Nos. 24-1703, 24-1783

In the United States Court of Appeals for the Ninth Circuit

SIMON AND SIMON, PC and VIP DENTAL SPAS,
Plaintiffs-Appellants,

v.

ALIGN TECHNOLOGY, INC.,
Defendant-Appellee.

MISTY SNOW, et al.,
Plaintiffs-Appellants,

v.

ALIGN TECHNOLOGY, INC.,
Defendant-Appellee.

On Appeal from the
United States District Court for the Northern District of California
Nos. 20-cv-03754, 21-cv-03269 (Hon. Vince Chhabria)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE UNITED STATES

The United States enforces the federal antitrust laws and has a strong interest in their correct application. The United States has a particular interest in ensuring that courts properly analyze unilateral refusals to deal with rivals under Section 2 of the Sherman Act, 15 U.S.C. § 2, and has filed multiple briefs on that subject in the Supreme Court of the United States and the United States Courts of Appeals, *e.g.*, Brief for the United States as Amicus Curiae, *Comcast Corp. v. Viamedia, Inc.*, No. 20-319 (U.S. May 25, 2021), https://www.justice.gov/atr/case-document/file/1397716/dl?inline, *cert. denied*, 141 S. Ct. 2877 (2021); Brief for the United States as Amicus Curiae in Support of Neither Party, *Chase Mfg., Inc. v. Johns Manville Corp.*, 84 F.4th 1157 (10th Cir. 2023) (No. 22-1164), https://www.justice.gov/media/1251336/dl?inline; Brief of United States as Amicus Curiae Supporting Plaintiffs-Appellants, *New York v. Meta Platforms, Inc.*, 66 F.4th 288 (D.C. Cir. 2023) (No. 21-7078), https://www.justice.gov/atr/case-document/file/1467321/dl?inline.

The United States files this amicus brief under Federal Rule of Appellate Procedure 29(a). Because parts of the summary judgment record are under seal, the United States takes no position on the ultimate merits of plaintiffs' antitrust claims.

ISSUE PRESENTED

Whether the district court erred in holding that a monopolist's refusal to deal with a rival cannot as a matter of law violate Section 2 of the Sherman Act, 15 U.S.C. § 2, if the refusal was based in part on a potentially legitimate business justification, even if it is also motivated by the desire to exclude competition and does in fact exclude competition.

STATEMENT

1. Defendant-appellee Align Technology, Inc. ("Align Tech") manufactures aligners and intraoral scanners for orthodontic treatments.[1] An aligner is a transparent mouthpiece that straightens teeth. Generally, a dental practice orders an aligner for a patient by sending the manufacturer an image of the patient's mouth taken using

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[1] Because parts of the summary judgment record remain under seal, this factual background is drawn from the district court's order denying Align Tech's motion to dismiss the *Simon & Simon* complaint, *Simon & Simon, PC v. Align Tech., Inc.*, 533 F. Supp. 3d 904 (N.D. Cal. 2021), unless otherwise noted.

an intraoral scanner. Dental practices tend to purchase only a single scanner, given its significant cost.

Align Tech's aligner is Invisalign®. Invisalign is by far the most popular aligner and "a 'must have' for dental practices." *Simon & Simon, PC v. Align Tech., Inc.*, 533 F. Supp. 3d 904, 909 (N.D. Cal. 2021). Align Tech also manufactures and sells an intraoral scanner, iTero™. iTero effectively can be used only for Invisalign. By contrast, the lone competing scanner—TRIOS®, marketed by 3Shape—can be used to create images for other, competing aligners.

In 2015, Align Tech and 3Shape entered into an agreement that allowed 3Shape's TRIOS scanner to interoperate with Invisalign. In late 2017, around the time that several of Align Tech's Invisalign patents expired, Align Tech terminated this interoperability agreement,[2] allegedly because 3Shape declined Align Tech's repeated requests to make TRIOS incompatible with aligners that compete with

[2] As noted by the district court, the agreement was in fact worldwide, and Align Tech did not stop interoperating with TRIOS outside the United States. 533 F. Supp. 3d at 910; 3-SimonER-395. According to plaintiffs, this was because Align Tech had less power in foreign markets for aligners; Align Tech could not leverage Invisalign to induce foreign dentists to use iTero in the way that it could domestically. 533 F. Supp. 3d at 910.

Invisalign, causing Align Tech to seek other means to maintain its "stranglehold on the aligner market," *ibid.*, as described below.

Align Tech contends that it terminated interoperability because 3Shape breached its contractual obligations and because Align Tech and 3Shape had become embroiled in litigation. One month before Align Tech announced termination of interoperability with TRIOS, it sued 3Shape for infringing Align Tech's iTero patents. *Align Tech., Inc. v. 3Shape A/S*, No. 17-1647 (D. Del. filed Nov. 14, 2017). According to Align Tech, continued interoperability would have supported affirmative defenses, such as waiver, that 3Shape might raise (and eventually did raise) in that litigation. 1-SimonER-4, 2-SimonER-177–79, 184–85, 211–16, 219–20.

