1 IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
2 WACO DIVISION

3 ALIGN TECHNOLOGY, INC. *
* June 29, 2026
4 VS. *
* CIVIL ACTION NO. 6:24-CV-187
5 CLEARCORRECT OPERATING, *
LLC, ET AL. *
6

BEFORE THE HONORABLE ALAN D ALBRIGHT
7 JURY TRIAL PROCEEDINGS
Volume 4 of 7
8

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ALIGN – EXHIBIT 2044
ClearCorrect Operating, LLC. v. Align Technology, Inc. IPR2025-00818

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08:32 1 (Hearing begins.)
08:32 2 THE BAILIFF: All rise.
08:32 3 THE COURT: Thank you. You may be
4 seated.
08:32 5 Good morning, everyone. Hope you had a
08:32 6 good weekend.
08:32 7 Allow me to start by addressing some
08:32 8 e-mails we got over the weekend or have gotten about
08:32 9 the parties' concerns or input on the Court's
08:32 10 calculations on how much time you all have, have used.
08:32 11 The next time we get an e-mail from you
08:32 12 all correcting our time, I've instructed the clerk to
08:32 13 take whatever time you all have and reduce it by an
08:32 14 hour. So we don't need your help. Okay?
08:33 15 MR. DURST: Understood, Your Honor.
08:33 16 MR. UNDERWOOD: Thank you, Your Honor.
08:33 17 THE COURT: So it's ridiculous that we
08:33 18 would get an e-mail over the accuracy of two minutes of
08:33 19 the amount of time that y'all have left, and I'm a
08:33 20 little disappointed in it.
08:33 21 So let's take up the issues we have.
08:33 22 Whoever wants to go.
08:33 23 MR. DURST: Yes, Your Honor. I'll go
08:33 24 first.
08:33 25 We had -- we left Wednesday afternoon,

08:33 1 Your Honor, with two issues open from Ms. Sterling's
08:33 2 testimony. I'm just looking to see if she's in the
08:33 3 courtroom.
08:33 4 MR. UNDERWOOD: She's not.
08:33 5 MR. DURST: Okay. Your Honor, one issue
08:33 6 you will recall related to Straumann's revenue. Global
08:33 7 revenue. And I have -- we have agreed not to elicit
08:34 8 testimony from Ms. Sterling about that, Your Honor. I
08:34 9 have no plans to introduce that. And so the Court
08:34 10 happily got no e-mails on that topic.
08:34 11 I do want to alert the Court that that
08:34 12 information is already in evidence. So it may be that
08:34 13 this -- that it's used from the exhibits that are
08:34 14 already in evidence in the future, but we're not going
08:34 15 to do that with Ms. Sterling.
08:34 16 MR. MUELLER: May I address that, Your
08:34 17 Honor, before we keep going, the revenue issue?
08:34 18 THE COURT: Sure.
08:34 19 MR. MUELLER: Sure. Your Honor, on the
08:34 20 revenue issue, there's no dispute for Ms. Sterling, as
08:34 21 we understand it.
08:34 22 Your Honor did ask at the end of the day
08:34 23 what the relevance would be and how it corresponded or
08:34 24 did not correspond. And when I say "it," I mean
08:34 25 Institut Straumann, the international Straumann, how

08:35 1 their revenues would relate to the antitrust case. The
08:35 2 answer is they have no relevance whatsoever.
08:35 3 Your Honor asked about the plaintiffs to
08:35 4 the antitrust case, or the antitrust counterclaims, I
08:35 5 should say. The antitrust counterclaimants are
08:35 6 ClearCorrect and Straumann USA. And the antitrust
08:35 7 damages model is based on lost sales by ClearCorrect
08:35 8 for clear aligners in the U.S. clear aligner market.
08:35 9 That's our damages case. It has nothing
08:35 10 to do with global revenues for other product of Align's
11 whatsoever.
08:35 12 So to the extent there are any documents
08:35 13 that refer to global revenues for other product lines,
08:35 14 we can certainly work out redaction before those go
08:35 15 back to the jury. No one's mentioned those yet in open
08:35 16 court, and we would certainly object to any references
08:35 17 to those because they have utterly no relevance to the
08:35 18 case.
08:35 19 The case in the phase that we're now
08:35 20 moving into is about whether or not there's a U.S.
08:35 21 market for doctor-directed clear aligners. We say
08:35 22 there is. They say there is not.
08:36 23 If we're right about that, the question
08:36 24 will become the conduct within that market and whether
08:36 25 it suppressed sales by ClearCorrect. And the measure

08:36 1 of damages would be the number of sales and the profits
08:36 2 on those sales for lost sales of clear aligners in the
08:36 3 U.S. market, not the global market and not the
08:36 4 marketplace for other product lines beyond clear
08:36 5 aligners.
08:36 6 THE COURT: Yes, sir.
08:36 7 Any response?
08:36 8 MR. DURST: Yes, Your Honor. There's no
08:36 9 issue that I believe is presented for the Court. If
08:36 10 we -- if we raise this issue, Your Honor, it will come
08:36 11 out of admitted exhibits that are already in evidence.
08:36 12 THE COURT: Well, I think what I heard
08:36 13 Mr. Mueller say is if there's information that's in
08:36 14 admitted documents that pertains to the global entity,
08:36 15 they want those redacted.
08:36 16 MR. DURST: I understand that,
08:36 17 Your Honor, but this is --
08:36 18 THE COURT: And I'm -- let me just
08:36 19 finish. And you say they're already in the exhibits,
08:36 20 and they shouldn't be redacted.
08:36 21 MR. DURST: I'm -- yes. They are in the
08:37 22 exhibits that have been admitted and discussed in open
08:37 23 court. Now, that number has not yet been discussed,
08:37 24 and it will not be discussed this morning, Your Honor.
08:37 25 THE COURT: Okay. So why do you care,

08:37 1 then -- and you may -- why do you care if it's redacted
08:37 2 or not redacted if you're not going to discuss it?
08:37 3 MR. DURST: I'm not going to discuss it
08:37 4 this morning, Your Honor. And that's the reason I
08:37 5 raised this. I wanted complete transparency with --
08:37 6 THE COURT: So at some point it may be
08:37 7 raised?
08:37 8 MR. DURST: Yes, Your Honor.
08:37 9 THE COURT: Okay. So in what situation
08:37 10 would it be raised?
08:37 11 MR. DURST: I do not expect to raise it
08:37 12 with -- to introduce -- first, not to introduce any
08:37 13 additional information. And it is appropriate,
08:37 14 Your Honor, for the control of Straumann over these
08:37 15 entities that are defendants in the actions in the
08:37 16 case. It's relevant to the patent case too,
08:37 17 Your Honor, for that control.
08:37 18 THE COURT: Why is the amount of revenue
08:37 19 relevant to control?
08:37 20 MR. DURST: What we have heard,
08:38 21 Your Honor, in the record is the degree of control that
08:38 22 Straumann -- that Straumann exercises over
08:38 23 ClearCorrect, for instance, and also over Bay Materials
08:38 24 and the degree, the percentage.
08:38 25 THE COURT: I'm sorry, is that Straumann

08:38 1 U.S. or Straumann global?
08:38 2 MR. DURST: Straumann global, Your Honor,
08:38 3 and that's --
08:38 4 THE COURT: I'm sorry. And who put on
08:38 5 the evidence -- so Mr. Mueller can respond to this,
08:38 6 who, in your opinion, put that evidence into the record
08:38 7 of control, of clear control by the global entities?
08:38 8 MR. DURST: Ms. Sterling.
08:38 9 THE COURT: Okay. Do you have any
08:38 10 citations of that?
08:38 11 MR. DURST: I can -- I can deliver those,
08:38 12 Your Honor, yes.
08:38 13 THE COURT: Okay. Now, it sounds to me,
08:38 14 but I don't want to kick the can down the road if it
08:38 15 would harm anyone, it sounds to me like there's no
08:38 16 problem until you want to introduce -- it would -- it
08:38 17 would seem silly to redact it at this point if you're
08:39 18 going to want to use it later and if you're not going
08:39 19 to mention it. And the jury doesn't actually
08:39 20 physically have the exhibits.
08:39 21 So I'm going to hold off on any decision
08:39 22 about redaction. But before you raise the issue
08:39 23 obviously with a witness, you'll need to raise it with
08:39 24 me about whether or not it's admissible.
08:39 25 And I -- if I find that you haven't

08:39 1 established -- I haven't been able -- I mean, I may
08:39 2 very well find that it's admissible. You can get me
08:39 3 those citations, and I can look at it.
08:39 4 But my guess would be if I find that
08:39 5 you -- that the plaintiff has not established that it
08:39 6 would go to show -- it would either go to show or
08:39 7 rebut, or whatever we want to say, control over the
08:39 8 entity, then you'll have to have some other reason to
08:39 9 get it in. But just let me know before you introduce
08:39 10 it.
08:39 11 MR. DURST: Yes, Your Honor. Understood.
08:39 12 And I appreciate that direction, and that's precisely
08:39 13 why I raised it. I didn't want the Court to feel
08:40 14 surprised --
08:40 15 THE COURT: No, I'm --
08:40 16 MR. DURST: -- when it comes up in the
08:40 17 future.
08:40 18 THE COURT: That's just fine. But if
08:40 19 you'll get those -- if you'll get the sections of the
08:40 20 transcript that you believe support you and if you'll
08:40 21 get those to Mr. Mueller so if he has any
08:40 22 counter-designations, we can do this all at once and I
08:40 23 can take it up.
08:40 24 MR. DURST: Indeed. And you won't hear
08:40 25 about this in open court before the jury without

08:40 1 hearing from us first.
08:40 2 THE COURT: Okay. And what else do we
08:40 3 have to take up this morning?
08:40 4 MR. DURST: The second issue, Your Honor,
08:40 5 was the issue with respect to termination of our
08:40 6 agreement to take scans from 3Shape in the United
08:40 7 States.
08:40 8 And this issue arises, Your Honor, due --
08:40 9 in connection with one of the Court's pretrial rulings
08:40 10 where we had withheld privileged information and the
08:40 11 Court issued an order that precludes us from relying --
08:40 12 it's a sword and shield type -- type order.
08:41 13 And what has happened in the trial thus
08:41 14 far, Your Honor, is that defendants have now introduced
08:41 15 evidence of the patent litigation between Align and
08:41 16 3Shape. And that's in evidence in documents that
08:41 17 they've used affirmatively with our witnesses already,
08:41 18 Your Honor. And Ms. Sterling on Wednesday testified,
08:41 19 Your Honor, that -- about the fact that Align had -- I
08:41 20 think she said "cut off" or "terminated" the ability --
08:41 21 THE COURT: Who elicited that? What --
08:41 22 who was asking the questions that elicited that
08:41 23 information?
08:41 24 MR. DURST: I believe both sides asked
08:41 25 questions about that. I don't --

08:41 1 THE COURT: Well, I have this -- my
08:41 2 attitude -- so again, if you can get me the transcript,
08:41 3 because I'm of the opinion that a party can't ask a
08:41 4 witness questions and then say they've opened the door.
08:41 5 It would have to be questions from opposing counsel
08:42 6 that put something in that would open the door.
08:42 7 MR. DURST: And, Your Honor, my able team
08:42 8 tells me that it was Mr. Underwood that asked those
08:42 9 questions.
10 THE COURT: Okay.
08:42 11 MR. DURST: And so, Your Honor, it's in
08:42 12 evidence. There's a piece of documentary evidence, an
08:42 13 e-mail, that talks about the patent litigation.
08:42 14 Ms. Sterling has now talked about the fact that we
08:42 15 terminated that. We need to be able to respond.
08:42 16 And here's our proposal, Your Honor: We
08:42 17 have some non-privileged information. It is a single
08:42 18 press release. And it identifies patent litigation
08:42 19 between Align and 3Shape. So it's not privileged. And
08:42 20 most importantly, Your Honor --
08:42 21 THE COURT: Who would put -- what witness
08:42 22 would that evidence come in through?
08:42 23 MR. DURST: Ms. Sterling.
08:42 24 THE COURT: And are you -- do you know
08:42 25 that she's aware of that article?

08:42 1 MR. DURST: Your Honor, I will examine
08:42 2 her on that, but she's -- she took the stand and talked
08:42 3 about us terminating that.
08:42 4 THE COURT: Well, what I'm saying is you
08:42 5 want to put something into evidence and through a
08:43 6 witness that may not have ever seen that exhibit. So
08:43 7 how do you get the exhibit in?
08:43 8 MR. DURST: Your Honor, I have confidence
08:43 9 I can get it in in evidence and with either her or we
08:43 10 have a witness that can get it in as well. We have a
08:43 11 corporate -- an employee that's still to come that can
08:43 12 get it in.
08:43 13 THE COURT: Of their corporate --
08:43 14 MR. DURST: No. Of our corporation, Your
15 Honor.
08:43 16 And the parties here have a broad
08:43 17 stipulation. There's no other objection to this
08:43 18 exhibit. The parties have a broad stipulation about
08:43 19 admission of evidence. And the only objection to this
08:43 20 press release is the Court's pretrial ruling. And this
08:43 21 document --
08:43 22 THE COURT: It's not admissibility of the
08:43 23 document?
08:43 24 MR. DURST: Correct.
08:43 25 This document does not fall within the

08:43 1 prohibited zone of the Court's order. So it's in
08:43 2 evidence. They've elicited testimony about the
08:43 3 subject.
08:43 4 THE COURT: Do you have a copy of the
08:43 5 exhibit?
08:43 6 MR. DURST: I do. Would you like to hand
08:43 7 it up or would you like it on the ELMO?
08:43 8 THE COURT: Hand it up. And if you can
08:43 9 tell me what it is you think in the article is relevant
08:44 10 to what -- specifically what the testimony has been
08:44 11 that the jury's heard.
08:44 12 MR. DURST: Yes, Your Honor.
13 THE COURT: Okay.
08:44 14 MR. DURST: May I approach?
08:44 15 THE COURT: Please.
08:44 16 MR. DURST: Do you have it, Your Honor?
08:44 17 THE COURT: I do.
08:44 18 MR. DURST: It is right from the top,
08:44 19 Your Honor, the reason for termination. It's the first
08:44 20 paragraph. Here it is on the screen as well,
08:44 21 Your Honor.
08:45 22 THE COURT: Anything else you want to
08:45 23 say?
08:45 24 MR. DURST: Your Honor, this goes -- this
08:45 25 adds -- this is responsive to the testimony

08:45 1 Mr. Underwood elicited, and it goes right to the
08:45 2 reasons for termination.
08:45 3 The Court's order said a specified --
08:45 4 gave examples. It was an EG. Gave examples of the
08:45 5 type of information that we could not admit, and that
08:45 6 all related to legal strategy and privileged
08:45 7 information.
08:45 8 And so here, we would be pointing to the
08:45 9 fact -- and just to respond to what they have
08:45 10 asserted -- the reason for the termination of this
08:45 11 interoperability with 3Shape. That's the argument,
08:45 12 Your Honor.
08:45 13 THE COURT: Okay.
08:45 14 A response?
08:45 15 MR. MUELLER: Yes, Your Honor. So as
08:45 16 brief background before I get to what Ms. Sterling said
08:45 17 on the stand, so very brief background, this is an
08:45 18 issue that --
08:45 19 THE COURT: We have -- our -- a juror's
08:45 20 late. So we have --
08:45 21 MR. MUELLER: Okay. Understood.
08:45 22 This is an issue that has been
08:46 23 percolating for quite some time. During discovery we
08:46 24 tried to take discovery of the purported rationale that
08:46 25 Mr. Durst is referring to for the termination of

08:46 1 3Shape.

08:46 2 So 3Shape is another one of these

08:46 3 intraoral scanners. And at one time Align allowed for

08:46 4 interoperability --

08:46 5 THE COURT: Let me ask you this, and I'll

08:46 6 let you get back to what you're arguing.

08:46 7 What -- assuming we had not had the spat

08:46 8 about the discoverability, do you have a position with

08:46 9 regard to whether or not otherwise this would be

08:46 10 relevant under 401?

08:46 11 MR. MUELLER: In terms of just the

08:46 12 relevance of the subject matter?

08:46 13 THE COURT: Yes.

08:46 14 MR. MUELLER: It is relevant to the case.

08:46 15 It is. The issue is this: So we say that the

08:46 16 termination of 3Shape, in terms of interoperability

08:46 17 with Invisalign, and what that means is Align would no

08:46 18 longer accept prescriptions based on scans through the

08:47 19 3Shape scanner, which we say was part of an overall

08:47 20 plan to consolidate around iTero, their own scanner,

08:47 21 and only accept scans from iTero. That's our argument.

08:47 22 Their response is no. We terminated the

08:47 23 3Shape because of legal advice relating to patent

08:47 24 litigation. That's their argument.

08:47 25 So in discovery we said, we'd like more

08:47 1 information about this. Do you intend to rely on
08:47 2 advice of counsel as a rebuttal to our argument that
08:47 3 the termination of interoperability was for
08:47 4 anticompetitive reasons?
08:47 5 THE COURT: Mr. Durst, you can sit down.
08:47 6 MR. DURST: Oh, yes.
08:47 7 MR. MUELLER: Judge Gilliland set a date
08:47 8 in December by which they had to choose whether or not
08:47 9 to elect to waive advice of counsel. They chose not
08:47 10 to. Okay? They chose not to.
08:47 11 We sent a follow-up letter in detail --
08:47 12 THE COURT: And that's where I got in.
08:47 13 MR. MUELLER: Exactly.
14 THE COURT: I'm with you up to there.
08:47 15 MR. MUELLER: Exactly. So Your Honor had
08:47 16 the Rule 37 motion, which you granted and precluded
08:47 17 them from offering testimony or evidence on this very
08:48 18 issue, this very issue.
08:48 19 So now the position is, as I understand
08:48 20 it, is we have somehow opened the door to their being
08:48 21 able to offer this rationale that Your Honor had
08:48 22 precluded and precluded, we believe, for good reason,
08:48 23 because they hadn't elected to waive advice of
08:48 24 counsel -- waive privilege on advice of counsel on this
25 issue.

