

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALIGN TECHNOLOGY, INC.,

Petitioner,

v.

DENTAL MONITORING SAS,

Patent Owner.

Case No. IPR2024-00110

U.S. Patent No. 11,109,945

PATENT OWNER'S OBJECTIONS TO EVIDENCE

Mail Stop **Patent Board**
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Pursuant to 37 C.F.R. § 42.64(b)(1), Patent Owner Dental Monitoring SAS (“Dental Monitoring”) submits the following objections to exhibits filed by Petitioner Align Technology, Inc. (“Align”) prior to institution. These objections are being timely filed within ten business days of the April 19, 2024, Institution Decision.

Exhibit No.	Objection(s)
1002	<p>Align identifies this exhibit as “Declaration of Dr. Hassan Foroosh.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE¹ 801/802: Each statement in this exhibit is inadmissible hearsay not subject to any exception, pending confirmation that Dr. Foroosh will be made available for cross-examination in a manner complying with all rules governing this proceeding. This exhibit also repeats statements from the various other exhibits cited therein (identified below) which are themselves inadmissible hearsay and/or hearsay-within-hearsay to the extent offered for the truth of the matter asserted therein. <i>E.g.</i>² EX1002 ¶¶ 44 (statement that particular methods were “well-known and preferred”), 48 (same), 82 (same).</p> <p>FRE 402/403/602/701/702: The expert testimony in this exhibit that is based upon Dr. Foroosh’s understanding or application of EX1005, EX1006, and EX1008, including as to the obviousness or ultimate patentability of the challenged claims, is inadmissible and irrelevant speculation because Dr. Foroosh is not qualified as an expert by knowledge, skill, experience, training, or education to provide the perspective of a person of ordinary skill in the dental arts, nor is it based upon his personal knowledge or observations. <i>E.g.</i>, EX1002 ¶¶ 44-46</p>

¹ Federal Rules of Evidence.

² Dental Monitoring cites select examples here and throughout without limitation as to the scope of the objections of which the citations are exemplary.

(interpreting EX1006), 58 (opining that EX1006 renders the claims of U.S. Pat. No. 11,109,945 obvious in combination with EX1005 and EX1012), 60 (same), 63 (same), 68 (same), 72 (same), 83-84 (same), 86 (same), 90-91 (same), 94 (same), 103 (same), 105-06 (same), 111 (same), 41-43 (interpreting EX1005), 56-57 (opining that EX1005 renders the claims of U.S. Pat. No. 11,109,945 obvious in combination with EX1006 and EX1012), 59 (same), 63 (same), 68 (same), 71 (same), 87 (same), 91 (same), 95 (same), 105 (same), 111 (same), 47-49 (interpreting EX1008), 61-62 (opining that EX1008 renders the claims of U.S. Pat. No. 11,109,945 obvious in combination with EX1005 and EX1006), 73 (same), 79 (same), 81-83 (same), 87 (same), 92 (same), 102 (same), 105 (same), 107-08 (same), 112 (same), 115 (same), 117 (same).

FRE 701/702: The expert testimony in this exhibit, including as to the obviousness or ultimate patentability of the challenged claims, is inadmissible because Dr. Foroosh is not qualified as an expert by knowledge, skill, experience, training, or education to provide the perspective of a person of ordinary skill in the art relevant to U.S. Patent No. 11,109,945, as properly construed. Specifically, Dr. Foroosh is not qualified to provide the perspective of individuals on a multidisciplinary team who are familiar with medical imaging, dental imaging, dentistry, and/or orthodontics. *E.g.* EX1002 ¶¶ 40 (concluding that the dependent claims “add routine aspects known conventionally in the art”), 51 (defining a person of ordinary skill), 54-55 (interpreting the claims from the perspective of a person of ordinary skill), 60 (opining on the motivations and expectations of a person of skill), 64 (same), 84 (same), 90 (same), 101 (same), 115 (same), 48 (providing interpretation of “a typographical error” from the perspective of a person of skill), 82 (same), 108 (opining on what would be “routine”), 117 (same), 48 (addressing what “a POSA would have understood”), 59 (same), 68 (same), 84 (same), 92 (same), 103 (same), 115 (same).