2. Plaintiffs-appellants are dental practices who purchased aligners and scanners (*Simon & Simon* plaintiffs) and consumers who purchased aligners (*Snow* plaintiffs). They claim that Align Tech monopolized the U.S. markets for aligners and intraoral scanners in violation of Section 2 of the Sherman Act. Specifically, plaintiffs allege that Align Tech has maintained its monopolies in these markets via multiple practices: (a) termination of interoperability with 3Shape's

TRIOS scanner and (b) exclusive-dealing and bundled-pricing contracts with dentists and dental service organizations. According to plaintiffs, these practices satisfy the anticompetitive-conduct element of the monopolization claims both individually and collectively.

a. *Termination of interoperability*. Plaintiffs allege that Align Tech's termination of interoperability with 3Shape's TRIOS scanner harms competition by excluding competing scanners and aligners. Align Tech maintains a 90% share of the U.S. market for aligners and an 80% share of the U.S. market for scanners. (Align Tech has not contested plaintiffs' allegations on relevant markets or on monopoly power in these markets.) Because dentists typically purchase only a single scanner, termination of interoperability has compelled them to choose Align Tech's iTero scanner so that they can order "must have" Invisalign aligners. Furthermore, because iTero effectively can be used only for Invisalign, the exclusion of competing scanners has reinforced Align Tech's dominance in aligners.

b. *Exclusive contracts*. Plaintiffs further allege that Align Tech maintains its monopolies through a series of contracts that compel dental practices to deal with it exclusively. For example, two of the nation's largest dental service organizations entered contracts to offer only Align Tech products. Align Tech also has offered bundled pricing on iTero scanners and Invisalign aligners, discounting the scanner if a dental practice agrees to order a minimum number of aligners.

3. After initially denying Align Tech's motion to dismiss, 533 F. Supp. 3d 904, the U.S. District Court for the Northern District of California granted Align Tech's motions for summary judgment in both the *Simon & Simon* and *Snow* actions, 1-SimonER-3.

a. The district court concluded that "[t]he evidence, viewed in the light most favorable to plaintiffs, does not give rise to a viable refusal-to-deal claim based on termination of the interoperability agreement." *Ibid.*

The court stated that there is "confusion in the case law" on the issue of "the proper legal test to apply at summary judgment in a refusal-to-deal case." *Ibid.* However, according to the court, plaintiffs appeared not to dispute that "a refusal to deal that is based in part on legitimate business reasons does not violate the antitrust laws, even if it is also motivated by the desire to harm competitors or does in fact harm competitors." *Id.* at 3–4 (quoting Model Jury Instructions in Civ.

Antitrust Cases 129 (Am. Bar Ass'n 2016)). The court treated this statement as the governing legal standard. *Id.* at 4–5.

The court then held that "no reasonable jury could reject the notion that the termination of the [interoperability] agreement was based 'in part' on legitimate business reasons," namely, Align Tech's presumptively valid "desire to protect and enforce patent rights" against 3Shape. *Id.* at 4. The court concluded that there was no triable issue as to whether the termination served that end because (1) the termination was "bound up" in Align Tech's decision to sue 3Shape for patent infringement, *id.* at 4–5, and (2) the termination "related to a defense that Align reasonably anticipated would be (and was in fact) asserted by 3Shape" in that litigation, *id.* at 5. Regarding the second rationale, the court stated that it was "beside the point" that there was evidence that 3Shape's defense to Align Tech's claim of patent infringement was "exceedingly weak" and that the termination of interoperability "actually strengthened other defenses that 3Shape asserted." *Id.* at 4–5.[3]

[3] The district court did not address Align Tech's other proffered justifications for the termination, including that 3Shape failed to fulfill its contractual

The court acknowledged that there was "plenty of evidence that Align's course of conduct was motivated in part by a desire to harm an emerging competitor" and "also evidence that Align knew its course of conduct would diminish its own clear aligner profits in the short term." *Id.* at 5. The court thus regarded the case as "close." *Id.* at 3; *see also id.* at 5 (describing the case as "difficult"). Nevertheless, "given the presumptive validity of an action taken to protect or assert intellectual property rights," the court held that "a reasonable jury could not find that Align's expressed concerns were a ruse or that the actions taken to address them were illegitimate." *Id.* at 5.