08:48 1 So here's the testimony that Ms. Sterling
08:48 2 offered. I'm going to quote it. This is from the
08:48 3 transcript on Wednesday, Page 906, Line 18,
08:48 4 through 907, Line 4. And how's the scanner --
08:48 5 Question: How's the scanner situation
08:48 6 different outside the United States versus inside the
08:48 7 United States?
08:48 8 Answer: So Align actually accepts scans
08:48 9 from 3Shape TRIOS 3. Outside of the United States
08:48 10 versus inside the United States, they only accept scans
08:48 11 from the iTero.
08:48 12 Question: I want to ask one more time
08:48 13 just so we're all clear. They accept scans from
08:49 14 non-Align scanners outside the United States?
08:49 15 Answer: Yes.
08:49 16 And that is not true inside the United
08:49 17 States?
08:49 18 Correct.
08:49 19 And then he went on, Mr. Underwood, to
08:49 20 ask about some of the effects of that. But that was
08:49 21 the total of the testimony on what happened.
08:49 22 As you can see, there was no questions at
08:49 23 all about the rationale that Align had offered for.
08:49 24 There was not even a hint of a reference to the
08:49 25 litigation. So --

08:49 1 THE COURT: I'm good.
08:49 2 Mr. Durst, can you cite to any other
08:49 3 testimony?
08:49 4 MR. DURST: The other relevant factual
08:49 5 item from the record, Your Honor, is the exhibit that
08:49 6 the defendants put in the record, which is Defendant's
08:49 7 Exhibit 46 which references Align's patent lawsuit with
08:50 8 3Shape, Your Honor. And that's what's already --
08:50 9 that's what's already in the record.
08:50 10 MR. MUELLER: If I could respond to that.
08:50 11 MR. DURST: And of course, Your Honor,
08:50 12 we're not relying on advice of counsel here. As the
08:50 13 Court has seen by reading the first paragraph of the
08:50 14 press release, it's public record.
08:50 15 Are you looking at that exhibit?
08:50 16 Mr. Smith, it's on Page 2.
08:50 17 And the situation with this e-mail,
08:50 18 Your Honor, that Mr. Mueller has been using with our
08:50 19 witnesses is this is post termination of the agreement
08:50 20 with 3Shape in the United States. And you can tell the
08:50 21 rationale they're discussing, whether it needs to go
08:50 22 further than the United States.
08:50 23 THE COURT: Okay. I think I'm good.
08:51 24 Okay. I'm going to exclude the Align
08:51 25 document, which is PTX-1362.

08:51 1 Is there anything else we need to take
08:51 2 up?
08:51 3 MR. DURST: Nothing before the jury comes
08:51 4 in. There are other pending issues, Your Honor, but I
08:51 5 understand the jury's waiting.
08:51 6 THE COURT: Jen, is the jury all here?
08:51 7 THE CLERK: No, sir.
8 THE COURT: We have a juror missing.
08:51 9 So --
08:51 10 MR. DURST: Okay. Our next most
08:51 11 important issue, Your Honor, would be a witness issue
08:51 12 that we would like to call that they're objecting to.
08:51 13 THE COURT: Okay.
08:51 14 MR. DURST: Ready to proceed with that?
08:51 15 Ms. Durie will argue that, Your Honor.
08:51 16 THE COURT: Okay.
08:51 17 MS. DURIE: Thank you, Your Honor, and
08:51 18 good morning.
08:51 19 This pertains to the testimony of
08:51 20 Mr. Robert Stoll. We had disclosed him as an expert on
08:51 21 Patent Office procedure.
08:51 22 THE COURT: On patent?
08:51 23 MS. DURIE: Patent Office procedure.
08:51 24 The defendants recently told us that they
08:51 25 do not intend to call their corresponding expert,

08:52 1 Mr. Matal, and they have suggested that for that
08:52 2 reason, we should not be permitted to call Mr. Stoll.
08:52 3 Mr. Stoll, however, is going to be
08:52 4 responding to arguments that have been made over the
08:52 5 course of the trial and suggestions, for example, that
08:52 6 it was improper for Dr. Li to amend the declaration
08:52 7 that she submitted when the claims changed.
08:52 8 We think it is important for Mr. Stoll to
08:52 9 be able to testify consistent with the expert report
08:52 10 that he submitted.
08:52 11 THE COURT: Let me see if I understand
08:52 12 what you're saying. She is going to be responding to
08:52 13 what the jury has heard in court?
08:52 14 MS. DURIE: He will be responding --
15 THE COURT: I'm sorry. He.
08:52 16 MS. DURIE: Yes. He will be responding
08:52 17 to what the jury has heard in court.
08:52 18 THE COURT: And what is his background?
08:52 19 MS. DURIE: He was the commissioner of
08:52 20 patents. He was a patent examiner for many years. He
08:52 21 has a 30-year very distinguished career in the Patent
08:52 22 Office.
08:52 23 THE COURT: They don't object to his
08:52 24 qualifications.
08:52 25 MS. DURIE: Correct.

08:52 1 THE COURT: Got you. Okay.
08:52 2 Anything else? I think I understand
08:52 3 what --
08:52 4 MS. DURIE: That's fine. Thank you,
08:53 5 Your Honor.
08:53 6 THE COURT: Okay.
08:53 7 Mr. Mueller?
08:53 8 MR. MUELLER: Yes, Your Honor. So you
08:53 9 may recall in the Daubert hearing, Align had moved to
08:53 10 exclude our Patent Office procedure expert, Joseph
08:53 11 Matal. And Your Honor reserved on that issue. And we
08:53 12 said at that time this may be a moot point, we may not
08:53 13 call Mr. Matal. We're not going to call Mr. Matal. So
08:53 14 this is a rebuttal to an opinion that's not being
08:53 15 offered.
08:53 16 The basis for the challenge that Align
08:53 17 articulated at the Daubert phase was that this was --
08:53 18 the gestalt of it was that this is merely a lawyer
08:53 19 talking about procedures that Your Honor --
08:53 20 THE COURT: Well, I have to say when
08:53 21 counsel got up, I was -- I couldn't remember what I'd
08:53 22 done. But I was skeptical -- I was going to say to
08:53 23 her -- that I was skeptical -- more than skeptical
08:53 24 whether or not I was going to allow your expert to get
08:53 25 on the witness stand. And you saved me ruling on that.

08:54 1 But I would have the same ruling for
08:54 2 their -- I don't see -- it reminds me of the good old
08:54 3 days 20 years ago when you could put a willfulness
08:54 4 expert on the witness stand and say, for your side,
08:54 5 infringe, and the other side said didn't infringe and
08:54 6 all that.
08:54 7 I don't think that kind of expert has a
08:54 8 role. So I'm going to -- now, to protect the
08:54 9 plaintiff, if the plaintiff at some point wants to --
08:54 10 outside the presence of the jury wants to put that
08:54 11 witness on and elicit what he would have said, I'm
08:54 12 happy to allow the plaintiff to do that.
08:54 13 MS. DURIE: Understood, Your Honor.
08:54 14 MR. MUELLER: Thank you, Your Honor.
08:54 15 MR. DURST: I think we will take the
08:54 16 Court up on the tender offer in all likelihood. We'll
08:54 17 get back -- we'll report back.
08:54 18 The next most important issue, Your
08:54 19 Honor, is another witness issue. And it relates to the
08:54 20 person I believe will be their second witness this
08:54 21 morning, a fellow named Mr. Coss, Jason Coss.
08:54 22 He's an employee of Straumann in Canada
08:55 23 who -- sales related to Straumann's implant business.
08:55 24 And they have in discovery designated him as an expert,
08:55 25 a nonretained expert. So he's an employee. They've

08:55 1 identified him under Rule 26.
08:55 2 THE COURT: Rule 26?
08:55 3 MR. DURST: Yes, under Rule 26 as an
08:55 4 expert.
08:55 5 Our objection -- he's fine to testify as
08:55 6 a fact witness. No objection to that. But,
08:55 7 Your Honor, we do object to him being qualified as an
08:55 8 expert under 702. The topics that they have designated
08:55 9 him on, Your Honor --
08:55 10 I just want to make sure he's not in the
08:55 11 courtroom. May I do that?
08:55 12 Is Coss in the courtroom?
08:55 13 MS. FERRERA: He's not.
08:55 14 MR. DURST: Okay. The topics they have
08:55 15 designated him on, Your Honor, are comparing our
08:55 16 scanner to alternative technologies, other scanners,
08:55 17 and also to PVS, which is that goop we've been talking
08:55 18 about.
08:56 19 He's done a goop treatment once ten years
08:56 20 ago in a sales meeting, and he told us in his
08:56 21 deposition --
08:56 22 THE COURT: I think I'm good.
08:56 23 MR. DURST: Okay.
08:56 24 THE COURT: Mr. Mueller or whoever's
08:56 25 going to argue, I'm -- I understand him being a quasi

08:56 1 expert with respect to how your products work and, you
08:56 2 know, where the line is between percipient witness and
08:56 3 expert, but I'm skeptical about him discussing other
08:56 4 products.
08:56 5 MS. FERRERA: Your Honor, well, two
08:56 6 things. And I have a copy of his Rule 26(a)(2)(C)
08:56 7 disclosure, if Your Honor would like to see it.
08:56 8 THE COURT: How long is it?
08:56 9 MS. FERRERA: Five pages.
08:56 10 THE COURT: Yeah. Sure, I'll take it.
08:56 11 MS. FERRERA: May I approach, Your Honor?
08:56 12 THE COURT: Please.
08:56 13 MS. FERRERA: Your Honor, Mr. Coss has
08:56 14 been in the industry for over 30 years. He's been
08:57 15 selling intraoral scanners for at least two decades, so
08:57 16 he has ample basis to talk about competitive scanners
08:57 17 in the marketplace.
08:57 18 The only citation that Align provides to
08:57 19 support their position that he's not qualified is a
08:57 20 question from his deposition transcript where he was
08:57 21 asked a very specific question about whether or not
08:57 22 certain features of ClearCorrect's or Straumann's own
08:57 23 scanners, whether some of them existed in, you know,
08:57 24 across multiple scanners. And he said: I'm not
08:57 25 sufficiently familiar with all the details of the

08:57 1 scanners to answer that.
08:57 2 He wasn't even asked about the scanners
08:57 3 that he was going to be testifying about here today.
08:57 4 So that deposition testimony doesn't support precluding
08:57 5 Mr. Coss from talking about --
08:57 6 THE COURT: Let me ask Mr. Durst, if he'd
08:57 7 come back.
08:57 8 You didn't file a Daubert on him, did
08:58 9 you?
08:58 10 MR. DURST: We did not file a Daubert.
08:58 11 THE COURT: Okay. And so why -- I mean,
08:58 12 with respect to Mr. -- it's mister, not doctor, I
08:58 13 assume?
08:58 14 MS. FERRERA: Yes.
08:58 15 MR. DURST: It's mister.
08:58 16 THE COURT: If Mr. Coss stays within the
08:58 17 five pages of what he gave you, why would that not be
08:58 18 okay?
08:58 19 MR. DURST: Here's the problem,
08:58 20 Your Honor. His opinions are not his. He's here to
08:58 21 channel hearsay, and they are trying to use a Rule 26
08:58 22 designation as a Trojan horse to get hearsay in this
08:58 23 case.
08:58 24 The problem, Your Honor, is he says --
08:58 25 he's going to say that there are no alternatives to

08:58 1 this device. That's what he's going to say, and he has
08:58 2 told us in his deposition --
08:58 3 THE COURT: Does he say that in this
08:58 4 expert report?
08:58 5 MS. FERRERA: He does not say that, and
08:58 6 that's not what he's going to say, Your Honor.
08:58 7 THE COURT: All right.
08:58 8 MR. DURST: Well, he -- as the disclosure
08:58 9 says, he's going to say that PVS, the goop, is not an
08:58 10 alternative and neither are scanners X and Y.
08:59 11 THE COURT: Well, again, he's not going
08:59 12 to say anything that's not in the report and especially
08:59 13 something like that. Because I don't -- I don't think
08:59 14 he is qualified to do something like that.
08:59 15 And so my question is I think you may
08:59 16 be -- I'm probably on your side, Mr. Durst. I just
08:59 17 think you're asking for a prophylactic ruling if --
08:59 18 they're going to be bound by the same rules as any
08:59 19 expert. If he tries to say something that's not in
08:59 20 this report, and that sounds to me like a lot more of
08:59 21 an opinion than I would let him give anyway, for
08:59 22 example, a hard opinion about whether something is
08:59 23 actually an alternative or not, I don't understand how
08:59 24 he could do that. He's not qualified to do that.
08:59 25 What he is qualified to do, short of

08:59 1 that, I'm not sure. But I'm happy to hear your
08:59 2 objections when he's on the stand.
08:59 3 MR. DURST: I will certainly object if he
08:59 4 starts offering opinions and alternatives, Your Honor.
09:00 5 THE COURT: And I'll keep this up here
09:00 6 and you can --
09:00 7 MR. DURST: Okay. And the issue will be
09:00 8 I think the channeling of hearsay. So once he is --
09:00 9 THE COURT: Is the what?
09:00 10 MR. DURST: The channeling of hearsay.
09:00 11 THE COURT: Well, you can object to
09:00 12 hearsay as well. I mean, he doesn't get to put in
09:00 13 hearsay just because he gave a Rule 26.
09:00 14 MR. DURST: Right.
09:00 15 THE COURT: I mean, he's still just a
09:00 16 percipient witness. And so -- and I have a feeling
09:00 17 I'll be able to -- if you make a hearsay objection, I
09:00 18 have a feeling I'll be able to deal with it.
09:00 19 MR. DURST: I'll be on my toes,
09:00 20 Your Honor.
09:00 21 THE COURT: Okay. And by the way, the
09:00 22 same rules would apply to the defendant that -- apply
09:00 23 on any expert, which is, by and large if Mr. Durst
09:00 24 makes an objection that something's not in the report,
09:00 25 I expect you to be able to say immediately where it is

09:00 1 from your outline. And if you can't, then Mr. Durst
09:00 2 wins.
09:00 3 On the other hand, if -- I've had this
09:00 4 too. If Mr. Durst makes three or four objections that
09:01 5 it's not in his report and it is, then he starts losing
09:01 6 some credibility.
09:01 7 So that -- but I'll have -- I have it up
09:01 8 here. I'll be able to deal with it.
09:01 9 MS. FERRERA: Understood, Your Honor.
09:01 10 Thank you.
09:01 11 MR. MUELLER: Actually, one more for Your
09:01 12 Honor, just in the interest of giving Your Honor a
09:01 13 heads-up on a document that might come up today, just
09:01 14 to tell you what we're going to do with it.
09:01 15 This would be something we use on
09:01 16 cross-examination. There's no cross disclosure
09:01 17 process, but I can put it up right now. It's DTX-308,
09:01 18 and this is an internal Align document.
09:01 19 And I'm going to turn to Page 28 to show
09:01 20 you the issue, Your Honor. On Page 28, this has an
09:01 21 Align internal analysis of ClearCorrect. It talks
09:01 22 about certain strengths that ClearCorrect has, pricing,
09:01 23 made in the USA, et cetera. Also weaknesses, also
09:01 24 mixed impressions.
09:01 25 The first line below the table says: In

09:01 1 addition to the strengths above, many felt advantage of
09:01 2 ClearCorrect was that it was not Align.
09:01 3 THE COURT: I think Kristie would
09:02 4 appreciate if you'd try to speak even faster.
09:02 5 MR. MUELLER: I'm sorry. I'll slow down.
09:02 6 I'll slow down.
09:02 7 These doctors felt Align had become a
09:02 8 greedy, litigious, and overly aggressive company that
09:02 9 did not care very much about its doctor providers.
09:02 10 We're going to redact the word
09:02 11 "litigious" to be -- out of an abundance of caution,
12 Your Honor, in light of Your Honor's in limine rulings
09:02 13 and other litigation and so on. But just wanted to
09:02 14 give Your Honor forewarning that if that word is
09:02 15 blacked out, that's why we're doing it.
09:02 16 THE COURT: Does the plaintiff have an
09:02 17 issue with that?
09:02 18 MR. DURST: Your Honor, this is classic
09:02 19 hearsay within hearsay, and we would object to it on
09:02 20 that grounds.
09:02 21 I'm not quite sure how he's going to use
09:02 22 it. I presume it will be in cross-examination of
09:02 23 Mr. Miller.
09:02 24 THE COURT: So is this a document that
09:02 25 Mr. Miller will be familiar with?

