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17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA

19 SIMON AND SIMON, PC d/b/a CITY SMILES;
 20 and VIP DENTAL SPAS, individually and on behalf
 of all others similarly situated,

21 Plaintiffs,

22 v.

23 ALIGN TECHNOLOGY, INC.,

24 Defendant.

**AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

1 Plaintiffs Simon and Simon, PC d/b/a City Smiles (“City Smiles”) and VIP Dental Spas
2 (“VIP”) (collectively, “Plaintiffs”) bring this antitrust action against Align Technology, Inc. (“Align” or
3 “Defendant”) under Section 2 of the Sherman Act, 15 U.S.C. § 2, on behalf of themselves and a
4 proposed class of similarly-situated dental and orthodontic practices (collectively, “Dental Practices”),
5 and allege as follows:

6 **I. NATURE OF THE CASE**

7 1. This antitrust suit arises from Align’s willful acquisition and maintenance of monopoly
8 power in the markets for two products: (1) custom-manufactured, transparent, removable dental
9 aligners made from clear plastic (Defendant’s product is called “Invisalign”, and the category of product
10 is generally called “Aligners”), and (2) hand-held digital intraoral scanners used to generate scans to
11 order Aligners (Defendant’s product is called “iTero”, and the category of product is generally called
12 “Scanners”). The relevant Aligner and Scanner markets are defined in more detail below.

13 2. Align has dominated the Aligner market for decades with its Invisalign brand Aligners.
14 Align controls approximately 90 percent of the market for Aligners and earns well over a billion dollars a
15 year selling Invisalign, with durable profit margins above 75 percent.

16 3. Align has also come to dominate the market for Scanners with its iTero product,
17 controlling approximately 80 percent of the market and earning hundreds of millions of dollars a year
18 selling iTero, with profit margins above 60 percent. Align’s only real competitor in the Scanner market
19 is 3Shape, who sells the Trios Scanner that, like iTero, is designed for ordering Aligners.

20 4. Aligners and Scanners are designed to work together for Dental Practices. Scanners take
21 a digital image of the jaws, teeth, and bite of a patient. These scans are sent to an Aligner manufacturer,
22 which uses the images to create custom-manufactured Aligners for patients. Patients typically undergo
23 regular scans and have numerous sets of Aligners manufactured during a course of treatment, with
24 Aligners being adjusted as the patients’ teeth move.

25 5. The use of Scanners creates a “digital workflow” designed to make it more convenient,
26 cheaper, and quicker for Dental Practices to order Aligners. Align has noted that the iTero is “so critical
27 from a digital workflow standpoint” because of the way iTero and Invisalign are linked together.
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1 6. This digital workflow was thus expected to increase the use of Invisalign Aligners by
2 Dental Practices, and indeed, Align has noted that “Invisalign doctors with an iTero scanner have
3 notably higher utilization rates than non-iTero doctors.” Align itself has also emphasized that Dental
4 Practices need a fast and accurate way to create digital scans that can be used to create Aligners and to
5 transfer those scans to the Aligner manufacturer.

6 7. There are only two Scanners designed specifically for ordering Aligners: Align’s iTero
7 and 3Shape’s Trios. But while Trios is an “open system” Scanner that can be used to order Aligners
8 from a range of Aligner manufacturers, iTero is a *de facto* “closed system” Scanner that imposes
9 substantial costs on Dental Practices who try to use the iTero to send Aligner orders to manufacturers
10 other than Align.

11 8. Thus, as Dental Practices commit to Align’s iTero closed-system Scanner, that drives
12 sales toward Invisalign and excludes rival Aligner manufacturers. Indeed, in 2018, Align touted this
13 linkage of its products as a key competitive advantage in the face of increased competition, telling
14 investors that “to obtain the results we have, you have to have that whole entire technology ready and
15 integrated, something that our competitors don’t have today.”

16 9. Invisalign has always been Align’s crown jewel. For many years, Align had been able to
17 charge high prices and earn high profit margins on Invisalign because the product was protected by a
18 thicket of hundreds of patents that Align wielded aggressively to protect its Aligner monopoly. As Align
19 CEO Joe Hogan stated in 2017:

20 We’ve been in business now for almost 20 years, and we’ve had so few
21 competitors and people think it’s because we have this great IP, it’s true
22 we have good intellectual property, but it took 15 years for people to really
23 believe that you can move teeth with plastics[.] ... It gave us this period of
time to really iterate and learn *without the outside influence of other
competitors coming in.*¹

24 10. Align’s monopoly started to come under threat in 2017 due to the expiration of several of
25 its key patents. Having enjoyed many years operating without “the outside influence of other
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27 ¹ Michela Tindera, *Out of Silicon Valley, A Billion-Dollar Orthodontics Business Built with Plastic and*
28 *Patents*, Forbes (April 25, 2017) (emphasis added).

1 competitors coming in,” and having raised investors’ expectations of continued high revenues and profit
2 margins, Align now faced competition in the Aligner market.

3 11. Align could have responded to that competition by lowering prices or spending more
4 money on research and development to improve the quality of its own Aligners, but instead responded
5 to the threat of competition with a multifaceted anticompetitive scheme to monopolize both the
6 Scanner and Aligner markets (“Scheme”). The Scheme includes: (1) multiyear exclusive dealing
7 contracts with two of the largest dental service organizations (“DSO”) that have the effect of
8 preventing Dental Practices that are DSO members from dealing with Align’s rivals in both the Scanner
9 and Aligner markets, (2) the “Fusion Program,” which bundled iTero with sales of Invisalign orders,
10 and thereby prevented Dental Practices from ordering either Aligners or Scanners from Align’s rivals,
11 (3) the “Advantage Program,” which effectively forces Dental Practices to use iTero to obtain non-
12 penalty prices for Invisalign that they need to offer patients a competitive price for Aligner treatments,
13 (4) the design of iTero and Invisalign such that the products operate as a *de facto* integrated product
14 bundle that penalizes Dental Practices who utilize competing products, and (5) the unilateral
15 termination of Align’s longstanding and profitable agreement with 3Shape that allowed the Trios
16 Scanner to be used to order Invisalign (“Interoperability Agreement”)—a decision that would have
17 been economically irrational but for the anticompetitive effects of that termination.