The court, however, rejected Align Tech's "additional, broader, home-run-type arguments" for summary judgment. *Id.* at 5–6. It concluded that "the willingness of the monopolist to deal with other customers on the same terms that it refuses to deal with the competitor" is not a requirement for a refusal-to-deal claim, but instead "just one of many factors to consider." *Ibid.* Similarly, the court rejected Align Tech's argument that "if a court can identify any

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obligations and that the economic benefits of termination outweighed those of continued interoperability.

conceivable justification for the refusal, no matter how disconnected that justification might be from the actual record, the defendant wins right out of the gate." *Id.* at 6.

b. The district court also held that plaintiffs had not created a triable issue as to whether Align Tech's exclusive-dealing and bundled-pricing contracts constituted anticompetitive conduct. The court stated, relying on its prior ruling at the motion-to-dismiss stage, that "[a]though the remainder of Align's allegedly anticompetitive actions might have combined with the refusal to deal claim to form the basis of a larger antitrust claim, they cannot stand on their own." *Id.* at 7 (citing *Align Tech.*, 533 F. Supp. 3d at 918).[4]

[4] In denying Align Tech's motion to dismiss the *Simon & Simon* complaint, the district court held that while the contracts with dental service organizations and the bundled pricing "raise antitrust concern," "the allegations about these arrangements—even considered together—do not state a section 2 claim on their own" given that "the complaint omits information in some areas, and is vague in other areas." 533 F. Supp. 3d at 917–18. But the court also held that these allegations "combin[e] with the refusal-to-deal allegations to make a strong overall section 2 claim in both the scanner and the aligner markets." *Id.* at 918.

SUMMARY OF ARGUMENT

This case appears to have the makings of a strong refusal-to-deal claim, including uncontested monopoly power and ample evidence of a purpose to monopolize. Anticompetitive purpose is here shown in a variety of ways, including "[t]he unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing," *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004); evidence that the defendant "knew" its refusal "would diminish its own . . . profits in the short term," 1-SimonER-5; and evidence that the defendant continued to deal with its rival in markets where it lacked monopoly power, *Align Tech.*, 533 F. Supp. 3d at 910. Plaintiffs also point to evidence of anticompetitive effect. *E.g.*, 11-SimonER-2433–34.

Yet the district court granted summary judgment to defendant-appellee Align Tech because, in the court's view, "no reasonable jury could reject the notion that" Align Tech's refusal to deal with its rival, 3Shape, was motivated "in part" by Align Tech's belief that this refusal would strengthen its position in separate patent litigation. 1-SimonER-4. Plaintiffs, however, introduced evidence that the refusal in fact weakened Align Tech's position in that litigation. *Ibid.* Accepting plaintiffs' version of this disputed issue, a reasonable juror could have questioned the "validity and sufficiency" of Align Tech's claimed justification for its refusal. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992). Accordingly, under controlling Supreme Court precedent—authority the district court never cited or applied—summary judgment was "inappropriate." *Ibid.*

ARGUMENT

A firm's "right" to refuse to deal with its competitors "is not absolute; it exists only if there are legitimate competitive reasons for the refusal." *Kodak*, 504 U.S. at 483 n.32. This principle traces back more than a century. In *United States v. Colgate & Co.*, the Supreme Court explained that although a "trader or manufacturer engaged in an entirely private business" may in general "freely exercise his own independent discretion as to the parties with whom he will deal," such freedom is not unlimited. 250 U.S. 300, 307 (1919). In particular, the antitrust laws limit this right when a business acts with "any purpose to create or maintain a monopoly." *Ibid.*; *see also Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 56 (1911). Accordingly, the Court has long recognized that "a refusal to cooperate with rivals," when motivated by a purpose to monopolize, "can constitute anticompetitive conduct and violate § 2." *Trinko*, 540 U.S. at 408; *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377–78 (1973).

Not all conduct involving a refusal of any kind implicates the so-termed "refusal to deal" framework, however. Importantly, the framework applies to unconditional unilateral refusals to deal with rivals, such as denials of access. It does not apply when a monopolist imposes on rival or non-rival trading partners conditions that restrict competition, *see Lorain Journal Co. v. United States*, 342 U.S. 143, 148, 152–53 (1951); *Kodak*, 504 U.S. at 463 n.8 (Kodak's "alleged sale of parts to third parties on condition that they buy service from Kodak is not" a "unilateral refusal to deal"), such as when a monopolist threatens not to sell to existing customers if they also do business with its rivals, *see Chase Mfg., Inc. v. Johns Manville Corp.*, 84 F.4th 1157, 1163–66, 1171–73 (10th Cir. 2023). In those situations, the proper focus is on the restrictive condition, and general Section 2 principles apply. *See id.* at 1171–73 (declining to apply "refusal-to-deal-with-rivals caselaw").[5]

When the refusal-to-deal framework is properly implicated, a defendant's refusal to deal with a rival constitutes anticompetitive conduct only if the refusal (1) is "predatory,"—*i.e.*, characterized by "attempting to exclude rivals on some basis other than efficiency," *Aspen Skiing*, 472 U.S. at 605 (internal quotation marks omitted); *see Trinko*, 540 U.S. at 407–09 (concluding that the complaint lacked allegations against Verizon suggesting the requisite "anticompetitive malice" or predatory "motivation of its refusal")—and (2) has anticompetitive effect. A plaintiff can show predatory purpose with a variety of direct or circumstantial evidence, including but not limited to the types of evidence used to establish liability in *Aspen Skiing*, *e.g.*, termination of a prior course of dealing; probative statements by