09:02 1 MR. MUELLER: Oh, yeah. This is an
09:03 2 internal document that --
09:03 3 THE COURT: Well, you say "oh, yeah."
09:03 4 Why do you -- why are you certain he would be familiar
09:03 5 with it?
09:03 6 MR. MUELLER: He's the vice president of
09:03 7 global operations.
09:03 8 THE COURT: And is he copied on this
09:03 9 document?
09:03 10 MR. MUELLER: Well, I'm not sure if he's
09:03 11 copied on the e-mail. I'm not sure as I stand here,
09:03 12 but this is an internal document.
09:03 13 THE COURT: All I care about is that I
09:03 14 don't -- is that he's familiar with the document and
09:03 15 not just being handed a document.
09:03 16 Do you have any evidence that he -- well,
09:03 17 what I care about is before you show that page or ask,
09:03 18 I need -- you need to establish that he was -- had seen
09:03 19 the document contemporaneously with it being sent.
09:03 20 MR. MUELLER: Understood.
09:03 21 THE COURT: And then before the jury sees
09:03 22 that page, that it's a page that he had seen and
09:03 23 understood at the time.
09:03 24 MR. MUELLER: Understood. And really it
09:03 25 was just a matter of the redaction that we wanted to

09:03 1 front with Your Honor to let you know that.
09:03 2 THE COURT: I think Mr. Durst is going to
09:03 3 object to it coming in at all. I don't have a problem
09:03 4 with you redacting the word "litigious." I understand
09:04 5 why you're doing that.
09:04 6 But before I allow you to question a
09:04 7 witness about it, you're going to have to establish
09:04 8 that he has some knowledge of this.
09:04 9 MR. MUELLER: Fair enough. Fair enough.
09:04 10 And I'll just add, Your Honor, the
09:04 11 document itself is an Align document. The parties have
09:04 12 a stipulation that documents from the respective
09:04 13 corporate files are authentic business records.
09:04 14 THE COURT: I'm not talking about
09:04 15 authentic or business record. I'm not talking about
09:04 16 admissibility. In my view, which could be wrong, you
09:04 17 know, you could pick anyone in the audience and show
09:04 18 them this document and say, well, what do you think
09:04 19 about this?
09:04 20 And I -- you know, unless he was a
09:04 21 recipient of the document at the time and had some
09:04 22 reason to be charged with knowledge of this at the
09:04 23 time, you don't get to ask him about it.
09:04 24 MR. MUELLER: Understood. Thank you,
09:04 25 Your Honor.

09:04 1 THE COURT: Anything else?
09:04 2 Yes, sir.
09:04 3 MR. TUBACH: Good morning, Your Honor.
09:04 4 Michael Tubach.
09:04 5 Just to raise something briefly that
09:05 6 we've disclosed to opposing counsel, there's a document
09:05 7 that we intend to introduce and use in
09:05 8 cross-examination of a witness this morning, and I just
09:05 9 want to alert the Court --
09:05 10 If I could have the ELMO.
09:05 11 -- that the -- this is a document
09:05 12 produced by ClearCorrect. And we're just redacting
09:05 13 patient names. We don't -- obviously don't want to
09:05 14 disclose patient names. I --
09:05 15 THE COURT: I'm fine with that.
09:05 16 MR. TUBACH: I just wanted to make sure
09:05 17 that no one's surprised by that.
09:05 18 THE COURT: That's fine.
09:05 19 You might explain that you all -- whoever
09:05 20 puts it on should explain that that was done on purpose
09:05 21 to keep the names confidential because it looks a
09:05 22 little weird, you know, when I just saw it, what that
09:05 23 is, but you might let the jury understand that we've
09:05 24 done that for privacy and --
09:05 25 MR. TUBACH: I don't want to commit a

09:05 1 HIPAA violation in open court, Your Honor. Thank you.
09:05 2 THE COURT: Anything else?
09:05 3 MR. MUELLER: Nothing from defendants,
09:05 4 Your Honor. Thank you.
09:05 5 MS. DURIE: No, Your Honor. Thank you.
09:05 6 Mr. Durst, is there anything -- oh,
09:05 7 sorry.
09:05 8 MR. DURST: Yes, there is. Yes.
09:05 9 MR. TUBACH: Yes, Your Honor. We do have
09:06 10 one other issue. This relates to one slide that the
09:06 11 opposing counsel disclosed they intend to use with
09:06 12 Dr. Perryman, their damages --
09:06 13 THE COURT: Will he go on this morning?
09:06 14 MR. TUBACH: No. So we can --
09:06 15 THE COURT: We'll take it up later. I
09:06 16 think the jury's --
09:06 17 (Off-the-record discussion.)
09:06 18 THE COURT: Okay. Let's go ahead and
09:06 19 take it up now.
09:06 20 MR. TUBACH: I thought we had --
09:06 21 THE COURT: No. No. We have a juror who
09:06 22 hasn't made it yet.
09:06 23 MR. TUBACH: Let me just grab that slide.
09:06 24 THE COURT: Please.
09:06 25 MR. TUBACH: And they've given us

09:06 1 something like 83 slides. We're objecting to --
09:06 2 Can I get the ELMO again, please?
09:06 3 We're objecting to one. And this is the
09:06 4 one. And what you see here is some lines and a box on
09:06 5 the right that says 84 to 92 percent market share.
09:06 6 Anyone looking at this chart is going to
09:06 7 think that those lines represent market share, and they
09:07 8 don't. It's just wrong.
09:07 9 These are revenue numbers, and what it
09:07 10 looks like to anyone looking at it, that you're going
09:07 11 from 84 to 92. That's what the blue line looks like
09:07 12 it's doing.
09:07 13 You'll notice there's no description of
09:07 14 what the Y-axis is. There's Ms and Ps. Now, maybe if
09:07 15 you think about it, you'd say, oh. That must be
09:07 16 revenue.
09:07 17 Also, importantly, this implies that
09:07 18 market share's been going up over this time period. As
09:07 19 they well know, market share has been going down. So
09:07 20 it's actually 92 to 84.
09:07 21 Now, of course I'll cross Dr. Perryman on
09:07 22 this if I have to, but this is totally misleading.
09:07 23 THE COURT: A response?
09:07 24 MR. HIRSCH: Good morning, Your Honor.
09:07 25 Jordan Hirsch for ClearCorrect.

09:07 1 Your Honor, Dr. Perryman explains in his
09:07 2 report and will explain that the way that you calculate
09:07 3 market share is by looking at the respective revenues
09:07 4 of each company as opposed to -- in contrast to the
09:08 5 total industry, the clear aligner U.S. industry
09:08 6 revenues.
09:08 7 So he's going to explain that when you
09:08 8 look at the total market and then you look at the
09:08 9 respective revenue of each company, that's how you
09:08 10 calculate market share.
09:08 11 The blue line are revenues, as indicated
09:08 12 on -- by the Y-axis, and he'll explain that those
09:08 13 revenue lines, when you do the typical market share
09:08 14 calculation, results in the 84 to 92 percent share
09:08 15 which is calculated by year.
09:08 16 This is fully disclosed in his report.
09:08 17 Both the revenue numbers and the market share numbers
09:08 18 are disclosed in the -- in the report. And
09:08 19 Dr. Perryman explains that this is precisely how to
09:08 20 calculate the market share, by looking at revenues and
09:08 21 then doing the division to turn that into the market
09:08 22 share number.
09:08 23 THE COURT: This is just going to be a
09:09 24 demonstrative, right?
09:09 25 MR. HIRSCH: Correct. It's just a

09:09 1 demonstrative as part of his testimony.
09:09 2 THE COURT: Does Dr. Perryman have a
09:09 3 way -- do you all have a way technically, since you
09:09 4 have the time -- yes, sir.
09:09 5 MR. TUBACH: Dr. Perryman's in court. I
09:09 6 don't know if we should have him step out for this or
09:09 7 if it matters.
09:09 8 THE COURT: It'd be helpful probably if
09:09 9 he hears this.
09:09 10 So is there a way that you can put up the
09:09 11 slide first without the 84 to 92 market share portion
09:09 12 of it?
09:09 13 MR. HIRSCH: Uh-huh.
09:09 14 THE COURT: Have him explain what he's
09:09 15 talking about, and then if you want to have a second
09:09 16 slide that adds --
09:09 17 MR. HIRSCH: That has it.
09:09 18 THE COURT: -- whatever it is that he
09:09 19 says. And then counsel can take him up on cross
09:09 20 with -- if he has an issue about what he did.
09:10 21 MR. HIRSCH: That's fine. Thank you,
09:10 22 Your Honor.
09:10 23 THE COURT: Okay. Anything else?
09:10 24 MS. DURIE: Assuming the jury's still not
09:10 25 here --

09:10 1 THE COURT: They're not.
09:10 2 MS. DURIE: -- and we have time
09:10 3 available --
09:10 4 THE COURT: Please.
09:10 5 MS. DURIE: -- there is one additional
09:10 6 issue that got raised.
09:10 7 If we could have the ELMO. Put this up.
09:10 8 It pertains to PTX-51.
09:10 9 So Your Honor may recall that this was
09:10 10 actually addressed in connection with one of the
09:10 11 motions in limine, and Your Honor overruled the
09:10 12 objection to this exhibit.
09:10 13 It is a Bay Materials document from -- to
09:10 14 Mr. Lahlouh discussing coming up with a different
09:10 15 configuration of the hard-soft-hard layers. This is a
09:10 16 document that we intend to use with Dr. Reitman in
09:10 17 connection with enablement.
09:10 18 THE COURT: And this is -- I'm sorry.
09:10 19 This is not in evidence yet?
09:10 20 MS. DURIE: This is not in evidence yet.
09:11 21 THE COURT: Okay.
09:11 22 MS. DURIE: And we plan to use it -- she
09:11 23 discusses this exhibit in her report.
09:11 24 We plan to use it in connection with her
09:11 25 examination on enablement in order to show that there

09:11 1 was no particular challenge with respect to changing
09:11 2 the order of the layers for enablement purposes, which
09:11 3 was the substance of the challenge that they are now
09:11 4 bringing.
09:11 5 And as I said, they raised this in one of
09:11 6 the motions in limine, making the same arguments that
09:11 7 they're making now, and that objection was overruled at
09:11 8 that time.
09:11 9 THE COURT: I should understand, but I
09:11 10 don't quite. Help me on how this helps on enablement.
09:11 11 I'm --
09:11 12 MS. DURIE: Because the argument that I
09:11 13 understand defendants to be making with respect to
09:11 14 enablement is that it was too hard to be able to change
09:11 15 the various order of layers --
09:11 16 THE COURT: Okay.
09:11 17 MS. DURIE: -- in order to be able to
09:11 18 make the various variations on the product.
09:11 19 THE COURT: Okay.
09:11 20 MS. DURIE: And this shows that they
09:11 21 considered flipping the order of the layers from
09:11 22 hard-soft-hard to soft-hard-soft, and they didn't see
09:12 23 that as presenting any particular problem.
09:12 24 THE COURT: So it rebuts the argument
09:12 25 that it would have been impossible or too difficult to

09:12 1 do.

09:12 2 MS. DURIE: That it would require undue

09:12 3 experimentation in order to be able to make the

09:12 4 different permutations of the product.

09:12 5 THE COURT: And --

09:12 6 MS. DURIE: It is also, for what it's

09:12 7 worth -- well, I'll leave it at that for the moment.

09:12 8 Thank you.

09:12 9 THE COURT: And the witness is going to

09:12 10 explain the way you just explained.

09:12 11 MS. DURIE: Correct.

09:12 12 THE COURT: Okay.

09:12 13 A response?

09:12 14 MR. MUELLER: So, Your Honor, a few

09:12 15 things. Dr. Reitman is coming back on enablement and a

09:12 16 response to the misrepresentation allegations that we

09:12 17 made with respect to the submissions to the Patent

09:12 18 Office, not on noninfringement.

09:12 19 This document, there's a couple of things

09:12 20 I would note. Number one, Dr. Reitman has no opinion

09:12 21 in her enablement sections of her expert reports

09:12 22 connected to this. So there's no connection between

09:13 23 her actual expert report and this.

09:13 24 Number two, there's nothing in this

09:13 25 document. It's very short. Your Honor can see there's

09:13 1 nothing in this that says how easy or hard it might be
09:13 2 to make any particular configuration.
09:13 3 Number three, this has nothing to do,
09:13 4 nothing to do with the accused product in the case.
09:13 5 And the way you see that, Your Honor, you've now seen
09:13 6 all the evidence about the development process.
09:13 7 Zendura FLX, this is undisputed, the
09:13 8 accused material was released in 2018. 2018. This
09:13 9 document is from December of 2019.
09:13 10 So it has nothing to do with the accused
09:13 11 product, nothing to do with enablement, no mention of
09:13 12 how easy or hard it would be to make any particular
09:13 13 configuration, no relationship to Dr. Reitman's
09:13 14 enablement opinions.
09:13 15 And honestly, Your Honor, we think they
09:13 16 want to use it just because it has the word "knockoff"
09:13 17 in it. That has nothing to do with anything. And it's
09:13 18 irrelevant to infringement, irrelevant to enablement.
09:13 19 The last thing I'll say is Mr. Lahlouh
09:13 20 was on the stand for about two hours. They didn't ask
09:14 21 him one question about this. Not one.
09:14 22 So it has nothing to do with the case,
09:14 23 and we think to try to inject this through Dr. Reitman
09:14 24 under the justification of enablement where it's not in
09:14 25 her enablement report --

09:14 1 THE COURT: Well, let me hear from -- if
09:14 2 you can tell me where it is in her report.
09:14 3 MS. DURIE: It is in the section -- and I
09:14 4 apologize. I don't have the citation right now, but I
09:14 5 will provide it to the Court in advance of her
09:14 6 testimony.
09:14 7 THE COURT: Well, and so if you can --
09:14 8 the ruling will be the same. If you think -- if you
09:14 9 think that it's in her report --
09:14 10 MS. DURIE: It is.
09:14 11 THE COURT: -- and you ask the question,
09:14 12 when they object it's not in her report, you can tell
09:14 13 me where it is and we should be good.
09:14 14 MS. DURIE: I understand. Thank you,
09:14 15 Your Honor.
09:14 16 MR. MUELLER: And I would just ask that
09:14 17 it not be published to the jury until we deal with this
09:14 18 issue.
09:14 19 THE COURT: I think that's fine.
09:14 20 Anything else?
09:14 21 MR. MUELLER: If we're still waiting, we
09:14 22 have one more issue --
23 THE COURT: Sure.
09:14 24 MR. MUELLER: -- if there's time. And
09:14 25 this relates to the '936 patent which Your Honor

09:14 1 granted JMOL on.

09:15 2 And the question is we believe it would

09:15 3 be appropriate to give the jury a very neutrally-worded

09:15 4 instruction akin to what you have done in other cases.

09:15 5 We've been discussing this over the

09:15 6 weekend with Align, and their position is that we

09:15 7 should not give any or you should not give any

09:15 8 instruction at all.

09:15 9 I can read you the text of our proposed

09:15 10 instruction, and we can give it to you in writing as

09:15 11 well, Your Honor. But it's adapted from what you did

09:15 12 in the ACQIS, if I'm pronouncing that correctly, ACQIS

09:15 13 versus ASUSTeK case. And the language would be as

09:15 14 follows:

09:15 15 Ladies and gentlemen, I'm going to read

09:15 16 you an instruction. You heard testimony last week

09:15 17 about the '936 patent and two products that Align

09:15 18 accused of infringement in this case, the SIRIOS and

09:15 19 Virtuo Vivo scanners.

09:15 20 On Wednesday, I addressed an issue

09:15 21 regarding the '936 patent outside of your presence.

09:15 22 The '936 patent is no longer a part of the case. I

09:15 23 tell you that because I didn't want you to wonder why

09:15 24 defendants were not discussing the '936 patent.

09:16 25 Defendants do not need to address the

09:16 1 '936 patent because it's no longer in the case, and you
09:16 2 will not need to answer any questions about it. You
09:16 3 should not allow the fact that the '936 patent is no
09:16 4 longer in the case to have any impact on you with
09:16 5 respect to any other issue in this case.
09:16 6 And the reason why we believe and would
09:16 7 respectfully request -- believe this instruction's
09:16 8 appropriate and respectfully request that Your Honor
09:16 9 give it is we're not going to present any expert
09:16 10 testimony responding to the infringement allegations.
09:16 11 And we don't want the jury to think that our silence on
09:16 12 that topic is somehow because we have no response.
09:16 13 And that's particularly true, Your Honor,
09:16 14 because as you've heard earlier today, there's scanner
09:16 15 issues for the antitrust claims. The closed system
09:16 16 argument that we're making, that's central to our
09:16 17 antitrust claims, and we don't want the jury to have
09:16 18 any confusion that Align's conduct is justified
09:16 19 vis-à-vis ClearCorrect and Straumann because of the
09:16 20 infringement allegations that we have not responded to
09:16 21 before them.
09:17 22 THE COURT: Well, ordinarily, but for
09:17 23 your antitrust counterclaims, I would not be providing
09:17 24 what you're suggesting.
09:17 25 What I -- what I'm not following, though,

09:17 1 is -- and I understand -- I do understand a concern on
09:17 2 your part having an antitrust argument.
09:17 3 What I don't understand is unless the
09:17 4 plaintiff makes some kind of affirmative statement
09:17 5 about it, why -- look, juries hear a lot of things.
09:17 6 But I don't understand why the jury would be impacted
09:17 7 on your antitrust case by the fact that silently --
09:18 8 now, by saying this out loud, I'm telegraphing to the
09:18 9 plaintiff not to intimate to the jury that there is
09:18 10 some connection.
09:18 11 But I think that absent -- if we get
09:18 12 through the trial without the plaintiff -- you being
09:18 13 able to show where the plaintiff made some argument
09:18 14 that is negative to your antitrust case because that
09:18 15 patent is no longer in it, I think that's unnecessary.
09:18 16 MR. MUELLER: Understood.
09:18 17 I just have one thing, Your Honor. To
09:18 18 the extent that does happen --
09:18 19 THE COURT: Let me say one more thing
09:18 20 just to protect you.
09:18 21 You are certainly welcome to proffer that
09:18 22 to protect the record and -- but I don't intend to give
09:18 23 it, absent you being able to articulate why it's
09:18 24 necessary based on something that -- and I'll say this
09:18 25 one more time. Y'all are good lawyers.