FRE 402/403/701/702: Each of Dr. Foroosh’s opinions regarding the validity/patentability of U.S. Patent No. 11,109,945 is irrelevant as based on ground references that have not been established as prior art. EX1006. Furthermore, Dr. Foroosh’s expert testimony regarding, and

	<p>based on, each of the inadmissible exhibits objected to herein—including the aforementioned opinion testimony regarding the validity/patentability of U.S. Patent No. 11,109,945—is inadmissible because it is not based on sufficient facts or data, is not the product of reliable principles and methods, and does not reflect a reliable application of the principles and methods to the facts of the case.</p> <p>FRE 402/403/701/702: Dr. Foroosh’s testimony is likewise inadmissible as <i>ipse dixit</i>, including because he has not cited sufficient evidence to support his conclusions, fails to meaningfully discuss each of the exhibits he does cite, and offers only conclusory assertions regarding the state of the art, the motivation to combine the ground references, and the reasonable expectation of success in doing so. <i>E.g.</i>, EX1002 ¶¶ 60 (conclusory testimony regarding motivation to combine and reasonable expectation of success), 64 (same), 84 (same), 90 (same), 101 (same), 115 (same).</p>
1003	<p>Align identifies this exhibit as “Curriculum Vitae of Hassan Foroosh, Ph.D.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p>
1004	<p>Align identifies this exhibit as “U.S. Patent Application No. 16/001,049 File History.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p>
1005	<p>Align identifies this exhibit as “U.S. Patent Pub. No. 2017/0281313 to Taewon Kim.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p>

	<p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p>
1006	<p>Align identifies this exhibit as “Align Technology, Invisalign Clinical Monitoring Guide (2003) (archived September 26, 2003, at http://web.archive.org/web/20030926024959/http://www.invisaligncec.com:80/consistent/pdfs/ICMG_Final.pdf).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay or hearsay within hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403: Align identifies this exhibit as a ground reference but has failed to demonstrate that it is prior art. For example, there is nothing on EX1006 itself indicating a publication date, where it was obtained, or any web address connected with the document. This exhibit is accordingly irrelevant to the merits of the instituted proceeding.</p> <p>FRE 901: Align has not produced evidence sufficient to establish this exhibit is what Align claims it is, including specifically in connection with Align’s claim that this exhibit is prior art published on a specific date in a particular manner. <i>E.g.</i>, Paper 2, at 7-8. Align has thus not authenticated this exhibit. For example, Align relies upon EX1011 to allege that EX1006 was archived at the URL http://web.archive.org/web/20030926024959if_/http://invisaligncec.com:80/consistent/pdfs/ICMG_Final.pdf on September 26, 2003. However, EX1011 does not reflect a declaration by anyone with personal knowledge of the Internet Archive and omits any mention of EX1006. Further, there is nothing on EX1006 itself indicating a publication date, where it was obtained, or any web address connected</p>

	with the document. For at least these reasons, Align fails to show the authenticity of EX1006.
1007	<p>Align identifies this exhibit as “Maninis et al., ‘Convolutional Oriented Boundaries: From Image Segmentation to High-Level Tasks,’ arXiv.org (Apr. 28, 2017).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, which Align offers to prove the truth of matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403: This exhibit is irrelevant, including because it does not concern the merits of the instituted grounds and it is referenced through the inadmissible testimony of Dr. Foroosh.</p> <p>FRE 901: Align has not produced evidence sufficient to establish this exhibit is what Align claims it is, including specifically in connection with Align’s claim that this exhibit was published on a specific date in a particular manner. Align has thus not authenticated this exhibit. For example, EX1007 does not on its face identify a publication method, date, or format, nor has any competent testimony been offered as to its nature.</p>
1008	<p>Align identifies this exhibit as “Translation of PCT Pub. No. WO 2016066651 to Salah et al.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope. The declarants’ statements are likewise inadmissible hearsay pending confirmation that he will be made available for cross-examination in a manner complying with the rules governing this proceeding.</p>

