:01 8 States Patent Office.

03:01 9 Let's talk about the pattern of the

03:01 10 alleged anticompetitive conduct.

03:01 11 ClearCorrect argues that Align's alleged

03:01 12 iTero technical implements -- impediments, contractual

03:01 13 terms, loyalty programs, and procurement and

03:01 14 enforcement of fraudulent patents constitute a pattern

03:01 15 of anticompetitive conduct that is harmful to

03:01 16 competition in the alleged market for doctor-directed

03:01 17 clear aligners.

03:01 18 The law states that you should consider

03:01 19 Align's conduct as a whole but only with respect to

03:02 20 conduct that you find to be anticompetitive. Unless

03:02 21 you find that an act is anticompetitive as described

03:02 22 above, you should not consider the act as a basis for

03:02 23 finding that Align willfully maintained monopoly power.

03:02 24 Let's talk about procompetitive

03:02 25 justification.

03:02 1 If you find that ClearCorrect has shown
03:02 2 that Align maintained monopoly power in a relevant
03:02 3 market through anticompetitive acts in the marketplace,
03:02 4 you must consider whether Align had a legitimate
03:02 5 procompetitive justification for its conduct.
03:02 6 Align, not ClearCorrect, must demonstrate
03:02 7 to you by a preponderance of the evidence that there is
03:02 8 a legitimate procompetitive business justification.
03:02 9 For conduct to be procompetitive, it must
03:02 10 be a form of competition on the merits because it
03:03 11 involves, for example, conduct that increased
03:03 12 efficiency or benefitted competition.
03:03 13 To be a legitimate justification, the
03:03 14 justification must not be pretextual. In other words,
03:03 15 if you find that the business justification offered by
03:03 16 Align was not the real reason for its conduct but,
03:03 17 rather, that Align was motivated primarily by
03:03 18 anticompetitive intent, then you should disregard that
03:03 19 justification as pretextual.
03:03 20 If you find that any of Align's conduct
03:03 21 was anticompetitive and Align has not advanced a
03:03 22 legitimate procompetitive justification for its
03:03 23 conduct, then ClearCorrect has established the
03:03 24 anticompetitive conduct element of the monopolization
03:03 25 claim.

03:03 1 If you find Align presented evidence of a
03:03 2 legitimate procompetitive justification for its
03:03 3 conduct, you must determine whether the anticompetitive
03:04 4 effect of Align's conduct outweighed the procompetitive
03:04 5 benefits of that conduct.
03:04 6 ClearCorrect bears the burden of
03:04 7 demonstrating to you by a preponderance of the evidence
03:04 8 that the anticompetitive effects of the conduct
03:04 9 outweigh the procompetitive justifications.
03:04 10 When you evaluate this balance, you may
03:04 11 consider whether less restrictive means were available
03:04 12 to Align to accomplish the alleged procompetitive
03:04 13 benefits of its conduct and whether those other means
03:04 14 would have been less harmful to competition.
03:04 15 If the anticompetitive effect of Align's
03:04 16 conduct in a relevant market outweighs the
03:04 17 procompetitive benefit, then ClearCorrect has
03:04 18 established the anticompetitive conduct element of its
03:04 19 monopolization claim.
03:04 20 But if the procompetitive benefit
03:04 21 outweighs the anticompetitive effects in the relevant
03:04 22 market, then you must find that ClearCorrect has failed
03:04 23 to establish the anticompetitive conduct element of its
03:05 24 monopolization claim.
03:05 25 What are antitrust injuries and

03:05 1 causation?

03:05 2 If you find that ClearCorrect has proven

03:05 3 the first three elements of its monopolization claim,

03:05 4 to conclude that Align is liable for monopolization,

03:05 5 ClearCorrect must prove that it was injured in business

03:05 6 by Align's anticompetitive conduct.

03:05 7 ClearCorrect is entitled to recover

03:05 8 damages for an injury to its business or property if it

03:05 9 can establish three elements of injury and causation:

03:05 10 First, ClearCorrect was in fact injured

03:05 11 as a result of Align's alleged violation of antitrust

03:05 12 laws;

03:05 13 Second, Align's alleged illegal conduct

03:05 14 was a material cause of ClearCorrect's injury; and

03:05 15 Third, ClearCorrect's injury is an injury

03:05 16 of the type that the antitrust laws were intended to

03:06 17 prevent.

03:06 18 The first element is sometimes referred

03:06 19 to as an injury in fact or the fact of damages. For

03:06 20 ClearCorrect to establish that it is entitled to

03:06 21 recover damages, it must prove it was injured as a

03:06 22 result of Align's alleged violation of the antitrust

03:06 23 laws.

03:06 24 Proving the fact of damages does not

03:06 25 require ClearCorrect to prove the dollar value of its

03:06 1 injury. It requires only that ClearCorrect prove that
03:06 2 it was in fact injured by Align's alleged antitrust
03:06 3 violation.
03:06 4 If you find ClearCorrect has established
03:06 5 that it was replaced -- that -- establishes it was
03:06 6 injured, you may then consider the amount of
03:06 7 ClearCorrect's damages.
03:06 8 It is important to understand, however,
03:06 9 the injury and amount of damages are different
03:06 10 concepts, and you cannot consider the amount of damages
03:06 11 unless you have concluded that ClearCorrect has
03:06 12 established that it was in fact injured.
03:07 13 Second, ClearCorrect must also offer
03:07 14 evidence that establishes by a preponderance of the
03:07 15 evidence that Align's alleged illegal conduct was a
03:07 16 material cause of ClearCorrect's injury.
03:07 17 This means that ClearCorrect must prove
03:07 18 that some damage occurred to it as a result of Align's
03:07 19 alleged antitrust violation and that there was not some
03:07 20 other cause.
03:07 21 ClearCorrect is not required to prove
03:07 22 that Align's alleged antitrust violation was the sole
03:07 23 injury of its -- sole cause of its injury, nor need
03:07 24 ClearCorrect eliminate all other possible causes of
03:07 25 injury. It is enough that ClearCorrect has proven that

03:07 1 the alleged antitrust violation was a material cause of
03:07 2 injury.
03:07 3 Third, ClearCorrect must establish that
03:07 4 its injury is the type of injury that the antitrust
03:07 5 laws were intended to prevent. This is sometimes
03:07 6 referred to as antitrust injury.
03:07 7 If ClearCorrect's injuries were caused by
03:08 8 a reduction in competition, acts that would lead to a
03:08 9 reduction in competition, or acts that would otherwise
03:08 10 harm consumers, then ClearCorrect's injuries are
03:08 11 antitrust injuries.
03:08 12 Examples of reduction in competition
03:08 13 include increased prices, decreased output, and reduced
03:08 14 quality in the relevant market.
03:08 15 If ClearCorrect's injuries were caused by
03:08 16 heightened competition, the competitive process, or by
03:08 17 acts that benefit consumers, then ClearCorrect's
03:08 18 injuries are not antitrust injuries, and ClearCorrect
03:08 19 may not recover damages for those injuries under
03:08 20 antitrust law.
03:08 21 You should bear in mind that businesses
03:08 22 may incur losses for many reasons that the antitrust
03:08 23 laws were never designed to prohibit or protect
03:08 24 against, such as where a competitor offers a better
03:09 25 product or better services, or where a competitor is

03:09 1 more efficient and can charge lower prices and still
03:09 2 earn the profit it desires.
03:09 3 The antitrust laws do not permit
03:09 4 ClearCorrect to recover the damages for losses that
03:09 5 were caused by the competitive process or conduct that
03:09 6 benefits consumers.
03:09 7 In summary, if ClearCorrect can establish
03:09 8 that it was in fact injured by Align's conduct, then --
03:09 9 or that Align's conduct was a material cause of
03:09 10 ClearCorrect's injury and that ClearCorrect's injury is
03:09 11 the type that the antitrust laws were intended to
03:09 12 prevent, then ClearCorrect is entitled to recover
03:09 13 damages for injuries to its business.
03:09 14 Attempted monopolization. ClearCorrect
03:09 15 alleges that it was injured by Align's attempted
03:09 16 monopolization of the product market at issue in the
03:09 17 case in violation of Section 2 of the Sherman Act.
03:10 18 To prevail on the claim, ClearCorrect
03:10 19 must prove by a preponderance of the evidence the
03:10 20 following:
03:10 21 First, Align engaged in anticompetitive
03:10 22 conduct;
03:10 23 Second, Align had specific intent to
03:10 24 achieve monopoly power in a relevant antitrust market;
03:10 25 Third, that there was a dangerous

03:10 1 probability that Align would achieve monopoly power in
03:10 2 the relevant market;
03:10 3 And fourth, ClearCorrect was injured in
03:10 4 its business or property by Align's anticompetitive
03:10 5 conduct.
03:10 6 If you find that the evidence is
03:10 7 insufficient to prove any one or more of these
03:10 8 elements, then you must find for Align and against
03:10 9 ClearCorrect on its claim of attempted monopolization.
03:10 10 If you find that the evidence is
03:10 11 sufficient to prove all four elements, then you must
03:10 12 find for ClearCorrect and against Align on
03:10 13 ClearCorrect's claim of attempted monopolization.
03:10 14 You should rely on the instructions given
03:10 15 to you in the previous sections concerning the relevant
03:10 16 markets and competitive conduct and antitrust injury
03:11 17 and causation in deciding whether Align engaged in
03:11 18 anticompetitive conduct with a specific intent to
03:11 19 monopolize a relevant market.
03:11 20 A specific intent to accomplish the
03:11 21 forbidden monopoly, as opposed to the mere intent to
03:11 22 perform the alleged competitive conduct, is required
03:11 23 for a successful claim of attempted monopolization.
03:11 24 ClearCorrect must prove that Align had a
03:11 25 specific intent to monopolize a relevant market. The

1 Court has already instructed you on what the relevant
2 market is.
03:11 3 The Court will now discuss specific
03:11 4 intent.
03:11 5 If ClearCorrect proves that Align had a
03:11 6 specific intent to monopolize a relevant market, in
03:11 7 this case, doctor-directed clear aligners, you must
03:11 8 find that ClearCorrect has proven this element of the
03:11 9 attempted monopolization claim and you should consider
03:11 10 the other elements of the claim.
03:11 11 If you find that ClearCorrect has failed
03:11 12 to prove this element, then you must find for Align on
03:11 13 the attempted monopolization claim.
03:11 14 There's several ways in which
03:12 15 ClearCorrect may prove Align had the specific intent to
03:12 16 monopolize. There may be evidence of direct statements
03:12 17 of Align's intent to obtain a monopoly in the relevant
03:12 18 market. Such proof of specific intent may be
03:12 19 established by documents prepared by responsible
03:12 20 officers or employees of Align at or about the time of
03:12 21 the conduct in question or by testimony concerning
03:12 22 statements made.
03:12 23 I'm sorry, I lost my place.
03:12 24 Such proof of specific intent may be
03:12 25 established by documents prepared by responsible

03:12 1 officers or employees of Align at or about the time of
03:12 2 the conduct in question or by testimony concerning
03:12 3 statements made by responsible officers or employees of
03:12 4 Align.
03:12 5 You must be careful, however, to
03:12 6 distinguish between Align's lawful intent to compete
03:12 7 aggressively, which may be accompanied by aggressive
03:12 8 language, and a true intent to acquire monopoly power
03:12 9 by using anticompetitive means.
03:13 10 Even if you decide that the evidence does
03:13 11 not prove directly that Align had actually intended to
03:13 12 obtain a monopoly in the relevant market, specific
03:13 13 intent may be inferred from what Align did.
03:13 14 For example, if the evidence shows that
03:13 15 Align lacked a legitimate business justification and
03:13 16 the natural and probable consequence of Align's conduct
03:13 17 in a relevant market was to give Align control over
03:13 18 prices and to exclude or destroy competition, and that
03:13 19 this was plainly foreseeable by Align, then you may,
03:13 20 but are not required to, infer that Align specifically
03:13 21 intended to acquire monopoly power in the relevant
22 market.
03:13 23 ClearCorrect must prove by a
03:13 24 preponderance to the evidence there was a dangerous
03:13 25 probability that Align would sooner or later succeed in

03:13 1 achieving its intended monopoly if it continued to
03:13 2 engage in anticompetitive conduct that is the same or
03:13 3 similar to that charged.
03:13 4 In order to prove this element,
03:13 5 ClearCorrect does not have to prove that success was
03:13 6 nearly certain. What ClearCorrect must prove is that
03:14 7 the chance of success was substantial and real, that
03:14 8 there was a reasonable likelihood that Align would
03:14 9 ultimately achieve its goal of monopoly power.
03:14 10 Thus, even if you find Align intended to
03:14 11 create a monopoly, you may not find that Align
03:14 12 attempted to monopolize if you find that it was not
03:14 13 possible for Align to achieve its goal.
03:14 14 In determining whether there was a
03:14 15 dangerous probability of success, you should consider
03:14 16 the following factors:
03:14 17 The size and power of Align in the market
03:14 18 as compared with its competitors;
03:14 19 Whether the barriers to entry into the
03:14 20 market made it difficult for competitors to enter the
03:14 21 market;
03:14 22 Align's share of the relevant market and
03:14 23 whether it was increasing or decreasing; and
03:14 24 The likely effect of any anticompetitive
03:14 25 conduct on Align's share of the market.

03:14 1 Again, the purpose of looking at these
03:14 2 and other factors is to determine whether there's a
03:14 3 dangerous probability that defendant would ultimately
03:14 4 acquire monopoly power.
03:14 5 A dangerous probability of success need
03:14 6 not mean that success was nearly certain, but it does
03:15 7 mean that there's a substantial and real likelihood
03:15 8 that the defendant would ultimately acquire monopoly
03:15 9 power.
03:15 10 If you should find by a preponderance of
03:15 11 the evidence that ClearCorrect has proven that Align is
03:15 12 liable for monopolization or attempted monopolization
03:15 13 on both -- or both, the law provides that ClearCorrect
03:15 14 is to be fairly compensated for all damages, if any, to
03:15 15 ClearCorrect's business or property caused by the
03:15 16 conduct of Align.
03:15 17 In arriving at the amount of the award,
03:15 18 you should include any damages suffered by ClearCorrect
03:15 19 because of lost profits, meaning profits that
03:15 20 ClearCorrect would have made but for the unlawful
03:15 21 conduct of Align, or fees or costs that it incurred in
03:15 22 defending against any patent that you may find to have
03:15 23 been procured from the Patent Office by fraud.
03:15 24 You must not award damages for losses
03:15 25 resulting from lawful competition, normal market

03:15 1 forces, or any other independent cause. The law does
03:15 2 not require mathematical precision, but it does require
03:15 3 a reasonable nonspeculative basis for attributing
03:16 4 damages to the unlawful conduct.
03:16 5 If you should find by a preponderance of
03:16 6 the evidence that damage to ClearCorrect's business or
03:16 7 property, such as loss -- a loss of profits was caused
03:16 8 by Align's illegal conduct complained of, then the fact
03:16 9 that the precise amount of damages may be difficult to
03:16 10 ascertain should not affect ClearCorrect's recovery,
03:16 11 particularly if Align's wrongdoings have caused the
03:16 12 difficulty in determining the precise amount.
03:16 13 You must not award ClearCorrect purely
03:16 14 speculative damages. An allowance for lost profits may
03:16 15 be included in the damages award only when there's some
03:16 16 reasonable basis in the evidence in this case for
03:16 17 determining that ClearCorrect suffered a loss of
03:16 18 profits, even though the amount of such loss may be
03:16 19 difficult to ascertain.
03:16 20 In arriving at the amount of any loss of
03:16 21 profits sustained by ClearCorrect, then you are
03:16 22 entitled to consider any past earnings of ClearCorrect
03:16 23 in the business in question as well as any other
03:17 24 evidence bearing on the issue. You should calculate
03:17 25 any damages that you may award on the patent claims,

03:17 1 any damages that you may award on the antitrust claims
03:17 2 separately.
03:17 3 You should not offset or reduce the
03:17 4 damages that you provide on one of these sets of claims
03:17 5 based on damages you award on the other set of claims.
03:17 6 Antitrust damages are only compensatory,
03:17 7 meaning their purpose is to put an injured plaintiff as
03:17 8 nearly as possible into the position in which it would
03:17 9 have been had the alleged antitrust violation not
03:17 10 occurred.
03:17 11 The law does not permit you to award
03:17 12 damages to punish anyone, what we sometimes refer to as
03:17 13 punitive damages, or to deter particular conduct in the
03:17 14 future.
03:17 15 ClearCorrect alleges that Align also
03:17 16 violated a state antitrust law called the Texas Free
03:17 17 Enterprise and Antitrust Act. The law follows the
03:17 18 federal Sherman Act.
03:17 19 Accordingly, to prove a violation of
03:17 20 Texas law, ClearCorrect must prove by a preponderance
03:18 21 of the evidence one of the foregoing claims that Align
03:18 22 violated federal antitrust law and that the unlawful
03:18 23 conduct took place within the state of Texas or
03:18 24 affected transactions taking place wholly or partly
03:18 25 within the state of Texas.