09:18 1 But just so -- you can't bring something
09:18 2 in and say it opened the door to them getting an
09:19 3 instruction. I would only give that instruction if it
09:19 4 were curative of something that the plaintiff did.
09:19 5 MR. MUELLER: Understood, Your Honor.
09:19 6 I guess the only thing I would add is
09:19 7 that to the extent that the situation arises where we
09:19 8 think some insinuation is being made or the like, we
09:19 9 may actually ask for a stronger curative instruction
09:19 10 than this.
09:19 11 THE COURT: You all do whatever you need
09:19 12 to do to protect your clients.
09:19 13 And so anything else?
09:19 14 MR. MUELLER: That's all we have,
09:19 15 Your Honor. Thanks very much.
09:19 16 THE COURT: Okay. We're still missing a
09:19 17 juror. And so when she -- it's a she, right? When she
09:19 18 gets here, I will let you know and we will commence.
09:19 19 THE BAILIFF: All rise.
09:19 20 (Recess taken.)
09:35 21 THE BAILIFF: All rise.
09:35 22 THE COURT: Please remain standing for
09:35 23 the jury.
09:35 24 (Jury entered the courtroom.)
09:35 25 THE COURT: Thank you. You may be

seated.

09:36 MR. DURST: Your Honor, we would like to
09:36 resume the cross-examination of Ms. Sterling.

CROSS-EXAMINATION CONTINUED

BY MR. DURST:

09:36 Q. Ms. Sterling, you realize you're still under
09:36 oath?

09:36 A. Yes. I do.

09:36 Q. It's that old saying: To tell the truth, the
09:36 whole truth, and nothing but the truth?

09:36 A. Yes.

09:36 Q. Now, over the weekend, Ms. Sterling, did you
09:36 have the opportunity to discuss your testimony with
09:36 anyone?

09:36 A. No.

09:36 Q. Did you talk about any of the questions that
09:36 we -- you and I talked about last week?

09:36 A. No.

09:36 Q. Did you talk about anything that might be
09:36 asked of you this week?

09:36 A. No.

09:36 Q. Did you get any feedback on how Wednesday
09:36 went?

09:36 A. No.

09:36 Q. All right. Now, let's give everyone just a

09:36 1 little refresher of where we left off. On Wednesday,
09:36 2 we talked about the scanner, iTero.
09:36 3 Do you remember that?
09:36 4 A. Yes.
09:36 5 Q. And we talked about how ClearCorrect has
09:36 6 received 50,000 orders for ClearCorrect aligners from
09:36 7 iTero scans, right? We talked about that?
09:36 8 A. Yes. We talked about that.
09:37 9 Q. And we talked about the size of your team, the
09:37 10 budget size and number of people you have focused on
09:37 11 marketing in the United States.
09:37 12 Do you remember that?
09:37 13 A. Yes. I remember.
09:37 14 Q. And then we talked about some of those
09:37 15 weaknesses that your team had identified in an internal
09:37 16 presentation.
09:37 17 Do you recall those?
09:37 18 A. Yes. We talked about the presentation.
09:37 19 Q. And the weaknesses that were in that SWOT
09:37 20 analysis.
09:37 21 Do you remember that?
09:37 22 A. Yes. I do.
09:37 23 Q. And we talked about those competitors that are
09:37 24 out there facing the same competitive forces as
09:37 25 ClearCorrect and how their revenues have been growing

09:37 1 while ClearCorrect's is shrinking.
09:37 2 Do you remember that?
09:37 3 A. I remember the slide, yes.
09:37 4 Q. All right. Now, Ms. Sterling, we thought we
09:37 5 were -- we thought we were getting close to the end of
09:37 6 your cross-examination, and I had some questions
09:37 7 prepared to ask another witness, Mr. Kirsch.
09:37 8 Mr. Kirsch is your boss?
09:37 9 A. Yes.
09:37 10 Q. And last week we thought he was coming, but I
09:37 11 learned over the weekend that he's not coming. Have
09:37 12 you been informed that Mr. Kirsch is not coming to
09:37 13 Waco?
09:37 14 A. I heard today he's not coming.
09:38 15 Q. You heard that this morning?
09:38 16 A. Yes.
09:38 17 Q. With my apologies, ma'am, I need to ask you
09:38 18 some of the questions I was going to ask Mr. Kirsch.
09:38 19 A. Okay.
09:38 20 Q. All right. So we were looking at PTX-1615
09:38 21 when we left on Wednesday afternoon, and that is
09:38 22 Straumann's annual report.
09:38 23 Do you remember this document, ma'am? This is
09:38 24 Straumann's annual report from 2024.
09:38 25 A. Yes. I see that.

09:38 1 MR. DURST: Move to admit Exhibit 1615,
09:38 2 Your Honor.
09:38 3 MR. UNDERWOOD: No objection, Your Honor.
09:38 4 THE COURT: Admitted.
09:38 5 BY MR. DURST:
09:38 6 Q. And, Ms. Sterling, if -- you can either follow
09:38 7 along in the document that you have in front of you
09:38 8 there or you can follow on the screen. We'll do both
09:38 9 here.
09:38 10 On Page 27 of this annual report, do you see
09:38 11 the discussion there that says: Becoming a leader -- a
09:38 12 leading orthodontic franchise.
09:39 13 Do you see that, ma'am?
09:39 14 A. Yes.
09:39 15 MR. DURST: Mr. Smith, would you please
09:39 16 highlight the sentence that begins "Clear aligners."
17 BY MR. DURST:
09:39 18 Q. Now, this is the document, this annual report
09:39 19 is the document that Straumann gives to -- gives to its
09:39 20 investors, right?
09:39 21 Right, Ms. Sterling?
09:39 22 A. Yes.
09:39 23 Q. And here, in the report to investors, it calls
09:39 24 aligners "a discreet alternative to traditional
25 braces."

09:39 1 Do you see that?
09:39 2 A. Yes. I see that.
09:39 3 Q. And do you remember that in your deposition,
09:39 4 you also called aligners a discreet alternative to
09:39 5 traditional braces, "an alternative modality," I think.
09:39 6 Do you remember that?
09:39 7 A. I don't remember.
09:39 8 Q. Do you agree with that, that clear aligners
09:39 9 are, I think in your words, "an alternative modality to
09:39 10 treatment with braces." That's true?
09:39 11 A. For a select group of patients.
09:39 12 Q. That's true?
09:39 13 A. For a select group of patients.
09:40 14 Q. Ma'am, is it true for -- that clear aligners
09:40 15 are an alternative modality for treatment -- an
09:40 16 alternative modality to braces?
09:40 17 A. For a select group of patients, yes.
09:40 18 Q. All right. And then also in this Straumann
09:40 19 report -- this is the Straumann AG, the parent company,
09:40 20 right?
09:40 21 A. Yes.
09:40 22 Q. Okay. That's the Swiss company?
09:40 23 A. The parent company, yes.
09:40 24 Q. Right. And that's the one that -- you're in
09:40 25 their offices, your office, your work office is in

09:40 1 their offices in Switzerland?
09:40 2 A. Yes.
09:40 3 Q. All right. And in this document, do you see
09:40 4 the reference to "effective teeth straightening."
09:40 5 Do you see that, ma'am?
09:40 6 A. Yes.
09:40 7 Q. Okay. And Straumann talks about teeth
09:40 8 straightening being a market, doesn't it?
09:40 9 I'm not asking about this slide that's right
09:40 10 now, but Straumann discusses teeth straightening as a
09:41 11 market, doesn't it, ma'am?
09:41 12 A. It says this in the document. Yes.
09:41 13 Q. It says it in the annual report that Straumann
09:41 14 sends to its investors?
09:41 15 A. Yes. That's what it says.
09:41 16 Q. Let's look at Page 27 and the highlighted
09:41 17 sentence there. Straumann, the parent company, refers
09:41 18 to a teeth-straightening market, doesn't it?
09:41 19 A. Yes. That's what it says.
09:41 20 Q. Now, Ms. Sterling, on Wednesday, you mentioned
09:41 21 some discussion of how within ClearCorrect, the United
09:41 22 States market is not faring as well as some other
09:41 23 places around the world.
09:41 24 Do you remember that?
09:41 25 A. Not specifically.

09:41 1 Q. So how is ClearCorrect in the United States
09:41 2 doing relative to other geographic markets around the
09:41 3 world?
09:41 4 A. Flat to declining.
09:41 5 Q. And compare -- I'm asking you to do a relative
09:41 6 comparison to other markets around the world.
09:41 7 A. For ClearCorrect, in the United States, we are
09:42 8 flat to declining compared to other countries around
09:42 9 the world. Yeah.
09:42 10 Q. And there are reasons that things are
09:42 11 different in those other countries, aren't there?
09:42 12 A. I don't understand.
09:42 13 Q. Well, demand is sometimes different in -- in
09:42 14 the other countries?
09:42 15 A. Not necessarily.
09:42 16 Q. Well, let's look at Page 27 of this -- pardon
09:42 17 me -- 39 of this annual report. And the paragraph that
09:42 18 begins "While the orthodontic segment" is there.
09:42 19 This very first sentence of this part of the
09:42 20 discussion within the annual report points to soft
09:42 21 demand in the United States.
09:42 22 Do you see that? Do you see that, ma'am? Do
09:42 23 you see that language?
09:42 24 A. Yes. I see the language.
09:42 25 MR. DURST: And if we take that blowout

09:42 1 down, Mr. Smith.
2 BY MR. DURST:
09:42 3 Q. We can see that we're talking about North
09:42 4 America, that the U.S. market has soft demand.
09:42 5 Do you see that?
09:42 6 A. Yes. I see that.
09:42 7 Q. Okay. And if we go to Slide -- pardon me --
09:43 8 Page 38, there's a discussion of Europe, Middle East,
09:43 9 and Africa.
09:43 10 Do you see that this is what your annual
09:43 11 report is referencing?
09:43 12 A. Yes. Overall.
09:43 13 Q. And in this section, Straumann calls out that
09:43 14 in the orthodontic section -- and that's clear
09:43 15 aligners, right, for Straumann, orthodontics?
09:43 16 A. Yes.
09:43 17 Q. In the orthodontic section, execution, which
09:43 18 means team performance, doesn't it? Team performance
09:43 19 means execution, Ms. Sterling?
09:43 20 A. It can mean it.
09:43 21 Q. And in this market, orthodontics is making a
09:43 22 significant contribution driven by strong execution in
09:43 23 a more targeted approach.
09:43 24 Do you see that?
09:43 25 A. Yes. I see that.

09:43 1 Q. And so in the annual report, Ms. Sterling,
09:43 2 your company is calling out differences between what's
09:43 3 happening in the United States and around the world.
09:43 4 Do you agree with that?
09:43 5 A. Calling out differences, yes.
09:44 6 MR. DURST: Now, we can take that down,
09:44 7 Mr. Smith.
8 BY MR. DURST:
09:44 9 Q. Ms. Sterling, who is the CEO? Who is
09:44 10 Mr. Kirsch's boss?
09:44 11 A. Guillaume.
09:44 12 Q. And what is his last name?
09:44 13 A. Daniellot.
09:44 14 Q. Daniellot?
09:44 15 A. Daniellot, yeah.
09:44 16 Q. I'm going to struggle with the name a bit. So
09:44 17 bear with me.
09:44 18 Does he come to the United States sometimes?
09:44 19 A. I believe so. Yes.
09:44 20 Q. Have you ever met with him in the United
09:44 21 States?
09:44 22 A. Yes.
09:44 23 Q. And has he ever been to Texas?
09:44 24 A. Yes.
09:44 25 Q. Did you meet with him when he was in Texas?

09:44 1 A. Yes.
09:44 2 Q. Do you remember when that was?
09:44 3 A. 2023.
09:44 4 Q. Now, when he came to the United States to
09:44 5 visit in 2023, that was for a discussion about the
09:44 6 North American market.
09:44 7 Do you remember that?
09:44 8 A. I don't remember that.
09:44 9 Q. Did you participate in meetings with him about
09:44 10 the North American market?
09:44 11 A. We did a global business review.
09:44 12 Q. A global business review. And you were part
09:44 13 of that?
09:44 14 A. Yes.
09:44 15 Q. And do you know that after that, his visit
09:44 16 here, the CEO's visit, he sent out -- around an e-mail
09:45 17 to his executive team. You've seen that, right?
09:45 18 MR. DURST: Let's pull up Exhibit
09:45 19 No. 586, please. This document is already in evidence.
09:45 20 BY MR. DURST:
09:45 21 Q. And if we go to the top of this, tell the jury
09:45 22 who are these people that Guillaume is e-mailing.
09:45 23 A. Aurelio, who is the head of North America for
09:45 24 Straumann Group, and Camila, who was the head of the
09:45 25 orthodontic business unit.

09:45 1 Q. And do you see the RE line, the subject matter
09:45 2 line, is Follow up on the North American Market visit?
09:45 3 A. Yes. I see that.
09:45 4 Q. Is this the same review that you participated
09:45 5 in or a different one?
09:45 6 A. This is a different time.
09:45 7 Q. Okay. So let's look now -- if we look at this
09:45 8 e-mail that he sends to his colleagues in the executive
09:45 9 suite there, he -- if we go down to Page -- let's see.
09:46 10 It's 586, Page 1, and the sentence that begins or the
09:46 11 paragraph that begins: I would like to summarize my
09:46 12 notes.
09:46 13 Do you that?
09:46 14 A. Yes. I see that.
09:46 15 Q. Okay.
09:46 16 MR. UNDERWOOD: Your Honor, I object.
09:46 17 THE COURT: Mr. Durst.
09:46 18 MR. DURST: Yes.
09:46 19 MR. UNDERWOOD: I apologize, Your Honor.
09:46 20 Under the Court's guidance this morning,
09:46 21 Ms. Sterling's not cc'd on this. And she just
09:46 22 testified that this was a different time period than
09:46 23 the meeting she had participated in. So I'm not sure
09:46 24 there's a foundation.
09:46 25 THE COURT: If you want to lay a

09:46 1 foundation whether or not she's seen this exhibit.
09:46 2 MR. DURST: Your Honor, this exhibit is
09:46 3 in evidence.
09:46 4 THE COURT: I know, but I don't even know
09:46 5 if she's ever seen this before today.
09:46 6 MR. DURST: Before today.
09:46 7 BY MR. DURST:
09:46 8 Q. Have you talked with Mr. Daniellot and his
09:46 9 team about the North American market, ma'am?
09:46 10 A. Not specifically.
09:46 11 Q. Never?
09:46 12 A. I don't remember. Not that I can remember.
09:46 13 Q. You've never talked to your boss' boss about
09:46 14 the North American market?
09:47 15 A. Not that I can remember.
09:47 16 Q. Have you seen his references to self-inflicted
09:47 17 wounds, ma'am?
09:47 18 A. I saw it in court a few days ago.
09:47 19 Q. He didn't tell you about that e-mail that he
09:47 20 sent that said in the North American market, we're
09:47 21 suffering from self-inflicted wounds?
09:47 22 A. He did not tell me.
09:47 23 Q. You've never heard that before?
09:47 24 A. He did not tell me.
09:47 25 Q. Now, if we go to -- if we go over to the -- up

09:47 1 to the first page of this e-mail, 12:27, Mr. Daniellot
09:47 2 talks about several reasons for the shortfalls.
09:47 3 MR. UNDERWOOD: Your Honor, I apologize.
09:47 4 I would just re-urge the same objection.
09:47 5 THE COURT: Counsel, unless you establish
09:47 6 that she's familiar with this document, I'm not going
09:47 7 to allow you to ask her questions about it.
09:47 8 MR. DURST: Okay, Your Honor.
09:48 9 You can take it down, Mr. Smith.
09:48 10 BY MR. DURST:
09:48 11 Q. Have you heard, Ms. Sterling, of the executive
09:48 12 suite calling for an emergency in the leadership in
09:48 13 North America? Has that ever been communicated to you?
09:48 14 A. No.
09:48 15 Q. By anyone?
09:48 16 A. No. I have not heard those words.
09:48 17 Q. And do you know that there were changes made
09:48 18 in the leadership in the United States after these
09:48 19 visits?
09:48 20 A. I know there were changes made. Yes.
09:48 21 Q. Yes. Mr. Kirsch came online, right?
09:48 22 A. Yes.
09:48 23 Q. He was hired as the new leader?
09:48 24 A. He was already part of the group, but --
09:48 25 Q. And Mr. Kirsch meets with Mr. Daniellot all

09:48 1 the time, right, on a regular basis?
09:48 2 A. I would assume so.
09:48 3 Q. Yes.
09:48 4 MR. DURST: Now, I'd like to go to PTX
09:49 5 No. 3111 (sic), please. It's just 311, Mr. Smith.
09:49 6 This document, Your Honor, is subject to
09:49 7 the parties' stipulation. I would move to admit
09:49 8 Exhibit 311, Your Honor.
09:49 9 MR. UNDERWOOD: Your Honor, the same
09:49 10 issue.
09:49 11 THE COURT: The question is whether or
09:49 12 not it can be admitted. I mean, if y'all -- I think
09:49 13 y'all have a stipulation that it can be, correct?
09:49 14 MR. UNDERWOOD: Oh, we do have a
09:49 15 stipulation as to authenticity and business records.
09:49 16 So for purposes of that, no objection.
09:49 17 THE COURT: Okay.
09:49 18 BY MR. DURST:
09:49 19 Q. Now, Ms. Sterling, are you aware of there
09:49 20 being manufacturing problems with ClearCorrect cases in
09:49 21 the United States?
09:49 22 A. I'm aware of complaints, yes.
09:49 23 Q. And you were -- what was your role? Were you
09:49 24 still in Round Rock in June of '23?
09:49 25 A. Yes. I was still in Round Rock.