18 12. This Scheme substantially foreclosed competition in the Aligner and Scanner markets.
19 Through this Scheme, Align ties Invisalign to iTero to maintain dominance in both the Aligner and
20 Scanner markets. For example, because of the closed system architecture of Align’s system, the Dental
21 Practices using iTero Scanners are effectively forced to use Invisalign—to order rival Aligners from their
22 iTero scans, they would incur substantial additional expense and difficulty.

23 13. A Dental Practice that wants to offer Invisalign must, for all practical purposes, purchase
24 and use an iTero. For example, under the Advantage Program, a Dental Practice must have a Scanner in
25 order to achieve the pricing tiers necessary to offer patients a price that is competitive with other Dental
26 Practices. Additionally, Align’s customer referral program steers customers to the top tier prescribers
27 (based on the number of Invisalign treatments ordered), and a Dental Practice can only reach the top
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1 tiers by using a Scanner. But since the implementation of the Scheme, the only Scanner option for these
2 Dental Practices looking to offer Invisalign is the iTero.

3 14. The DSO contracts themselves also represent long-term, exclusive commitments on the
4 part of DSOs to deal only with Align for Aligners and Scanners. Likewise, the Fusion Program ties iTero
5 discounts to such high levels of Invisalign commitments over a number of years that those customers are
6 essentially locked into using both the iTero and Invisalign exclusively. All of this is compounded by
7 Align's "closed system" design and the termination of the Interoperability Agreement with 3Shape,
8 which means that any Dental Practice who wants to offer the dominant Invisalign product must use only
9 an iTero Scanner.

10 15. A rival Aligner manufacturer looking to compete against Invisalign would have to offer
11 below-cost prices to offset the penalties and overcome the restrictions Align has placed on its customers
12 through this Scheme. Likewise, Align has foreclosed Trios, its only true rival in the Scanner market, and
13 has, upon information and belief, not authorized interoperability for any other Scanner manufacturer.
14 Because Align controls approximately 90 percent of the Aligner market, that has effectively foreclosed
15 the ability for a rival Scanner manufacturer to compete.

16 16. The essence of this scheme was that Align was able to use its monopoly power in the
17 Aligner market to drive 3Shape out of the Scanner market, and then to use its increased monopoly
18 power in the Scanner market to maintain its monopoly power in the Aligner market. In this way, Align's
19 ability to leverage both its Scanner and Aligner monopolies to prevent competition in both markets has
20 enabled it to maintain or increase its monopoly power in both markets and to charge supracompetitive
21 prices for both its Aligners and its Scanners.

22 17. Plaintiffs bring this action on behalf of themselves and other Dental Practices who
23 purchased Aligners and/or Scanners directly from Align during the Class Period (defined below).
24 Plaintiffs seek treble damages and injunctive relief, demanding a trial by jury of all issues so triable,
25 under Section 2 of the Sherman Act (15 U.S.C. § 2), and Sections 4 and 16 of the Clayton Act (15
26 U.S.C. §§ 15, 26).

II. PARTIES

18. Plaintiff City Smiles is a Dental Practice located in Chicago, IL that performs scans for Invisalign using the iTero Scanner. City Smiles regularly purchased Invisalign Aligners from Defendant throughout the Class Period (defined below) at prices that were artificially inflated as a result of Defendant's anticompetitive scheme, and thereby suffered antitrust injury. City Smiles also purchased the iTero Scanner from Defendant during the Class Period at a price that was artificially inflated as result of Defendant's anticompetitive scheme, and thereby suffered antitrust injury.

19. Plaintiff VIP is a Dental Practice with offices in the West Hollywood, Los Angeles, and Beverly Hills areas of California. VIP regularly purchased Invisalign aligners from Defendant throughout the Class Period (defined below) at prices that were artificially inflated because of Defendant's anticompetitive scheme, and thereby suffered antitrust injury. VIP also purchased an iTero scanner from Defendant in 2018, at a price that was artificially inflated as result of Defendant's anticompetitive scheme, and thereby suffered antitrust injury.

20. Defendant Align Technology, Inc. is a Delaware corporation, with its headquarters in San Jose, California. Upon information and belief, Defendant has many Invisalign providers in the Northern District of California, which are trained by Defendant to prescribe Invisalign, which purchased iTero Scanners from Defendant, and which purchase Invisalign from Defendant for their patients.

III. FACTS

A. Align's Success Depends Upon Maintaining Its Aligner Monopoly

21. Align's largest source of revenue comes from its Invisalign brand Aligners, by far the dominant product in the Aligner market, with an approximately 90 percent share of the Aligner market. Align earns well over a billion dollars per year selling Invisalign products at gross margins exceeding 75 percent. Its revenues and profits continue to grow year after year, and it continues to raise prices, despite the (largely unsuccessful) efforts of other companies to break into the Aligner market.

22. Align also sells the iTero Scanner. Align acquired the iTero technology through a corporate acquisition and then integrated it with the Invisalign system. The iTero Scanner's integration with Invisalign, as well as Align's anticompetitive conduct described herein, have enabled iTero to

1 become the dominant Scanner. Align now controls approximately 80 percent of the Scanner market,
2 which earns Align hundreds of millions of dollars a year. The iTero Scanner is highly profitable, with
3 profit margins above 60 percent. Align’s only real competitor in the Scanner market is 3Shape, which
4 sells the Trios Scanner. Trios, like iTero, is designed for ordering Aligners.