03:18 1 Ladies and gentlemen, I will read the
03:18 2 last couple of pages after the closing arguments
03:18 3 because it makes more sense.
03:18 4 It is 3:18. We'll take a recess. Please
03:18 5 remember my instructions not to discuss the case. We
03:18 6 will resume at 3:30 with the closing arguments.
03:18 7 THE BAILIFF: All rise.
03:18 8 (Jury exited the courtroom.)
03:18 9 THE COURT: Thank you. You may be
03:18 10 seated.
03:18 11 I'll just say if I weren't going to quit
03:19 12 before --
03:19 13 (Laughter.)
03:19 14 THE COURT: So I apologize for how hard.
03:19 15 Any -- anyone -- go on and just read any part of this
03:19 16 for 30 minutes, and then think you've got another hour
03:19 17 and a half to go.
03:19 18 So we'll go -- we'll get started at 3:30.
03:19 19 Is there anything we need to take up?
03:19 20 MR. MUELLER: Just two quick things,
03:19 21 Your Honor.
03:19 22 THE COURT: Yes, sir.
03:19 23 MR. MUELLER: We had just a handful of
03:19 24 exhibits before they go back to the jury that had some
03:19 25 redactions for compliance with the in limine orders.

03:19 1 The parties have been discussing them. I'm not sure
03:19 2 what Your Honor's preference is on how to effectuate
03:19 3 those.
03:19 4 Also, I understand that Align had been
03:19 5 disputing some of the redactions. And I'll just say if
03:19 6 they want the document that says -- and I'll quote
03:19 7 this -- "Align is greedy and litigious and overly
03:19 8 aggressive" to go back unredacted, then we're fine with
03:19 9 no redactions. But we do think that if we're going to
03:19 10 be careful about this, we should be careful about this
03:20 11 on both sides and make sure they go back in the right
03:20 12 way.
03:20 13 So whatever Your Honor's preference is,
03:20 14 we're happy to do it.
03:20 15 MR. NASH: Your Honor, I think the
03:20 16 dispute relates to one document that happens to be an
03:20 17 e-mail that I don't happen to have on me because I
03:20 18 believe the evidence closed. And so I didn't bring
03:20 19 that back with me.
03:20 20 But we do have several issues with that.
03:20 21 The evidence did get submitted without any redactions
03:20 22 being done. The evidence was submitted in Dr. Mishra's
03:20 23 testimony, Your Honor, and it was submitted by
03:20 24 plaintiff. Now they're wanting to go back and redact
03:20 25 aspects of that, and they used that with the witness.

03:20 1 The e-mail in question that they're
03:20 2 trying to redact, if it were to be redacted, destroys
03:20 3 any context for the portion that they used to
03:20 4 cross-examine Dr. Mishra with that aspect.
03:20 5 So it would remove any context for it, so
03:20 6 we would sort of oppose that type of redaction,
03:20 7 Your Honor.
03:20 8 Also, as we already saw, the portion that
03:20 9 Mr. Mueller just mentioned on the other documents where
03:21 10 the word "greedy" appears, he already used in
03:21 11 cross-examination with a witness earlier today. And so
03:21 12 he effectively already had violated that MIL that he's
03:21 13 now saying he wants to go back and redact it to try and
03:21 14 save.
03:21 15 MR. MUELLER: Again, Your Honor, first of
03:21 16 all, that's not true. Okay? And the version that I
03:21 17 showed to the jury was redacted. Okay. That's just
03:21 18 not true.
03:21 19 The second thing is what they want to
03:21 20 unredact, to be clear, or what they don't want to
03:21 21 redact is a reference to the 3Shape litigation which
03:21 22 Your Honor's kept out over and over and over and over
03:21 23 again. This is the Rule 37 issue.
03:21 24 All we're asking is that Your Honor's
03:21 25 orders be effectuated in this small handful of

03:21 1 documents before they go back to the jury. That's it.
03:21 2 THE COURT: I'm going to -- go ahead,
03:21 3 Mr. Nash.
03:21 4 MR. NASH: Only that, Your Honor, he
03:21 5 did -- I mean, we were here when he questioned the
03:21 6 witness on the specific word "greedy." He redacted the
03:21 7 word "litigious" but did not remove the word "greedy,"
03:21 8 which is obviously part of Your Honor's standard MIL 9.
03:22 9 I'm happy to answer other questions about
03:22 10 the document that I think is the primary cause of this
03:22 11 issue, but I don't happen to have it on me.
03:22 12 It's our position that the documents have
03:22 13 been submitted, Your Honor, that the documents that are
03:22 14 in question were submitted by the defendants. And so
03:22 15 he brought those in without these redactions. I think
03:22 16 that the evidence is in and should rest.
03:22 17 MR. MUELLER: Again, Your Honor, our
03:22 18 position is we're fine with not redacting any of these,
03:22 19 including the "greedy/litigious" document. We think it
03:22 20 would be better to redact the three and make them
03:22 21 compliant with Your Honor's in limine rulings. We've
22 been fastidious about those rulings.
03:22 23 Your Honor may recall that before I used
03:22 24 the "greedy/litigious" document, I raised it in the
03:22 25 morning, and I showed it to Your Honor in a redacted

03:22 1 form to be careful about it.
03:22 2 THE COURT: Well, I'm going to allow it
03:22 3 in an unredacted fashion.
03:22 4 Now, let me tell you something. Jen just
03:22 5 let me know -- I may just dismiss them when we're done
03:23 6 with the closing arguments because it's --
03:23 7 (Off-the-record discussion.)
03:23 8 THE COURT: Never mind. So what I intend
03:23 9 to do after you all finish your closing arguments and I
03:23 10 read the two pages I have left is ask the jury whether
03:23 11 or not they want to stay and get started or whether
03:23 12 they want to come back tomorrow. And whatever they do,
03:23 13 I'm going to allow them to do.
03:23 14 Now, my plan, which is not in concrete
03:23 15 but just so you have some idea, if they decide to stay
03:23 16 tonight, I'm not going to tell them that we're quitting
03:23 17 at 7:00, but we're going to quit at 7:00 if they
03:23 18 haven't finished. So that is, generally speaking, my
03:23 19 plan.
03:23 20 So if you all will get ready for closing
03:23 21 arguments.
03:23 22 Yes, sir.
03:23 23 MR. MUELLER: And this is the very last
03:23 24 thing, Your Honor. I just wanted to note before we end
03:23 25 this, the parties have agreed that for the inequitable

03:23 1 conduct issues, we're both going to rest on the
03:23 2 evidentiary record here and brief it, argue it to
03:24 3 Your Honor at an appropriate time that's convenient for
03:24 4 you.
03:24 5 THE COURT: Sounds good.
03:24 6 MS. DURIE: And I just want to note,
03:24 7 Your Honor, I think from our point of view, the jury's
03:24 8 finding with respect to Walker process will be
03:24 9 conclusive as to inequitable conduct. So I'm not sure
03:24 10 there will actually be anything left to brief if we get
03:24 11 a verdict from the jury.
03:24 12 THE COURT: I think -- just off the top
03:24 13 of my head, I think you are correct if they -- if it's
03:24 14 negative. I'm not sure that if it's positive, meaning
03:24 15 they find that you violated that, that I would be bound
03:24 16 to also find -- and I don't think you would want me to
03:24 17 be bound to find that there's inequitable conduct.
03:24 18 MS. DURIE: I agree that it wouldn't.
03:24 19 And that's fine. I just wanted to --
03:24 20 THE COURT: I think -- I do think -- my
03:24 21 sense would be -- I'm telling you as a person finding
03:24 22 inequitable conduct that if the jury were to rule in
03:24 23 your favor on the issue of Walker process, it would be
03:25 24 very damaging to their case of inequitable conduct on
03:25 25 the part of the inventor.

03:25 1 But if the jury were to make the
03:25 2 determination of a violation of a Walker process, I
03:25 3 would still make an independent decision whether or not
03:25 4 there was inequitable conduct on the part of your
03:25 5 inventor.
03:25 6 MS. DURIE: Understood. Thank you.
03:25 7 MR. MUELLER: Nothing further,
03:25 8 Your Honor. Thank you.
03:25 9 THE COURT: Okay.
03:25 10 THE BAILIFF: All rise.
03:25 11 (Recess taken.)
03:34 12 THE BAILIFF: All rise.
03:34 13 THE COURT: Yes, sir.
03:35 14 MR. MUELLER: Yes, Your Honor. I have
03:35 15 one question before I start based on the exchange we
03:35 16 had right before break. This is the document. May I
03:35 17 pass one up, Your Honor?
03:35 18 This is the document that I referred to
03:35 19 which we had offered to redact, and Align doesn't want
03:35 20 to redact this handful of documents.
03:35 21 I understood Your Honor's ruling to be
03:35 22 this document is not going to be redacted and,
03:35 23 therefore, I'm free to refer to the unredacted version.
03:35 24 I just want to confirm that.
03:35 25 THE COURT: They're the ones who don't

03:35 1 want it redacted.

03:35 2 MR. MUELLER: Okay. So I am free to

03:35 3 refer to it.

03:35 4 THE COURT: They're the ones who don't

03:35 5 want it redacted. Yes.

03:35 6 MR. MUELLER: Okay. Thank you, Your

03:35 7 Honor. That's all I had, Your Honor.

03:35 8 MS. DURIE: Your Honor, we are amenable

03:35 9 to the redaction across the board.

03:35 10 MR. MUELLER: That's fine, Your Honor.

03:35 11 That's fine. That's what we had proposed originally.

03:36 12 So we'll use the redacted version of that. But we'd

03:36 13 expect the same on the redactions that we proposed.

03:36 14 Do we have that agreement?

03:36 15 MS. DURIE: Yeah.

03:36 16 THE COURT: So you understand that -- you

03:36 17 need to get us a copy of the redacted version. The

03:36 18 jury won't have it for four hours. So, I mean, that's

03:36 19 not -- physically it will take four hours for us to

03:36 20 upload it. So with that being said, are you all ready

03:36 21 to do closing arguments?

03:36 22 MR. MUELLER: We are, Your Honor.

03:36 23 MR. DURST: We are, Your Honor.

03:40 24 (Recess taken.)

03:40 25 THE BAILIFF: All rise.

03:40 1 THE COURT: Please remain standing for
03:40 2 the jury.
03:40 3 (Jury entered the courtroom.)
03:41 4 THE COURT: Thank you so much for coming
03:41 5 back. You may be seated.
03:41 6 (Laughter.)
03:41 7 THE COURT: Mr. Durst, about how long
03:41 8 will you go in the first half, and would you like a
03:41 9 warning of any kind?
03:41 10 MR. DURST: Your Honor, I would like a
03:41 11 warning with 15 minutes left.
03:41 12 THE COURT: Okay.
03:41 13 MR. DURST: 15 minutes remaining.
03:41 14 THE COURT: And how long are you going to
03:41 15 go?
03:41 16 MR. DURST: I'm going to try to hit about
03:41 17 that number.
03:41 18 THE COURT: You're going to go about
03:41 19 15 minutes?
03:41 20 MR. DURST: 15 to -- no. I'm going to go
03:41 21 about 30 to 35 minutes.
03:41 22 THE COURT: That's what I meant. So I
03:41 23 will -- at 20 minutes I will give you a warning. That
03:41 24 way --
03:41 25 MR. DURST: 20 minutes remaining. Yes.

03:41 1 THE COURT: No. Ten minutes remaining.
03:41 2 I'll do whatever you want. If you say 30 or
03:41 3 35 minutes, I'm not sure how to give you that warning.
03:41 4 So if you tell me how many minutes you think you'll go,
03:41 5 I can give you a warning, or I can just give you a
03:42 6 warning in 20 minutes, if you'd like, or whatever you
03:42 7 want.
03:42 8 MR. DURST: Let's do this: Why don't you
03:42 9 give me a warning with 20 minutes remaining.
03:42 10 THE COURT: Okay.
03:42 11 MR. DURST: Okay.
03:42 12 THE COURT: I'll do it.
03:42 13 MR. DURST: Thank you. Thank you, Your
14 Honor.
03:42 15 OPENING ARGUMENT ON BEHALF OF THE PLAINTIFF
03:42 16 MR. DURST: May it please the Court.
03:42 17 THE COURT: Please.
03:42 18 MR. DURST: Ladies and gentlemen of the
03:42 19 jury, as you've learned these last two weeks, this case
03:42 20 is about two companies, one company that innovated,
03:42 21 made its way through struggles with scrappy grit,
03:42 22 invested heavily, often at a loss, sometimes investing
03:42 23 more money in research and development and promotion of
03:42 24 their brand than they actually had.
03:42 25 They competed hard and fair and earned a

03:42 1 loyal customer following and a dentist following. It
03:42 2 earned its place in the world of medical products
03:42 3 technology by improving patients' lives.
03:42 4 In 1997, five employees in a small duplex
03:43 5 started Align Technology and created a whole new
03:43 6 product line for teeth straightening. It wasn't easy.
03:43 7 They were at it alone, the only people out there taking
03:43 8 on what has for decades and decades and decades been
03:43 9 the dominant force in teeth-straightening braces.
03:43 10 They built it from scratch. They worked
03:43 11 hard to attract smart scientists, partnered with
03:43 12 dentists, and tiredly worked to get the message out to
03:43 13 doctors and patients: There is a better way to
03:43 14 straighten teeth.
03:43 15 Ladies and gentlemen, on behalf of the
03:43 16 good people at Align, I thank you for your time and
03:43 17 attention and the coming attention that we ask that you
03:43 18 give to the details of this case and to the actual
03:43 19 evidence in the case.
03:44 20 Thank you very much. Your service is
03:44 21 incredibly important to our country and to the parties
03:44 22 in this courtroom.
03:44 23 Now, here we are 25 years later. Align
03:44 24 has found success for sure. We've won customers in
03:44 25 head-to-head competition with braces, and we did it