[5] Here, for example, it appears that the refusal-to-deal framework should not apply at least to Align Tech's conduct with respect to the market for aligners. 3Shape is not Align Tech's rival in that market. And Align Tech's alleged anticompetitive conduct included attempts "to cajole 3Shape into preventing its . . . scanner from being used for any type of aligner other than Invisalign." *Align Tech.*, 533 F. Supp. 3d at 914. Therefore, to the extent the issues are properly preserved, general Section 2 principles should apply to plaintiffs' aligner claims. *See Lorain Journal*, 342 U.S. at 152–53; *Chase Mfg.*, 84 F.4th at 1171–73.

executives or agents; evidence that the refusal was used threateningly; or evidence supporting an inference that the refusal was not motivated by efficiency or that the defendant was willing to sacrifice short-run benefits to achieve an anticompetitive end. 472 U.S. at 608 & n.39, 610–11; *see, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 457 (7th Cir. 2020). In the Ninth Circuit, the factors discussed in *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004), are especially probative. *See infra* pp. 30–31. But the proper analysis is highly factual and depends on "the particular structure and circumstances of the industry at issue." *Trinko*, 540 U.S. at 411.

Once a plaintiff makes an initial showing that a monopolist's refusal is predatory and harms competition, the monopolist may respond by showing a business justification for its conduct. *Kodak*, 504 U.S. at 483; *Aspen Skiing*, 472 U.S. at 608; *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209 (9th Cir. 1997). The issue in this case is the proper standard for evaluating such justifications.

I. A Business Reason May Justify A Monopolist's Refusal To Deal With A Rival Only If The Reason Is In Fact "Valid" And "Sufficient."

The Supreme Court has addressed the proper standard for evaluating a claimed business justification in a refusal-to-deal case. Most recently, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, the Court considered "whether 'valid business reasons'" could "explain Kodak's" refusal to deal with rival independent service organizations (ISOs), specifically, its "unilateral refusal to sell [replacement] parts to [them]." 504 U.S. at 459, 483 (quoting *Aspen Skiing*, 472 U.S. at 605); *see id.* at 483 n.32 (indicating that any "right" Kodak had to "refuse to deal with its competitors" was "not absolute" (citing *Aspen Skiing*, 472 U.S. at 602–05)); *Image Tech. Servs. v. Eastman Kodak Co.*, 903 F.2d 612, 619–20 (9th Cir. 1990) (explaining that ISOs' Section 2 claim was premised on Kodak's refusal to deal with them); *Image Tech.*, 125 F.3d at 1209–11 (same).[6]

The Ninth Circuit had held that "a monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede

[6] This claim was distinct from the ISOs' Section 1 tying claim. *Kodak*, 504 U.S. at 459; *Image Tech.*, 903 F.2d at 614.

competition without a legitimate business reason." *Image Tech.*, 903 F.2d at 620 (citing *Aspen Skiing* and *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360 (9th Cir. 1988)). Kodak then asked the Supreme Court to address its proffered business reasons for its "unilateral refusal to deal." Petitioner's Brief on the Merits at 5–8, 38–40, *Kodak*, 504 U.S. 451 (No. 90-1029). The Court did so after first concluding that the ISOs had "presented evidence that Kodak took exclusionary action to maintain its . . . monopoly." *Kodak*, 504 U.S. at 483.[7]

Kodak's proffered business reasons could justify its refusal to deal with ISOs, the Supreme Court held, only if the reasons were "valid" and "sufficient." *Kodak*, 504 U.S. at 483, 485; *see also id.* at 483 ("validity and sufficiency"); *id.* at 483 n.32 ("legitimate" and "competitive"). A business reason may be invalid or insufficient in various ways. First, the reason is invalid if it is pretextual. *Id.* at 483–84; *Aspen Skiing*, 472 U.S. at 608–10; *Image Tech.*, 125 F.3d at 1212–14, 1218–20. Second, the reason is invalid if it is not procompetitive. *Kodak*, 504 U.S. at 485

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[7] This is a logical ordering of the analysis, consistent with the burden-shifting framework for Section 2 claims. *See United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc); *accord FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020) (citing *Microsoft* and *Kodak*).

(rejecting Kodak's "understanding of free-riding" because it confused the prevention of free riding with the erection of entry barriers); *Aspen Skiing*, 472 U.S. at 608 (noting Ski Co.'s "failure to offer any efficiency justification whatever for its pattern of conduct"); *Image Tech.*, 125 F.3d at 1212 ("A plaintiff may rebut an asserted business justification by demonstrating . . . that the justification does not legitimately promote competition . . . ."). Third, the reason is insufficient to justify the monopolist's conduct if the conduct does not actually promote the business's claimed objective. *Kodak*, 504 U.S. at 484–85 ("More importantly, [Kodak's inventory-costs] justification fails to explain respondents' evidence that Kodak forced OEM's, equipment owners, and parts brokers not to sell parts to ISO's, actions that would have no effect on Kodak's inventory costs."). Fourth, the reason is insufficient if any benefit is outweighed by significant anticompetitive harm. *Viamedia*, 951 F.3d at 461 & n.13 ("Otherwise we could arrive at absurd outcomes: . . . an act might benefit the defendant very slightly while doing considerable harm to the rest of the economy . . . ." (internal quotation marks omitted)).

