

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

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

Inv. No. 337-TA-562
(Enforcement Proceeding)

Order No. 75

Complainant Align Technology, Inc. (“Align”) filed a Joint Motion to Stay All Remaining Dates in the Procedural Schedule Pending the Federal Circuit’s Opinion. Motion Docket No. 562-70. Align is joined in the pending motion by respondents ClearCorrect Operating, LLC; ClearCorrect Pakistan (Private), Ltd.; Mudassar Rathore; Waqas Wahab; Asim Waheed; and Nadeem Arif (collectively, “ClearCorrect”).¹ The Commission Investigative Staff (“Staff”) does not oppose the requested relief.² *See* Mot. at 1, 12-13.

The movants request “to stay all remaining dates in the procedural schedule pending the issuance of the mandate in the pending Federal Circuit Appeal (Appeal Nos. 14-1533 and 14-1527) of related Inv. No. 337-TA-833 (‘833 Appeal’) under certain conditions agreed to by the parties.” Mot. at 1. This is similar to the relief previously requested in ClearCorrect’s Motion to Stay, *i.e.*, “a stay of this investigation until the appeal of investigation 337-TA-833 is complete.” *See* Mem. in Support of ClearCorrect’s Mot. to Stay at 12.

¹ ClearCorrect previously filed Respondents’ Motion to Stay Investigation Pending the Appeal of Investigation 337-TA-833 (“ClearCorrect’s Motion to Stay”) (Motion Docket No. 562-63). Order No. 70 denying ClearCorrect’s Motion to Stay issued on January 5, 2015.

² With respect to ClearCorrect’s Motion to Stay, the Staff filed a response opposing a stay. *See* Staff Resp. to ClearCorrect’s Mot. to Stay.

In response to ClearCorrect's Motion to Stay, Align previously argued that all five factors enumerated in *Certain Semiconductor Chips* weighed against a stay of this proceeding. *See, e.g.,* Opp'n to ClearCorrect's Mot. to Stay at 11 (citing *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, Comm'n Op. at 3). Specifically, Align argued that (1) "the advanced state of discovery and the proceedings do not support a stay," (2) "the appeal of the Commission's determination in the 833 Investigation will not simplify the issues or hearing in this case," (3) "Align will be prejudiced by a stay," (4) "the appeal of the Commission's determination in the 833 investigation is still in the early stages," and (5) "a stay is not an efficient use of Commission resources." *See id.* at 12-31. With the currently pending motion, Align now argues that all five factors warrant a stay. *See* Mot. at 9-12.

With respect to the first factor (*i.e.*, the state of discovery and the hearing date), it is argued that "there are less than five weeks remaining until the hearing date (April 15-17, 2015), and a significant amount of discovery remains that was: (i) not anticipated by the Parties; and (ii) related to processes not of record in 2012," and that "a stay, during which the Parties can complete their review of documents collected by [a discovery vendor] and for Align to fully consider Respondents' current process, is warranted." Mot. at 9.

With respect to the second factor (*i.e.*, whether a stay will simplify the issues and hearing of the case), it is argued that "the current record now weighs in favor of a stay," yet it does not appear that the positions held by the private parties as to this factor have shifted appreciably since the issuance of Order No. 70. In particular, it is stated that "[w]hile the Private Parties continue to disagree as to the potential effects of the rulings in the '833 Appeal, at least one of the Private Parties believes that such rulings will provide guidance in this Investigation as to [certain] issues," and that "[a]t least one of the Private Parties believes that rulings as to these

issues would make similar issues in this Investigation more amenable to summary determination and/or stipulation after the record is more fully developed.” *See* Mot. at 10. These are the same positions taken by the private parties in connection with ClearCorrect’s Motion to Stay, where Align argued that the Federal Circuit appeal would not simplify the issues in this proceeding, and where ClearCorrect argued that it would do so.

With respect to the third factor (*i.e.*, the undue prejudice or clear tactical disadvantage to any party), it is argued that “the prejudice to Align as to further delay is balanced by Align’s ability to fully review the collected information during the interim period.” *See* Mot. at 11.

With respect to the fourth factor (*i.e.*, the stage of the concurrent proceedings), it is argued that, “since Respondents’ prior *Motion to Stay* was analyzed, the ‘833 Appeal has proceeded and its schedule has crystallized.” *See* Mot. at 11. It is further argued that “[t]he parties expect that oral argument will likely be scheduled in June or July of 2015, and that a Federal Circuit Mandate will issue by the end of this year. Thus, the proposed stay here would be relatively limited, and the parties will use the intervening time to complete their discovery activities as outlined above.” *See id.*

With respect to the fifth factor (*i.e.*, the efficient use of Commission resources), it is argued that “the current record now weighs in favor of a stay.” *See* Mot. at 12. Specifically, it is argued that “the Private Parties now submit that the other four factors weigh in favor of a stay, and the potential efficiencies gained from completing the ‘833 Appeal are complementary to the findings as to those factors.” *Id.*

Having reviewed the arguments advanced by the parties, it is evident to the administrative law judge that Align’s switch in position regarding a stay of this proceeding is motivated in part by the discovery produced by ClearCorrect. Indeed, “Align believes that it

should be afforded time to ensure it understands Respondents' changes to its [accused] processes and to fully digest Respondents' documents with regard to their current process" Mot. at 5. Nevertheless, the only relief requested is dependent on the Federal Circuit mandate.³

On January 5, 2015, the administrative law judge issued Order No. 71 setting the target date for this remand proceeding at October 26, 2015. This 11-month target date was set in accordance with the Commission Rules, which anticipate completion of formal enforcement proceedings within 12 months. *See* 19 C.F.R. § 210.51(a)(2). The stay requested in the pending motion would require extending the target date of this proceeding to an unspecified length of time, but in excess of 22 months by even the most conservative calculation. The parties have not shown good cause to do so. *See* 19 C.F.R. § 210.51(a) ("After the target date has been set, it can be modified by the administrative law judge for good cause shown . . .").

In particular, the parties propose a discovery schedule in which document discovery continues through October 2015. *See* Mot. at 5-7. The parties further propose to "submit a joint paper to the presiding ALJ within two weeks of a[n] issuance of a Federal Circuit Mandate in the pending appeals from the Commission's determination in the 833 Investigation (Appeal Nos. 14-1533 and 14-1527) in which they detail their positions on whether the stay should continue and, if not, their proposed procedural schedule and positions as to necessary discovery in view of the Mandate." *Id.* at 7-8. It is unclear what timeframe the parties contemplate for completing fact and expert discovery, holding the evidentiary hearing, and terminating this enforcement proceeding.

The administrative law judge declines to issue the open-ended stay of the proceedings

³ The posture in which Align finds itself cannot be entirely unforeseen. Align brought the complaint in the underlying 562 investigation. Align brought the enforcement complaint upon which the instant proceeding is based. Align brought the complaint in the 833 investigation. Align is an appellant in the 833 case before the Federal Circuit.

requested by the parties.

Motion No. 562-70 is denied.

A handwritten signature in cursive script, appearing to read "D. Shaw", positioned above a horizontal line.

David P. Shaw
Administrative Law Judge

Issued: March 17, 2015

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PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 75** has been served by hand upon the Commission Investigative Attorney, **Monica Bhattacharyya, Esq.**, and the following parties as indicated, on MAR 18 2015



Lisa R. Barton, Secretary
U.S. International Trade Commission
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