03:44 1 with technology and better products.
03:44 2 Align has now changed the lives of
03:44 3 24 million people who have worn their aligners. That's
03:44 4 about the population, ladies and gentlemen, of all the
03:44 5 largest cities in Texas combined.
03:44 6 But the work is not done. Braces still
03:44 7 dominate. 75 percent of the market is still owned by
03:44 8 wires and brackets, by braces, and Align's continuing
03:44 9 to work hard. Still investing heavily in people and
03:44 10 technology to make better products, still trying to
03:44 11 reach doctors and patients, and still busting it to
03:44 12 help those dentists and those patients.
03:45 13 Years have passed. Align's success has
03:45 14 inspired other companies to follow. There's been a
03:45 15 steady drumbeat of other companies following Align's
03:45 16 lead in making aligners to compete with braces.
03:45 17 And braces are changing too. We now have
03:45 18 transparent braces and hidden braces behind your teeth.
03:45 19 Align welcomes that competition.
03:45 20 Remember Matt Miller, Align's vice
03:45 21 president? He told you how Align impacts patients. He
03:45 22 mentioned Patrick Mahomes and showed you that little
03:45 23 video, and he said competition is healthy. It makes
03:45 24 them stronger.
03:45 25 Now, today, competition is coming from

03:45 1 everywhere. U.S. companies are chasing the market.
03:45 2 Others from overseas, from Europe and from China, are
03:45 3 working to get in the game. And they're making some
03:45 4 progress, finding success for themselves, many of them.
03:46 5 But the other company in this courtroom
03:46 6 in this case is different. As Ms. Sterling,
03:46 7 Straumann's corporate representative, told you from
03:46 8 that stand right up there, quote, there's something up
03:46 9 with ClearCorrect, unquote.
03:46 10 Well, you've heard what that is.
03:46 11 ClearCorrect and Straumann have crossed the line.
03:46 12 Their business is struggling. That left them to try
03:46 13 shortcuts, to skirt the rules, to try to catch up with
03:46 14 Align and compete with braces and the other
03:46 15 competitors.
03:46 16 And in one of their shortcuts, the one
03:46 17 that's in issue in this case, they are using Align's
03:46 18 inventions. They are using Dr. Li's patented
03:46 19 inventions without permission.
03:46 20 That's what started this legal fight.
03:46 21 Straumann and ClearCorrect are infringing our patents,
03:46 22 and we don't have to put up with that. We shouldn't
03:46 23 have to.
03:46 24 It's unfair. It's against the law in
03:46 25 this country, and laws happily in our country don't

03:47 1 tolerate someone else taking your property. We're
03:47 2 asking you to call them on that.
03:47 3 Their response when we caught them
03:47 4 infringing? Come in this courtroom and claim to be a
03:47 5 victim. Blame others. And worst of all, try to take
03:47 6 away what Align has worked so hard to achieve.
03:47 7 Their approach in this case has been to
03:47 8 divert your attention, a sleight of hand, trying to get
03:47 9 you to focus on everything other than the facts. And
03:47 10 they counterattack to avoid the truth.
03:47 11 Please pay close attention to what
03:47 12 they're telling you, including this afternoon. They
03:47 13 claim they don't infringe. But if that isn't right,
03:47 14 they say Align's patents can't be valid. The Patent
03:47 15 Office made a mistake, they say. And if those two
03:47 16 don't work, they say Dr. Li intentionally lied to the
03:48 17 Patent Office.
03:48 18 They're asking you, asking you to call
03:48 19 her a liar and take away her patents.
03:48 20 And then they came up with these
03:48 21 antitrust counterclaims. At the same time their
03:48 22 internal documents over in Switzerland were all focused
03:48 23 on problems of their own making, self-inflicted wounds,
03:48 24 their CEO called them, at that same time they came to
03:48 25 this courthouse in this town and tried to tell a

03:48 1 different story, to say that it's all Align's fault.
03:48 2 The evidence shows you that's just -- it's just not
03:48 3 true.
03:48 4 So what we're asking you to do is look at
03:48 5 what's really going on. Did Align want to compete and
03:48 6 compete hard and try to win? Well, sure we did. And
03:48 7 some of our e-mails reflect that, sometimes with sharp
03:48 8 language.
03:48 9 They've used incomplete documents and
03:48 10 statements out of context repeatedly. We're asking you
03:48 11 to look deeper. What do the facts really tell you?
03:49 12 Now, we've already asked a lot of you as
03:49 13 jurors, and we need to ask a little more. Your role as
03:49 14 jurors here is to assess what has really happened.
03:49 15 What is the real story?
03:49 16 Align wants to win and worked hard to do
03:49 17 that. No one, not Straumann's witnesses from the stand
03:49 18 nor the instructions you've received from the Court,
03:49 19 are telling you that there's anything wrong with
03:49 20 working hard to win.
03:49 21 When you look carefully at the facts,
03:49 22 you'll see that only one party in this courtroom has
03:49 23 crossed the line, has done something that the law
03:49 24 doesn't allow. And it's Straumann.
03:49 25 So let's start there. Straumann has

03:49 1 infringed Align's patents.
03:49 2 Now, you've heard the instructions on the
03:49 3 burden of proof. This is a little hokey draw-up of the
03:49 4 scales of justice. The burden of proof for Align to
03:49 5 prove that Straumann has infringed our patents is
03:50 6 preponderance of the evidence.
03:50 7 And what does that mean? That means if
03:50 8 there is a feather of more evidence in favor of Align's
03:50 9 position on infringement, then the verdict should come
03:50 10 our way.
03:50 11 Let's start with one of the biggest
03:50 12 sleights of hand of all. How much time, ladies and
03:50 13 gentlemen -- I lost track -- did Straumann spend
03:50 14 talking about the '691 patent, the soft-hard-soft
03:50 15 claims? You remember that. A good part of that first
03:50 16 week was spent focusing on this patent.
03:50 17 That patent's not asserted. We have not
03:50 18 sued them for infringing this claim. These are the
03:50 19 patents that they have infringed. These are the
03:50 20 material patents that Dr. Li and others invented.
03:50 21 There are multiple claims in these patents. All have a
03:50 22 little different features. But there's only one thing
03:51 23 disputed in all of them, and it's that elongation at
03:51 24 break element.
03:51 25 Here is -- let's put the board up. Here

03:51 1 is a -- here's a sample claim representative of all the
03:51 2 claims in the lawsuit. This is from the '091 patent,
03:51 3 Claim 1. If you're looking at your notebook, it's
03:51 4 JTX-04 and it's the next to the last page in that
03:51 5 patent.
03:51 6 It's highlighted this way for a
03:51 7 particular purpose, to show you an easy way to dissect
03:51 8 the claims of this patent. All of those blue are
03:51 9 depending on -- looks like it's blue. All of those
03:51 10 blue colors talk to you about the first layer and give
03:51 11 you the specifications for elongation at break of that
03:51 12 first layer.
03:51 13 And then there's the second layer shown
03:51 14 here in purple. The second layer has a different
03:52 15 elongation at break requirement. And then there's the
03:52 16 third layer, and notice there are no specifications
03:52 17 with respect to the third layer.
03:52 18 Now, you all remember Dr. Reitman. She
03:52 19 came and testified twice. This is how she described
03:52 20 the patent. All of the patents have this or a similar
03:52 21 claim. There has to be three layers, two types of
03:52 22 materials, one hard and one soft, and the third one you
03:52 23 get to pick.
03:52 24 This is like the dealer's choice. The
03:52 25 third one is the dealer's choice. If it has three

03:52 1 layers, one that's hard and one that's soft, and the
03:52 2 third one, whatever it might be, that product infringes
03:52 3 all of these patents.
03:52 4 Dr. Reitman, I trust as you saw in her
03:52 5 testimony, is a straight shooter. She's very
03:52 6 knowledgeable. She's been in this business a long
03:53 7 time.
03:53 8 So when you look at the elements of this
03:53 9 claim -- this is very important -- all of the elements
03:53 10 except one are admitted by Straumann. There's only one
03:53 11 patent infringement issue in this case, and it is the
03:53 12 elongation at break requirement of the hard layer.
03:53 13 Now, let's look at that. There it is,
03:53 14 elongation of break at greater than 200 percent.
03:53 15 This is another way of looking at that
03:53 16 claim. You see the blue, the first layer; the purple,
03:53 17 the second layer; and then the third layer, as
03:53 18 Dr. Reitman had said, dealer's choice.
03:53 19 So what did she do? She tested the
03:53 20 individual layers of the material. She tested the
03:53 21 individual layers of Straumann's material to see if
03:53 22 they satisfy the requirements of the claim.
03:53 23 And it makes sense that you test the
03:53 24 individual layers. If you look at the claim, there's a
03:53 25 requirement for elongation at break in the first

03:53 1 element, in the first layer, and there is a separate
03:54 2 one in the second layer. The elongation at break
03:54 3 requirements are different. If this was to be
03:54 4 considered as a whole, that language wouldn't make any
03:54 5 sense at all. You wouldn't have two different
03:54 6 standards for elongation at break.
03:54 7 What Straumann tries to do is get you to
03:54 8 focus on the multi-layer sheet and test the whole sheet
03:54 9 at once. The claim language itself tells you that the
03:54 10 first layer has to have this property, and the second
03:54 11 layer has to have this property, and they're
03:54 12 individually specified.
03:54 13 So Dr. Reitman appropriately tested the
03:54 14 different layers, which as she points out here, is what
03:54 15 the patent tells you to do.
03:54 16 Now, Straumann's own documents admitted
03:54 17 this as well. This is a document from Bay Materials,
03:54 18 and it tells you that their material that they put in
03:55 19 Zendura FLX for Straumann has an elongation at break of
03:55 20 [redacted] percent. An elongation of break of [redacted] percent.
03:55 21 Satisfies that claim element.
03:55 22 That's the last element, the only one
03:55 23 they haven't admitted, and their own internal documents
03:55 24 from Bay Materials shows you that that element is
03:55 25 satisfied as well.

03:55 1 A moment about Align's damages in this
03:55 2 case. You heard about this sort of interesting
03:55 3 structure that the law puts on us.
03:55 4 THE COURT: Counsel, 20 minutes.
03:55 5 MR. DURST: Puts on you for -- puts on us
03:55 6 for considering damages in this case. You have to take
03:55 7 yourself back in time and imagine before Straumann
03:55 8 started infringing this patent, what would the parties
03:55 9 have agreed to?
03:56 10 Under that construct, it is a requirement
03:56 11 that Straumann had to take a license. They were
03:56 12 infringing a valid patent, and you have to imagine what
03:56 13 would have happened in that negotiation. How much
03:56 14 would Align have demanded and how much would Straumann
03:56 15 have been willing to pay in that environment back
03:56 16 before Straumann launched its infringing product and
03:56 17 Align was being required to give a license to what our
03:56 18 CEO calls our best competitor.
03:56 19 Now, Mr. Lasinski took the stand, and he
03:56 20 testified about what an appropriate damages number
03:56 21 should be. And it's $73.5 million. You didn't really
03:56 22 hear a number in competition to $73.5 million from
03:56 23 Straumann.
03:56 24 Dr. Perryman took the stand and said he
03:56 25 really hadn't made an opinion, given an opinion about

03:56 1 what would have happened at that hypothetical
03:57 2 negotiation.
03:57 3 Now, I want to show you one thing that is
03:57 4 on this verdict form. This is a picture of the verdict
03:57 5 form that you're going to get when you begin
03:57 6 deliberations.
03:57 7 And this is an important element, ladies
03:57 8 and gentlemen. This damage number, $73.4 million, are
03:57 9 Align's damages to date. You will have an option on
03:57 10 that verdict form of selecting damages to date. It's
03:57 11 called a running royalty for past damages, or a lump
03:57 12 sum that gives Straumann a license forever to our
03:57 13 patents.
03:57 14 This amount, Dr. -- Mr. Lasinski's
03:57 15 calculation, is for past damages up to now, past
03:57 16 damages, not lump sum.
03:57 17 So you'll see that on the verdict form,
03:57 18 and we're going to ask that you return a verdict that
03:57 19 is for $73.4 million with a running royalty for past
03:57 20 damages.
03:57 21 Now, let me move on to the validity of
03:58 22 our patents.
03:58 23 So the burdens of proof here, and you've
03:58 24 heard this from Judge Albright as well, the burden of
03:58 25 proof with respect to validity is different. The

03:58 1 burden of proof here is clear and convincing evidence.
03:58 2 Again, a little hokey with the scales of justice, but
03:58 3 they have to tip the scales heavily in their favor to
03:58 4 invalidate Dr. Li's patents.
03:58 5 You will see in the jury instructions
03:58 6 that in order to prove to you that Dr. Li's patents are
03:58 7 invalid, they must have given you enough evidence that
03:58 8 you now have an abiding conviction as to the truth of
03:58 9 the matter that they're asserting, that the patents are
03:58 10 invalid.
03:58 11 Now, let's look at what this is about.
03:58 12 These four patents-in-suit, they've all been through
03:58 13 the Patent Office. They've all been looked at by a
03:58 14 highly qualified examiner, and they've all been
03:59 15 certified as genuine inventions by the United States
03:59 16 government, by the Patent and Trademark Office. And
03:59 17 the certification says that all the requirements of law
03:59 18 have been complied with, and the patented invention is
03:59 19 being granted.
03:59 20 Now, what is Straumann's invalidity
03:59 21 challenge? Straumann's challenge is called enablement.
03:59 22 And you will see this on the jury form. And the
03:59 23 question is: Do the patents tell you how to make the
03:59 24 materials to make the aligners? That's the question
03:59 25 for validity.

03:59 1 And ladies and gentlemen, we have in this
03:59 2 case as straightforward evidence of an enablement as
03:59 3 you can imagine. The test for judging enablement is
03:59 4 the entire patent. They may focus you on snippets here
03:59 5 and there. Again, incomplete documents, out of
03:59 6 context. You have to focus on the interior -- on the
03:59 7 entire patent.
03:59 8 Now, how do we know that the patent is
03:59 9 enabled? We have a very simple approach to that. We
04:00 10 know the patent is enabled because John Lahlouh --
04:00 11 looking to see if he is in the courtroom. I don't see
04:00 12 him here. John Lahlouh and his boss at Bay Materials
04:00 13 looked at our patent and built SmartTrack simulate
04:00 14 constructions.
04:00 15 They looked at our patent. The patent
04:00 16 told them enough that they knew how to build what are
04:00 17 called simulates, which are replicas or very similar
04:00 18 layers of materials. And they learned that from a
04:00 19 patent.
04:00 20 So the question on enablement is very
04:00 21 straightforward. Does the patent teach enough that
04:00 22 someone could build the invention from its language,
04:00 23 and Bay Materials themselves tells us that it has.
04:00 24 Now, their next argument is that
04:00 25 Dr. Li -- Dr. Li, would you stand up?