The proper analysis of business justifications is fact intensive. In both *Kodak* and *Aspen Skiing*, the Supreme Court carefully parsed the record to determine whether the defendants' claimed business justifications were valid and sufficient. It was not enough for the defendants merely to assert a justification, or even to introduce evidence of some general relationship between the defendants' conduct and the asserted justification. *See Kodak*, 504 U.S. at 483–85; *Aspen Skiing*, 472 U.S. at 608–11. Rather, the defendant had to *establish* a justification that was objectively "valid" and "sufficien[t]" in light of the plaintiff's showing that the defendant's predatory refusal harmed competition. *Kodak*, 504 U.S. at 483.

Kodak was decided on summary judgment. The Court therefore "presumed correct" the non-movants' "version of any disputed issue of fact." 504 U.S. at 456. This standard of review applied equally to Kodak's asserted business justifications. Hence, the Court held—in no uncertain terms—that where "[f]actual questions exist . . . about the validity and sufficiency" of a claimed business justification, summary judgment is "inappropriate." *Id.* at 483. Such questions must instead be resolved by the finder of fact.

Trinko did not alter this framework. There, the Supreme Court considered only whether a complaint alleging breach of Verizon's duty under the Telecommunications Act of 1996 to share its telephone network with competitors stated a claim under Section 2. *Trinko*, 540 U.S. at 401. The complaint failed to do so because the allegations were insufficient to conclude that Verizon's refusal to deal was "prompted not by competitive zeal but by anticompetitive malice." *Id.* at 409.[8] In other words, the claim in *Trinko* never got off the ground because the plaintiff failed to plead a *prima facie* unlawful refusal to deal in the first place. Accordingly, Verizon had no reason to assert, and the Court had no occasion to consider, any business justifications for the refusal.

II. The District Court Erred In Granting Summary Judgment Based On Align Tech's Claimed Business Justification.

This case presents a straightforward application of *Kodak*. The case is on summary judgment, and the defendant has proffered business reasons in response to plaintiffs' introduction of evidence of an unlawful

[8] Sufficient allegations might have taken the form of a "unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing," an "unwillingness to [sell] *even if compensated at retail price*," or other evidence of "a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409.

refusal to deal. In particular, and as relevant to this appeal, Align Tech has asserted that its unilateral termination of a voluntary (and thus presumably profitable) course of dealing with 3Shape was necessary to strengthen its position in separate patent litigation. 1-SimonER-4. But plaintiffs introduced evidence that this refusal in fact weakened Align Tech's position in that litigation. *Id.* at 4–5, 2-SimonER-185–87, 220–22; *see also* 3-SimonER-302 (expert testifying that "terminating interoperability . . . did not improve the enforcement of [Align Tech's] patents and, in fact, hurt the enforceability of its patents"). "[P]resum[ing] correct" plaintiffs' version of this "disputed issue of fact," a reasonable juror could have concluded that Align Tech's proffered business reason was invalid or insufficient to justify its conduct, either because it was pretextual or because the challenged conduct did not actually promote the claimed objective. *Kodak*, 504 U.S. at 456, 483–86. Thus, "[f]actual questions exist . . . about the validity and sufficiency of Align Tech's] claimed justification, making summary judgment inappropriate." *Id.* at 483; *e.g.*, *Duke Energy Carolinas, LLC v. NTE*

Carolinas II, LLC, No. 22-2168, 2024 WL 3642432, at *20 (4th Cir. Aug. 5, 2024).[9]

The district court appears to have overlooked the Supreme Court's decision in *Kodak*. The court's order does not cite the case once, despite both sets of plaintiffs' raising it below as controlling precedent. Rather than test Align Tech's claimed business justification for validity and sufficiency, the district court—citing a pre-*Kodak* Ninth Circuit case, *Oahu Gas*—adopted a standard from the American Bar Association's Model Jury Instructions in Civil Antitrust Cases: "a refusal to deal that is based in part on legitimate business reasons does not violate the antitrust laws, even if it is also motivated by the desire to harm competitors or does in fact harm competitors." 1-SimonER-4.[10]

[9] Although "[t]he desire to protect and enforce patent rights is a presumptively valid business justification," 1-SimonER-4 (citing *Image Tech.*, 125 F.3d 1195), that presumption is "rebuttable," *Image Tech.*, 125 F.3d at 1218. It does not remove the issue of the validity and sufficiency of a claimed business justification from the finder of fact. *See Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 986 (9th Cir. 2023) (stating that the desire to profit from intellectual property is "presumptively procompetitive" but not specially analyzing an intellectual-property-related justification). The presumption serves simply to "focus the factfinder on the primary interest of both intellectual property and antitrust law: public interest." *Image Tech.*, 125 F.3d at 1218.