5 23. Because of its dominance, Invisalign is a “must have” for Dental Practices that offer
6 Aligner treatment to patients. When a patient seeks Invisalign treatment, that patient would visit a
7 Dental Practice authorized by Align to prescribe the treatment. A dentist or staff member would then
8 normally perform a scan of the patient’s jaws, teeth, and bite using a Scanner, and the dentist would
9 review the scan. If the dentist determines that Invisalign treatment is appropriate, the Dental Practice
10 will then purchase a set of custom-made Invisalign Aligners directly from Defendant for that patient’s
11 treatment.

12 24. Align knew that the use of digital Scanners, like iTero, would make it more likely that a
13 Dental Practice would use Aligners—because of the Scanner’s design and “digital workflow,” because it
14 provides a more accurate impression of a patient’s jaws, teeth, and bite for the improved design of that
15 patient’s Aligners, and because once a Dental Practice makes a large investment in a digital Scanner,
16 that practice would be more likely to order more Aligners as a way to pay for the Scanner. In addition, as
17 described below, Dental Practices are able to access non-penalty pricing on Aligners as the number of
18 Invisalign orders increases, thus making Scanners—and in particular ones that can be used to order
19 Invisalign—a critical piece of a Dental Practice’s business.

20 25. The primary focus of Align is selling more Aligners at extremely high profit margins. As
21 Align’s Chief Executive Officer, Joe Hogan, stated in a July 2017 investor call, “[W]e’re in the clear
22 aligner business and anything that help us to sell more clear aligners directly . . . would be in our . . .
23 range. So, that’s why we have a scanner business. We have a scanner business not from a diversification
24 standpoint. We have a scanner business because it allows us to sell more clear aligners.”

25 26. The bottom line was that more iTero Scanners meant more Invisalign orders for Align.
26 As Joe Hogan told investors in an April 2018 call, “So yeah, [iTero] is another component of growth in
27 the company overall. What’s great is it’s synergistic growth, right. You have equipment growth, but it
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1 really leads to the growth of our core product line which is Invisalign.” And as Mr. Hogan reminded
2 Wall Street analysts when discussing Scanner sales in an October 2018 investor call: “[R]emember, it’s
3 just a wonderful footprint for us for future Invisalign business once we have those scanners in place.”

4 27. The fact that Scanners make it easier to order Aligners *could* have spelled trouble for
5 Align’s market dominance in the Aligner market *if* the two available Scanners (iTero and Trios) were
6 able to send scans to any Aligner manufacturer. Then Dental Practices could have offered Invisalign and
7 competing Aligners on equal footing, which would have engendered competition among Aligner
8 manufacturers that would have lowered prices and/or improved quality or innovation. Indeed, Trios is
9 such an “open” platform—as a technological matter, Trios can be used to order Aligners from a wide
10 range of manufacturers. But Align has created a “closed” system for iTero, which limits the ability of
11 Dental Practices to use it to order competing Aligners. And Align has imposed contractual
12 commitments to limit access to Trios and competing Aligners and—after 3Shape refused Align’s
13 demand to send scans for Aligner orders only to Align—terminated the highly profitable Interoperability
14 Agreement with 3Shape, all to create a bulwark to defend Invisalign from competition.

15 28. Thus, for Align, monopolizing the Scanner market was not just about increasing price
16 (and profits) in the Scanner market—which it did—but also about maintaining its monopoly power in
17 the Aligner market, and thereby maintaining its supracompetitive prices and profits on Aligners.

18 **B. Align’s Patents Started to Expire, Exposing it to Potential Competition**

19 29. Defendant held hundreds of patents on its Aligner technology. These patents, along with
20 other high barriers to entry, largely deterred entrants into the Aligner market. Align has aggressively
21 wielded those patents as well, filing patent and trade proceedings against potential competitors in the
22 Aligner market as necessary to maintain its monopoly position.

23 30. The Invisalign brand has become synonymous with Aligners generally. As a result,
24 Dental Practices engaged in the business of straightening teeth must carry Invisalign to satisfy the
25 demands of customers. And as described below, for those Dental Practices who want to offer Invisalign,
26 Align has essentially made it impossible to offer competing Aligners or to use Scanners that compete
27 with Align’s iTero.
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1 31. Align’s monopoly started to come under threat in 2017 due to the expiration of many of
2 its key patents, with additional key patents expiring by the end of 2019. Having enjoyed years of
3 operating without “the outside influence of other competitors coming in,” as patent expiry loomed,
4 Align changed its message to investors from reliance on the patents to protect its monopoly, to concern
5 that “[w]hen patents expires, we lose the protection and competitive advantages they provided to us,
6 which could negatively impact . . . operating results.” But instead of competing on the merits of its
7 products and its pricing, Align responded to the emerging threat of competition by implementing the
8 Scheme, described in detail below, to use its monopoly power in both the Aligner and Scanner markets
9 to maintain and/or increase its monopoly power in each market and continue to charge
10 supracompetitive prices for both Aligners and Scanners.

11 **C. Align’s “Closed System” Protects It from Competition**

12 32. One piece of the bulwark protecting Align’s monopoly power is Align’s “closed system”
13 design of its Scanner and Aligner technology. For example, iTero is the only Scanner with integration
14 into the Align treatment system, including Align’s Invisalign Outcome Simulator. Because of the way
15 iTero is integrated into the “digital workflow” a Dental Practice would use to order Invisalign, Align
16 knew that placing its Scanners in Dental Practices was going to drive those Dental Practices to use
17 Invisalign exclusively.

18 33. Second, iTero is intentionally designed in such a way that it is expensive, inefficient, and
19 impracticable to use it to order non-Invisalign Aligners. For example, iTero does not create scans in the
20 standard file format used by other Aligner manufacturers, and thus, a Dental Practice wishing to order
21 non-Invisalign Aligners using iTero scans must either undertake an expensive and time-consuming
22 process of converting iTero scans to a format that can be used for other Aligners, or use silicone-based
23 molds to create a cast of a patient’s mouth and teeth, which is a messy, uncomfortable for the patient,
24 time-consuming, and inefficient method. By contrast, 3Shape’s Trios Scanner uses standard file formats
25 and cloud technology to work with numerous Aligner brands, including Invisalign (prior to Align’s
26 termination of 3Shape’s Interoperability Agreement). For this reason, Trios represented a breach in
27 Align’s bulwark protecting Invisalign from competition.