04:00 1 Dr. Li, that she didn't tell the truth,
04:00 2 that she didn't tell the truth to the Patent Office,
04:01 3 and they're also -- they're calling her a liar. And
04:01 4 they're saying she lied to the Patent Office and that
04:01 5 she took that stand and looked all of you in the eyes
04:01 6 and lied.
04:01 7 Dr. Li told the truth, and they cannot
04:01 8 meet their burden of taking her patent away by
04:01 9 trumped-up claims of incomplete submissions.
04:01 10 She worked eight long years on these
04:01 11 inventions, and she got all four of these patents. And
04:01 12 Straumann is trying to take them away.
04:01 13 Now, here's her oath. She gave this
04:01 14 statement under oath, when she was involved in
04:01 15 prosecuting these patents or applying for these
04:01 16 patents. She submitted everything that was required.
04:01 17 And this declaration, ladies and
04:01 18 gentlemen, is her 2019 declaration. You've heard a
04:01 19 fair amount about declarations. It's not a revision to
04:01 20 a prior declaration. So don't be fooled if Straumann
04:01 21 puts up that redline of the two declarations together.
04:02 22 That's a lawyer-created redline. That's
04:02 23 a comparison of her 2016 declaration to her 2019
04:02 24 declaration. Dr. Li told you from that stand that the
04:02 25 2019 declaration was for a new invention, a new set of

04:02 1 claims. It was a new declaration.
04:02 2 When they show you that redline that
04:02 3 suggests that she was amending something she had
04:02 4 already said, that's not what happened. She filed a
04:02 5 new declaration directed to a new set of claims.
04:02 6 Now, here is the questions you're going
04:02 7 to be asked on this. I'd like you to focus on that
04:02 8 language. In order for Straumann to prove -- and by
04:02 9 the way, as you know from Judge Albright's
04:02 10 instructions, ClearCorrect is the shorthand name for
04:02 11 all of the defendants together, including Straumann.
04:02 12 They have to show that Dr. Li
04:02 13 deliberately falsified or withheld information from the
04:02 14 Patent Office, and they also have to show that she had
04:02 15 the specific intent to deceive. They have to show that
04:03 16 Dr. Li set out to lie and then lied to the Patent
04:03 17 Office. They can't show it, ladies and gentlemen. The
04:03 18 verdict on those should be no.
04:03 19 Now, Align earned its place in the
04:03 20 market. As Dr. Perryman said from the stand -- you
04:03 21 remember him. He's the Baylor professor, the local
04:03 22 economist. He invoked the Fourth of July, as I recall,
04:03 23 and said there's no guarantee of success, but there is
04:03 24 a guarantee of an opportunity to try.
04:03 25 What Straumann and ClearCorrect are doing

04:03 1 in this case is they're trying to convince you to
04:03 2 require Align to help them succeed, to help them
04:03 3 succeed.
04:03 4 There is no guarantee of success in the
04:03 5 marketplace. We talked about that even playing field.
04:04 6 And Mr. Coss told us from the stand even in -- in an
04:04 7 even playing field, there are winners and losers. And
04:04 8 you remember we talked about sports teams. His
04:04 9 favorite were the hockey team from Montreal, as I
04:04 10 recall.
04:04 11 The first question with respect to these
04:04 12 antitrust claims is the most important perhaps. This
04:04 13 is the relevant market question: Do the products,
04:04 14 according to the actual behavior of customers and
04:04 15 markets and marketing efforts, that products need not
04:04 16 be identical or precisely interchangeable as long as
04:04 17 they are -- and this is important -- reasonable
04:04 18 substitutes.
04:04 19 You've heard a lot in this case about how
04:04 20 braces and aligners do the same thing. They are
04:04 21 reasonable substitutes.
04:04 22 Now, what does this mean? So we didn't
04:04 23 come up with the notion on our own. The lawyers didn't
04:04 24 come up with the notion that the relevant market here
04:05 25 is the teeth-straightening market. That's ripped right

04:05 1 from Straumann's annual report, where they call it a
04:05 2 teeth-straightening market.
04:05 3 Now, in this courtroom you've heard
04:05 4 evidence that over and over again, all the time in
04:05 5 dentists' office all across the country, patients and
04:05 6 doctors are choosing between braces and aligners.
04:05 7 Those are reasonable substitutes. Dr. Taylor, their
04:05 8 dentist from here in town, agreed with that.
04:05 9 And we talked about what's happening in
04:05 10 the local market. You may remember Dr. Taylor said
04:05 11 this is -- this is -- this is advertising from Bear
04:05 12 Braces, which has that billboard up on 35.
04:05 13 And here are more examples: Dr. Taylor's
04:05 14 own website. There's a Bear Braces again. And
04:05 15 substitute aligners are offered or aligners and braces
04:05 16 are offered by these other local dentists.
04:06 17 And then Dr. Cohanim took the stand
04:06 18 yesterday. He is the orthodontist from Seattle. He's
04:06 19 the one who did the 45-second video, and he gave us
04:06 20 this direct testimony.
04:06 21 Are braces and clear aligners reasonable
04:06 22 substitutes for the other?
04:06 23 The answer to that is yes.
04:06 24 So you will get a question on your
04:06 25 verdict form that looks like this: Did ClearCorrect

04:06 1 prove by a preponderance of the evidence that the
04:06 2 relevant market is -- listen to this -- the relevant
04:06 3 market is the market for doctor-directed clear
04:06 4 aligners? If that language sounds tortured, it is.
04:06 5 Very few times in the last two weeks have those words
04:06 6 been spoken. Doctor-directed clear aligners.
04:06 7 Now, that's a definition that Straumann
04:06 8 chose. And I'll be direct with you about why they
04:06 9 chose it. They want this market to be defined as
04:06 10 narrow as it can possibly be defined so that our market
04:07 11 share looks larger.
04:07 12 A narrower market makes Align's market
04:07 13 share look larger, and that's why they chose this
04:07 14 tortured language to define the market.
04:07 15 When Ms. Sterling was on the stand, she
04:07 16 asked -- we asked her about the proper definition of
04:07 17 the market, and she said it would include direct to
04:07 18 consumers.
04:07 19 Now, why does that matter? Because in
04:07 20 Dr. Perryman's view, in Straumann's view and what
04:07 21 they're asking you to find, is that direct-to-consumer
04:07 22 aligners are outside of the market, are outside of the
04:07 23 market.
04:07 24 Dr. Perryman took that evidence -- that
04:07 25 definition. Straumann has taken it out of their market

04:07 1 definition. Ms. Sterling says that's wrong. That is
04:07 2 wrong. It's the wrong definition.
04:07 3 Now, here is the importance of this: If
04:08 4 Straumann fails to convince you that the market is
04:08 5 narrower than teeth straightening, if the market is
04:08 6 this contorted doctor-directed clear aligners, if they
04:08 7 fail to prove that to you, your work as jurors is over.
04:08 8 They haven't even made it to first base on their
04:08 9 antitrust claims. That is the importance of this
04:08 10 market definition instruction.
04:08 11 Now, they're also going to talk about
04:08 12 monopoly power. If you go -- if you find a relevant
04:08 13 market, then you will have to address monopoly power,
04:08 14 and that is the power to control prices or exclude
04:08 15 competition. Control prices or exclude competition.
04:08 16 Now, what Straumann wants you to believe
04:08 17 is that big is bad, that big is bad. That's a little
04:08 18 like the pot calling the kettle black in this case a
04:09 19 little bit, because we know that Straumann itself is a
04:09 20 very large dental implant company. This is not a case
04:09 21 of David versus Goliath.
04:09 22 But more importantly, here in Texas, we
04:09 23 know better than to say big is bad. Big can be really
04:09 24 good. Big can be really good. And it has been here
04:09 25 for Align. It's led to better technology, better

04:09 1 products, lower prices, and most importantly, better
04:09 2 for patients. It has been better for dentists and
04:09 3 patients, what Align has done.
04:09 4 So I'm just going to just go now to the
04:09 5 two touchpoints of this monopoly power definition. The
04:09 6 first is that prices have dropped. Remember, to be a
04:09 7 monopolist, you have to have the power to control
04:09 8 prices. Prices have come down. Prices have come down.
04:09 9 If Align were a monopolist, would the
04:10 10 prices be going down? No. The prices are coming down.
04:10 11 Second, competition has flourished. And
04:10 12 you've heard a lot about this. But competition has
04:10 13 flourished. These are all competitors that are in the
04:10 14 marketplace. You've seen something like this -- this
04:10 15 or something like this before. Every one of these
04:10 16 companies competes with Align.
04:10 17 If Align were a monopolist, able to
04:10 18 exclude competitors, this would not be happening. This
04:10 19 would not be happening.
04:10 20 Now, a monopolist, in order to -- even
04:10 21 having a large market share and even if you conclude --
04:10 22 you were to conclude that Align is a monopolist, then
04:10 23 your test becomes did they do anticompetitive actions
04:10 24 to maintain that monopoly power?
04:11 25 Anticompetitive actions are defined on --

04:11 1 in your instructions as I've noted here. And they
04:11 2 exclude if you are supplying better products or
04:11 3 services, possessing superior business skills, or just
04:11 4 because of luck, none of those things are unlawful.
04:11 5 So if Align's actions fall in that
04:11 6 category, there is no willful maintenance of monopoly
04:11 7 power.
04:11 8 I want to talk about -- quickly about
04:11 9 their principal charge here. This is the only charge
04:11 10 of anticompetitive behavior for which they seek
04:11 11 damages, this one right here, that somehow Align --
04:11 12 Align's iTero scanner device is not available to the
04:11 13 marketplace.
04:11 14 But, ladies and gentlemen, look at the
04:11 15 facts, and you know that's not true. All of these
04:12 16 companies receive scans from iTero scanners. And it's
04:12 17 not that hard.
04:12 18 Dr. Cohanim took the stand yesterday and
04:12 19 showed you that 45-second video. Ladies and gentlemen,
04:12 20 they are seeking $289 million because it takes
04:12 21 45 seconds to upload a file.
04:12 22 We asked Dr. Taylor if 45 seconds is too
04:12 23 long, how fast would be fast enough? Of course it's a
04:12 24 rhetorical question. He doesn't have an answer to
04:12 25 that. 45 seconds is no barrier to competition.

04:12 1 And then the answer to this lies as well
04:12 2 in the files of Straumann where you've heard testimony
04:12 3 that one out of every five scans that's used to build a
04:12 4 ClearCorrect aligner comes from that iTero machine.
04:13 5 One out of every five. Yet they're in this courtroom
04:13 6 telling you that they're blocked from that technology.
04:13 7 The other piece of their scanner argument
04:13 8 is this: That we do not take incoming scans, that we
04:13 9 do not take incoming scans to build Invisalign.
04:13 10 Mr. Miller talked to you about that.
04:13 11 The witnesses here have told you that bad
04:13 12 scans lead to bad aligners, lead to bad patient
04:13 13 experiences. Our products -- this is kind of a bad
04:13 14 picture, but our products are out in the marketplace
04:13 15 with our name on them.
04:13 16 We send them out in the marketplace to
04:13 17 patients who trust us. Some of whom are parents who
04:13 18 put these in the mouths of their kids, and they have
04:13 19 our name on them. Mr. Coss told us it's a reasonable
04:13 20 thing to be worried about the quality of scans that go
04:14 21 out into the marketplace.
04:14 22 This, ladies and gentlemen, is why Align
04:14 23 is very careful about the inputs that are made to build
04:14 24 Invisalign. It's like building a foundation to a
04:14 25 house. If you build it on a rock, you're going to be

04:14 1 fine. If you build it on sand, you're going to have
04:14 2 problems. Scans are the foundation for building
04:14 3 aligners.
04:14 4 Ladies and gentlemen, I'm going to come
04:14 5 back up and talk to you in just a few minutes. I would
04:14 6 like to ask that you listen carefully to what comes
04:14 7 next.
04:14 8 Is he going to talk about the patent
04:14 9 claims that are really at issue here, or is he going to
04:14 10 talk about something else? And will he talk about
04:14 11 what's really going on in the marketplace, what's
04:14 12 really happening out there, prices going down,
04:14 13 competitors coming in, or is he going to talk more
04:14 14 about e-mails?
04:14 15 We'll be listening. I'll talk to you
04:15 16 again in a few minutes.
04:15 17 MR. MUELLER: Your Honor, may we have a
04:15 18 couple minutes to set up?
04:15 19 THE COURT: Surely.
04:17 20 (Pause in proceedings.)
04:18 21 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT
04:18 22 MR. MUELLER: May I please have a
04:19 23 five-minute-left warning and a two-minute-left warning?
04:19 24 THE COURT: You bet.
04:19 25 MR. MUELLER: May I proceed, Your Honor?

04:19 1 Good afternoon, ladies and gentlemen.
04:19 2 This is my last chance to speak with you, and I want to
04:19 3 start by thanking all of you for your careful time and
04:19 4 attention over the course of this case.
04:19 5 Ladies and gentlemen, this is a case
04:19 6 about competition. About what you see on the board
04:19 7 right here in the U.S. market for doctor-directed clear
04:19 8 aligners.
04:19 9 Now, the case began, the lawsuit was
04:19 10 filed with allegations of patent infringement made
04:19 11 against ClearCorrect and Straumann.
04:19 12 Those allegations were false, and
04:19 13 remarkably they were known to be false based on
04:19 14 internal testing data within Align's own files. And
04:19 15 we're going to come back to that in a bit.
04:20 16 Those allegations, ladies and gentlemen,
04:20 17 were the latest in years and years of anticompetitive
04:20 18 conduct by Align designed to suppress competition from
04:20 19 all of the other clear aligner companies in this market
04:20 20 that you see right here.
04:20 21 And, ladies and gentlemen, we are here to
04:20 22 say, enough. We are here to say, enough of the
04:20 23 baseless patent allegations. We are here to say,
04:20 24 enough of misrepresentations to the Patent Office. And
04:20 25 we are here to say, enough of the anticompetitive

04:20 1 conduct that has confined every other clear aligner
04:20 2 supplier in the U.S., not just ClearCorrect, every one
04:20 3 of them to the region of the chart at the bottom of
04:20 4 this placard. They are there because of
04:20 5 anticompetitive conduct by Align, and we are here to
04:20 6 ask you to hold them accountable.
04:20 7 Now, I said in my opening statement that
04:21 8 Invisalign is a good product. I said credit where
04:21 9 credit is due. I told you we weren't going to
04:21 10 criticize that product over the course of the trial,
04:21 11 and we haven't. It's a good product.
04:21 12 But Align has been a bad actor in this
04:21 13 industry for years and years, and we are here to ask
04:21 14 you to hold them accountable for that misconduct.
04:21 15 So let's get into the details of the
04:21 16 evidence, and I'd like to begin with Align's patent
04:21 17 misconduct.
04:21 18 As context, this is a technology area
04:21 19 making multi-layer aligners out of several polymers
04:21 20 that involves unpredictable technology, as Dr. Li
04:21 21 acknowledged. The ways in which the materials interact
04:21 22 with each other is unpredictable.
04:21 23 Now, Dr. Li and her colleagues, starting
04:21 24 in the mid-2000s and continuing for about eight years,
04:21 25 did over 260 experiments in an effort to develop a new

04:22 1 multi-layer aligner for a next-generation version of
04:22 2 Invisalign. This was intended to replace a
04:22 3 single-layer aligner that they had released in the
04:22 4 early 2000s.
04:22 5 And in those 260 experiments that Dr. Li
04:22 6 and her colleagues conducted, many of them were
04:22 7 rejected. The samples that they created were rejected.
04:22 8 And that's common. This is trial and error in an area
04:22 9 of unpredictable technology.
04:22 10 And so they kept working, and that's the
04:22 11 right thing to do. They kept trying to find one that
04:22 12 would work, and eventually they did. They found a
04:22 13 soft-hard-soft configuration, which you heard a lot
04:22 14 about last week and you've heard a bit about this week
04:22 15 as well, that was successful in meeting the criteria
04:22 16 that Align itself had developed to measure what would
04:22 17 be a successful dental aligner material.
04:22 18 They identified soft-hard-soft that in
04:22 19 their view was the best, and they sought patent
04:23 20 protection for the ideas that they had come up with.
04:23 21 They sought patent protection, and they told the Patent
04:23 22 Office that the invention was a hard copolyester layer
04:23 23 between two soft layers of thermoplastic polyurethane
04:23 24 elastomer.
04:23 25 Now, ladies and gentlemen, you have the

04:23 1 four patents that are for your consideration in a
04:23 2 notebook. And they all have the same -- we call it the
04:23 3 written description or the specification. It's the
04:23 4 body of the patent. They have different claims at the
04:23 5 end, but the body of the patent is the same.
04:23 6 And let me take you to just one example.
04:23 7 If you were to go, ladies and gentlemen, to the '613
04:23 8 patent application -- I'm sorry, patent, '613 patent,
04:23 9 and we'll put it up here, and go to the cover page,
04:23 10 this is the patent issued to Dr. Li and her colleagues.
04:23 11 Go to the abstract on the first page. It
04:23 12 says: The appliance includes a hard polymer layer
04:24 13 having a hard polymer layer elastic modulus disposed
04:24 14 between a first soft polymer layer having a first soft
04:24 15 polymer layer elastic modulus, and a second soft
04:24 16 polymer layer having a second soft polymer layer
04:24 17 elastic modulus.
04:24 18 The abstract of the patent and the
04:24 19 examples in the patent speak of this soft-hard-soft.
04:24 20 Now, I'm showing you one of the patents
04:24 21 that are in your notebooks, but those are based on the
04:24 22 very same filings done when they originally completed
04:24 23 the work that led to SmartTrack.
04:24 24 So the invention that Dr. Li and her
04:24 25 colleagues had conceived in those eight years of