09:49 1 Q. And when did you move to Switzerland?
09:49 2 A. December 2024.
09:50 3 Q. And are you aware of a concern within the
09:50 4 company, ma'am, that business was being lost, cases
09:50 5 were being lost on account of manufacturing delays?
09:50 6 You're aware of that, turnaround times?
09:50 7 THE COURT: He has not yet mentioned the
09:50 8 exhibit.
09:50 9 MR. UNDERWOOD: I understand. It is on
09:50 10 the screen, though.
09:50 11 THE COURT: Oh, okay. If we could take
09:50 12 it down, please.
09:50 13 MR. DURST: Your Honor, it's in evidence.
09:50 14 THE COURT: I understand. But I'm not
09:50 15 going to -- approach the bench. I must not be making
09:50 16 myself clear.
09:50 17 (Bench conference.)
09:50 18 THE COURT: You only get to use the
09:50 19 exhibit if the witness is familiar with the exhibit.
09:50 20 You could ask -- you can -- you had the chance to
09:50 21 depose people and ask them who wrote it, received it,
09:50 22 saw it, whatever. And you can put that evidence in.
09:50 23 Have you done that?
09:50 24 But unless you establish that this
09:50 25 witness has seen the exhibit, is familiar with what's

09:51 1 in it, you don't get to use the exhibit. You can ask
09:51 2 the questions you ask.
09:51 3 MR. DURST: Your Honor.
09:51 4 THE COURT: You don't get to --
09:51 5 MR. DURST: I understand, and I will
09:51 6 abide.
09:51 7 This situation is complicated by the fact
09:51 8 that her boss, the author of many of these documents,
09:51 9 was on the will call list until Friday. And now he's
09:51 10 not in the United States.
09:51 11 THE COURT: Why is he not going to
09:51 12 participate?
09:51 13 MR. MUELLER: I'm sorry?
09:51 14 THE COURT: Why is he not --
09:51 15 MR. MUELLER: We don't need him. They
09:51 16 have his deposition. They could designate from it.
09:51 17 THE COURT: Well, I understand. But I
09:51 18 think what Mr. Durst is saying is he intended to use
09:51 19 this exhibit with him, and by him not being here,
09:51 20 he's -- but that doesn't change the fact that she's not
09:51 21 familiar with this exhibit.
09:51 22 So you can play his deposition in your
09:51 23 rebuttal if you want. If you questioned him about this
09:51 24 and there's information you want to put about this
09:51 25 exhibit from him in, you can do it that way.

09:52 1 MR. MUELLER: And we said we'd give them
09:52 2 the expedited counter-designations this afternoon.
09:52 3 MR. DURST: Your Honor, may I raise
09:52 4 another issue while we're right up here?
5 I understand the Court's rules is it's
09:52 6 one riot, one ranger, and we were instructed we are to
09:52 7 only bring one lawyer. Now, while we kind of like
09:52 8 Mr. Mueller hopping up and running up here every time,
09:52 9 that's kind of --
09:52 10 THE COURT: I was going to discuss that
09:52 11 when we weren't all up here, but you are correct. I
09:52 12 just like having one lawyer per side.
09:52 13 MR. DURST: Thank you.
09:52 14 MR. UNDERWOOD: Thank you, Your Honor.
09:52 15 (Bench conference concludes.)
09:52 16 BY MR. DURST:
09:52 17 Q. Ms. Sterling, ClearCorrect has suffered from
09:52 18 turnaround time in manufacturing and lost business on
09:52 19 account of that, isn't it?
09:52 20 A. I don't know that I would characterize it like
09:52 21 that.
09:52 22 Q. ClearCorrect has suffered in the market with
09:52 23 its customers due to manufacturing issues.
09:52 24 Do you agree with that part?
09:52 25 A. We've had manufacturing issues.

09:53 1 Q. And you've had complaints about turnaround
09:53 2 times from your customers?
09:53 3 A. Yes. We've had complaints.
09:53 4 Q. And some of those complaints have gone all the
09:53 5 way up to the Swiss CEO, Mr. Daniellot, right? You
09:53 6 know that?
09:53 7 A. Yes.
09:53 8 Q. And have you -- have you heard that
09:53 9 Mr. Daniellot is concerned about continuously receiving
09:53 10 complaints? Have you heard that, ma'am?
09:53 11 THE COURT: I'm sorry. I just couldn't
09:53 12 understand your question. I didn't hear it.
09:53 13 MR. DURST: Has she been informed that
09:53 14 the CEO is concerned about continuously receiving
09:53 15 complaints about manufacturing issues?
09:53 16 MR. UNDERWOOD: Your Honor, I would
09:53 17 object to lack of foundation.
09:53 18 THE COURT: Overruled.
09:53 19 A. Can you restate the question? Sorry.
09:53 20 BY MR. DURST:
09:53 21 Q. Have you been informed that the CEO, the chief
09:54 22 CEO, the boss' -- your boss' boss, has been informed
09:54 23 about continuously receiving complaints regarding
09:54 24 manufacturing delays and manufacturing quality?
09:54 25 A. I know he's received complaints. Yes.

09:54 1 Q. Now, I would like to show you Exhibit No. 549.
09:54 2 What is Exhibit 549?
09:54 3 MR. DURST: You can put this on the
09:54 4 screen, Mr. Smith.
09:54 5 A. It is a presentation titled Introduction to
09:54 6 Global Orthodontic Overview on Key Questions, from
09:54 7 June 2020.
09:54 8 MR. DURST: I would move to admit this
09:54 9 document, Your Honor.
09:54 10 MR. UNDERWOOD: No objection, Your Honor.
09:54 11 THE COURT: Admitted.
09:54 12 BY MR. DURST:
09:54 13 Q. This document was prepared, it has on its
09:54 14 face, the person who was in your role before you were
09:54 15 there, right?
09:54 16 A. No.
09:54 17 Q. Ms. Finzi?
09:54 18 A. Correct. That's who's on this, but she was
09:54 19 not in my role.
09:54 20 Q. Who is -- she was a former business unit head,
09:55 21 correct?
22 A. Correct.
09:55 23 Q. And you told us in your deposition that she
09:55 24 took over for you in October of 2023, didn't you?
09:55 25 A. No. I did not.

09:55 1 Q. Who is Ms. -- who is Ms. Finzi?
09:55 2 THE COURT: Well, counsel, you --
09:55 3 MR. DURST: Yeah. I don't have the
09:55 4 deposition to use it, Your Honor.
09:55 5 THE COURT: Okay.
09:55 6 BY MR. DURST:
09:55 7 Q. Who is Ms. Finzi?
09:55 8 A. She was the former head of the orthodontic
09:55 9 business unit.
09:55 10 Q. All right. Now, let's look at this document.
09:55 11 This document is from your business unit that you're
09:55 12 involved with now, correct?
09:55 13 A. I believe so.
09:55 14 Q. Yes. And you've seen this document before?
09:55 15 A. I do not believe I've seen this document
09:55 16 before.
09:55 17 Q. You've never seen this document before?
09:55 18 A. I don't believe so.
09:55 19 Q. Ms. Sterling, there was a time when
09:55 20 ClearCorrect was suffering from and it knew it was
09:56 21 suffering from material problems, correct, problems
09:56 22 with its materials?
09:56 23 A. Not that I recall.
09:56 24 MR. DURST: Your Honor, may I refresh the
09:56 25 witness' recollection with this document?

09:56 1 THE COURT: Sure.
09:56 2 MR. DURST: All right.
09:56 3 THE COURT: If by that you mean that she
09:56 4 was aware of it, not just that the issue existed. But
09:56 5 is there something in here that would refresh her
09:56 6 recollection that she had -- knows this?
09:56 7 MR. DURST: Yes, Your Honor.
09:56 8 THE COURT: Okay.
09:56 9 BY MR. DURST:
09:56 10 Q. Let's go to Page 10.
09:56 11 Do you see these bullet points, Ms. Sterling,
09:56 12 at the top? The third bullet point is: Aligner
09:56 13 material is not best in class.
09:56 14 A. I see that bullet point.
09:56 15 Q. Yeah. Identified as a pain point.
09:57 16 Now, does this -- this refresh you that in
09:57 17 2020, ClearCorrect was suffering from aligner material
09:57 18 problems?
09:57 19 A. I didn't join until 2021.
09:57 20 Q. But you studied up when you joined. Please
09:57 21 answer my question, ma'am.
09:57 22 Does this refresh your recollection that you
09:57 23 know that in 2020, ClearCorrect was suffering from
09:57 24 material problems?
09:57 25 A. I knew a previous material wasn't sufficient.

09:57 1 Yes.
09:57 2 Q. You knew that?
09:57 3 A. Yes. A previous material.
09:57 4 Q. And you know that in this -- this document we
09:57 5 looked at a moment ago was in June of 2021, and you
09:57 6 know that shortly after this, ClearCorrect moved from a
09:57 7 single-layer material to a multi-layer material.
09:57 8 You know about that too, right?
09:57 9 A. I know that we moved to multi-layer. Yes.
09:57 10 Q. And that --
09:57 11 MR. DURST: Let's go to PTX-387, please.
09:57 12 I want to make sure I got 549 admitted.
09:58 13 I believe I did. 387.
09:58 14 BY MR. DURST:
09:58 15 Q. And you recognize this document, ma'am, as
09:58 16 a -- as material from ClearCorrect? It's a printout of
09:58 17 your website, right?
09:58 18 A. Yes.
09:58 19 MR. DURST: Move to admit 387,
09:58 20 Your Honor.
09:58 21 MR. UNDERWOOD: No objection, Your Honor.
09:58 22 THE COURT: Admitted.
09:58 23 BY MR. DURST:
09:58 24 Q. And do you see --
09:58 25 MR. DURST: Let's highlight, Mr. Smith,

09:58 1 the ClearQuartz tri-layer material.
2 BY MR. DURST:
09:58 3 Q. Do you see this?
09:58 4 A. Yes.
09:58 5 Q. This a reference to the tri-layer material
09:58 6 being used for ClearCorrect. That is the material you
09:58 7 are using now, correct?
09:58 8 A. Correct.
09:58 9 Q. And you know that ClearCorrect moved to this
09:58 10 tri-layer material just 60 days after that internal
09:58 11 review found materials problems with its prior
09:58 12 material.
09:58 13 Do you know that?
09:58 14 A. No. I don't know that.
09:58 15 Q. Do you know that ClearCorrect started using
09:58 16 the tri-layer material in August of 2020?
09:59 17 A. Yes. I learned that.
09:59 18 Q. And the prior document that we looked at that
09:59 19 said we had materials problems, that was in June of
09:59 20 2020, wasn't it?
09:59 21 A. That was the date of the document. Yes.
09:59 22 MR. DURST: And I'd like to pull up
09:59 23 Exhibit PTX-324.
24 BY MR. DURST:
09:59 25 Q. What is this document, ma'am? This is a

09:59 1 document, internal Straumann e-mail. Do you -- from
09:59 2 2024.
09:59 3 Do you see that?
09:59 4 A. Yes. I see this.
09:59 5 MR. DURST: Move to admit Exhibit 324,
09:59 6 Your Honor.
09:59 7 MR. UNDERWOOD: No objection to it being
09:59 8 admitted, but I don't see her on here. So we would
09:59 9 object to use with the witness.
09:59 10 THE COURT: It'll be admitted.
09:59 11 BY MR. DURST:
09:59 12 Q. Now, Ms. Sterling, have you seen this document
09:59 13 before?
09:59 14 A. No. I do not believe so.
09:59 15 Q. Do you know these players, Mr. Chavanne?
10:00 16 A. Yes. I know.
10:00 17 Q. And, Ms. Sterling, this document talks --
10:00 18 THE COURT: Counsel, she's never seen the
10:00 19 document before. Move on.
10:00 20 MR. DURST: Okay.
10:00 21 BY MR. DURST:
10:00 22 Q. Ms. Sterling, the SmartTrack material that is
10:00 23 referenced in this e-mail, SmartTrack material is
10:00 24 Align, correct? You know that?
10:00 25 A. SmartTrack material is Align.

10:00 1 Q. Okay. Okay. Now, Florian Kirsch took over
10:00 2 his role about the same time as you?
10:00 3 A. No.
10:00 4 Q. October of '23?
10:00 5 A. No.
10:00 6 Q. When did Mr. Kirsch start his role?
10:00 7 A. He started in October of '23.
10:00 8 Q. And you started in -- later in the year, your
10:00 9 role?
10:00 10 A. I started in March 2021.
10:00 11 Q. In Round Rock. You moved to Switzerland in
10:01 12 '23?
10:01 13 A. In '24.
10:01 14 Q. '24. And you know that when Kirsch first came
10:01 15 in, he did the 100-day review. You know that, right?
10:01 16 A. Not that I remember.
10:01 17 Q. Did he ask you any questions about his 100-day
10:01 18 review?
10:01 19 A. About his 100-day review?
10:01 20 Q. Yes, in connection with his 100-day review of
10:01 21 the status?
10:01 22 A. He asked me questions. I'm not sure if it was
10:01 23 in connection.
10:01 24 Q. Now, I want to show you PTX-0624.
10:01 25 This document is called The 100 -- The First

10:01 1 100 Days.

10:01 2 MR. DURST: Now, this is PTX-624. I move to

10:01 3 admit PTX-624.

10:01 4 MR. UNDERWOOD: Your Honor, again, no

10:01 5 objection to its admission, just to use with the

10:01 6 witness.

10:01 7 THE COURT: Admitted.

10:01 8 BY MR. DURST:

10:01 9 Q. Now, Ms. Sterling, what does OBU mean?

10:02 10 A. Orthodontic Business Unit.

10:02 11 Q. And what does the first line right below the

10:02 12 title, what does that say? Can you read that language?

10:02 13 A. No. Sorry.

10:02 14 Q. All right. This document, I'll represent to

10:02 15 you, ma'am, is Mr. Kirsch's 100-day review.

10:02 16 Have you seen this document before?

10:02 17 A. I have not.

10:02 18 MR. DURST: I would like to go

10:02 19 specifically, Mr. Smith, to Page No. 11.

20 BY MR. DURST:

10:02 21 Q. And the first question, Ms. Sterling, is have

10:02 22 you seen this -- whether in this document or not, have

10:02 23 you seen this rating of product delivery and

10:02 24 reliability and clinic treatment reliability?

10:02 25 A. I don't believe so.

10:02 1 Q. Have you seen this type of information before?
10:02 2 A. Not in this form.
10:02 3 Q. Okay. Let's move on to --
10:03 4 MR. DURST: You can take that down,
10:03 5 Mr. Smith.
6 BY MR. DURST:
7 Q. -- to Bain.
10:03 8 Are you familiar with the fact that Bain &
10:03 9 Company, a consulting firm, did a review of
10:03 10 ClearCorrect and Straumann's orthodontic business?
10:03 11 A. Yes. I'm aware of Bain.
10:03 12 Q. Well, they interviewed you for that, right?
10:03 13 A. Yes. They interviewed me.
10:03 14 Q. I'd like to show you Exhibit No. 199, which is
10:03 15 already in evidence. This is a report that came out on
10:03 16 the Bain review.
10:03 17 You've seen this, correct?
10:03 18 A. Yes. I've seen this.
10:03 19 Q. All right. Let's go to Page No. 6, please.
10:03 20 On Page No. 6, there is a pullout of the fifth
10:03 21 paragraph on the left: ClearCorrect is a loss-making
10:04 22 distant follower with key gaps versus Align Technology.
10:04 23 Do you see that?
10:04 24 A. Yes. I see that.
10:04 25 Q. And this document right above it identifies

10:04 1 Align as the leader.
10:04 2 Do you see that?
10:04 3 A. Yes. That's what it says.
10:04 4 Q. This document and this review, Ms. Sterling,
10:04 5 are the result of a thorough analysis by Bain &
10:04 6 Company, an outside consulting firm, that then reported
10:04 7 back to the management of Straumann, correct?
10:04 8 A. I disagree.
10:04 9 Q. It is an analysis that Straumann hired Bain to
10:04 10 do of its orthodontic business, true?
10:04 11 A. Yes.
10:04 12 Q. And if you go to the -- let's go to Page
10:04 13 No. 24 of this document.
10:04 14 Part of what Bain did was do some ratings of
10:04 15 ClearCorrect versus competitors, right? Ma'am?
10:05 16 A. That's what that -- this page, yes.
10:05 17 Q. And Bain did this?
10:05 18 A. Bain did this. Yes.
10:05 19 Q. And you see that this is the distant follower
10:05 20 slide that Bain prepared, right?
10:05 21 A. Yes.
10:05 22 Q. And under the Assessment line, under
10:05 23 Assessment column, this is assessing ClearCorrect on
10:05 24 all these various categories, right?
10:05 25 A. Yes.