1 34. Third, Align intentionally does not accept scans from any Scanner for Invisalign orders,
2 but rather, only allows Invisalign orders from a limited group of authorized scanners. Until the
3 termination of Align's Interoperability Agreement with 3Shape, discussed below, the Trios Scanner was
4 one such authorized Scanner. Upon information and belief, Align has only allowed interoperability for
5 scanners that are not designed for ordering Aligners, that do not compete with iTero in the Scanner
6 market, and that do not represent a threat to Align's dominance of the Aligner market. According to
7 3Shape, at the Greater New York dental meeting in November 2017, Align executive Raphael Pascaud
8 communicated to 3Shape that Align will no longer validate any non-iTero intraoral scanner for use with
9 Invisalign. Given that Invisalign orders are highly profitable for Align, this decision by Align terminated
10 a previously highly profitable course of conduct for Align for the sole reason of furthering Align's
11 exclusionary conduct.

12 35. Scanners are essential for Dental Practices to offer and sell Aligners (particularly
13 Invisalign) to their patients, and Dental Practices typically do not purchase more than one Scanner due
14 to the expense. In the case where a Dental Practice buys more than one Scanner, that practice
15 nonetheless would tend to use only one *brand* of Scanner due to the cost of maintaining multiple
16 software subscriptions and the time and expense to train personnel to use different Scanners and
17 software programs. And like most such capital investments, a Scanner is meant to last several years.

18 36. Thus, the iTero Scanner and Invisalign operate as a *de facto* product bundle by (a) making
19 iTero the only viable option for Dental Practices seeking to sell the market-dominant Invisalign to their
20 patients, and (b) preventing other Scanners from becoming established in the market that would allow
21 dentists to order competing Aligners without undue burden. In order to cause the vast majority of
22 Dental Practices to have long-term dependence on both the iTero Scanner and Invisalign Aligners,
23 Align has engaged in the anticompetitive Scheme to entrench its monopoly power in the Aligner and
24 Scanner markets.

D. Align Terminated 3Shape's Interoperability to Foreclose Competition

37. 3Shape has been selling the Trios Scanner internationally since 2011, and in the United States since 2012. Unlike Align's iTero, the Trios can send scans to any manufacturer of Aligners without any fees, delays, conversion process, or loss of image resolution. This was an advantage to Trios customers because it allowed for choice of Aligners and would have benefitted Dental Practices had other Aligner manufacturers been able to compete with Invisalign on the merits with lower prices and/or better quality for Aligners.

38. Indeed, Align's then-Chief Operating Officer told industry analysts in an April 23, 2015 investor call (when its Aligner market dominance was protected by patents), such open systems

are better for our customers. No one wants to have to redesign, start over, buy multiple pieces of equipment if they can have greatest utility from a scanner... So, we believe what we hear from our customers is they don't want to be forced to buy a system from you for the pleasure of offering Invisalign to their patients and other therapies we may have down the road. So we feel actually very strongly There's no reason for us not to act in complementary ways because it's good for the customer. So in our minds, we don't need to own the channel. We don't need to have exclusivity. *In fact, we want probably more high-quality scanners that can make it easier to do Invisalign and other chair-side procedures that we have the unique capabilities to fulfill.*

39. In December 2015, Align and 3Shape entered into the Interoperability Agreement, under which the parties worked together to build an interface so that dental professionals could send Trios scans into Align's Invisalign workflow. According to 3Shape, Align executive Raphael Pascaud testified in prior litigation that Align had entered into this Interoperability Agreement to increase Aligner sales, including from Dental Practices that were already using the Trios Scanner.

40. But even as Align was preparing to enter into the Interoperability Agreement, according to 3Shape, Align was seeking to change the terms of its relationship with 3Shape by proposing an agreement whereby 3Shape would agree to make its Trios Scanners send scans *exclusively* to Align for Invisalign Aligners. Align also did not want 3Shape to promote or offer alternative software capable of staging treatments from non-Invisalign Aligners. Align knew that 3Shape's open system and popularity represented a breach in the bulwark it had erected around Invisalign, and thus, the purpose of this proposed exclusive arrangement was for Align to impair other Aligner manufacturers.

1 41. 3Shape refused to make the Trios exclusive to Align, as Align had asked. Instead, 3Shape
2 sought to continue to allow the Trios to send scans to any Aligner manufacturer in the interests of open
3 competition. 3Shape wanted to maintain 3Shape’s relationships with other Aligner manufacturers, as
4 well as to allow 3Shape to develop its own software to compete with Align. The Interoperability
5 Agreement ultimately permitted 3Shape to provide scans to other Aligner manufacturers as well as to
6 continue to promote and offer its own software.

7 42. According to 3Shape, shortly after the Interoperability Agreement was signed, Align
8 began again to seek to change the terms. In a February 2016 meeting, attended by top Align executives,
9 Align made clear that as part of any further collaboration between the companies, 3Shape would need to
10 treat Invisalign as the “preferred partner” for Aligners. In a November 2016 meeting, Align asked
11 3Shape to enter into a joint venture that would allow Align to control Trios. 3Shape again refused.

12 43. According to 3Shape, throughout 2017, including at the International Dental Show in
13 March 2017, Align executive Raphael Pascaud continued to demand that 3Shape agree to the joint
14 venture that would exclude Invisalign competitors. During this time, 3Shape has alleged that it heard
15 from resellers and distributors that Align had threatened that it would end interoperability with Trios.

16 44. On December 20, 2017, Align announced that it would terminate the Interoperability
17 Agreement with 3Shape as of January 17, 2018, and the Trios would no longer be able to submit scans
18 for Invisalign.

19 45. After many Dental Practices and the American Association of Orthodontists expressed
20 dismay at the termination, Align extended the date of termination to January 31, 2018, and then
21 terminated the Interoperability Agreement on that date, making Trios Scanners no longer capable of
22 ordering Invisalign.