04:24 1 experiments that led to the discovery of the
04:24 2 soft-hard-soft, that invention didn't change.
04:24 3 And if you look at the patents in your
04:24 4 notebook, you're going to see examples of
04:24 5 soft-hard-soft, which makes good sense because that's
04:24 6 where this came from.
04:24 7 What you won't see is any example in your
04:25 8 notebooks in those patents of hard-soft-hard. The
04:25 9 invention back then was soft-hard-soft, and Dr. Li and
04:25 10 her colleagues received patents other than the ones in
04:25 11 your notebooks. They received some earlier ones.
04:25 12 Mr. Durst mentioned the '691. That's an earlier patent
04:25 13 that was expressly directed to soft-hard-soft.
04:25 14 But something changed later where they
04:25 15 tried to expand the invention, and we're going to come
04:25 16 back to that in a bit.
04:25 17 Go back to the deck, Mr. Lee.
04:25 18 Okay. So they went to the Patent Office
04:25 19 after having run those experiments and said we have two
04:25 20 soft layers and one hard layer. And they told the
04:25 21 Patent Office, and Dr. Li, in particular, personally
04:25 22 told the Patent Office in a sworn declaration -- this
04:25 23 is right here -- that from 2016, that only, only the
04:25 24 materials of the instant claims -- and there's no
04:25 25 dispute that those claims were soft-hard-soft -- only

04:26 1 the materials of the instant claims met Align's
04:26 2 development criteria.
04:26 3 So this is what Dr. Li said under oath to
04:26 4 the Patent Office in 2016, nearly a decade ago.
04:26 5 Now, in 2018, Bay Materials announced the
04:26 6 Zendura FLX material. This was hard-soft-hard. It had
04:26 7 resulted from 16 years of development and work by John
04:26 8 Lahlouh, who testified to you, and his colleagues at
04:26 9 Bay Materials.
04:26 10 Now, Mr. Durst, like Ms. Durie in her
04:26 11 opening statement last week, referred to a shortcut.
04:26 12 This took 16 years and over 800 experiments by the four
04:26 13 engineers at Bay Materials, including Mr. Lahlouh, who
04:26 14 created this. That's no shortcut. It took 16 years
04:26 15 and over 800 experiments to create this.
04:26 16 But in 2018, they released it, and it was
04:26 17 totally different from SmartTrack. Mr. Lahlouh was
04:26 18 familiar with SmartTrack. He had done benchmarking.
04:26 19 He had read Align's patents to stay clear of them. He
04:27 20 knew exactly what SmartTrack was and what Align's
04:27 21 technology was, soft-hard-soft. And he did something
04:27 22 different. He struck his own path, and he,
04:27 23 Mr. Lahlouh, came up with something that was totally
04:27 24 different composed of a hard outer layer and a soft
04:27 25 inner layer.

04:27 1 Now, Dr. Li and Align, after Zendura FLX
04:27 2 was released, started to study it. And to be clear,
04:27 3 there's nothing wrong with that. You can do
04:27 4 benchmarking or competitive analysis. It's sometimes
04:27 5 called reverse engineering. What you can't do is to
04:27 6 falsely claim that you have patents and inventions that
04:27 7 would cover the work of other folks, but you certainly
04:27 8 can do benchmarking to see what else is in the
04:27 9 marketplace.
04:27 10 Dr. Li obtained a sample, and she did
04:27 11 reverse engineering. Now, she told you under oath just
04:27 12 last week:
04:27 13 Question: But you and your colleagues
04:27 14 did reverse engineering on Zendura FLX, correct?
04:27 15 And her answer was no.
04:27 16 She was asked: You and your colleagues
04:28 17 did reverse engineering on Zendura FLX, correct?
04:28 18 And her answer was no.
04:28 19 And that was a curious answer for two
04:28 20 reasons. Number one, there's nothing wrong with
04:28 21 reverse engineering. There's nothing to run away from.
04:28 22 You can do reverse engineering.
04:28 23 But the second thing is she had done
04:28 24 reverse engineering. Here's an e-mail on the right
04:28 25 which talks about reverse engineering of Zendura FLX.

04:28 1 They had done reverse engineering of
04:28 2 Zendura FLX with Covestro, the supplier they used for
04:28 3 SmartTrack.
04:28 4 So it's abundantly clear from the
04:28 5 documents and the record -- and we put the exhibit
04:28 6 stamps on these in case you need to refer to any of
04:28 7 them. This is DTX-95, for example -- that they did
04:28 8 reverse engineering. Here's another document. Trial
04:28 9 Plan Reverse Engineered Zendura FLX.
04:28 10 Now, again, there's nothing wrong with
04:28 11 that, but what happened next is wrong. So first, they
04:28 12 realized how good the material was, and this is the
04:28 13 CEO, Joe Hogan, talking to an area sales manager. And
04:29 14 the correspondence which you saw last week said that
04:29 15 they had conducted extensive testing. It's the best
04:29 16 material we've seen so far.
04:29 17 The executive management committee in an
04:29 18 April 2019 meeting, the year after it was released,
04:29 19 said: Bay Materials hard-soft-hard structure big
04:29 20 threat to superiority of SmartTrack.
04:29 21 Now, they didn't say in that document Bay
04:29 22 Materials, using the structure that Dr. Li had come up
04:29 23 with, because they couldn't say that. Dr. Li had
04:29 24 soft-hard-soft, and Bay Materials had come up with a
04:29 25 hard-soft-hard structure. And it was a big threat to

04:29 1 the superiority of SmartTrack.
04:29 2 Here's Joe Hogan again corresponding with
04:29 3 the director of marketing, Raj Pudipeddi. And he's
04:29 4 referring to when Straumann acquired Bay Materials.
04:29 5 And he referred to Straumann as "the best competitor we
04:29 6 have." And he further said that the Bay Materials: As
04:29 7 to Bay Materials, I just wanted to get the asset off
04:30 8 the market.
04:30 9 He's regretting not having purchased the
04:30 10 company himself.
04:30 11 Further correspondence from Mr. Hogan,
04:30 12 the CEO, this is with the vice president of research
04:30 13 and development, Srini Kaza. He said: I'm really
04:30 14 worried about marginalizing SmartTrack.
04:30 15 And look at the first sentence. He said:
04:30 16 Chunhua sent a previous note to me on the material.
04:30 17 That's Dr. Li.
04:30 18 Dr. Li was corresponding with the top
04:30 19 executives including Joe Hogan in this time period:
04:30 20 Chunhua sent a previous note to me on the material so I
04:30 21 know it will be better than EX30. I'm really worried
04:30 22 about marginalizing SmartTrack. I am just looking for
04:30 23 any area of leverage for SmartTrack versus this
04:30 24 material.
04:30 25 And Mr. Kaza candidly acknowledged:

04:30 1 Unless we can stop with IP -- including patents, that's
04:30 2 a form of intellectual property -- they will keep
04:30 3 coming.
04:30 4 And that's what they did. They tried to
04:30 5 get patents that would stop Zendura FLX. They went
04:31 6 back to the Patent Office, and Dr. Li, under oath here
04:31 7 in court, said: I submitted this declaration to
04:31 8 expand, expand our invention to the Patent Office.
04:31 9 Well, you don't get to do that. His
04:31 10 Honor instructed you that you are allowed to go back to
04:31 11 seek claims on a competitor product. That's
04:31 12 permissible. But you need to be honest with the Patent
04:31 13 Office, and you can't try to expand something that you
04:31 14 came up with before. You're confined to the scope of
04:31 15 what you invented in the first place.
04:31 16 And here, the way the expansion was
04:31 17 attempted was through a new declaration in 2019. And
04:31 18 you saw the changes. I won't go through all of them,
04:31 19 but you saw that there were changes that went from
04:31 20 narrowly tailoring the statements of the Patent Office
04:31 21 to SmartTrack in soft-hard-soft. They changed it to
04:31 22 broaden it out, broaden it out to get new claims to
04:31 23 stop Bay Materials and Zendura FLX.
04:32 24 And one of the most telling changes was
04:32 25 in Paragraph 5. It originally said only the materials

04:32 1 of the instant claims which were soft-hard-soft met
04:32 2 Align's development criteria. They changed it to say,
04:32 3 well, only the materials of the current claims, the new
04:32 4 ones they were trying to expand. That's a material
04:32 5 change.
04:32 6 And it worked. They were able to get
04:32 7 some broader claims. Now, not broad enough. Not broad
04:32 8 enough such as Zendura FLX would actually infringe. It
04:32 9 doesn't. It didn't stretch far enough. But they did
04:32 10 get broader claims, and they did so in part because of
04:32 11 that affidavit, that declaration.
04:32 12 This is the patent examiner. The
04:32 13 applicant's affidavit, that's Dr. Li's declaration, was
04:32 14 also found persuasive. In particular, attention to the
04:32 15 statement of the appliances recited in the claims,
04:32 16 unexpectedly positive results over previously known
04:32 17 appliances.
04:32 18 So the examiner's saying there's
04:32 19 unexpectedly positive results of what's now being
04:32 20 claimed in this new set of claims, the broader claims.
04:33 21 But in fact, as Dr. Spiegelberg
04:33 22 explained, the data didn't support that. That was a
04:33 23 misrepresentation. He was asked: Can you think of any
04:33 24 technical or scientific reason that would justify the
04:33 25 change from the text in 2016 to 2019?

04:33 1 And he said: No.
04:33 2 He noted that the new language would
04:33 3 cover 23 additional materials that they had tested in
04:33 4 those 260 tests way back when. And of those 23
04:33 5 materials, he was asked how many of them were superior
04:33 6 to EX30, which is what Dr. Li said they were in the
04:33 7 declaration. The answer is none of them.
04:33 8 As a scientific matter, as
04:33 9 Dr. Spiegelberg explained, the declaration wasn't true.
04:33 10 Now, His Honor instructed you that for
04:33 11 this type of claim, we need to show that there was a
04:33 12 misrepresentation or an omission. And here, there was
04:33 13 both. There was a misrepresentation in the changes to
04:33 14 the declaration, and there was an omission. And the
04:33 15 omission was they did not provide the backup testing.
04:34 16 Now, you don't always need to provide
04:34 17 testing to the Patent Office, but you do, you do when
04:34 18 it would be material or important to the Patent Office
04:34 19 in assessing what you're saying to the Patent Office.
04:34 20 Here, Dr. Li went from saying in 2016
04:34 21 only soft-hard-soft, only the materials of the instant
04:34 22 claims, which were soft-hard-soft. Dr. Li changed the
04:34 23 language after having the back-and-forth with the CEO
04:34 24 and after the CEO had identified Zendura FLX as a
04:34 25 competitive threat, changed it to say: We actually had

04:34 1 broader testing results and greater success. But they
04:34 2 hadn't. And that would have been apparent to the
04:34 3 Patent Office if they had provided the backup data.
04:34 4 Dr. Spiegelberg was asked: Having
04:34 5 reviewed the actual testing data that wasn't submitted
04:34 6 to the Patent Office, what, if anything, did you
04:34 7 conclude about the accuracy of the statement we're
04:34 8 looking at in the revised declaration?
04:34 9 And he says: It's not accurate.
04:35 10 Despite those misrepresentations -- and
04:35 11 to be clear, the statements in the declaration were
04:35 12 false. I can't get into Dr. Li's head as to why she
04:35 13 said what she said, whether it was pressure from the
04:35 14 CEO or some other reason, but what was said to the
04:35 15 Patent Office was false. And in addition, the backup
04:35 16 testing wasn't provided, and it should have been.
04:35 17 But despite all that, these patents don't
04:35 18 cover Zendura FLX. They don't cover ClearCorrect's
04:35 19 aligners.
04:35 20 Now, let me start with one issue, which
04:35 21 is, after reviewing all the material in this case, as
04:35 22 Dr. Reitman acknowledged yesterday, she has offered no
04:35 23 opinion that Mr. Lahlouh had set out to intentionally
04:35 24 copy the Align patents or SmartTrack.
04:35 25 Answer: I have not offered that opinion.

04:35 1 Now, Mr. Durst gets to speak again. I
04:35 2 don't get a chance to go after him. So he's going to
04:35 3 get a chance to make some statements that I won't
04:35 4 respond to. And he may try to convince you that
04:35 5 somehow, somewhere, Mr. Lahlouh or his colleagues
04:35 6 copied the Align patents or SmartTrack.
04:36 7 We saw a good example of this yesterday,
04:36 8 where there's a document used with Dr. Reitman that
04:36 9 used the term "knockoff," and there was an insinuation,
04:36 10 I think, that Mr. Lahlouh had somehow knocked off
04:36 11 SmartTrack. But if you looked at that document, it was
04:36 12 from 2019. Zendura FLX was released in 2018.
04:36 13 And tellingly, when Mr. Lahlouh was on
04:36 14 that stand for hours, they didn't ask him a single
04:36 15 question about that, nor did they ask Dr. Spiegelberg a
04:36 16 single question.
04:36 17 So I have no idea what they're going to
04:36 18 come up with now in their final argument to you, but
04:36 19 whatever they do, I'd like you to remember this:
04:36 20 Dr. Reitman, who's willing to say many things on the
04:36 21 stand to you, wasn't willing, wasn't willing to accuse
04:36 22 Mr. Lahlouh of copying. And the reason was he didn't
04:36 23 do it. Not once. Not ever.
04:36 24 It's a false insinuation to suggest he
04:36 25 did. And when asked point blank, Dr. Reitman has not

04:36 1 offered an opinion that he copied because he didn't.
04:36 2 Mr. Lahlouh took the stand and asked -- answered every
04:36 3 question that Align had for him, and he made clear that
04:37 4 Zendura FLX was invented by himself and his colleagues
04:37 5 at Bay Materials.
04:37 6 Dr. Spiegelberg was asked: Are you aware
04:37 7 of any evidence that Mr. Lahlouh or ClearCorrect
04:37 8 copied?
04:37 9 And he said: No. I'm not.
04:37 10 Because there's none.
04:37 11 Is it a copy? It's not.
04:37 12 In fact, it's based on 16 years of
04:37 13 research and development that go back to 2002, 10 years
04:37 14 before SmartTrack was released.
04:37 15 Ten years before that, Mr. Lahlouh in his
04:37 16 lab notebook talked about a multi-layer construction,
04:37 17 three layers with hard layers on the outside and the
04:37 18 inside.
04:37 19 You will not see any document. There is
04:37 20 no such document in which anyone from Align came up
04:37 21 with what Mr. Lahlouh did back in 2002. SmartTrack was
04:37 22 a decade later.
04:37 23 In 2010, he had a second document, this
04:37 24 is two years before SmartTrack, in which he had a
04:37 25 hard-soft-hard configuration. And he got a patent.