	<p>FRE 402/403: Align identifies this exhibit as a translation of a ground reference (EX1012). This exhibit is not itself prior art and has no independent relevance to the instituted proceeding. To the extent this exhibit is improperly translated and thus does not reflect the disclosure of the underlying reference, it is irrelevant to the merits of the instituted proceeding.</p> <p>FRE 901: Align has not produced evidence sufficient to establish this exhibit is what Align claims it is, including specifically in connection with Align’s claim that this exhibit is a true and correct translation of another document. <i>E.g.</i>, Paper 2 at 8. Align has thus not authenticated this exhibit.</p>
1009	<p>Align identifies this exhibit as “Scott Frey, Blog – The Ortho Cosmos, (archived May 4, 2017 at http://web.archive.org/web/20170504155213/http://theorthocosmos.com:80/blog).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403: Align has not shown that this exhibit is prior art. This exhibit was allegedly published less than one year before the priority date of the 11,109,945 patent and expressly attributes the disclosure on which Align relies to the inventors of the 11,109,945 patent, who had publicly disclosed the same before the alleged publication date of EX1009. <i>See</i> 35 U.S.C. § 102(b)(1). Therefore, Align has failed to show that EX1009 is relevant, and it is substantially more prejudicial than probative.</p>
1010	<p>Align identifies this exhibit as “Declaration of Nathaniel E. Frank-Wright.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p>

	<p>FRE 801/802/105: Each statement in this exhibit is inadmissible hearsay not subject to any exception, pending confirmation that Nathaniel E. Frank-Wright will be made available for cross-examination in a manner complying with all rules governing this proceeding. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>Improper Declaration in lieu of oath: EX1010 purports to be a declaration, but it does not comply with either the language of 28 U.S.C. § 1746 (especially because it does not explain whether the document was sworn within the United States) or the specific language of 37 C.F.R. 2.20, and, therefore, it is inadmissible in its entirety. <i>See</i> 37 C.F.R. § 2.20; 35 U.S.C. § 25; 37 C.F.R. 1.68.</p>
1011	<p>Align identifies this exhibit as “Declaration of Mitra Derakhshan.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: Each statement in this exhibit is inadmissible hearsay not subject to any exception, pending confirmation that Mitra Derakhshan will be made available for cross-examination in a manner complying with all rules governing this proceeding. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403/701/702: EX 1011 is irrelevant because it purports to address only the alleged publication of EX1006, but does not establish the foundation or expertise to do so. In addition, Dr. Derakhshan is not qualified as an expert by knowledge, skill, experience, training, or education to provide expert opinion testimony related to the archival process.</p> <p>FRE 602: Dr. Derakhshan discusses the archival date, but she does not have first-hand knowledge of that date or the archival process.</p>
1012	<p>Align identifies this exhibit as “PCT Pub. No. WO 2016066651 to Salah et al.” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are</p>

	<p>inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p>
1013	<p>Align identifies this exhibit as “Joint Stipulation and Order of Voluntary Dismissal Without Prejudice (Dkt. No. 90), Dental Monitoring SAS v. Align Technology, Inc., No. 3-22-cv-07335-WHA (N.D. Cal.).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403: This exhibit is offered solely to support Align’s arguments against the Board’s discretion to deny institution (<i>e.g.</i>, Paper 2 at 47). This issue is now moot. Thus, this exhibit is no longer relevant</p>
1014	<p>Align identifies this exhibit as “Criminisi et al., ‘Single View Metrology,’ International Journal of Computer Vision 40(2) (2000).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403: The substance of this exhibit was not discussed in depth by Dr. Foroosh or in the Petition. Therefore, it is irrelevant and inadmissible.</p> <p>FRE 901: Align has not produced evidence sufficient to establish this exhibit is what Align claims it is, including specifically to the extent Align claims that this exhibit is prior art published on a specific date in a particular manner. Align has thus not authenticated this exhibit. For example, EX1014 does not on its face identify a publication method, date, or format.</p>