23 46. This termination represented a sacrifice of revenue for Align, and it was economically
24 irrational but for the market exclusion this profit sacrifice created. Indeed, according to 3Shape, Align
25 had profited from the interoperability agreement with 3Shape that allowed Trios users to order
26 Invisalign, and in fact received 40,000 Invisalign orders from Trios in the United States between
27 October 2016 and January 2018. Upon information and belief, at an estimated consumer price of \$3,000
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1 to \$8,000 per treatment with high profit margins, Align’s termination of the interoperability agreement
2 represented a profit sacrifice of many millions of dollars.

3 47. Because Align has not blocked Trios users outside of the United States from ordering its
4 Aligners, there are approximately 23,000 Invisalign orders per month from those Trios users, which is
5 nearly 40 percent of all Invisalign global submissions to Align. Align sacrificed profits in the short run by
6 refusing to allow the Trios or other potential Scanners to order Invisalign in the United States, and
7 Align engaged in this conduct solely to make the iTero the only viable Scanner for dental professionals
8 in the United States to purchase and use, which would allow it to enhance its monopoly power in the
9 Scanner market, and would allow it to maintain its monopoly power in the Aligner market.

10 48. Although the Interoperability Agreement extends beyond the United States, Align
11 terminated interoperability only with respect to the United States. In the rest of the world, where Align
12 has a materially lower Aligner market share, Align has continued to accept scans from the Trios scanner
13 because it cannot effectively force customers to use iTero by threatening to withhold access to
14 Invisalign, and because Align profits from interoperability there just as it did when Trios interoperability
15 existed in the United States.

16 49. Interoperability had also been a benefit to Dental Practices who had increased choice of
17 Scanners and Aligners, and who would have benefitted from increased competition in the form of lower
18 prices but for Align’s conduct. Upon termination of the Interoperability Agreement, those Dental
19 Practices with Trios Scanners were forced either to quit offering Invisalign to patients (and many of
20 those patients were in the middle of multi-month treatment programs with Invisalign), to order a new
21 Scanner (despite having spent thousands or tens of thousands of dollars on a Trios, which many Dental
22 Practices find to be a superior Scanner), or to go back to using silicone-based molds. According to
23 3Shape, for American Dental Practices seeking to order Invisalign Aligners, termination of
24 interoperability in the United States made the Trios “basically a paperweight,” as one dental
25 professional complained.

26 50. In short, Align was willing to forego short-term profits on its Aligners (from Trios
27 owners ordering Invisalign), and to sacrifice customer goodwill, in order to engage in the
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1 anticompetitive Scheme described herein and thereby further its dominance in the Aligner and Scanner
2 markets. By gaining and/or maintaining its monopoly power in the Aligner and Scanner markets, and
3 foreclosing competition in both markets, Align would profit far more than it lost by terminating the
4 Interoperability Agreement, all at the expense of Align’s customers.

5 **E. Align Entered into Multi-Year Exclusionary Contracts to Entrench its Monopoly Power**

6 51. Beginning in mid-2018, Align entered into multiyear contracts with at least two of the
7 nation’s largest dental service organizations (“DSOs”), Heartland Dental and Aspen Dental, that
8 effectively exclude 3Shape from their members’ dental offices. DSOs provide business support to
9 independent Dental Practices, including by managing purchasing contracts with suppliers. Align has
10 reported that DSOs are an important “strategic part of [Align’s] overall strategy,” are a “force
11 multiplier” for Align, and were a significant factor in Align’s 2018 “[r]ecord Q4 volumes [of sales].”

12 52. In line with its “Fusion Program,” described below, Align dramatically dropped the price
13 of the iTero to major DSOs in exchange for multi-year Invisalign order commitments. Those
14 commitments could practicably be achieved only if a DSO sent Aligner scans exclusively to Align, and
15 not to its Aligner competitors. As a result, sales of iTero scanners to DSOs increased dramatically, and
16 sales of Invisalign were accordingly higher than they would have been absent these agreements.

17 53. On July 25, 2018, Align announced a multi-year deal with Heartland Dental, the nation’s
18 largest DSO with more than 850 supported dental offices, to place iTero scanners in member dental
19 offices, under a timeline that would place iTero in 90 percent of supported offices nationwide by the end
20 of the year. As a result of the deal, Heartland Dental purchased 900 iTero scanners in 2018. The
21 Heartland “endeavor represent[ed] the industry’s single-largest scanner deployment.” And as with
22 Align’s overall efforts to use iTero to lock practices into Invisalign, Heartland’s “front-loading their
23 businesses with iTero” will, in turn, “give them a very strong position in clear aligners.”

24 54. On July 25, 2018, Align announced that it had also secured a deal with Aspen Dental,
25 another of the nation’s largest DSOs with nearly 700 locations, to equip all Aspen locations with iTero
26 scanners.

1 55. 3Shape has stated that it bid for the Aspen Dental contract, and its Trios scanner scored
2 the highest in Aspen Dental’s evaluations, but Aspen Dental informed 3Shape that Aspen Dental did
3 not select the Trios scanner because Align did not permit the Trios to interoperate with Invisalign. In
4 other words, because of Align’s dominant position in the Aligner market, Aspen Dental was forced to
5 select Align’s less desirable iTero scanner.

6 56. These DSO contracts have enabled Align to rapidly increase its market share in the
7 Scanner market and, because of Align’s conduct as alleged herein, to use its increased monopoly power
8 in the Scanner market to maintain and enhance its monopoly power in the Aligner market. Align
9 reported an 84 percent growth in its scanner sales in North America in the first quarter of 2018. And in
10 Q3 2018, Align saw “strong volume growth from the Dental Service Organizations (DSOs) channel
11 which increased over 40% Y/Y in Q3.”

