

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN INCREMENTAL DENTAL
POSITIONING ADJUSTMENT
APPLIANCES AND METHODS OF
PRODUCING SAME**

**Investigation No. 337-TA-562
(Enforcement Proceeding)**

**NOTICE OF COMMISSION DETERMINATION TO REMAND INVESTIGATION TO
THE CHIEF ADMINISTRATIVE LAW JUDGE PURSUANT TO REMAND FROM THE
U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to remand the above-captioned investigation to the Chief Administrative Law Judge for assignment to an administrative law judge (“ALJ”) to resume enforcement proceedings following remand from the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”).

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-3090. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the underlying investigation in this matter on February 15, 2006, based on a complaint filed by Align Technology, Inc. (“Align”) of Santa Clara, California (now of San Jose, California). *71 Fed. Reg.* 7995-96. The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain incremental dental positioning adjustment appliances by reason of infringement of certain claims of U.S. Patent Nos. 6,685,469; 6,450,807 (“the ‘807 patent”); 6,394,801; 6,398,548; 6,722,880 (“the ‘880 patent”); 6,629,840; 6,699,037; 6,318,994; 6,729,876; 6,602,070; 6,471,511 (“the ‘511 patent”); and 6,227,850. The complaint also alleged a violation of section 337 by reason of misappropriation of trade secrets. The

Commission's notice of investigation named OrthoClear, Inc. of San Francisco, California; OrthoClear Holdings, Inc. of Tortola, British Virgin Islands; and OrthoClear Pakistan Pvt, Ltd. of Lahore, Pakistan as respondents. On July 12, 2006, the ALJ granted Align's motion to terminate the investigation as to the '807 patent, which the Commission determined not to review. Order No. 10 (July 12, 2006), Notice of Non-Review (July 20, 2006).

On November 13, 2006, the Commission issued notice of its determination not to review the presiding administrative law judge's initial determination granting Align's and the respondents' joint motion to terminate the investigation based on a consent order. The consent order prohibits the importation, sale for importation, and sale in the United States after importation of incremental dental positioning adjustment appliances referenced in the complaint and any other articles manufactured in violation of the asserted patents or trade secrets described therein.

On March 1, 2012, Align filed a complaint for an enforcement proceeding under Commission Rule 210.75, and filed a corrected complaint on March 22, 2012. On April 25, 2012, the Commission determined that the criteria for institution of an enforcement proceeding were satisfied and instituted an enforcement proceeding, naming the following six respondents: ClearCorrect Operating, LLC, of Houston, Texas; ClearCorrect Pakistan (Private), Ltd. of Lahore, Pakistan; and Mudassar Rathore, Waqas Wahab, Nadeem Arif, and Asim Waheed ("Enforcement Respondents"). 77 *Fed. Reg.* 25747 (May 1, 2012). The complaint for enforcement, as corrected, asserts that the successors and bound officers of the original respondents have violated the November 13, 2006, consent order by the continued practice of prohibited activities such as importing, offering for sale, and selling for importation into the United States of articles that infringe the '511 and '880 patents. According to the complaint for enforcement, the imported items are digital datasets, which are used to manufacture dental positioning adjustment appliances in the United States. The notice of institution of an enforcement proceeding noted the threshold issue of whether the accused digital datasets are within the scope of the consent order sought to be enforced, and indicated that the ALJ may wish to consider this issue at an early date.

On November 28, 2012, the ALJ issued Order No. 57, and found that the accused digital datasets are within the scope of the term "articles" in the consent order. On December 21, 2012, the Commission issued a notice recognizing that Order No. 57 is an ID provided for in the notice of institution of an enforcement proceeding and that the deadline for determining whether to review the ID was January 14, 2013.

On January 4, 2013, the Commission determined to review and reverse Order No. 57. 78 *Fed. Reg.* 2282-83 (Jan. 10, 2013). The Commission found that the importation of the accused digital datasets did not fall within the scope of the consent order because the order did not contain an express provision prohibiting the electronic transmission of data. *Id.* at 2283. The Commission then terminated the enforcement proceeding with a finding of no violation of the consent order. *Id.*

Align timely appealed the Commission's final determination of no violation of the consent order. Specifically, Align contended that the Commission erred by treating Order No. 57 as an initial determination subject to Commission review and by finding that the digital datasets did not fall within the scope of the consent order.

On July 18, 2014, the Federal Circuit held that Order No. 57 was not reviewable as an initial determination under the Commission's rules. *Align Tech., Inc. v. Int'l Trade Comm'n*, __ F.3d __, 2014 WL 5350419 (Fed. Cir. 2014). The Court vacated the Commission's determination to review and reverse Order No. 57, and remanded the case to the Commission for further proceedings consistent with the Court's opinion. *Id.* The Enforcement Respondents petitioned for a rehearing *en banc* on August 14, 2014, which was denied on September 17, 2014. The mandate issued on September 25, 2014, returning jurisdiction to the Commission.

The Commission has determined to remand the investigation to the Chief ALJ for assignment to a presiding ALJ to resume enforcement proceedings.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: November 24, 2014