1015	<p>Align identifies this exhibit as “Krizhevsky et al., ‘ImageNet Classification with Deep Convolutional Neural Networks,’ Advances in Neural Information Processing Systems 25 (2012).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403: The substance of this exhibit is addressed neither in Align’s petition nor in the declaration of Align’s expert. The exhibit is thus irrelevant to the merits of this proceeding. To the extent Align seeks to rely on the substance of this exhibit, it would constitute an improper incorporation by reference. 37 C.F.R. § 42.6(a)(3); <i>see also</i> PTAB Consolidated Trial Practice Guide November 2019, 35.</p> <p>FRE 901: Align has not produced evidence sufficient to establish this exhibit is what Align claims it is, including specifically to the extent Align claims that this exhibit is prior art published on a specific date in a particular manner. Align has thus not authenticated this exhibit. For example, EX1015 does not on its face identify a publication method, date, or format, does not indicate that it is a publication, bears no copyright, bears no volume, issue, catalogue, or index numbers, and makes no reference to “Advances in Neural Information Processing Systems,” nor has any competent testimony been offered as to its nature.</p>
1016	<p>Align identifies this exhibit as “Patrick Cavanaugh, ‘Visual Cognition’ Vision Research 51 (2011).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p>

	<p>FRE 402/403: The substance of this exhibit is addressed neither in Align’s petition nor in the declaration of Align’s expert. The exhibit is thus irrelevant to the merits of this proceeding. To the extent Align seeks to rely on the substance of this exhibit, it would constitute an improper incorporation by reference. 37 C.F.R. § 42.6(a)(3); <i>see also</i> PTAB Consolidated Trial Practice Guide November 2019, 35.</p> <p>FRE 901: Align has not produced evidence sufficient to establish this exhibit is what Align claims it is, including specifically to the extent Align claims that this exhibit is unedited prior art published on a specific date in a particular manner. Align has thus not authenticated this exhibit. For example, EX1016 does not on its face identify that it was not later revised.</p>
1017	<p>Align identifies this exhibit as “Prasad et al., ‘Learning Class-specific Edges for Object Detection and Segmentation,’ Computer Vision, Graphics and Image Processing: 5th Indian Conference, ICVGIP 2006 (2006).” Paper 2 at 52-53. Dental Monitoring objects to this exhibit as follows:</p> <p>FRE 801/802/105: The statements contained in this exhibit, to the extent they are offered to prove the truth of any matters asserted, are inadmissible hearsay that does not fall under any exception. Even if admissible for some purpose, the exhibit must be restricted to its proper scope.</p> <p>FRE 402/403: The substance of this exhibit is addressed neither in Align’s petition nor in the declaration of Align’s expert. The exhibit is thus irrelevant to the merits of this proceeding. To the extent Align seeks to rely on the substance of this exhibit, it would constitute an improper incorporation by reference. 37 C.F.R. § 42.6(a)(3); <i>see also</i> PTAB Consolidated Trial Practice Guide November 2019, 35.</p> <p>FRE 901: Align has not produced evidence sufficient to establish this exhibit is what Align claims it is, including specifically to the extent Align claims that this exhibit is prior art published on a specific date in a particular manner. Align has thus not authenticated this exhibit. For example, EX1017 does not on its face identify a publication method,</p>

	date, or format, does not indicate that it is a publication, bears no copyright, bears no volume, issue, catalogue, or index numbers, and makes no reference to “Computer Vision, Graphics and Image Processing: 5th Indian Conference, ICVGIP 2006,” nor has any competent testimony been offered as to its nature.
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Date: May 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e), the undersigned certifies that on May 3, 2024, a complete copy of **PATENT OWNER'S OBJECTIONS TO EVIDENCE** was served in its entirety on the Petitioner's counsel of record by email to:

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DATED: May 3, 2024

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