12 **F. Align’s “Fusion Program” Links iTero Prices and Invisalign Sales**

13 57. In late 2017, as patent expiry loomed, Align launched the Fusion Program, a bundled
14 pricing mechanism for iTero that further entrenched its dominance in the Aligner and Scanner markets.

15 58. Upon information and belief, under the Fusion Program, the price of the iTero Scanner
16 depended on a Dental Practice’s purchases of Invisalign. Failure to meet a minimum threshold of
17 Invisalign cases each year for a three-year period resulted in substantial annual back-end penalties. Align
18 set these targets in a manner that forced the Dental Practices either to stop sending cases to Align’s
19 Aligner competitors or trigger the substantial penalties.

20 59. The penalties could total \$10,000 over three years, or 30 percent or more of the cost of
21 the iTero scanner. A Dental Practice that incurred these penalties would be at a substantial disadvantage
22 to other Dental Practices that avoided these penalties. Given Align’s dominant position in the market
23 for Aligners, Dental Practices who wanted to offer Aligner treatment could not forego Invisalign orders
24 entirely.

25 60. The effect of Align bunding its Scanner with its market dominant Aligners is that Dental
26 Practices are substantially foreclosed from ordering Aligners from Align’s rivals. Indeed, according to
27 3Shape, experts have described the Fusion Program as “a not-so-subtle effort on the part of
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1 management to lock these customers in for a fairly long time, in our view, just as Clear Aligner
2 competition is likely set to rise over the next 3-6+ months.”

3 61. Absent the bundled pricing, the Trios and iTero scanners were sold at similar list prices.
4 In the bundle, however, the effective price of the iTero (when incorporating the incentives for effectively
5 agreeing not to purchase Aligners from Align’s competitors) was \$10,000 cheaper (as reflected in the
6 penalty provisions of the program). According to 3Shape, dropping the Trios price to offset the
7 penalties on such sales would represent a loss of a third of the Trios Scanner revenue, yet Align could
8 make up the lost revenue with the sales of just a few cases of Invisalign per iTero Scanner.

9 **G. Align’s Advantage Program Further Forecloses Competition**

10 62. Align offers a tiered discount program, called the Advantage Program, that conditions a
11 Dental Practice’s prices for Invisalign on that Dental Practice’s ability to maintain certain levels of
12 Invisalign cases over time. In the most recent iterations of the Advantage Program, a Dental Practice’s
13 prices are based on its ability to maintain recent (either the prior six-month or 12-month) numbers of
14 Invisalign orders. The structure of the Advantage Program is such that Dental Practices must maintain a
15 very high prescribing level of Invisalign in order to keep the prices that would allow their practice to
16 offer competitive prices to patients.

17 63. Upon information and belief, in 2018, Align changed the program by changing the
18 pricing criteria from focusing on the number of lifetime cases for a Dental Practice to a system based on
19 the number of cases submitted by a Dental Practice in the previous six months. The Advantage Program
20 was then changed again more recently to base discounts on the number of cases submitted in the most
21 recent 12-month period.

22 64. One practical effect of the Advantage Program is that for Dental Practices to obtain the
23 pricing for Invisalign necessary to offer Invisalign at competitive rates, those Dental Practices would, for
24 all practical purposes, need to purchase a Scanner. Because Trios is no longer interoperable with
25 Invisalign, the Advantage Program forces Dental Practices to either stop purchasing and/or using Trios
26 or lose favorable pricing. According to 3Shape, Align’s Advantage program has thus caused Dental
27 Practices to forego 3Shape’s Trios entirely, or in some cases, drastically reduce purchases from 3Shape.
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1 65. Another practical effect of the Advantage Program is that Dental Practices would have a
2 strong incentive to forego competing Aligners at least until it was clear that the practice had achieved
3 the minimum number of Invisalign orders necessary to maintain its prices. Further, for those Dental
4 Practices who have now been forced over to iTero, those practices are also effectively foreclosed for rival
5 Aligner manufacturers because of the “closed system” architecture of the iTero system.

6 66. In this way, the Advantage Program substantially forecloses competition from rival
7 Aligner and Scanner manufacturers and has allowed Align to maintain and/or increase its monopoly
8 power in the Aligner and Scanner markets.

9 **H. Align’s Scheme Substantially Foreclosed Competition and Harmed Consumers**

10 67. Align’s Scheme has substantially foreclosed competition in both the Aligner and Scanner
11 markets and has enabled Align to impose supracompetitive prices for Scanners and Aligners.

12 68. Through this Scheme, Align ties Invisalign to iTero to maintain dominance in both the
13 Aligner and Scanner markets. For example, because of the closed system architecture of Align’s system,
14 the Dental Practices using iTero Scanners are effectively forced to use Invisalign or incur the expense
15 and difficulty of using iTero to order rival Aligners.

16 69. A Dental Practice that wants to offer Invisalign must, for all practical purposes, purchase
17 and use an iTero. For example, under the Advantage Program, a Dental Practice must have a Scanner in
18 order to achieve the pricing tiers necessary to offer patients a competitive price for Invisalign.

19 Additionally, Align’s customer referral program steers customers to the highest-volume prescribers, and
20 a Dental Practice can only reach those tiers by using a Scanner. Since the implementation of the
21 Scheme, the only true Scanner option for these Dental Practices looking to offer Invisalign is the iTero.

22 70. The DSO contracts themselves also represent long-term, exclusive commitments on the
23 part of DSOs to deal only with Align for Aligners and Scanners. Likewise, the Fusion Program ties iTero
24 discounts to such high levels of Aligner commitments over a number of years that those customers are
25 essentially locked into using both the iTero and Invisalign exclusively. All of this is compounded by
26 Align’s “closed system” design and the termination of the Interoperability Agreement with 3Shape,
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1 which means that any Dental Practice who wants to offer the dominant Invisalign product must use only
2 an iTero Scanner.