[10] The American Bar Association's Model Jury Instructions were drafted by practitioners and are not themselves a source of legal authority binding on this or any other tribunal.

To the extent there is any dissonance between *Kodak* and *Oahu Gas*, *Kodak* must control: It is a later-in-time Supreme Court decision. The two cases may be read in harmony, however. Although *Oahu Gas* initially said only "a legitimate business justification" was needed to excuse the defendant's conduct, 838 F.2d at 368, the court later held that the defendant's claimed justification was "*sufficient* . . . to preclude antitrust liability," *id.* at 369 (emphasis added). So for a proffered business reason to rise to the level of a legal justification, the ultimate test is the same: the business reason must be legitimate (valid) and sufficient.

Moreover, the claimed justification in *Oahu Gas* easily cleared the bar. The plaintiff had argued that the defendant excluded competition by deciding not to expand its refinery to produce propane that might have been used by the plaintiff. 838 F.2d at 368. But it "was clear" from the trial record that producing propane "would have been uneconomical" for the defendant because the "investment required" to expand the refinery for that purpose "would have resulted in a negative return." *Id.* at 368. The defendant's rationale for its decision not to offer essentially a new product—"because it was not economically efficient" to do so—was therefore both "legitimate" and "sufficient." *Id.* at 369.

Here, there is no similar argument that Align Tech's termination of interoperability with 3Shape was "economically efficient" because it avoided a "negative return," or that continuing interoperability would have required Align Tech to offer a product it never had before. *Id.* at 368. On the contrary, the district court found "evidence that Align knew its course of conduct"—which included the unilateral termination of a voluntary course of dealing—"would diminish its own clear aligner profits in the short term." 1-SimonER-5. Although Align Tech has other arguments for why its termination of interoperability was justified, *see supra* pp. 4, 20, the disputed nature of those arguments makes summary judgment "inappropriate," *Kodak*, 504 U.S. at 483.

III. Align Tech's Contrary Arguments Lack Merit.

A. A "mixed motive" alone is not sufficient to excuse an otherwise unlawful refusal to deal.

Align Tech has argued that so long as a monopolist has some partial motivation for its refusal to deal with a rival other than to monopolize, its conduct must be lawful. Reply Supp. Mot. Summ. J. 5, *Simon & Simon, PC v. Align Tech., Inc.*, No. 20-cv-03754 (N.D. Cal. Jan.

11, 2024). By allowing Align Tech's claimed patent justification—whether or not ultimately established—to excuse termination of interoperability with 3Shape even in the presence of anticompetitive purpose and effect, the district court appears to have created such a safe harbor. But *Kodak* requires otherwise. For a business reason to justify a monopolist's refusal to deal with a rival, the reason must be "valid[]" and "*sufficien[t]*." 504 U.S. at 483 (emphasis added). Align Tech's asserted rule would nullify *Kodak*'s "sufficiency" requirement. *Ibid.* It also runs counter to the "well settled" principle that "good motives"—even those "accorded a respectful presumption of validity"—"will not validate an otherwise anticompetitive practice." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984).

To be clear, intent is not irrelevant in a refusal-to-deal case. In addition to showing anticompetitive effect, the plaintiff must show that the refusal was "predatory." *Aspen Skiing*, 472 U.S. at 605; *supra* pp. 13–14. And evidence of "specific intent to engage in predation" is probative in that respect. *Aspen Skiing*, 472 U.S. at 608 n.39.[11]

[11] To this end, the district court was correct to consider Align Tech's entire "course of conduct," 1-SimonER-5, because a monopolist's other actions may shed additional light on whether "its refusal to deal" was "motivat[ed]" by

Regardless of what evidence is used, however, the Supreme Court has asked only "whether the defendant's refusal . . . was in furtherance of *a* purpose to monopolize." *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 375 (1927) (emphasis added); *see also Colgate*, 250 U.S. at 307 ("*any* purpose to create or maintain a monopoly" (emphasis added)). Some courts equate the intent relevant to the refusal-to-deal analysis with that required for attempted monopolization. *E.g.*, *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 859 (6th Cir. 1979). In the latter context, the question is one of "predominan[ce]." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 627 (1953); *accord Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1259 (9th Cir. 1990) ("primary motivation"). Under any of these standards, the district court's holding that the defendant's *sole* purpose must be to exclude rivals is plainly incorrect.