04:37 1 That alone is not proof of noninfringement. You can
04:38 2 infringe even if you have your own patent, as His Honor
04:38 3 instructed you, but this is his patent on
04:38 4 hard-soft-hard; two hard layers, one soft.
04:38 5 And unlike Dr. Li, Mr. Lahlouh was
04:38 6 forthcoming to the Patent Office and provided his
04:38 7 benchmarking data against SmartTrack. He had done
04:38 8 benchmarking, and he told the Patent Office about it.
04:38 9 He told the Patent Office about his simulates. And
04:38 10 they granted him his patent on hard-soft-hard.
04:38 11 Now, why does that matter? It matters
04:38 12 because even though they tried to stretch and stretch
04:38 13 and stretch to get to Zendura FLX and ClearCorrect's
04:38 14 products, they can't stretch far enough. The
04:38 15 elongation at break requirement in all the claims is
04:38 16 not met and, frankly, it's not even close to met.
04:38 17 It requires an elongation at break of
04:38 18 greater than 200 percent. Dr. Li admitted that to test
04:38 19 for elongation at break, you develop the material, the
04:38 20 multi-layer material, then do testing.
04:38 21 The claims -- and here's one example --
04:39 22 talk about three or more layers in a sheet.
04:39 23 Dr. Reitman admits that if you do the multi-layer
04:39 24 testing, the requirement's not met.
04:39 25 Align's own testing before this case

04:39 1 shows that Zendura FLX, which is what they were
04:39 2 testing, was at somewhere between 123 and 139 for
04:39 3 elongation at break, way below 200.
04:39 4 That's what I meant when they filed this
04:39 5 case despite knowing the patents aren't infringed.
04:39 6 They had data in their files showing the elongation at
04:39 7 break wasn't met, and they filed the lawsuit anyway.
04:39 8 Bay Materials did their own testing long
04:39 9 before this case, and elongation at break was way below
04:39 10 200. Dr. Spiegelberg tested after this case. He found
04:39 11 the same. The only one who didn't was Dr. Reitman, and
04:39 12 the only way she found that was by making two mistakes.
04:39 13 Number one, she tested raw ingredients
04:39 14 instead of the multi-layer material once it had been
04:39 15 composed.
04:39 16 Number two, she used the wrong testing
04:39 17 speed. As Dr. Spiegelberg told you, it matters how
04:40 18 fast or slow you pull these layers apart. She made two
04:40 19 mistakes.
04:40 20 Dr. Spiegelberg made no such mistake. It
04:40 21 was the head of the standards committee that developed
04:40 22 the standard for the testing. He did it the right way.
04:40 23 Bay Materials did it the right way. Align, before the
04:40 24 litigation, had done it the right way. And under the
04:40 25 right way, there's no infringement. And, frankly, it's

04:40 1 not even close.

04:40 2 And Mr. Lahlouh had personally tested the

04:40 3 product, and it was less than 200 percent.

04:40 4 How could this happen? How could we be

04:40 5 here with that sort of information in their files?

04:40 6 Dr. Spiegelberg said: I don't know. It

04:40 7 doesn't make any sense.

04:40 8 And, frankly, the only explanation was it

04:40 9 was an attempt to hurt a competitor, part of many

04:40 10 attempts to hurt competitors by Align.

04:40 11 And just finally, the enablement issue is

04:40 12 this: They had soft-hard-soft in the patent. And if

04:40 13 you read your patents, the only examples you'll see are

04:40 14 soft-hard-soft. If you stretch the fence in the way

04:40 15 that they did, they stretched it so far, it's no longer

04:40 16 enabled.

04:40 17 Mr. Durst said dealer's choice. The

04:41 18 claim covers anything you want. That's not the way

04:41 19 this works. Okay? It's not the way this works. You

04:41 20 have to enable and teach the coverage of your claims,

04:41 21 and if you don't, the claims are invalid. They didn't.

04:41 22 These claims are invalid.

04:41 23 And Dr. Li herself acknowledged that this

04:41 24 is an unpredictable field, and you don't know what's

04:41 25 going to happen unless you do the trial and error.

04:41 1 So at the end of this section of the
04:41 2 case, ladies and gentlemen, this is not about promoting
04:41 3 the progress of science as the patent clause was
04:41 4 designed for. This is about trying to hurt a
04:41 5 competitor with patents that were obtained by
04:41 6 misrepresentations to the Patent Office that are not
04:41 7 infringed and, frankly, not even close to infringed
04:41 8 even with those misrepresentations and that have had
04:41 9 enablement problems on top of all that.
04:41 10 So let's turn to the competition issues,
04:41 11 and you've seen this graph over and over again. It
04:41 12 speaks for itself. In the doctor-directed market for
04:41 13 clear aligners, Align has a dominant market share.
04:41 14 There's no challenge to the math here,
04:41 15 and you heard Dr. Knittel and Dr. Jena acknowledge that
04:42 16 there's no quarrel with the math on this slide.
04:42 17 Dr. Perryman's math is correct.
04:42 18 So what is the issue? Well, let's go
04:42 19 through it. First is what's the relevant market. And
04:42 20 as Dr. Perryman told you, you can -- you can't be too
04:42 21 narrow. You can't define a market as a single model of
04:42 22 pickup truck or a single model of dental aligners.
04:42 23 Likewise, you can't be too broad. You
04:42 24 can't define the market for vehicles to be all
04:42 25 vehicles, nor can you define the market to be all

04:42 1 models and structures for teeth straightening. Those
04:42 2 are too broad.
04:42 3 The appropriate and relevant antitrust
04:42 4 market would be pickup trucks for pickup trucks, and
04:42 5 dental aligners, clear dental aligners, doctor-directed
04:42 6 aligners in the U.S. market. That is the relevant
04:42 7 antitrust market.
04:42 8 The issues here are quite
04:42 9 straightforward. One question is should we include
04:42 10 braces. And the reason why Align wants to include
04:43 11 braces is to lower its market share by broadening the
04:43 12 market. But there's obvious differences between the
04:43 13 two. Braces are not invisible, and braces don't come
04:43 14 out. You can't remove them. And for a lot of folks,
04:43 15 that makes a huge difference.
04:43 16 Some of the folks for whom it makes a
04:43 17 difference are adults but also kids, and Joe Hogan
04:43 18 himself in testimony that you saw said hundreds of
04:43 19 millions of patients would never go with analog wires
04:43 20 and brackets.
04:43 21 So if you agree with Align's own CEO,
04:43 22 then one of the arguments you heard throughout this
04:43 23 trial can be rejected based on the CEO's own words.
04:43 24 Now, Align has shown you a few times this
04:43 25 annual report that talks about -- Straumann annual

04:43 1 report that uses the term "teeth-straightening market."
04:43 2 But if you look a little bit further down the page, it
04:43 3 talks about ClearCorrect in the clear aligner market.
04:43 4 So if you read the whole document, and
04:43 5 this is an issue that's come up over and over again in
04:43 6 this trial, you will see the whole document contradicts
04:44 7 the claim they're making.
04:44 8 And here's the testimony or the interview
04:44 9 excerpt from Mr. Hogan that you've seen before. And if
04:44 10 he's right, their first argument can be rejected.
04:44 11 The second argument is
04:44 12 direct-to-consumer. Now, you were shown by Mr. Durst
04:44 13 just now some testimony from Ms. Sterling. To be
04:44 14 clear, when she was being asked those questions, it was
04:44 15 about a 2020 document.
04:44 16 Since then, something important happened.
04:44 17 The direct-to-consumer market essentially, to quote
04:44 18 Mr. Hogan, blew itself apart through Smile Direct Club
04:44 19 obviously and other companies all around the world.
04:44 20 Mr. Hogan said you need a doctor in that process.
04:44 21 So again, if he's right, you can reject
04:44 22 their second argument on market definition.
04:44 23 Now, Mr. Durst said just now this is a
04:44 24 "tortured phrase," doctor-directed aligner marketing.
04:44 25 "Tortured phrase," he said a couple times. In fact, I

04:44 1 asked Mr. Miller:

04:44 2 So, sir, if I could, have you ever seen

04:45 3 or heard the term "doctor-directed aligner market" in

04:45 4 your time at Align?

04:45 5 Yes.

04:45 6 You've also seen an e-mail -- this is

04:45 7 DTX-136 -- from Dan Diederich, top executive at Align.

04:45 8 In 2020, Invisalign had an 88 percent share of the

04:45 9 doctor-directed aligner market.

04:45 10 So that tortured phrase was used by Align

04:45 11 in their own files, and Mr. Miller on the stand

04:45 12 acknowledged it. And it's not a tortured phrase. It

04:45 13 makes all the sense in the world.

04:45 14 "Doctor-directed" means you should go to

04:45 15 a doctor, which is what Texas has said by making DTC

04:45 16 illegal. You need to go to a doctor for good reason.

04:45 17 This is something that requires a dentist or an

04:45 18 orthodontist to take a look at you before you get a

04:45 19 prescription.

04:45 20 That's all "doctor-directed means." Go

04:45 21 see a doctor, an orthodontist or a dentist before the

04:45 22 prescription.

04:45 23 And clear aligners is the appropriate

04:45 24 market because braces are different. That's all this

04:45 25 means. It means going to see a doctor, and it means

04:45 1 clear aligners. It's very simple, very
04:46 2 straightforward, and it's a term that Align itself has
04:46 3 used.
04:46 4 So that's the market definition. And if
04:46 5 you accept that braces are different, if you accept
04:46 6 that DTC has, in Mr. Hogan's word, "blown itself apart"
04:46 7 and is no longer a viable option and that doctors are
04:46 8 required, here's the math. There's no dispute on this.
04:46 9 84 to 92 percent. That's way above the standard for a
04:46 10 monopoly. Way above the standard for a monopoly.
04:46 11 And the fact that Align's market share
04:46 12 has gone down a little bit from 92 to 84, they're still
04:46 13 at 84, which is way above the standard for a monopoly.
04:46 14 So let's turn more to their monopoly
04:46 15 power. Align has acknowledged in e-mails for years
04:46 16 they have a huge share of this market. And it's really
04:46 17 uncontested. If you find that the appropriate market
04:46 18 is doctor-directed clear aligners, their market share
04:46 19 is overwhelming.
04:46 20 Did they engage in anticompetitive
04:46 21 conduct? Well, they did, and Dr. Perryman showed it to
04:47 22 you in their own documents. Document after document
04:47 23 after document show you that they planned to engage in
04:47 24 anticompetitive conduct and did just that.
04:47 25 Years ago -- this is a 2013 e-mail --

04:47 1 they said: As we're preparing for serious competition
04:47 2 in three to five years, an iTero customer is a
04:47 3 locked-in Invisalign customer. We should be locking in
04:47 4 every Invisalign customer now.
04:47 5 And, Your Honor, may we approach this?
04:47 6 We're going to show you something, ladies
04:47 7 and gentlemen, that I hadn't expected we would need to
04:47 8 do, but there's been a fair amount of pushback from
04:47 9 Align witnesses on this issue of a moat.
04:47 10 So what we're going to try to do is to
04:47 11 illustrate exactly what the moat is and what the
04:47 12 mechanics of it were. And as you can see here, we have
04:47 13 set up a diagram which shows various companies, Spark,
04:47 14 SureSmile, ClearCorrect, others that you've heard about
04:48 15 and seen evidence about over the course of this case.
04:48 16 They are on their own technology pathways
04:48 17 towards the marketplace. And here, we have doctors,
04:48 18 dentists, and orthodontists in the center. The way
04:48 19 this should work is on a level playing field, they all
04:48 20 come together and compete on product quality and price.
04:48 21 But what Align wanted to do and has done
04:48 22 is to create a moat. And so what they have done over a
04:48 23 period of years is to use the iTero scanner to create a
04:48 24 moat. And again, I didn't expect to have to illustrate
04:48 25 what a moat is, but they have fought this in this

04:48 1 trial.
04:48 2 So here's iTero and here's the moat.
04:48 3 That's an iTero, by the way. The moat prevents every
04:48 4 other company from having fair access to the
04:48 5 marketplace except for Align.
04:48 6 So how does it work? Well, it works in
04:48 7 two steps. The first step is Invisalign -- Align
04:48 8 refuses to accept scans from any other scanner in the
04:49 9 industry, any of them, any of them. And you've seen
04:49 10 document after document recognizing the high quality of
04:49 11 scanners like Medit and others as well including
04:49 12 SIRIOS, Straumann's scanner.
04:49 13 They refuse to accept any scanner except
04:49 14 for their own scanner, the iTero. That's Step 1.
04:49 15 Step 2 is the iTero doesn't work as well
04:49 16 as other scanners.
04:49 17 So this moat, which you saw and we're now
04:49 18 depicting, was a moat that they announced at a 2019
04:49 19 kickoff meeting of their entire sales force, they told
04:49 20 all their salespeople the iTero scanner builds a moat.
04:49 21 The iTero digital scanner builds a moat. The iTero
04:49 22 scanner will block competition from gaining business in
04:49 23 your accounts and help your doctors keep and grow
04:49 24 treatment with Invisalign rather than seeking out
04:49 25 another option.

04:49 1 They couldn't have been more clear. They
04:49 2 were using iTero to build a moat.
04:50 3 Dan Stubbs: If you want to do
04:50 4 Invisalign, you're forced to buy iTero and live with
5 it.
04:50 6 I think that pretty much sums it up, Dan.
04:50 7 How does this work in detail? Well, with
04:50 8 Invisalign, you just press a button. You take the scan
04:50 9 using this iTero scanner, and you press a button and
04:50 10 off goes the order to Align for Invisalign. Very easy
04:50 11 to use. That's why the moat doesn't restrict access to
04:50 12 Align. One touch.
04:50 13 In contrast, and Mr. Miller acknowledged
04:50 14 this: Just so we're crystal clear with this jury, the
04:50 15 iTero scanner can send data directly to Invisalign,
04:50 16 correct?
04:50 17 In contrast, everybody else has to go
04:50 18 through this cumbersome process. They can't just send
04:50 19 it from the scanner. They have to go to a separate
04:50 20 computer, log into myitero.com.
04:50 21 And as Dr. Taylor took you through this
04:50 22 process, there's a number of steps. Now, they say it's
04:50 23 45 seconds per scan. It could be two minutes or three
04:50 24 minutes. Whatever it is, it's a lot more than it is
04:51 25 for Invisalign. And there's no good reason they had to

04:51 1 do it that way except to create the moat.
04:51 2 And again, it's not my words. They
04:51 3 called it a moat.
04:51 4 They also acknowledge what they were
04:51 5 doing. This is the vice president of product and
04:51 6 design for iTero. It's highly manual and time
04:51 7 consuming -- referring to the STL export for other
04:51 8 companies' aligners -- and thus will never be widely
04:51 9 adopted.
04:51 10 They wanted it to be hard to use. They
04:51 11 wanted it to be hard to use and hard to adopt. That's
04:51 12 the whole point of the moat.
04:51 13 The workflow is not simple, said Raphael
04:51 14 Pascaud to Joe Hogan. The workflow is not simple, and
04:51 15 we would of course not support it or facilitate it.
04:51 16 .5 percent of doctors, according to their
04:51 17 own statistic, use the STL export feature. 99.5,
04:51 18 according to their statistic, don't. 99.5 are using
04:51 19 the Invisalign one touch, one click. .5 are using the
04:51 20 cumbersome STL feature.
04:52 21 This is the closed ecosystem. They have
04:52 22 closed the system, locked out other companies through
04:52 23 this moat. And these are their own documents. If you
04:52 24 want to do Invisalign, you're forced to buy iTero and
04:52 25 live with it. And the only alternative they offer

04:52 1 these days is the putty, the putty in your mouth, which
04:52 2 is less precise, as you heard today on the stand from
04:52 3 Dr. Knittel, than the scanners.
04:52 4 So all this talk about "we're doing this
04:52 5 for quality for the patients," if that were true, why
04:52 6 do they still accept putty? Why do they still accept
04:52 7 putty and don't accept digital scanners from other
04:52 8 companies that are way beyond putty?
04:52 9 It's not about product quality or patient
04:52 10 care. It's about locking out competitors and
04:52 11 suppressing competition, foreclosing other folks from
04:52 12 being in the marketplace.
04:52 13 That's not all. They also have
04:52 14 exclusivity contracts which are designed to lock out
04:52 15 DSOs -- or lock in DSOs and lock out competitors.
04:52 16 These are their words, "Lock in DSOs."
04:52 17 You saw there's thousands of these
04:53 18 agreements that have language like this. And the
04:53 19 language precludes these DSOs from diversion of
04:53 20 patients into non-Invisalign treatment; that is to say,
04:53 21 you can't prescribe the competitor.
04:53 22 Now, they say this is to prevent bait and
04:53 23 switch, but you know the truth. The internal documents
04:53 24 that we looked at today with Dr. Knittel made crystal
04:53 25 clear that was a pretext. A pretext.