3 71. A rival Aligner manufacturer looking to compete against Invisalign would have to offer
4 below-cost prices to offset the penalties and overcome the restrictions Align has placed on its customers
5 through this Scheme. Likewise, Align has foreclosed Trios, its only true rival in the Scanner market, and
6 has, upon information and belief, not authorized interoperability for any other Scanner manufacturer.
7 Because Align controls approximately 90 percent of the Aligner market, that has substantially foreclosed
8 any ability for a rival Scanner manufacturer to compete.

9 72. As discussed above, Align's Scanner and Aligner monopolies are self-reinforcing. Align
10 sought to use its substantial market power to eliminate competition from the Trios and other competing
11 Scanners that are able to order Aligners from other manufacturers, and thereby make the iTero the only
12 viable option for Dental Practices to purchase and use. Not only would that allow Align to enhance its
13 monopoly power in the Scanner market, but that would also allow Align to prevent other Aligner
14 manufacturers from becoming established and competing with Invisalign, allowing Defendant to
15 enhance its monopoly power in the Aligner market.

16 73. Indeed, these foreclosure effects and the harm to competition and consumers are not
17 hypothetical. After the expiration of key patents, Align began to face the prospect of competition in the
18 Aligner market from large companies with substantial experience in the dental field, such as Straumann,
19 a global tooth replacement and orthodontics manufacturer who had purchased Align's largest (though
20 still minimal) competitor ClearCorrect; Henry Schein, a worldwide distributor of medical and dental
21 supplies that tried to introduce a competing Aligner product; and 3M, a global manufacturer who tried
22 to introduce a competing Aligner product in May 2018. Yet despite the size and resources of the
23 potentially competing Aligner manufacturers, none of them have been able to gain a foothold in the
24 Aligner market, where Align has maintained an approximately 90 percent share. Indeed, according to
25 3Shape, Align's CEO insisted that it could "still jack price in the marketplace" notwithstanding
26 potential competitors, and indeed, Align did increase prices in 2019. Thus, because of Align's Scheme,
27 choice has been limited and prices have continued to be supracompetitive.

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1 80. Defendant has marketed its Invisalign Aligners to Dental Practices and patients in all 50
2 states.

3 81. Defendant has sold its Invisalign Aligners to Dental Practices in all 50 states.

4 82. Defendant has recruited and trained dental and orthodontic professionals to perform
5 scans for Invisalign patients in all 50 states, and there are dental and orthodontic professionals who
6 actively perform scans for Invisalign patients in all 50 states.

7 83. The market for Scanners in the United States is a national market.

8 84. Defendant has marketed and sold its iTero Scanner to Dental Practices in all 50 states.

9 85. Defendant's business in Aligners and Scanners involves a continuous and uninterrupted
10 flow of commerce across state lines.

11 86. Defendant's anticompetitive actions have had a substantial effect on interstate trade and
12 commerce in the markets for Aligners and Scanners.

13 VI. CLASS ACTION ALLEGATIONS

14 87. Plaintiffs bring this action on behalf of themselves and all others similarly situated
15 pursuant to Federal Rule of Civil Procedure 23 as representative of a Class defined as follows:

16 All persons or entities in the United States that purchased Invisalign
17 Aligners and/or iTero Scanners directly from Defendant Align
18 Technology, Inc. during the period beginning March 15, 2015 until such
19 time as the anticompetitive conduct alleged herein has ceased (the "Class
20 Period"). Excluded from the Class are (a) Defendant, its subsidiaries,
21 affiliate entities, and employees, and (b) all federal or state government
22 entities or agencies.

23 88. The members of the Class are so numerous that joinder is impracticable. Tens of
24 thousands of Dental Practices have purchased Invisalign Aligners and iTero Scanners directly from
25 Defendant during the Class Period.

26 89. There are numerous questions of law and fact that are common to the Class and that
27 predominate over any issues affecting individual members of the Class, including, *inter alia*:

28 a. Whether Defendant terminated its agreement with 3Shape in order to
maintain and/or enhance its monopoly power in the market for Aligners;

1 b. Whether Defendant terminated its agreement with 3Shape in order to
2 maintain and/or enhance its monopoly power in the market for Scanners;

3 c. Whether Defendant's practice of allowing only its iTero Scanner to send
4 scans directly to Defendant for Invisalign patients on commercially reasonable terms, and
5 preventing 3Shape's Trios Scanner and other potentially competing Scanners from doing so,
6 constitutes a violation of the antitrust laws;

7 d. Whether Defendant's policy of requiring dentists who wish to prescribe
8 Invisalign Aligners, but who do not use Defendant's iTero Scanner or another approved scanner,
9 to create manual casts of patients' teeth from a silicone mold, involves imposing a burdensome
10 and inefficient alternative;

11 e. Whether Defendant's refusal to accept, for Invisalign orders, the standard
12 file format used by other Aligner manufacturers, has legitimate medical or technical reasons or is
13 anticompetitive;

14 f. Whether Defendant's contractual restrictions and penalties imposed on
15 customers for dealing with rivals are anticompetitive;

16 g. Whether Defendant has substantial market power in the market for
17 Aligners sold in the United States;

18 h. Whether Defendant has substantial market power in the market for
19 Scanners sold in the United States;

20 i. Whether Defendant has substantially foreclosed competition in the
21 markets for Aligners and/or Scanners;

22 j. Whether Defendant's Scheme has artificially raised prices and reduced
23 competition in the market for Aligners;

24 k. Whether Defendant's Scheme has artificially raised prices and reduced
25 competition in the market for Scanners;

26 l. Whether Defendant's Scheme has a legitimate pro-competitive
27 justification;

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1 m. Whether the conduct alleged herein artificially maintained, preserved, or
2 enhanced Defendant's market power in the market for Aligners;

3 n. Whether the conduct alleged herein artificially maintained, preserved, or
4 enhanced Defendant's market power in the market for Scanners;

5 o. The operative time period and extent of Defendant's antitrust violations;

6 p. Whether the conduct alleged herein caused damages to the members of
7 the Class in the form of overcharges paid for Aligners, and the proper measure of such
8 overcharge damages;

9 q. Whether the conduct alleged herein caused damages to the members of
10 the Class in the form of overcharges paid for Scanners, and the proper measure of such
11 overcharge damages; and

12 r. The appropriate injunctive and equitable relief for the Class.