10:05 1 Q. And in Bain's review, the slide bar, the
10:05 2 diamond being far to the left or being left of center,
10:05 3 is low on the Bain assessment scale, correct?
10:05 4 A. That's how I read this. Yes.
10:05 5 Q. And so Bain found ClearCorrect to be low on
10:05 6 targeting the right customer segment, correct?
10:05 7 A. In this document, yes.
10:05 8 Q. Delivering a best-in-class product, correct?
10:05 9 A. What was the question?
10:05 10 Q. Bain found ClearCorrect to be low on the scale
10:06 11 compared to competitors about best-in-class products?
10:06 12 A. After two weeks, yes.
10:06 13 Q. And we go on down. All -- each of these is
10:06 14 Bain's assessment on those areas, correct?
10:06 15 A. Yes.
10:06 16 Q. Now, if we go -- Bain did more work than just
10:06 17 this first report, didn't they?
10:06 18 A. Yes. I believe so.
10:06 19 MR. DURST: Let's go to PTX-125.
20 BY MR. DURST:
10:06 21 Q. And this is another Bain report. Do you
10:06 22 recognize that, Ms. Sterling?
10:06 23 A. I don't know that I've seen this one.
10:06 24 Q. Do you recognize that to be the Straumann
10:06 25 report?

10:06 1 A. Yes.
10:06 2 Q. And you were interviewed for this report,
10:06 3 weren't you?
10:06 4 A. I was interviewed for the project.
10:06 5 Q. So let's look at Page 3, and tell me,
10:06 6 Ms. Sterling, if you see your name down about midway in
10:07 7 that column of Straumann interviews. You had input
10:07 8 into this document, didn't you?
10:07 9 A. I was interviewed for it.
10:07 10 Q. For Bain's purposes of preparing it?
10:07 11 A. Yes.
10:07 12 MR. DURST: I move to admit PTX-125,
10:07 13 Your Honor.
10:07 14 MR. UNDERWOOD: No objection, Your Honor.
10:07 15 THE COURT: Admitted.
10:07 16 MR. DURST: And let's go to Slide 25,
10:07 17 Mr. Smith.
10:07 18 BY MR. DURST:
10:07 19 Q. This is another set of Bain rankings, right?
10:07 20 A. I believe so. Yes.
10:07 21 Q. And in the Bain rankings here on the left, the
10:07 22 line follows the ClearCorrect ranking, correct?
10:07 23 A. Yes. That's what it says.
10:07 24 Q. You have seen this type of ranking before,
10:07 25 haven't you, ma'am?

10:07 1 A. I've seen this type of chart before.
10:07 2 Q. And the way we read this chart is the dots
10:07 3 that are connected by the lines, that's Bain's ranking
10:08 4 of where ClearCorrect stands on all these scales,
10:08 5 correct?
10:08 6 A. That's Bain's ranking, correct.
10:08 7 Q. Now, including on costs and lead time after
10:08 8 ordering, right?
10:08 9 A. Yes. That's Bain's ranking.
10:08 10 Q. And the other dots, they show where
10:08 11 ClearCorrect stands relative to the competition, don't
10:08 12 they?
10:08 13 A. Yes, in Bain's ranking.
10:08 14 Q. And so each of the dots to the right of the
10:08 15 ClearCorrect dot show a competitor who is better, in
10:08 16 Bain's view, than ClearCorrect; is that true?
10:08 17 A. Not exactly.
10:08 18 Q. In Bain's view, all of the dots on the right,
10:08 19 they all represent competitors, right?
10:08 20 A. Yes.
10:08 21 Q. And the way Bain ranked this, if a dot is to
10:09 22 the right of where ClearCorrect is, it is closer to
10:09 23 being a leader than it is a laggard, correct?
10:09 24 A. Sorry. Can you resay that?
10:09 25 Q. In Bain's view, each of these dots that is to

10:09 1 the right of ClearCorrect is closer to being the leader
10:09 2 in the category than is ClearCorrect?
10:09 3 A. Correct.
10:09 4 Q. And ClearCorrect consistently falls near the
10:09 5 bottom of all of these rankings versus the competitors,
10:09 6 in Bain's view, right?
10:09 7 A. In Bain's view, yes.
10:09 8 MR. DURST: All right. Let's go to
10:09 9 Page 77, Slide 77, please.
10 BY MR. DURST:
10:09 11 Q. And here's more slider scales. You've seen
10:09 12 Bain use this before, correct?
10:09 13 A. I've not seen this slide.
10:09 14 Q. You've not seen this slide. All right.
10:09 15 MR. DURST: All right. Let's go to
10:09 16 Exhibit No. 670.
17 BY MR. DURST:
10:09 18 Q. You know, Ms. Sterling, your boss, Mr. Kirsch,
10:10 19 about the time you were arriving in Switzerland, I
10:10 20 guess this is probably about that time, gave a
10:10 21 presentation to the board of directors of the parent
10:10 22 company related to -- in part related to the Bain
10:10 23 report, right?
10:10 24 A. Yes. He did.
10:10 25 MR. DURST: And this is PTX-670. I move

10:10 1 to admit that, Your Honor.
10:10 2 MR. UNDERWOOD: No objection.
10:10 3 THE COURT: Admitted.
10:10 4 BY MR. DURST:
10:10 5 Q. Okay. And he took -- you know that he took
10:10 6 many of these Bain findings and reported them to the
10:10 7 management, the board of directors of a company,
10:10 8 correct?
10:10 9 A. I don't know that.
10:10 10 Q. You know he gave a report. Did he talk to you
10:10 11 about the report that he gave to the board? Did you
10:10 12 know that he was giving a report?
10:10 13 A. I didn't know he was giving, but I knew about
10:10 14 this.
10:10 15 Q. You knew about that -- about that document?
10:10 16 A. Yes.
10:10 17 Q. All right. So this document is in December of
10:10 18 '23.
10:10 19 Now, Ms. Sterling, we have talked about the
10:11 20 three Bain reports starting in April of 2020 -- I'm
10:11 21 sorry -- Mr. Kirsch's 100-day presentation starting in
10:11 22 April of 2024. Then we've talked about the Bain
10:11 23 reports in September and November and then this
10:11 24 December presentation to the board of directors.
10:11 25 And at least some of those documents you are

10:11 1 familiar with, right?
10:11 2 A. Yes. This one.
10:11 3 Q. And in none of those documents is there a
10:11 4 statement by Bain or by Mr. Kirsch or anyone at
10:11 5 Align -- or anyone at ClearCorrect that says Align is
10:11 6 responsible for these weaknesses we have in the market.
10:11 7 Those don't appear in these documents, do they?
10:11 8 A. I don't know all the documents.
10:11 9 Q. Have you ever seen that in any of these
10:11 10 documents we've talked about?
10:11 11 A. I have not seen that in the documents.
10:11 12 Q. Okay. And do you know, Ms. Sterling, as the
10:11 13 corporate representative for ClearCorrect, that in July
10:11 14 of 2024 here in Waco, ClearCorrect accused Align of
10:12 15 antitrust violations saying it has caused
10:12 16 ClearCorrect's business problems? You know that,
10:12 17 right?
10:12 18 A. I know the filing, yes.
10:12 19 Q. And so while Align was being accused in this
10:12 20 court by ClearCorrect, of being the source of
10:12 21 ClearCorrect's problems, internally at Straumann and
10:12 22 ClearCorrect, the board of directors and the management
10:12 23 team was talking about all the problems that
10:12 24 ClearCorrect had created for itself.
10:12 25 That's true, isn't it, Ms. Sterling?

10:12 1 A. I don't know what the board's talking about.
10:12 2 Q. You know these documents tell us about the
10:12 3 internal problems that ClearCorrect had on its own
10:12 4 watch. You know that, right?
10:12 5 A. I know this is a Bain assessment, external.
10:12 6 Q. Well, this is the -- this is the -- this is
10:12 7 Mr. Kirsch's board report, right? This one?
10:12 8 A. Correct.
10:12 9 Q. And in those internal materials, ClearCorrect
10:12 10 and Straumann were telling the board and the management
10:13 11 team, were identifying in these internal documents
10:13 12 ClearCorrect's own self-inflicted wounds, weren't they?
10:13 13 A. You're talking about ClearCorrect's situation,
10:13 14 yes.
10:13 15 Q. And that's different than the allegations that
10:13 16 are here in this courtroom, isn't it, Ms. Sterling?
10:13 17 A. It's part of.
10:13 18 Q. It's different, isn't it, ma'am?
10:13 19 A. It's part of.
10:13 20 MR. DURST: I pass the witness,
10:13 21 Your Honor.
10:13 22 REDIRECT EXAMINATION
10:13 23 BY MR. UNDERWOOD:
10:13 24 Q. Good morning, Ms. Sterling. How are you
10:13 25 doing?

10:13 1 A. Good morning. I'm fine. Thank you.
10:13 2 Q. Is it okay if I ask you some questions to
10:13 3 follow up on Mr. Durst's questions to you?
10:13 4 A. Yes.
10:13 5 MR. UNDERWOOD: Mr. Lee, can we get
10:13 6 PTX-199?
7 BY MR. UNDERWOOD:
10:13 8 Q. Okay. So this is the Bain report he was just
10:14 9 asking you about?
10:14 10 A. Yes.
10:14 11 Q. Do you agree -- point blank, do you agree with
10:14 12 Bain's findings in this report?
10:14 13 A. No. Not everything.
10:14 14 Q. Why not?
10:14 15 A. I mean, this was a global assessment, and it
10:14 16 was done in a short period of time with a select number
10:14 17 of interview respondents.
10:14 18 MR. UNDERWOOD: Can we go to Page 6,
10:14 19 Mr. Lee?
10:14 20 BY MR. UNDERWOOD:
10:14 21 Q. All right. You mentioned that there was a
10:14 22 short period of time?
10:14 23 A. Yes.
10:14 24 Q. And do you see the title of this slide?
10:14 25 A. Yes.

10:14 1 Q. And does it indicate what period of time this
10:14 2 study lasted for?
10:14 3 A. This says after two weeks.
10:14 4 Q. And Mr. Durst asked you about some statements
10:14 5 here towards the -- on the left-hand side of the page,
10:14 6 Align Technology.
10:14 7 Do you see that one?
10:14 8 A. Yes. I see it.
10:14 9 Q. And it says: Align Technology is the
10:15 10 undisputed scale and profit leader in a winner takes
10:15 11 all market.
10:15 12 Right?
10:15 13 A. Yes. I see that.
10:15 14 Q. Now, do you agree that Align is in fact the
10:15 15 biggest player in the market?
10:15 16 A. Yes. I agree.
10:15 17 Q. And below that, it says: ClearCorrect is a
10:15 18 loss making distant follower.
10:15 19 Do you see that?
10:15 20 A. Yes.
10:15 21 Q. And do you agree that ClearCorrect has
10:15 22 experienced some troubles certainly in the United
10:15 23 States?
10:15 24 A. Yes. I agree.
10:15 25 Q. And why is that?

10:15 1 A. And for a variety of reasons. But as we've
10:15 2 talked about, one of the main reasons is Align's
10:15 3 practices of locking out customers, forcing them to buy
10:15 4 an iTero, to do business with them, making it difficult
10:15 5 to get the STL files off of the scanner, and requiring
10:15 6 them to purchase a certain number of cases in order to
10:15 7 avoid penalties.
10:15 8 Q. Thank you, Ms. Sterling.
10:15 9 MR. UNDERWOOD: Mr. Lee, you can take
10:15 10 that down.
10:15 11 BY MR. UNDERWOOD:
10:15 12 Q. Does ClearCorrect offer a high-quality
10:16 13 product?
10:16 14 A. Absolutely.
10:16 15 Q. Were you here last week during the testimony
10:16 16 of Mr. Kossol?
10:16 17 A. Yes. I was.
10:16 18 Q. Do you recall him speaking to the complaint
10:16 19 rate for ClearCorrect?
10:16 20 A. Yes.
10:16 21 Q. Do you recall that being about 2 percent?
10:16 22 A. Yes.
10:16 23 Q. Is that a normal or an abnormal volume of
10:16 24 complaints that ClearCorrect has experienced?
10:16 25 A. Based on my own experience, it's a normal

10:16 1 volume.
10:16 2 Q. 2 percent is a normal volume in this industry?
10:16 3 A. Yes.
10:16 4 Q. Nothing unusual about that at all?
10:16 5 A. No. Nothing unusual.
10:16 6 MR. UNDERWOOD: Let's go to PTX-126.
7 BY MR. UNDERWOOD:
10:16 8 Q. Now, this was a document I believe you got
10:16 9 some questions about last week before we broke for the
10:16 10 week.
10:16 11 Do you remember those?
10:16 12 A. Yes.
10:16 13 MR. UNDERWOOD: And can we go to Page 33?
10:16 14 BY MR. UNDERWOOD:
10:16 15 Q. All right. You got some questions about the
10:16 16 column here that says "Weaknesses."
10:17 17 Do you see that?
10:17 18 A. Yes.
10:17 19 Q. Was this document a United States-only
10:17 20 document, or was this document a global document?
10:17 21 A. This was a global document.
10:17 22 Q. And how do we know that? Who created this
10:17 23 document?
10:17 24 A. Two members of my team who are on the global
10:17 25 team.

10:17 1 Q. They're on the global team?
10:17 2 A. Correct.
10:17 3 Q. So the weaknesses discussed here, these
10:17 4 so-called weaknesses discussed here, are these unique
10:17 5 to the United States or are these global?
10:17 6 A. No. These are global.
10:17 7 Q. These are global?
10:17 8 A. Yes.
10:17 9 Q. And remind the ladies and gentlemen of the
10:17 10 jury how ClearCorrect's business has been in the United
10:17 11 States compared to global?
10:17 12 A. Yeah. In the United States, we've been flat
10:17 13 to declining, and outside of the United States, we're
10:17 14 growing.
10:17 15 Q. Even though in both areas you're experiencing
10:17 16 these same so-called weaknesses?
10:17 17 A. Correct.
10:17 18 Q. So these issues here on the screen, can they
10:18 19 conceivably at all explain the difference in
10:18 20 performance in the U.S. versus the difference in
10:18 21 performance in the global industry?
10:18 22 A. No. I don't believe so.
10:18 23 Q. And last week when you spoke to the United
10:18 24 States market versus the global market, do I recall you
10:18 25 saying that the product is the same in both?

10:18 1 A. Yes. The product is the same.
10:18 2 Q. And is the marketing the same in both?
10:18 3 A. Yes. The marketing is the same.
10:18 4 Q. And as we were just talking about, complaint
10:18 5 rate, so-called weaknesses, same in both?
10:18 6 A. Same in both.
10:18 7 Q. So if all that's the same, what accounts for
10:18 8 the difference?
10:18 9 A. Align's practices in the United States.
10:18 10 Q. Which is causing what in the United States?
10:18 11 A. It's causing customers to be locked in, which
10:18 12 is causing us to not be able to offer our options to
10:18 13 the customers.
10:18 14 Q. And that is not what you've experienced
10:18 15 outside the United States?
10:18 16 MR. DURST: Objection, Your Honor. We
10:18 17 have a little leading going on here with his own
10:19 18 witness.
10:19 19 THE COURT: Sustained.
10:19 20 BY MR. UNDERWOOD:
10:19 21 Q. How has the experience been outside the United
10:19 22 States?
10:19 23 A. We've experienced something very different.
10:19 24 Q. All right.
10:19 25 MR. UNDERWOOD: Let's go to -- oh, can we

10:19 1 go to JTX-60, please?
10:19 2 BY MR. UNDERWOOD:
10:19 3 Q. Do you recall getting questions about this
10:19 4 document last week before we broke for the long
10:19 5 weekend?
10:19 6 A. Yes. I do.
10:19 7 Q. What does this show?
10:19 8 A. This is submissions from 2017 to Q2 of 2024
10:19 9 from various scanner and impression types.
10:19 10 Q. And do you recall getting some questions about
10:19 11 the Virtuo Vivo scanner?
10:19 12 A. Yes. I do.
10:19 13 Q. What is the Virtuo Vivo scanner?
10:19 14 A. It was a Straumann scanner that was available
10:19 15 for several years.
10:19 16 Q. Is it available anymore?
10:19 17 A. It is not.
10:19 18 Q. When was it made unavailable?
10:20 19 A. Varies by geography, but 2004, 2005.
10:20 20 Q. So the fact that it's unavailable, could that
10:20 21 at all contribute to the low amount of submissions?
10:20 22 A. Yes.
10:20 23 Q. And what about the SIRIOS, Straumann SIRIOS,
10:20 24 what is that?
10:20 25 A. It is a scanner from Straumann.

10:20 1 Q. And this one has a very low number of
10:20 2 submissions. Do you recall getting questions about
10:20 3 this low volume of submissions?
10:20 4 A. Yes. I do.
10:20 5 Q. Why is the volume of submissions so low for
10:20 6 this scanner?
10:20 7 A. Because it wasn't fully released until 2024.
10:20 8 Q. And so what are these submissions here, the
10:20 9 one in each year?
10:20 10 A. It's test data.
10:20 11 Q. This is just test data?
10:20 12 A. Correct.
10:20 13 Q. You also got questions -- and just to close
10:21 14 the loop on that, Ms. Sterling, so the Virtuo Vivo and
10:21 15 the SIRIOS, those were the Straumann ones?
10:21 16 A. Correct.
10:21 17 Q. All right. You also got questions about the
10:21 18 iTero scanner.
10:21 19 Do you recall those?
10:21 20 A. Yes.
10:21 21 Q. And the iTero scanner is offered by who?
10:21 22 A. Align Technology.
10:21 23 Q. That's Align's scanner?
10:21 24 A. Yes.
10:21 25 Q. And the questions were about the volume of

10:21 1 submissions from iTero.
10:21 2 Do you remember that?
10:21 3 A. Yes. I remember.
10:21 4 Q. And in total, there have been 50,000
10:21 5 submissions, fair?
10:21 6 A. Fair.
10:21 7 Q. And that's out of how many?
10:21 8 A. 1.5 million.
10:21 9 Q. Which is about 3 to 5 percent, I believe?
10:21 10 MR. DURST: Objection, Your Honor. I
10:21 11 would request that the counselor stop leading his
10:21 12 witness.
10:21 13 THE COURT: Sustained.
10:21 14 MR. UNDERWOOD: Thank you, Your Honor.
10:21 15 BY MR. UNDERWOOD:
10:21 16 Q. What's the percentage?
10:21 17 A. 3 to 5 percent.
10:21 18 Q. Does this reflect an open or a closed system?
10:21 19 A. Does what?
10:21 20 Q. The fact that only 3 to 5 percent of the iTero
10:22 21 scan -- or strike that.
10:22 22 The fact that only 3 to 5 percent of all the
10:22 23 submissions come from iTero.
10:22 24 Maybe I could ask a better question,
10:22 25 Ms. Sterling.