Here, too, Align Tech's reliance on *Oahu Gas* is misplaced. *Oahu Gas* states: "Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust

"anticompetitive malice," *Trinko*, 540 U.S. at 409; *see United States v. Am. Tobacco Co.*, 221 U.S. 106, 182–83 (1911).

liability by asking whether there was a legitimate business justification for the monopolist's conduct." 838 F.2d at 368. This is simply a statement about the order of analysis: After the plaintiff establishes a *prima facie* unlawful refusal to deal, the defendant can justify the refusal with valid and sufficient business reasons. The proposition that Align Tech infers from this statement—that where a monopolist's refusal to aid a competitor is based partially on a desire other than to restrict competition, antitrust liability is precluded—does not logically follow from it. This is reinforced by *Oahu Gas*'s use of the more demanding term "justification" (rather than desire or motivation), together with its holding that the defendant's proffered business reason—"[e]conomic necessity"—was "sufficient." *Id.* at 368–69.

Align Tech's "mixed motive" rule also is unsound as a matter of antitrust policy. A person, and even more so an organization, may have multiple motivations for a business decision. It would therefore be too easy for an antitrust defendant to evade scrutiny by identifying some partial purpose, or by manufacturing some subjective motivation, for its conduct. The district court appeared to recognize this problem when, at the summary judgment hearing, the court asked: "But aren't there also always going to be documents in the files identifying *some* purpose for the refusal to deal other than, you know, preserving the monopoly?" 2-SimonER-39 (emphasis added). Yet the court adopted the standard anyway. The solution to the problem was instead to *test* Align Tech's proffered justifications against the available evidence to assess their "validity and sufficiency." *Kodak*, 504 U.S. at 483.

B. The district court correctly rejected Align Tech's "only conceivable rationale" argument.

An even more extreme version of the "mixed motive" argument is that a plaintiff must affirmatively prove that the defendant's "only conceivable rationale" for its refusal to deal is to harm competition such that any theoretical reason, regardless of its factual basis or sufficiency, is enough to defeat the plaintiff's proof. Mot. Summ. J. 1, *Align Tech.*, No. 20-cv-03754 (N.D. Cal. Nov. 20, 2023) (quoting *FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020)). The district court forcefully rejected this argument, *see* 1-SimonER-6, and rightly so.

The flaw in the argument is apparent from the genesis of the "only conceivable rationale" language. In *MetroNet*, this Court explained that *Trinko* and *Aspen Skiing* considered whether the defendant's conduct "indicated a willingness to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition." 383 F.3d at 1132; *see also id.* at 1133 (asking whether the challenged conduct "entail[s] a sacrifice of short-term benefits"). *Aerotec International, Inc. v. Honeywell International, Inc.* then grafted the "only conceivable rationale" phrase onto *MetroNet*'s "short-term benefits" language. 836 F.3d 1171, 1184 (9th Cir. 2016) ("the only conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition'" (quoting *MetroNet*, 383 F.3d at 1132)). But that addition played no role in *Aerotec*'s analysis, which instead considered only: (1) the onerousness of the defendant's conduct on the plaintiff and (2) the difficulty of imposing the plaintiff's requested remedy. *Ibid.*

Qualcomm quoted *Aerotec* to describe what "the Supreme Court's decision in *Aspen Skiing* . . . held." 969 F.3d at 993–94. But *Qualcomm*, like *Aerotec*, never again mentioned the "only conceivable rationale" language, let alone analyzed it in its actual application of the law. Rather, the court considered the facts on the ground and determined there was no profit sacrifice. 969 F.3d at 994. In fact, Qualcomm's refusal "was far more lucrative" "in both the short and long terms," which distinguished the case from *Aspen Skiing*. *Ibid.* (internal quotation marks omitted).

Accordingly, *Aerotec*'s insertion of the "only conceivable rationale" phrase is best understood as combining a couple inquiries into a single formulation: First, under Ninth Circuit law, a plaintiff may show that a refusal is predatory by evidencing conduct "indicat[ing] a willingness to sacrifice short-term benefits." *MetroNet*, 383 F.3d at 1132. Then, if the plaintiff does so, the defendant may identify a valid and sufficient business justification supported by the facts, which the plaintiff may rebut. *Qualcomm*, 969 F.3d at 991.

Align Tech instead interprets the "only conceivable rationale" language as "akin to rational basis review of economic legislation under the Equal Protection Clause." 1-SimonER-6. This radical view would severely curtail Section 2 enforcement against anticompetitive refusals to deal. After all, it is easy enough to *conceive* of some purpose (however detached from the record) other than to harm competition, and it is virtually impossible to *rule out* every such conceivable purpose. Align Tech's interpretation should be rejected because it is inconsistent with *Qualcomm*. As the district court here explained, "a burden-shifting framework that involves an inquiry into whether a proffered justification is pretextual"—like the one endorsed in *Qualcomm*, *see* 969 F.3d at 991—"would make little sense if the inquiry ends the moment a conceivable rationale can be theorized," 1-SimonER-6.