13 90. Plaintiffs' interests are typical of, and not antagonistic to, those of other or absent
14 members of the Class, such that they can fairly and adequately represent and protect the interests of the
15 Class members.

16 91. Plaintiffs have retained counsel with substantial experience litigating complex antitrust
17 class actions, including substantial experience litigating such cases within this District.

18 92. Class treatment of Plaintiffs' federal antitrust claims is a superior method for the fair and
19 efficient adjudication of this controversy in that, among other things, such treatment will permit a large
20 number of similarly situated persons to prosecute common claims in a single forum simultaneously,
21 efficiently, and without the unnecessary duplication of effort and expense that numerous individual
22 actions would engender.

23 93. Plaintiffs know of no difficulty likely to be encountered in the maintenance of this action
24 as a class action under Federal Rule of Civil Procedure 23.

VII. RELEVANT MARKETS

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2 94. At all relevant times, Align had substantial market power in the market for Aligners. It
3 had the power to maintain the price of Invisalign at supracompetitive levels profitably without losing
4 substantial sales to other products used for the same purposes as Invisalign.

5 95. To the extent Plaintiffs' claims require the definition of a relevant market for Aligners,
6 the relevant product market is the market for custom-manufactured, transparent, removable dental
7 aligners made from clear plastic or similar materials.

8 96. To the extent Plaintiffs' claims require the definition of a relevant market for Aligners,
9 the relevant geographic market is the United States. The Food and Drug Administration has to approve
10 medical devices such as Aligners, and consumers in the United States cannot practically seek out
11 alternative Aligners from other countries that have not been approved for sale and use in the United
12 States. Therefore, the price of Aligners in other countries does not affect the market for Aligners in the
13 United States.

14 97. There are also high barriers to entry in the Aligner market, due in part to the cost of
15 establishing and running manufacturing facilities and the cost of regulatory approval.

16 98. At all relevant times, Align has had an approximately 90 percent share of the market for
17 Aligners in the United States. Moreover, there are substantial barriers to entry for potential competitors
18 in the Aligner market.

19 99. Metal braces are not a reasonable substitute for Aligners. Aligners are used for patients
20 with moderate tooth misalignment, or who cannot receive metal braces due to activities in which they
21 are involved, such as certain sports. Metal braces are used for patients with severe tooth misalignment,
22 for whom Aligners would not be sufficient for proper treatment. Metal braces are also far more
23 uncomfortable, typically take a longer period for treatment to complete, require patients to avoid certain
24 foods, and require repeated visits to an orthodontist.

25 100. A small but significant and non-transitory artificial inflation of the price of Aligners
26 would not cause any significant number of consumers to purchase other potentially substitutable
27 products, including metal braces, instead, so as to make such price inflation unprofitable. A small but
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1 significant and non-transitory artificial inflation of the price of metal braces would not cause any
2 significant number of consumers to purchase Aligners instead, so as to make the artificial price inflation
3 unprofitable.

4 101. At all relevant times, Align had market power in the market for Scanners. It had the
5 power to maintain the price of iTero Scanners at supracompetitive levels profitably without losing
6 substantial sales to other products used for the same purposes as iTero Scanners.

7 102. To the extent Plaintiffs' claims require the definition of a relevant market for Scanners,
8 the relevant product market is the market for hand-held digital intra-oral scanners designed for ordering
9 Aligners.

10 103. To the extent Plaintiffs' claims require the definition of a relevant market for Scanners,
11 the relevant geographic market is the United States. The Food and Drug Administration has to approve
12 medical devices such as Scanners, and dental professionals in the United States cannot practically seek
13 out alternative Scanners from other countries that have not been approved for sale and use in the United
14 States. Therefore, the price of Scanners in other countries does not affect the market for Scanners in the
15 United States.

16 104. There are also high barriers to entry in the Scanner market, due in part to the cost of
17 establishing and running manufacturing facilities and the cost of regulatory approval.

18 105. At all relevant times, Align has had an approximately 80 percent share in the market for
19 Scanners in the United States. Additionally, there are substantial barriers to entry for potential
20 competitors in the Scanner market.

21 106. 3Shape's Trios and Defendant's iTero are part of the relevant market for Scanners.

22 107. 3M's True Definition and Dentsply Sirona's CEREC Omnicam scanners are designed to
23 scan individual teeth for crowns and other localized dental restorative work, and they are not as suitable
24 for performing a full-mouth scan for the customized design of a patient's Aligners, and they are thus not
25 reasonable economic substitutes for Scanners.

26 108. Accordingly, 3M's True Definition and Dentsply Sirona's CEREC Omnicam scanners
27 are not part of the relevant market for Scanners.
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WHEREFORE, Plaintiffs demand a trial by jury and hereby respectfully request:

- (a) That the Court determine that Plaintiffs’ claim regarding the Class alleged herein is suitable for class treatment and certify the proposed Class pursuant to Fed. R. Civ. P. 23;
- (b) That the Court appoint Plaintiffs as the representatives of the Class;
- (c) That Plaintiffs’ counsel be appointed as counsel for the Class;
- (d) That the Court award, pursuant to 15 U.S.C. § 15, compensatory and trebled damages to the Class resulting from Defendant’s violations of the Sherman Act;
- (e) That the Court order, pursuant to 15 U.S.C. § 26, permanent injunctive relief preventing Defendant from continuing its unlawful acts in violation of the Sherman Act;
- (f) That Plaintiffs and the Class be awarded their costs, expenses, and reasonable attorney’s fees in bringing this action;
- (g) That Plaintiffs and the Class be awarded pre-judgment and post-judgment interest on all sums awarded; and
- (h) Such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiffs demand a trial by jury of all issues properly triable to a jury in this case.

1 Dated: August 14, 2020

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3 Joseph R. Saveri

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