10:22 1 What is the most commonly used scanner in the
10:22 2 market?
10:22 3 A. TRIOS.
10:22 4 Or sorry. In the total market, it is Align
10:22 5 iTero.
10:22 6 Q. Thank you.
10:22 7 In the total United States market --
10:22 8 A. Yep.
10:22 9 Q. -- what is the most commonly used scanner?
10:22 10 A. It's the iTero.
10:22 11 Q. And despite being the most commonly used
10:22 12 scanner, what is the percentage of submissions that
10:22 13 ClearCorrect receives from iTero?
10:22 14 A. 3 to 5 percent.
10:22 15 Q. If it were an open system, would you expect
10:22 16 that number to be higher?
10:22 17 A. Absolutely.
10:22 18 Q. All right.
10:23 19 MR. UNDERWOOD: Let's go to -- oh, can we
10:23 20 go to DTX-2236, please, Mr. Lee?
10:23 21 BY MR. UNDERWOOD:
10:23 22 Q. All right. Last week you got some questions
10:23 23 about this document.
10:23 24 Do you recall that?
10:23 25 A. Yes.

10:23 1 Q. You also received some questions in the
10:23 2 context of this document about direct to consumer.
10:23 3 Are you familiar with direct to consumer?
10:23 4 A. I am.
10:23 5 Q. What is direct to consumer?
10:23 6 A. It's where a company promotes their products
10:23 7 directly to the end user, the patient.
10:23 8 MR. UNDERWOOD: And can we go to Page 4,
10:23 9 please? And can we zoom in on that direct to consumer,
10:23 10 the bottom row there? Okay.
11 BY MR. UNDERWOOD:
10:23 12 Q. Are you familiar with the first company shown
10:23 13 here, Smile Direct?
10:23 14 A. I am.
10:23 15 Q. Are they in business?
10:23 16 A. They are not.
10:24 17 Q. When did they go out of business? Do you
10:24 18 recall?
10:24 19 A. In past year, two years.
10:24 20 Q. Okay. The next company, SnapCorrect, do you
10:24 21 see that?
10:24 22 A. Yes.
10:24 23 Q. Are you familiar with them?
10:24 24 A. I'm not.
10:24 25 Q. Okay. You're unfamiliar with SnapCorrect.

10:24 1 Are you familiar with any of the other
10:24 2 companies here, SmileLove or Candid?
10:24 3 A. Candid, yes.
10:24 4 Q. And is Candid at all doing direct to consumer
10:24 5 these days?
10:24 6 A. Not direct to consumer.
10:24 7 Q. Okay. Thank you.
10:24 8 Do you recall Mr. Daniellot's testimony last
10:24 9 week via deposition? Do you remember that?
10:24 10 A. Yes.
10:24 11 Q. Do you recall that Mr. Daniellot, his
10:24 12 deposition was played to the ladies and gentlemen of
10:24 13 the jury? Do you remember that?
10:24 14 A. Yes. I remember.
10:24 15 Q. And I believe he testified that ClearCorrect
10:24 16 does not compete with direct to consumer.
10:24 17 Do you remember that?
10:24 18 A. Yes. I remember.
10:24 19 Q. And do you agree with him?
10:24 20 A. I agree.
10:24 21 MR. UNDERWOOD: Let's go to -- can we go
10:25 22 to PTX -- let's go to -- strike that, Mr. Lee.
10:25 23 PDX-1.79.
10:25 24 BY MR. UNDERWOOD:
10:25 25 Q. Okay. Last week during your testimony, do you

10:25 1 recall Mr. Durst asking you some questions about this
10:25 2 slide?
10:25 3 A. Yes.
10:25 4 Q. And this was something that the plaintiff
10:25 5 prepared for their opening statement?
10:25 6 A. Yes.
10:25 7 Q. Does this tell the whole story?
10:25 8 A. No.
10:25 9 Q. Of the competitors listed on this slide, who's
10:25 10 missing?
10:25 11 A. Invisalign.
10:25 12 Q. Invisalign is not shown on this slide?
10:25 13 A. Correct.
10:25 14 MR. UNDERWOOD: Can we go to DDX-3?
10:26 15 All right. And let's just go to DDX-3.
16 BY MR. UNDERWOOD:
10:26 17 Q. Now, if you were to add Invisalign, where
10:26 18 would they fall?
10:26 19 A. Significantly higher than the rest of the
10:26 20 companies in the market.
10:26 21 Q. Now, if you look at the last slide, I think
10:26 22 they were suggesting that ClearCorrect was below the
10:26 23 others?
10:26 24 A. Correct.
10:26 25 Q. On this slide, how does ClearCorrect fare

10:26 1 compared to the others, pretty close?
10:26 2 A. Pretty close.
10:26 3 Q. And how do all of those compare to Invisalign?
10:26 4 A. Significantly lower.
10:26 5 Q. And Invisalign operates what type of system?
10:26 6 A. Closed system.
10:26 7 Q. ClearCorrect operates what type of system?
10:26 8 A. An open system.
10:26 9 Q. Ms. Sterling, if Invisalign offered an open
10:26 10 system, is ClearCorrect ready, willing, able, and
10:26 11 prepared to compete on an even playing field with them?
10:27 12 A. Absolutely.
10:27 13 MR. UNDERWOOD: Thank you very much.
10:27 14 I pass the witness.
10:27 15 MR. DURST: Let's go back to JTX-60,
10:27 16 Mr. Smith.
17 RECROSS-EXAMINATION
18 BY MR. DURST:
10:27 19 Q. Just a couple more questions, ma'am.
10:27 20 Virtuo Vivo is a Straumann scanner?
10:27 21 A. Yes.
10:27 22 Q. And it was on the market for all of these
10:27 23 years fully up through 2023 I think was your testimony?
10:27 24 A. Yes. So it was on the market --
10:27 25 Q. And sometime after 2023, it came off the

10:27 1 market?
10:27 2 A. Correct.
10:27 3 Q. And it came off the market because there were
10:27 4 problems with the scanner, didn't it, Ms. Sterling?
10:27 5 A. Yes.
10:27 6 Q. And the Straumann SIRIOS scanner, that's not
10:27 7 on the market right now either, is it?
10:27 8 A. It's on the market.
10:27 9 Q. There were problems with the SIRIOS scanner as
10:27 10 well, right?
10:27 11 A. Not that I'm aware.
10:27 12 Q. Now, Ms. Sterling, your testimony is that even
10:28 13 though according to this slide some 50,000 scans came
10:28 14 to ClearCorrect from an iTero scanner, your testimony
10:28 15 is that's a closed system?
10:28 16 A. Yes.
10:28 17 Q. Now, I want to show you Exhibit No. 190,
10:28 18 please.
10:28 19 This is -- you recognize this to be one of
10:28 20 your e-mails, correct? Go down to the bottom. At the
10:28 21 bottom, it's your e-mail, Ms. Sterling.
10:28 22 A. Yes. At the bottom.
10:28 23 Q. In October of 2023, right? You were in Round
10:28 24 Rock then, right?
10:28 25 A. Yes.

10:28 1 Q. Had you taken some global responsibilities at
10:28 2 that point?
10:28 3 A. Yes.
10:28 4 Q. So at that point, you were wearing both a
10:28 5 United States hat and a global hat?
10:28 6 A. Yes.
10:28 7 Q. And if we go to the body -- actually, before
10:28 8 we leave that, you wrote this, and it is -- the topic
10:28 9 is Pure Orthodontics and an "urgent" in all caps with
10:29 10 two exclamation points.
10:29 11 Do you see that?
10:29 12 A. Yes. I see that.
10:29 13 Q. Now, if we go down into what you were writing
10:29 14 here, so we'll need to go to the next page, you're
10:29 15 forwarding -- you're forwarding this message, right?
10:29 16 A. Yes. I'm forwarding.
10:29 17 Q. And can you read to the jury what you wrote to
10:29 18 your team there in the first paragraph of the e-mail?
10:29 19 Just read it out loud.
10:29 20 A. See this e-mail chain below. We are losing
10:29 21 the confidence of the customers in the field. Our full
10:29 22 attention on these issues has to be our biggest
10:29 23 priority. Nothing else we do will matter if we cannot
10:29 24 solve this.
10:29 25 Q. You were in an urgent situation with a big

10:29 1 priority item because you were losing customer
10:29 2 confidence, right?
10:29 3 A. We could lose customer confidence, yes.
10:29 4 Q. It doesn't say "could." It says "we are,"
10:29 5 doesn't it, ma'am?
10:29 6 A. That's what it says.
10:29 7 Q. And you were in Round Rock wearing a global
10:29 8 hat?
10:29 9 A. Yes.
10:29 10 MR. DURST: Your Honor, I'll conclude the
10:30 11 examination.
10:30 12 MR. UNDERWOOD: Just a couple more
10:30 13 questions on this, Your Honor.
10:30 14 And I apologize. Can we get that exhibit
10:30 15 back up? Was it 190?
10:30 16 MR. DURST: It is Exhibit PTX-190. And I
10:30 17 move to admit it.
10:30 18 MR. UNDERWOOD: No objection.
10:30 19 THE COURT: Admitted.
10:30 20 MR. UNDERWOOD: And can we go back down
10:30 21 to the e-mail that was just discussed?
10:30 22 FURTHER REDIRECT EXAMINATION
10:30 23 BY MR. UNDERWOOD:
10:30 24 Q. Okay. Ms. Sterling, is ClearCorrect always
10:30 25 looking to improve?

10:30 1 A. Absolutely.
10:30 2 Q. Why is that?
10:30 3 A. It's part of our DNA. We have a
10:30 4 player/learner culture, and it's important for us to
10:30 5 understand the feedback and constantly improve and
10:30 6 evolve.
10:30 7 Q. What's player/learner culture?
10:30 8 A. It's the culture. It's from a group. It's
10:30 9 about playing and understanding and failing and failing
10:30 10 fast and learning from it.
10:31 11 Q. And is that what's happening in this e-mail
10:31 12 here?
10:31 13 A. Yes.
10:31 14 Q. Do you stand by the quality of the products
10:31 15 ClearCorrect offers?
10:31 16 A. Absolutely.
10:31 17 MR. UNDERWOOD: I pass the witness.
10:31 18 MR. DURST: Nothing further.
10:31 19 THE COURT: You may step down, ma'am.
10:31 20 Who's your next witness?
10:31 21 MR. MUELLER: Your Honor, we call as our
10:31 22 next witness Jason Coss, and Ms. Ferrera will conduct
10:31 23 the examination.
10:31 24 (The witness was sworn.)
10:31 25 DIRECT EXAMINATION

10:31 1 BY MS. FERRERA:
10:32 2 Q. Good morning, sir.
10:32 3 A. Good morning.
10:32 4 Q. Can you please introduce yourself to the jury?
10:32 5 A. Sure. My name is Jason Coss. I'm the vice
10:32 6 president of sales for Straumann North America. I live
10:32 7 in a town called Still, Massachusetts, for almost three
10:32 8 years now with my family, which is my wife, my
10:32 9 17-year-old daughter, and my 14-year-old son.
10:32 10 Q. And can you tell us a little bit about your
10:32 11 work history before you joined Straumann?
10:32 12 A. Sure. I basically grew up in the dental
10:32 13 world. My father was a business owner, had a dental
10:32 14 distribution company when I was a little boy. He used
10:32 15 to take me to different trade shows and help him set up
10:33 16 tables.
10:33 17 And when I was coming out of school, he had
10:33 18 been out of the dental market for a few years. I
10:33 19 wanted to get back in and started our own dental
10:33 20 distribution company that was called Denesca. So I
10:33 21 worked there for 14 years.
10:33 22 And after 14 years, we sold that company to a
10:33 23 large dental distribution company called Patterson
10:33 24 Dental. I worked for them for approximately five
10:33 25 years, and then I joined Straumann Group.

10:33 1 Q. And why did you decide to join Straumann?
10:33 2 A. Well, at the time, I wanted to start another
10:33 3 dental company and, you know, there was a lot of
10:33 4 dynamics in the dental market that was changing on the
10:33 5 surgical side that I wanted to learn, and that's why I
10:33 6 joined Straumann.
10:33 7 Q. So what roles have you held at Straumann?
10:33 8 A. When I started, I was in charge of the lab and
10:33 9 digital side for Eastern Canada. And then
10:33 10 approximately eight months afterwards, I was promoted
10:33 11 to sales director for that same geography.
10:33 12 And then I did that for several years, and
10:34 13 then I became country manager in Canada. I did that
10:34 14 for approximately two and a half years, and then I was
10:34 15 promoted to vice president of Digital Solutions for
10:34 16 North America. And then in July of 2024, in my current
10:34 17 role that I'm in.
10:34 18 Q. And what countries are you responsible for in
10:34 19 your current role?
10:34 20 A. I'm responsible for the United States and for
10:34 21 Canada.
10:34 22 Q. And does your portfolio include intraoral
10:34 23 scanners?
10:34 24 A. Yes. It does.
10:34 25 Q. And we've heard a little bit about intraoral

10:34 1 scanners already in this case, Mr. Coss, but could you
10:34 2 just remind us briefly, what is an intraoral scanner?
10:34 3 A. An intraoral scanner is basically a handheld
10:34 4 wand that acts as a camera, that the clinician would
10:34 5 hover over the patient's teeth in order to take a 3D
10:34 6 rendering of their teeth.
10:34 7 Q. And what intraoral scanners has Straumann sold
10:34 8 or does it currently sell?
10:34 9 A. We've sold the entire 3Shape portfolio, which
10:34 10 includes the TRIOS 3, the TRIOS Basic, the TRIOS Core,
10:34 11 the TRIOS 4, the TRIOS 5, and the TRIOS 6.
10:35 12 We also distributed Medit scanners, which
10:35 13 include the i500, the i700.
10:35 14 We had our proprietary scanner called the
10:35 15 Virtuo Vivo, and now we have our own proprietary
10:35 16 scanners called the SIRIOS and the X3.
10:35 17 Q. Does Straumann still sell the Virtuo Vivo?
10:35 18 A. No. We no longer sell the Virtuo Vivo.
10:35 19 Q. Now, Mr. Coss, in your role, do you have
10:35 20 occasion to visit doctors' offices?
10:35 21 A. I do on a regular basis.
10:35 22 Q. And why do you do that?
10:35 23 A. I'll travel with our field sales teams and
10:35 24 visit just different customers in different markets.
10:35 25 I also attend a lot of trade shows on an

10:35 1 annual basis. We host over 1,500 educational events on
10:35 2 an annual basis. I obviously don't attend all of them,
10:35 3 but I try to attend as many as I can.
10:35 4 And we also host customers in our headquarters
10:35 5 in Massachusetts.
10:35 6 Q. So how often are you meeting or speaking to
10:35 7 doctors?
10:35 8 A. I speak to customers every week.
10:35 9 Q. And so all told, Mr. Coss, how many years have
10:36 10 you networked in the dental industry?
10:36 11 A. It's been over 30 years.
10:36 12 Q. Now, we've heard a lot in this case about open
10:36 13 and closed systems. Are you familiar with the term
10:36 14 "open system" in the dental space?
10:36 15 A. Yes. I am.
10:36 16 Q. And what do you understand that term to mean
10:36 17 in the dental space?
10:36 18 A. Simply I would say it allows the clinician the
10:36 19 freedom and the flexibility to send scans or cases in
10:36 20 an open environment to multiple sources.
10:36 21 Q. And did you help prepare some slides to assist
10:36 22 your testimony here today, Mr. Coss?
10:36 23 A. Yes. I did.
10:36 24 MS. FERRERA: Could we pull up Slide
10:36 25 No. 2, please?

10:36 1 BY MS. FERRERA:
10:36 2 Q. So let's look at this first from the
10:36 3 perspective of a doctor who wants to order Invisalign.
10:36 4 What would an -- as a factual matter, what would an
10:36 5 open system look like for them?
10:36 6 A. It would allow users of not only the iTero
10:36 7 scanners but all other scanners that offer STL files to
10:36 8 Invisalign.
10:36 9 Q. And then if we look at it from the perspective
10:37 10 of a doctor who has a third-party scanner, what would
10:37 11 an open system look like for them?
10:37 12 A. This would allow those clinicians to not only
10:37 13 send their scans to Invisalign but also to other clear
10:37 14 aligner providers.
10:37 15 Q. So if we put it all together, what would an
10:37 16 open system look like in the context of clear aligners
10:37 17 and intraoral scanners?
10:37 18 A. As I mentioned, I think it allows the
10:37 19 clinician the flexibility to send to multiple sources
10:37 20 in every direction.
10:37 21 Q. I want to ask you a little bit about how
10:37 22 Straumann does things. Are the scanners that Straumann
10:37 23 sells open or closed systems?
10:37 24 A. Yes. Every scanner Straumann sells is an open
10:37 25 system.