04:53 1 They said, Bait and switch is frequently
04:53 2 used. This is someone within Align being reflective
04:53 3 and self-criticizing: Bait and switch is frequently
04:53 4 used, which insinuates our customers have negative
04:53 5 intentions of switching customers versus legitimate
04:53 6 reasons for their behavior.
04:53 7 This document, which is DTX-2019, is
04:53 8 truly revealing. It goes on to say: It feels like
04:53 9 we've resorted to how we can force our customers to do
04:53 10 more cases versus how we can make it so they want to do
04:53 11 more Invisalign.
04:53 12 Last bullet: Unfortunately this mindset
04:53 13 cascades throughout the organization and results in our
04:53 14 customers feeling that we're arrogant -- that's
04:54 15 Align -- we're arrogant and only interested in
04:54 16 ourselves.
04:54 17 And you saw that one doctor had the
04:54 18 audacity to say: I like Invisalign. I'm going to keep
04:54 19 using it, but I found another good option and I'm going
20 to explore that.
04:54 21 Word got to Joe Hogan, and he -- and
04:54 22 Mr. Jergenson, and they said perhaps we can help to
04:54 23 adjust his thinking. They took him off the doctor
04:54 24 locator and started to make accusations of bait and
04:54 25 switch.

04:54 1 It's awful behavior.
04:54 2 The loyalty program, this was analogized
04:54 3 to the American Airlines loyalty program and others.
04:54 4 Well, in fact, what it is is yet another attempt by a
04:54 5 monopolist who's already created a moat and already
04:54 6 created this thicket of thousands of exclusionary
04:54 7 contract provisions to do yet more to lock in customers
04:54 8 and create barriers to competition.
04:54 9 It's one thing for there to be a loyalty
04:54 10 program in a healthy marketplace. When you're in the
04:54 11 world of a monopolist, which is what we're dealing with
04:54 12 here, you can't let the monopolist create further
04:55 13 barriers to competition. And that's exactly what they
04:55 14 wanted to do.
04:55 15 Don't take it from me. The objective of
04:55 16 the program included creating barriers to switch
04:55 17 protecting from competition.
04:55 18 So did all of this cause injury? Well,
04:55 19 it's obvious it did.
04:55 20 They want to say ClearCorrect's not that
04:55 21 effective or has quality problems, but look at
04:55 22 everybody else. Everyone in this industry is in the
04:55 23 basement. Everyone. Good, bad, old, new, hundreds of
04:55 24 years of dental experience, brand-new entrant, every
04:55 25 single company is down here. Everyone.

04:55 1 There's one common denominator. They're
04:55 2 all suffering from the anticompetitive conduct and
04:55 3 foreclosure activities of Align. Every single company.
04:55 4 Certainly including ClearCorrect, also including every
04:55 5 other clear aligner company trying to compete in this
04:55 6 doctor-directed clear aligner market. Every one of
04:55 7 them.
04:55 8 The causation speaks for itself. And
04:55 9 their complaints or their attempts to say that
04:56 10 ClearCorrect is somehow at fault don't withstand any
04:56 11 scrutiny. They say that we receive too many
04:56 12 complaints. Well, it turns out the complaint rate is
04:56 13 virtually identical to Align.
04:56 14 Mr. Miller acknowledged that Align's
04:56 15 received thousands and thousands of complaints
04:56 16 themselves. Cherry-picking a few doesn't make a
04:56 17 product a bad product. Invisalign's not a bad product
04:56 18 and ClearCorrect's product is a good product.
04:56 19 They know it. This is their own internal
04:56 20 document. ClearCorrect patient scores came back eerily
04:56 21 similar to Invisalign. This is from 2017, before
04:56 22 Zendura FLX was introduced and the hard-soft-hard
04:56 23 material made the product even better.
04:56 24 They've known for years this is a good
04:56 25 product. And, frankly, it's offensive to criticize,

04:56 1 like folks like the ones you've heard testify, and to
04:56 2 analogize them to losers in a hockey game. These are
04:56 3 not losers. These are smart, industrious, hard-working
04:56 4 people who took the stand, answered every one of their
04:56 5 questions, and who are ready, willing, and able to
04:56 6 compete on a level playing field if given the chance.
04:57 7 And it's shown by the numbers. Where
04:57 8 there's less anticompetitive conduct, including outside
04:57 9 the U.S., ClearCorrect is doing very well. Within the
04:57 10 U.S., where Align operates differently and
04:57 11 anticompetitively, ClearCorrect is suffering and so is
04:57 12 everyone else on this chart. Every other company
04:57 13 trying to compete is down in that basement because of
04:57 14 their anticompetitive conduct.
04:57 15 Pricing. Mr. Durst says, well, this
04:57 16 can't be a monopoly. They've lowered the prices.
04:57 17 Well, I'll give Mr. Durst a break because he wasn't
04:57 18 here today.
04:57 19 Two economists called as witnesses by
04:57 20 Align said the exact opposite. You can be a monopolist
04:57 21 and still have lower prices at times, including to try
04:57 22 to freeze out the growth of competition. There's a lot
04:57 23 of reasons why a monopolist might cut prices a little
04:57 24 bit and still be a monopolist.
04:57 25 The one thing we know is that

04:57 1 ClearCorrect offers lower prices today and has offered
04:57 2 lower prices over the years than Align. So they're not
04:57 3 winning on price. They're not winning on quality.
04:57 4 They're winning on anticompetitive conduct. They know
04:58 5 it.
04:58 6 Here's ClearCorrect's strengths in an
04:58 7 internal Align document. Attractive pricing. Efficacy
04:58 8 on low-stage cases. Easy company to deal with. Made
04:58 9 in the USA at the plant in Round Rock.
04:58 10 And what else did they say in this very
04:58 11 same document? In addition to the strengths above,
04:58 12 many felt, many felt an advantage of ClearCorrect was
04:58 13 that it was not Align. These doctors felt Align had
04:58 14 become a greedy, overly aggressive company that did not
04:58 15 care very much about its doctor providers.
04:58 16 Now, Align wants to put a happy face on
04:58 17 this situation, and today we saw it. Dr. Knittel
04:58 18 literally put a happy face on doctors and suggested
04:58 19 that they were in love with what Align is doing. Well,
04:58 20 they're not. They're not.
04:58 21 The evidence from Align's own files shows
04:58 22 that they're not. This is a broken market. It is a
04:58 23 broken market where competition is being foreclosed,
04:58 24 foreclosed across the board through the anticompetitive
04:59 25 activities of Align.

04:59 1 No one's happy with this situation, and
04:59 2 that certainly includes doctors and patients. And
04:59 3 calling a few folks to testify at over $1,000 an
04:59 4 hour --
04:59 5 THE COURT: Counsel, five minutes.
04:59 6 MR. MUELLER: Thank you, Your Honor.
04:59 7 -- over $1,000 an hour, a number of whom
04:59 8 have appeared in multiple litigations for Align,
04:59 9 doesn't make it any different.
04:59 10 This situation is a situation in which
04:59 11 doctors and patients are suffering from fewer options
04:59 12 and higher prices because of their anticompetitive
04:59 13 conduct. It is obvious from looking at the math here,
04:59 14 which they don't contest. If you take braces off, as
04:59 15 Joe Hogan said you should, if you recognize the DTC
04:59 16 market blew itself up, as Joe Hogan said, this is the
04:59 17 math. This is the math. There's no dispute.
04:59 18 That's a monopoly, it's foreclosure, and
04:59 19 it's hurting all of us.
04:59 20 So what were the damages? Well,
04:59 21 Dr. Perryman calculated damages in the conservative
05:00 22 way. He did a quantification of the effects of the
05:00 23 iTero moat, and he found that there would be a
05:00 24 15 percent shift or there has been a 15 percent shift
05:00 25 of sales that Align would have -- that Align shouldn't

05:00 1 have made but did because of the moat.
05:00 2 Now, he also said there was harm from the
05:00 3 exclusivity provisions in those contracts, those
05:00 4 thousands of contracts. He also said there was harm in
05:00 5 the Advantage Program that was designed as a barrier to
05:00 6 competition. But to be conservative, he offered you
05:00 7 his quantification of the moat effects. It was
05:00 8 $289 million.
05:00 9 Now, you heard from Dr. Knittel today and
05:00 10 Dr. Jena. They don't have an alternative number. Let
05:00 11 me say that again. You have not heard an alternative
05:00 12 number.
05:00 13 So if you conclude that this is the right
05:00 14 market and they have done the wrong thing by engaging
05:00 15 in anticompetitive conduct, you have one and only one
05:00 16 number that's been given to you. It's by Dr. Perryman,
05:00 17 this $289 million.
05:00 18 Now, the actual harm was greater because
05:01 19 he didn't include any quantification of the exclusivity
05:01 20 provisions in the contracts and the Advantage Program
05:01 21 barriers, but to be conservative, he quantified the
05:01 22 moat and the lockout effects of iTero to be
05:01 23 $289 million.
05:01 24 And ladies and gentlemen, that is the
05:01 25 only quantification of the harm that you've received in

05:01 1 this trial.

05:01 2 So if you were to conclude that Align has

05:01 3 acted anticompetitively, as their documents say over

05:01 4 and over and over again from the CEO level on down, the

05:01 5 appropriate measure of damages, the only one that

05:01 6 you've heard, is from Dr. Perryman.

05:01 7 Now, what would that mean? It means that

05:01 8 if we look at this broken market, we asked the

05:01 9 question. Here's where ClearCorrect has been. Where

05:01 10 would they have been but for the lockout effects of

05:01 11 iTero? They would have made many more sales,

05:01 12 $289 million in lost profits over that period of time.

05:01 13 THE COURT: Counsel.

05:01 14 MR. MUELLER: Thank you, Your Honor.

05:01 15 What would that mean overall? Here's

05:02 16 Invisalign. The dotted line would be where they would

05:02 17 be if they'd paid the $289 million.

05:02 18 So again, this would give ClearCorrect

05:02 19 the compensation for what it's lost and still leave

05:02 20 Align in a commanding position in the market. This is

05:02 21 not overreach. This is fair compensation for what

05:02 22 ClearCorrect has suffered in this case.

05:02 23 Ladies and gentlemen, I'm at the end of

05:02 24 my time, and I won't have a chance to respond to

05:02 25 Mr. Durst. As you listen to his final words, I'd ask

05:02 1 you to keep a few things in mind.
05:02 2 First, are you being shown data that you
05:02 3 know, you know to be out of context?
05:02 4 Second, are you hearing insinuations
05:02 5 about people who had the -- when they had the chance to
05:02 6 ask questions on the stand and didn't, like
05:02 7 Mr. Lahlouh?
05:02 8 And third, are they now telling you
05:02 9 things that are directly contradicted by the words of
05:02 10 Joe Hogan and the other top executives?
05:02 11 Ladies and gentlemen, we are asking you
05:02 12 for a verdict for ClearCorrect and Straumann. That
05:02 13 would be the first step in fixing this broken
05:03 14 marketplace. And if it were fixed and restored to a
05:03 15 level playing field, at that point, it's up to
05:03 16 ClearCorrect.
05:03 17 We have faith that Mr. Kossol, that
05:03 18 Mr. Coss, that Mr. Buitta, Ms. Sterling and their
05:03 19 colleagues on a level playing field will do just fine.
05:03 20 And we have faith that in an open and fair marketplace
05:03 21 where closed systems are opened, locked systems are
05:03 22 unlocked, and the playing field is level, not only will
05:03 23 ClearCorrect do better, we will do better, patients,
05:03 24 doctors, consumers. More options, lower prices.
05:03 25 Ladies and gentlemen, Align started this

05:03 1 case, but we should end it by holding them accountable
05:03 2 for their anticompetitive conduct over the course of
05:03 3 many years. I'm not going to show you the verdict
05:03 4 form. We trust your judgment.
05:03 5 The case will soon be in your hands,
05:03 6 ladies and gentlemen. And we are confident you'll
05:03 7 reach a just verdict.
05:03 8 Thank you very much.
05:04 9 THE COURT: Thank you, sir.
05:04 10 CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF
05:06 11 MR. DURST: May it please the Court.
05:06 12 Ladies and gentlemen, let's talk about
05:06 13 the antitrust claims first. The gating issue here, the
05:06 14 first thing, the requirement for them to even get first
05:07 15 base -- to first base on their antitrust claims is the
05:07 16 market definition.
05:07 17 You'll be instructed that you are to
05:07 18 consider what is the appropriate market from the years
05:07 19 2020 to the present. What Mr. Mueller said about SDC,
05:07 20 about direct to consumers going away is relevant to
05:07 21 that market calculation.
05:07 22 The fact that they -- that that
05:07 23 particular company is out of business now does not
05:07 24 determine whether they were in the market during the
05:07 25 time that you are to consider what is the market

05:07 1 definition. And Ms. Sterling told us it doesn't belong
05:07 2 in the market. They don't get past first base.
05:07 3 Now, think about this. Reasonable
05:07 4 substitutes. What have you heard? Braces and
05:07 5 aligners. Same providers. Same function, moving teeth
05:07 6 and bones the same way, the same price, the same
05:08 7 consumers. The test is reasonable substitute. That's
05:08 8 what you will be instructed in the jury instructions
05:08 9 and as it relates to those verdict questions.
05:08 10 Now, we do have a quarrel with his board
05:08 11 because he leaves braces off of there. Braces,
05:08 12 according to Ms. Sterling, make up 75 percent of the
05:08 13 market. So if you put that chart in scale and included
05:08 14 the full market, it would look dramatically different
05:08 15 than that board that they've shown you over and over
05:08 16 again. They're excluding braces to make us look larger
05:08 17 than we really are.
05:08 18 Notably, he skipped over monopoly power.
05:08 19 Remember, for testing of monopoly power, being big
05:08 20 alone is not enough. Big alone is not enough, and it
05:08 21 is not illegal.
05:08 22 So what they have to show are
05:09 23 anticompetitive acts. You will be asked to test
05:09 24 whether four specific things are anticompetitive acts,
05:09 25 meaning that they lack a legitimate business purpose.

05:09 1 So those acts are discounts and loyalty
05:09 2 programs. Those programs are everywhere in our
05:09 3 economy.
05:09 4 Is there a legitimate business purpose
05:09 5 for having a loyalty program or a discount program?
05:09 6 That's an easy answer. The answer to that will be no.
05:09 7 The second, contracts. Mr. Mueller made
05:09 8 a big show of putting those boxes up there, but they've
05:09 9 only shown you and focused on one clause. That's the
05:09 10 good faith clause. And Mr. Matt Miller took the stand
05:09 11 and told you why that is important. We have instances
05:09 12 out there where people are being sold and paying for
05:09 13 Invisalign and receiving other products, including
05:09 14 ClearCorrect's products.
05:09 15 And that is a legitimate business reason
05:10 16 for having that good standing clause. That's the
05:10 17 clause that has the nondivert language that if you are
05:10 18 a dentist using Invisalign and getting support from
05:10 19 Align, you will not divert prospective patients into
05:10 20 competitive products.
05:10 21 "Divert" means change direction. That
05:10 22 means bait and switch. That is why that clause is
05:10 23 there. It is a legitimate business purpose.
05:10 24 Let's pull up Slide 39.10. 39.10.
05:10 25 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

05:12 1 products that go into the marketplace? Should we be
05:12 2 required to do that?
05:12 3 The Align witnesses have told you, and
05:12 4 Mr. Coss from Straumann admitted, that it's a
05:12 5 reasonable thing to do to want to be sure that your
05:12 6 scans are high quality. That is a legitimate business
05:12 7 purpose for relying on our scanner to build our
05:12 8 products.
05:12 9 That's half the scanner questions. The
05:12 10 other half is do we allow our scans to go out? You
05:12 11 really need to look no further than the fact that one
05:12 12 out of every five of their aligners is built with our
05:12 13 scans. Scans are going out.
05:13 14 Now, last, let's look at causation. So
05:13 15 let's go to PDX-3664. This is the instruction that you
05:13 16 will have on causation. Causation is the last element
05:13 17 of your antitrust consideration or it is an element of
05:13 18 the antitrust consideration. And this is the
05:13 19 instruction that you've gotten from Judge Albright.
05:13 20 ClearCorrect must have proven that some
05:13 21 damage occurred to it as a result of Align's alleged
05:13 22 antitrust violation and not some other cause. Not some
05:13 23 other cause.
05:13 24 Let's go to the next slide, Mr. Smith,
05:13 25 please.