C. The district court properly declined to treat the **MetroNet** *factors as a rigid checklist.*

The district court also was correct to reject Align Tech's argument that a "willingness of the monopolist to deal with other customers on the same terms that it refuses to deal with the competitor" must "be present in every refusal-to-deal case." 1-SimonER-6. Following *Trinko*, the Ninth Circuit in *MetroNet* highlighted three "fact[s] found relevant in [*Trinko*]" in deciding whether the defendant's refusal to deal fit the *Aspen Skiing* "mold": (1) "the unilateral termination of a voluntary and profitable course of dealing"; (2) "the defendant's refusal to sell . . . to the plaintiff '*even if compensated at retail price*,'" indicating "a willingness to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition"; and (3) a refusal "to provide to . . . competitors products that were already sold in a retail market to other customers," the "importance of [which] relates to the Court's concern about the administrability of a judicial remedy."

MetroNet, 383 F.3d at 1132–34 (quoting *Trinko*, 540 U.S. at 409); *see also Qualcomm*, 969 F.3d at 993–94.

Importantly, *MetroNet* did not treat these three "fact[s]" or "circumstances" as necessary elements, but rather as "significant" in determining whether the refusal was predatory. 383 F.3d at 1132–33. Although *Qualcomm* might be read literally to "require[]" all three factors, 969 F.3d at 994–95, that is not the best reading of the decision, for several reasons. To start, *Qualcomm* purported merely to describe what "the [Supreme] Court held" in *Aspen Skiing*, *id.* at 993, and nowhere in *Aspen Skiing* (or *Trinko*) did the Supreme Court hold that these factors are necessary conditions. Just so, because *Trinko* accepted the result in *Otter Tail*, which upheld refusal-to-deal liability without any prior course of dealing. 540 U.S. at 410; *see also MetroNet*, 383 F.3d at 1131. *Qualcomm* cannot overrule *Otter Tail*, of course. Finally, as the district court recognized, "treating the absence of [a single] factor as dispositive in all cases could open the door to all sorts of anticompetitive conduct by a monopolist that could not be anticipated." 1-SimonER-6. This Court can avoid that danger by applying a flexible, "case-by-case" approach, one that focuses on "actual market realities" and "the particular facts disclosed by the record." *Kodak*, 504 U.S. at 466–67; *see, e.g.*, *Viamedia*, 951 F.3d at 457.

Even so, it appears plaintiffs satisfy all three *MetroNet* factors, properly understood: (1) Align Tech's agreement to interoperate with 3Shape from 2015 until 2017 constitutes a "voluntary" and thus presumably "profitable course of dealing," which Align Tech "unilaterally terminate[d]." *Qualcomm*, 969 F.3d at 993 (quoting *MetroNet*, 383 F.3d at 1132).[12] (2) As the district court acknowledged, plaintiffs adduced evidence that Align Tech "knew" its refusal to deal with 3Shape "would diminish its own clear aligner profits in the short term." 1-SimonER-5; *see Qualcomm*, 969 F.3d at 993–94; *MetroNet*, 383 F.3d at 1132. And (3) "the refusal to deal involves products that the defendant already sells . . . to other similarly situated customers,"

[12] There is no basis for Align Tech's contrary argument that a "one-off arrangement (lasting fourteenth months)," Reply Supp. Mot. Summ. J. 11, cannot constitute a voluntary course of dealing, *see, e.g.*, *Viamedia*, 951 F.3d at 444, 451, 463 (course of dealing where defendant refused to renew single contracts in relevant markets); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1068, 1076 (10th Cir. 2013) (course of dealing where defendant shared intellectual property related to forthcoming operating system but withdrew access a few months later).

Qualcomm, 969 F.3d at 994, insofar as Align Tech continued to interoperate with 3Shape abroad, 3-SimonER-395.[13]

Assuming plaintiffs also have shown anticompetitive effect,[14] the question becomes whether Align Tech can justify its *prima facie* unlawful refusal to deal with 3Shape by establishing a "valid" and "sufficient" business reason for the refusal. *Kodak*, 504 U.S. at 483–86. Or, at this juncture, whether "[f]actual questions exist" "about the validity and sufficiency of [Align Tech's] claimed justification." *Id.* at 483. In the United States' view, such questions do exist, *supra* pp. 19–23, "making summary judgment" on that basis "inappropriate," *Kodak*, 504 U.S. at 483.

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[13] Align Tech also is incorrect to assert that liability is precluded because interoperability is not a "retail product" and it "never refused to sell it at a retail price." Reply Supp. Mot. Summ. J. 11. An anticompetitive refusal to deal need not operate at the retail level. *E.g.*, *Otter Tail*, 410 U.S. at 377–78 (concluding defendant engaged in anticompetitive conduct by refusing "to sell at wholesale or to wheel" electric power); *Qualcomm*, 969 F.3d at 995 (considering whether defendant discriminated in licensing IP to manufacturers); *Viamedia*, 951 F.3d at 434–35 (permitting Section 2 claim based on refusal to provide access to cooperative selling arrangements for advertising).

[14] The evidence relevant to this issue is under seal, so the United States cannot evaluate its merits.

CONCLUSION

The district court applied the wrong legal standard in granting summary judgment to Align Tech on plaintiffs' refusal-to-deal claim under Section 2 of the Sherman Act.

Respectfully submitted,

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