05:13 1 Ms. Sterling, she took the stand. She
05:13 2 testified about all of these other companies that are
05:13 3 facing the same Align competition as is ClearCorrect.
05:13 4 ClearCorrect is the only one that is failing.
05:14 5 Now, Ms. Sterling came in here to
05:14 6 testify, and you remember that there was a plan for her
05:14 7 CEO to be here to testify. And she found out on the
05:14 8 morning of her testimony that that man was not coming
05:14 9 to Waco from Switzerland after all. They left her
05:14 10 hanging. They left her hanging to answer questions on
05:14 11 that stand, difficult questions that the CEO didn't
05:14 12 want to face. They've also left her hanging in
05:14 13 business too.
05:14 14 You remember she has $2 million in
05:14 15 marketing and four people in the United States to
05:14 16 support her marketing efforts in all of the United
05:14 17 States.
05:14 18 We asked her: Has Straumann, your big
05:14 19 parent with lots of resources, as Dr. Perryman said,
05:14 20 have they provided support? Have they helped you out
05:14 21 to get over your problems?
05:14 22 The answer was no. The answer was no.
05:14 23 Let's go to the next slide.
05:14 24 And there are lots of issues with
05:15 25 Straumann, and you've heard about this. You heard

05:15 1 Mr. Daniellot testify in a deposition that many of the
05:15 2 reasons for their shortfall are self-inflicted wounds.
05:15 3 In order to prevail on their antitrust counterclaims,
05:15 4 they have to show you that there was no other cause for
05:15 5 their struggle, for their struggles in the marketplace.
05:15 6 They simply cannot do that.
05:15 7 Let's go to PDX-3651, please.
05:15 8 Now, if all of these actions --
05:15 9 Maybe 39.51, James.
05:15 10 If all of these actions were as bad as
05:15 11 they say they are, why is it, ladies and gentlemen,
05:15 12 that the only orthodontists that came to testify, the
05:15 13 only orthodontists that are prescribing Invisalign
05:15 14 because they believe it is the best product, is
05:15 15 Dr. Taylor, their own paid expert? He prescribes
05:15 16 Invisalign. They don't prescribe ClearCorrect.
05:16 17 Where are all the other doctors and
05:16 18 dentists out there saying they are locked out, that
05:16 19 they wish they would be able to sell ClearCorrect but
05:16 20 they just can't get in?
05:16 21 No one. The only doctors that testified
05:16 22 in this case are Invisalign users who use -- Invisalign
05:16 23 prescribers who use Invisalign and prescribe it to
05:16 24 their patients because they trust the product.
05:16 25 No one told you they felt locked out.

05:16 1 Even Dr. Taylor admitted that he had done all of what
05:16 2 he'd done and signed up for Invisalign, signed up for
05:16 3 the loyalty program, all of that voluntarily.
05:16 4 The doctors' absence speaks volumes.
05:16 5 Now, let's go back to the core of the
05:16 6 case, which is patent infringement. I think
05:16 7 Mr. Mueller spent less than two minutes -- I had the
05:16 8 benefit of his timer -- less than two minutes on this
05:16 9 claim language. He did, as I thought he would do, he
05:16 10 started with the patent that's not even in suit and
05:17 11 never showed you the claim language of the patent in a
05:17 12 way that walks through what has happened.
05:17 13 Now, the only challenge, the only defense
05:17 14 he gave for infringement is that we did the wrong
05:17 15 testing. This is the, this layer has these properties,
05:17 16 and this layer has these properties. You'll remember
05:17 17 in opening Ms. Durie said: Elongation at break means
05:17 18 how long you can stretch it before it breaks.
05:17 19 This is the soft layer. This would
05:17 20 represent the soft layer. This is how Dr. Reitman
05:17 21 tested elongation at break. She tested it layer by
05:17 22 layer by layer.
05:17 23 Now, what did Dr. Spiegelberg do? He
05:17 24 took the two hard layers and put the soft layer between
05:17 25 them. And lo and behold, they don't stretch to meet

05:17 1 the elongation at break standards.
05:17 2 It's as simple as that. That is their
05:17 3 only defense to infringement, is that you test the
05:18 4 layers together rather than separately.
05:18 5 You know, and we showed you, I showed you
05:18 6 a moment ago, the papers from Dr. -- from Bay Materials
05:18 7 about their own admission that their products meet the
05:18 8 standards.
05:18 9 Now, let's turn to Dr. Li. You didn't
05:18 10 hear anything about her submission of truthful
05:18 11 statements in a way that focused on the language she
05:18 12 actually submitted.
05:18 13 Now, she took the stand. She told you
05:18 14 what she submitted. Dr. Reitman took the stand, said
05:18 15 she had looked over all the files. All of the data had
05:18 16 been submitted and everything that Dr. Li said was
05:18 17 truthful.
05:18 18 His lead-up to say that Dr. Li was a liar
05:18 19 was testimony from that stand about doing reverse
05:18 20 engineering. But again, he didn't show you the full
05:19 21 testimony.
05:19 22 He was asking her questions about reverse
05:19 23 engineering for purposes of copying, and she said: No,
05:19 24 we did not do that. He took that testimony out of
05:19 25 context. It, of course, is irrelevant in any event to

05:19 1 whether Dr. Li lied to the Patent Office.
05:19 2 Remember, to invalidate the patent and to
05:19 3 take it away from Dr. Li, you have to have an abiding
05:19 4 conviction that she intentionally lied to the Patent
05:19 5 Office. The evidence is just not there.
05:19 6 Now, as Dr. Perryman reminded us a few
05:19 7 days ago, the Fourth --
05:19 8 THE COURT: Mr. Durst, if you can wrap
05:19 9 up.
05:19 10 MR. DURST: I will.
05:19 11 The jury system is very important to our
05:19 12 system, both to hold people accountable, which we ask
05:19 13 that you do for Straumann, and also to clear the name
05:19 14 of people who have done nothing wrong.
05:19 15 Align has competed fairly, and we ask
05:20 16 that you return a verdict in favor of Align.
05:20 17 Thank you.
05:20 18 Thank you, Your Honor.
05:20 19 THE COURT: Thank you, Mr. Durst.
05:20 20 Mr. Durst, could you take that down?
05:20 21 MR. DURST: I will.
05:20 22 THE COURT: Thank you, sir.
05:20 23 Ladies and gentlemen of the jury, I think
05:20 24 what we're going to do is the following. I'd like you
05:20 25 to retire to the jury room and do one thing before you

05:20 1 go home, which is please pick your jury foreperson and
05:20 2 write it down on a note. I prefer it be someone whose
05:20 3 handwriting is legible, but I don't control that.
05:20 4 So if you will pick your foreperson, hand
05:20 5 the note to Bob, and then you'll be free to go for the
05:21 6 day because you can't begin to deliberate tomorrow
05:21 7 until you've picked a foreperson. And I'm worried some
05:21 8 of you might get here and all that.
05:21 9 So here are the new instructions which,
05:21 10 first, you still can't discuss the case with each other
05:21 11 until tomorrow morning when you're back and when you
05:21 12 get back tomorrow until all eight of you are in the
05:21 13 room. Please don't discuss anything about the trial.
05:21 14 Number two, once you're back tomorrow,
05:21 15 you will not have access -- you'll be sequestered. You
05:21 16 won't have access to your phones.
05:21 17 So if one of you have a problem because
05:21 18 of, you know, you need to get in touch with someone,
05:21 19 again, if you'll let Bob or whoever's sitting outside
05:21 20 know, we'll -- I'll bring you in the chambers or
05:21 21 something and we'll take care of it if you really have
05:21 22 to communicate with someone.
05:21 23 Oh, thank God I have great staff. I've
05:21 24 not -- I've not finished the charge. Let me do that.
05:21 25 It'll be very quick.

05:21 1 I'm on Page 93.
05:22 2 It is now your duty to deliberate, which
05:22 3 you'll begin tomorrow morning, and consult with one
05:22 4 another in an effort to reach a verdict.
05:22 5 Each of you must decide the case for
05:22 6 yourself, but only after an impartial consideration of
05:22 7 the evidence with your fellow jurors.
05:22 8 During your deliberations, do not
05:22 9 hesitate to reexamine your own opinions and change your
05:22 10 mind if you are convinced that you were wrong, but do
05:22 11 not give up on your honest beliefs because others think
05:22 12 differently or just to finish the case.
05:22 13 Remember at all times you are the judges
05:22 14 of the facts.
05:22 15 You've been allowed to take notes during
05:22 16 the trial. Any notes you took during the trial are not
05:22 17 evidence. They are only aids to memory. If your
05:22 18 memory differs from your notes, rely on your memory,
05:22 19 not your notes. They are not evidence.
05:22 20 If you did not take notes, rely on your
05:22 21 independent recollection of the evidence. Do not be
05:22 22 unduly influenced by the notes of other jurors. Notes
05:22 23 are not entitled to a greater weight than the
05:22 24 recollection and impression of each of you about the
25 evidence.

05:22 1 When you go -- I always ad-lib a little
05:22 2 bit. You can take the charge with you. The verdict
05:23 3 form will be waiting for you in the morning to begin
05:23 4 working on. You're going to pick a foreperson as soon
05:23 5 as we break.
05:23 6 Your verdict must be unanimous. Once
05:23 7 you've reached a unanimous verdict, your jury
05:23 8 foreperson must fill out the answers to the written
05:23 9 questions on the verdict form, sign it, and date it.
05:23 10 Answer each question in the verdict form
05:23 11 from the evidence and the facts as you find them. Do
05:23 12 not decide who you think should win and answer
05:23 13 questions to reach a result. Your answers must be
05:23 14 unanimous.
05:23 15 After you've concluded your service and
05:23 16 I've discharged you, I will discuss my -- how you can
05:23 17 handle discussions about what happened in -- during the
05:23 18 trial.
05:23 19 If you need to communicate with me during
05:23 20 the deliberations, then the jury foreperson and only
05:23 21 the jury foreperson is permitted to write a note and
05:23 22 hand it to one of the CSOs, who will get it to me, and
05:23 23 I will give you an answer to whatever question you
05:23 24 might have written.
05:24 25 When you send a note, please do not in

05:24 1 any way indicate where you are at in terms of, like,
05:24 2 say two of us feel one way or, you know, we're
05:24 3 whatever. Until I get the final note from the jury
05:24 4 foreperson that says "we have a unanimous verdict," the
05:24 5 world should never have any idea where you're at on any
05:24 6 issue as you deliberate. That's exclusively the eight
05:24 7 of you's province.
05:24 8 And of course the same instructions apply
05:24 9 tonight. Don't discuss the case. Don't do any
05:24 10 research. And please don't go on social media about
05:24 11 the case.
05:24 12 So with that, I will dismiss you to go
05:24 13 back to the jury room. We will be bringing lunch in
05:24 14 for you tomorrow. My understanding is it will be here
05:24 15 around 11:00. So you are dismissed.
05:24 16 Please go pick a jury foreperson. Let --
05:24 17 hand the note to Bob with respect to who it is, and
05:25 18 then you are free to go for the day.
05:25 19 THE BAILIFF: All rise.
05:25 20 (Jury exited the courtroom.)
05:25 21 THE COURT: Thank you. You may be
05:25 22 seated.
05:25 23 Okay. Yes, sir.
05:25 24 MR. TUBACH: Just one logistical issue.
05:25 25 In our haste to pass out the instructions, they had

05:25 1 included the verdict form. And so it would be good if
05:25 2 maybe one of the marshals or someone could go in and
05:25 3 remove those different verdict forms so that they don't
05:25 4 all have different ones. We didn't realize that we
05:25 5 were supposed to hand that out to the jury.
05:25 6 THE COURT: We will -- one of the clerks
05:25 7 will do that once --
05:25 8 MR. TUBACH: Thank you very much.
05:25 9 Appreciate that.
05:25 10 THE COURT: Yes, sir.
05:25 11 MR. NASH: I was just going to let you
05:25 12 know one of the jurors just handed one of them to us.
05:25 13 We didn't communicate other than that, but it's a
05:25 14 verdict form.
05:26 15 THE COURT: Okay. Very good. You can
05:26 16 just throw it away.
05:26 17 Now, what I'd like for the -- those of
05:26 18 you who are the lawyers on this side of the bar, if you
05:26 19 would just remain where you are until we get the note
05:26 20 who the foreperson is, which hopefully will be quick.
05:26 21 I certainly encouraged quick.
05:26 22 And then as soon as that's done, you'll
05:26 23 be dismissed. The jury told me they would like to come
05:26 24 back tomorrow morning at 9:00 -- start at 9:00. So for
05:26 25 tomorrow --

05:26 1 This doesn't need to be on the record.
05:28 2 (Off-record discussion.)
05:28 3 THE COURT: I can go back on the record.
05:28 4 I thought that the closing arguments were
05:28 5 outstanding. And so I didn't expect any less. I did
05:28 6 not -- which is rare, I did not regret giving you the
05:28 7 45 minutes per side, which I usually do.
05:28 8 And so y'all have a good evening. Enjoy
05:28 9 Waco. And you certainly deserve a break tonight. So
05:28 10 we'll see you tomorrow.
05:29 11 (Recess taken.)
05:30 12 THE COURT: I have a Jury Note No. 1.
05:30 13 The foreman is Charles Cox. I will sign it now.
05:30 14 I just want to make sure -- and this
05:30 15 should be on the record because I just want to make
05:30 16 sure with respect to the verdicts -- the verdict form,
05:30 17 do -- was what you gave to Jen a perfect version of the
05:30 18 verdict, or are we waiting -- do -- because they're
05:30 19 not -- they won't have looked at it tonight. So make
05:31 20 sure that we have -- y'all make sure that we have the
05:31 21 verdict form you all will want them to have.
05:31 22 MR. DURST: Okay.
05:31 23 THE COURT: And we will have it -- they
05:31 24 only get one. We'll take whatever's in their notebooks
05:31 25 out. They only get one verdict form. So whatever you

05:31 1 give to us -- you can do it tonight or tomorrow
05:31 2 morning, whatever, they just need to have it in there
05:31 3 by 9 o'clock.
05:31 4 MR. DURST: Perfect.
05:31 5 THE COURT: Okay?
05:31 6 MR. MUELLER: Thank you, Your Honor.
05:31 7 (Hearing adjourned.)
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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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4
5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
8 correct transcript from the record of proceedings in
9 the above-entitled matter.
10 I certify that the transcript fees and
11 format comply with those prescribed by the Court and
12 Judicial Conference of the United States.
13 Certified to by me this 12th day of July
14 2026.
15
16 /s/ Kristie M. Davis
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