10:37 1 Q. So how can a user of a SIRIOS scanner, for
10:37 2 example, export a scan file to another clear aligner
10:37 3 manufacturer?
10:37 4 A. It's really simple. It's a few clicks, and
10:37 5 you click send.
10:37 6 Q. And is there a term that's used for those scan
10:37 7 files?
10:37 8 A. Yes. It's called an STL file.
10:38 9 MS. FERRERA: Let's pull up the next
10:38 10 slide.
11 BY MS. FERRERA:
10:38 12 Q. And can you show us how the STL export process
10:38 13 works on the SIRIOS?
10:38 14 A. Yeah. So what you see here on the screen is
10:38 15 basically the image you would -- the clinician would
10:38 16 see right after scanning the patient. So this is what
10:38 17 we call the review phase.
10:38 18 They review their scans. They would click on
10:38 19 next. Then they would decide if they wanted to keep it
10:38 20 within the Straumann ecosystem or click on local to
10:38 21 export that as an open scan. And then they would
10:38 22 simply click on send, and you're done.
10:38 23 Q. So how many total steps is it?
10:38 24 A. That's three clicks and two steps.
10:38 25 Q. And how does the process that you just showed

10:38 1 us for the SIRIOS scanner compare to the STL export
10:38 2 process on other scanners that you're aware of?
10:38 3 A. It's very similar to all other scanners in the
10:38 4 marketplace with the exception of the iTero scanner.
10:38 5 MS. FERRERA: Let's pull up Slide 8.
6 BY MS. FERRERA:
10:38 7 Q. And again, this is what an open system would
10:38 8 look like for users who want to order Invisalign; is
10:39 9 that right?
10:39 10 A. That's correct.
10:39 11 Q. So I want to now ask you about the scanners
10:39 12 that can be used to order Invisalign.
10:39 13 If you turn to Tab 3 in your binder, and
10:39 14 DTX-109.
10:39 15 A. Yep.
10:39 16 Q. And can you tell us what that document is,
10:39 17 Mr. Coss?
10:39 18 A. This is Align's public policy on what
10:39 19 impressions are accepted.
10:39 20 Q. What's the date of that document?
10:39 21 A. November 2019.
10:39 22 Q. And where did this policy come from?
10:39 23 A. It comes from their website.
10:39 24 Q. Are you familiar with the policy that's
10:39 25 reflected in DTX-109?

10:39 1 A. Yes.
10:39 2 Q. How are you familiar with it?
10:39 3 A. I've read the document, and I've obviously
10:39 4 interacted with several customers over the years that
10:39 5 use the different scanners in this listing.
10:39 6 MS. FERRERA: We offer DTX-109.
10:39 7 MR. DURST: No objection, Your Honor.
10:39 8 BY MS. FERRERA:
10:39 9 Q. So the title of this document, Mr. Coss, is
10:40 10 Invisalign Aligner Case Submission, Third-Party
10:40 11 Intraoral Scanner Interoperability.
10:40 12 Do you see that?
10:40 13 A. Yes. I do.
10:40 14 Q. And if we look at the first paragraph under
10:40 15 the title, can you just read that paragraph for us,
10:40 16 please?
10:40 17 A. Align accepts case submissions for its clear
10:40 18 aligner products in two ways: One, physical
10:40 19 impressions of the patient's teeth; or, two, intraoral
10:40 20 scans of the patient's teeth.
10:40 21 Q. And what do you understand the phrase
10:40 22 "physical impressions of the patient's teeth" to be
10:40 23 referring to?
10:40 24 A. Now, this refers to what we call PVS, which is
10:40 25 a vinyl polysiloxane putty-like material.

10:40 1 Q. And then if I can have you look at the second
10:40 2 paragraph that starts "Please note," can you read that
10:40 3 paragraph for us?
10:40 4 A. Sure. Please note that this -- that the list
10:40 5 below is a comprehensive list of third-party intraoral
10:40 6 scanners that can be used for Invisalign aligner case
10:40 7 submission.
10:40 8 Q. And what scanners are on this comprehensive
10:40 9 list?
10:40 10 A. The first is 3M True Definition scanner;
10:41 11 Dentsply Sirona CEREC Omnicam scanner; 3Shape TRIOS 2,
10:41 12 TRIOS 3 scanners, including TRIOS 3 Basic, only
10:41 13 accepted outside of the U.S., Japan, and China.
10:41 14 Q. So I want to talk about each of the options
10:41 15 that are listed in this document starting with physical
10:41 16 impressions or a PVS.
10:41 17 And we've heard a little bit about PVS
10:41 18 already, Mr. Coss, but could you describe what your
10:41 19 experience with PVS is?
10:41 20 A. Yes. I have experience as a patient and as a
10:41 21 demonstrator of how to use the product in many
10:41 22 educational events.
10:41 23 Like I mentioned, it's like -- it's a
10:41 24 putty-like material. So the clinician would apply this
10:41 25 putty into what we call an impression tray. It has the

10:41 1 shape of the patient's mouth. Then the patient would
10:41 2 then bite down on this material for anywhere between 4
10:41 3 and 12 minutes. It's a super uncomfortable process.
10:41 4 Many of you might have had this done. I have as a
10:42 5 patient. Many patients have the gag reflex.
10:42 6 Yeah. It's just -- it's just a pretty
10:42 7 uncomfortable procedure.
10:42 8 Q. And based on your experience, how common is
10:42 9 PVS in orthodontics today?
10:42 10 A. It's extremely rare today. I haven't seen
10:42 11 clinicians use this material in a long time.
10:42 12 Q. And what issues are there with using PVS to
10:42 13 order clear aligners?
10:42 14 A. Well, outside of the patient experience, I
10:42 15 would say the other issue is that once the impression
10:42 16 is taken, that material is then put into a box and
10:42 17 shipped to a clear aligner provider.
10:42 18 The issue with this material is that it reacts
10:42 19 poorly to different climates. So if it's hot or cold,
10:42 20 it'll expand or contract, based on the climate.
10:42 21 And so obviously when the clinician puts this
10:42 22 in a box, ships it out through UPS or FedEx, they have
10:42 23 no way of controlling the climate. And what happens is
10:42 24 the clear aligner provider, when they receive this,
10:42 25 oftentimes will call back the clinician and tell them

10:42 1 that their impression is inaccurate or they can't use
10:42 2 it. And then that clinician needs to call back the
10:43 3 patient and repeat those same steps with zero certainty
10:43 4 that the next impression will be accurate.
10:43 5 Q. Now, does ClearCorrect still receive PVS
10:43 6 impressions for purposes of ordering clear aligners?
10:43 7 A. Less and less, but yes.
10:43 8 Q. And so based on your awareness of
10:43 9 ClearCorrect's experience and your own experience, is
10:43 10 PVS a commercially-viable option for ordering clear
10:43 11 aligners?
10:43 12 MR. DURST: Objection, Your Honor. This
10:43 13 is a -- this is an opinion question, and we object to
10:43 14 him offering opinions at this stage.
10:43 15 MS. FERRERA: Your Honor, I'd direct you
10:43 16 to Paragraph 2 in the disclosure that we submitted.
10:43 17 THE COURT: Mr. Durst?
10:43 18 MR. DURST: I see it in the report,
10:43 19 Your Honor. I think it's a matter of qualification.
10:43 20 THE COURT: Overruled.
10:43 21 BY MS. FERRERA:
10:44 22 Q. So, Mr. Coss, based on your experience, is PVS
10:44 23 a commercially-viable option for ordering clear
10:44 24 aligners?
10:44 25 A. No. It is not.

10:44 1 Q. So that's PVS, Option No. 1.
10:44 2 Let's talk about the devices that Align says
10:44 3 are part of its comprehensive list of third-party
10:44 4 intraoral scanners that it accepts.
10:44 5 MS. FERRERA: And actually, if I can --
10:44 6 you have it on the screen. That's fine.
7 BY MS. FERRERA:
10:44 8 Q. So the first item or machine that's listed
10:44 9 there is the 3M True Definition scanner.
10:44 10 Do you see that?
10:44 11 A. Yes. I do.
10:44 12 Q. And do you know of any company today that
10:44 13 still sells the 3M True Definition?
10:44 14 A. No. It's been discontinued since early 2019.
10:44 15 Q. And in the past six years, say, have you
10:44 16 visited a doctor's office that had a 3M True
10:44 17 Definition?
10:44 18 A. No. I have not seen that in several years.
10:44 19 Q. And so as a factual matter, is the True
10:44 20 Definition listed in Align's policy actually an option
10:44 21 for ordering Invisalign in the United States?
10:44 22 A. No. It is not.
10:45 23 Q. The next scanner that's listed here is the
10:45 24 Dentsply Sirona CEREC Omnicam scanner.
10:45 25 Do you see that?

10:45 1 A. Yes. I do.
10:45 2 Q. And are you familiar with that scanner?
10:45 3 A. Yes. I helped introduce it in 2012.
10:45 4 Q. And does Dentsply Sirona still sell the
10:45 5 Omnicam?
10:45 6 A. No. It was also discontinued in 2019.
10:45 7 Q. So when was the last time that you saw an
10:45 8 Omnicam in a doctor's office?
10:45 9 A. It's been several years.
10:45 10 Q. So as a factual matter, is the Onmiscam --
10:45 11 Omnicam that's listed in Align's policy actually a
10:45 12 scanner that's available for ordering a clear aligner
10:45 13 scan -- or Invisalign in the United States?
10:45 14 A. No. It is not.
10:45 15 Q. Then let's talk about the 3Shape TRIOS 2,
10:45 16 TRIOS 3, and TRIOS 3 Basic that are listed in Align's
10:45 17 policy.
10:45 18 Do you see that?
10:45 19 A. Yes. I do.
10:45 20 Q. And do you see that it says in parentheses:
10:45 21 Only accepted outside of the U.S., Japan, and China?
10:45 22 A. Yes. I do.
10:46 23 Q. So as a factual matter, are any of the 3Shape
10:46 24 TRIOS scanners that are listed in Align's policy
10:46 25 actually available for use to order Invisalign in the

10:46 1 United States?
10:46 2 A. Well, two out of those three have been
10:46 3 discontinued as well for several years, and none of
10:46 4 them are accepted in the United States from Align.
10:46 5 Q. And so as a factual matter, are any of the
10:46 6 third-party intraoral scanners listed in Align's
10:46 7 comprehensive list actually an option to order
10:46 8 Invisalign in the United States?
10:46 9 A. No. Hasn't been for several years.
10:46 10 Q. All right. I want to ask you about the
10:46 11 possibility of having an iTero scanner to order
10:46 12 Invisalign and then buying another scanner to order
10:46 13 clear aligner brands from other manufacturers.
10:46 14 In visiting dental offices, have you
10:46 15 encountered doctors' offices or practices that have
10:46 16 multiple scanners?
10:46 17 A. I have, but it's pretty rare for two main
10:46 18 reasons.
10:46 19 The first reason is it's a huge capital
10:46 20 investment. Scanners cost tens of thousands of
10:47 21 dollars. So that would be Point No. 1.
10:47 22 Point No. 2 is when you have a second system,
10:47 23 you need to learn a second system. You need to learn a
10:47 24 second software. And just like many other businesses,
10:47 25 in dental practices, there's a lot of turnover of

10:47 1 staff.
10:47 2 And every time, you know, there's a different
10:47 3 assistant, a new hygienist, even a new clinician that
10:47 4 joins that practice, having to learn multiple systems
10:47 5 is very complicated and not efficient.
10:47 6 Q. And in your experience, how often do doctors
10:47 7 typically keep a scanner before investing in a new one?
10:47 8 A. I would say the average is between three to
10:47 9 four years.
10:47 10 MS. FERRERA: So if we could turn to the
10:47 11 next slide, DTX-10.15, please.
10:47 12 BY MS. FERRERA:
10:47 13 Q. Based on what we've just seen, Mr. Coss, is
10:47 14 Invisalign an open or a closed system?
10:47 15 A. I would say it's a closed system.
10:47 16 MS. FERRERA: And we can take that down,
10:47 17 please.
10:47 18 BY MS. FERRERA:
10:47 19 Q. Now, I'd like to talk about ClearCorrect.
10:47 20 What scanners can doctors use to order
10:47 21 ClearCorrect clear aligners?
10:48 22 A. Every intraoral scanner in the marketplace.
10:48 23 Q. And does ClearCorrect have concerns about the
10:48 24 quality of scans that it receives from third-party
10:48 25 scanners?

10:48 1 A. No. All scanners today provide a quality
10:48 2 scan.
10:48 3 Q. And if we can focus on other clear aligner
10:48 4 manufacturers.
10:48 5 What companies accepted scans from the Virtuo
10:48 6 Vivo when it was on the market?
10:48 7 A. Every clear aligner company with the exception
10:48 8 of Align.
10:48 9 Q. And did you ever hear complaints about the
10:48 10 Virtuo Vivo while Straumann was selling it?
10:48 11 A. I did. Primarily on the user experience side
10:48 12 of it.
10:48 13 Q. Did you ever hear complaints about the quality
10:48 14 of scans from the Virtuo Vivo?
10:48 15 A. No. The Virtuo Vivo provided a quality scan.
10:48 16 Q. And how did Straumann address the complaints
10:48 17 about the user experience with the Virtuo Vivo?
10:48 18 A. Well, we take a lot of pride in everything
10:48 19 that we do, not just our intraoral scanners. We're
10:48 20 always trying to be better, trying to improve. And the
10:48 21 customer experience, the user experience is super
10:48 22 important. So when we saw that the Virtuo Vivo was not
10:48 23 providing that experience, we pulled it from the
10:48 24 market.
10:48 25 Q. And what scanners does Straumann make and sell

10:49 1 today?
10:49 2 A. We offer the SIRIOS Straumann scanner and the
10:49 3 X3.
10:49 4 Q. And what clear aligner companies accept scans
10:49 5 taken using the SIRIOS and the X3?
10:49 6 A. Every clear aligner company accepts those
10:49 7 scans, with the exception of Align.
10:49 8 Q. We've talked a little bit about the 3Shape
10:49 9 scanners that Straumann used to sell. What clear
10:49 10 aligner company -- or currently sells.
10:49 11 What clear aligner company accepts scans taken
10:49 12 using a 3Shape?
10:49 13 A. Every clear aligner provider accepts 3Shape
10:49 14 scans, with the exception of Align.
10:49 15 Q. And then you also mentioned that Straumann
10:49 16 used to distribute a Medit scanner; is that right?
10:49 17 A. That's correct.
10:49 18 Q. And what clear aligner companies accept the
10:49 19 Medit scanners?
10:49 20 A. Every clear aligner company accepts Medit
10:49 21 scans, with the exception of Align.
10:49 22 Q. So as someone who's sold intraoral scanners
10:49 23 for several decades now, are you aware of any clear
10:49 24 aligner company that only accepts scan files from its
10:49 25 own scanner?

10:49 1 A. No. I do not.
10:49 2 MS. FERRERA: Thank you, Mr. Coss.
10:49 3 Pass the witness.
10:49 4 CROSS-EXAMINATION
10:49 5 BY MR. DURST:
10:50 6 Q. Good morning, Mr. Coss.
10:50 7 A. Good morning.
10:50 8 Q. My name is Tim Durst. I represent Align.
10:50 9 A. Nice to meet you.
10:50 10 Q. Nice to meet you too. Nice to meet you too.
10:50 11 Now, Mr. Coss, on your direct examination, you
10:50 12 talked about your experience, and part of that is
10:51 13 promoting and selling your company's scanners?
10:51 14 A. That's correct.
10:51 15 Q. And your company has a practice of -- or has
10:51 16 had programs, at least in the past, where you offered
10:51 17 discounts to doctors and dentists on scanners that you
10:51 18 were -- you were proposing, right?
10:51 19 A. We have, yes.
10:51 20 Q. And you call them bundles sometimes?
10:51 21 A. We have, yes.
10:51 22 Q. And what's in the bundles, scanners and what?
10:51 23 A. Could be a multitude of different products.
10:51 24 Q. Including potentially aligners?
10:51 25 A. Yes. It could --

10:51 1 Q. And if you sell your scanner into a doctor's
10:51 2 office, your hope is that you're also going to --
10:51 3 you're going to sell more aligners, right?
10:51 4 A. Yes.
10:51 5 Q. And the expectation is they have your scanner.
10:51 6 You hope you get more business for the aligners that
10:51 7 ClearCorrect makes. All true?
10:51 8 A. Well, it depends.
10:51 9 Q. Yeah. This is in a program that you've
10:52 10 attempted, right?
10:52 11 A. For a very small amount of time.
10:52 12 Q. And when you were doing that, when you were
10:52 13 doing that for Straumann, when you were offering to
10:52 14 them your scanners at a discount to try to sell more
10:52 15 aligners, did you think you were doing something wrong?
10:52 16 A. No.
10:52 17 Q. Did you think you were doing something
10:52 18 illegal?
10:52 19 A. Definitely not.
10:52 20 Q. Now, you have defined an open system to be
10:52 21 a -- actually, I'll hold that for just a moment.
10:52 22 Now, Mr. Coss, incoming scans to Invisalign.
10:52 23 MR. DURST: If we could get DDX-10.2 up.
10:52 24 BY MR. DURST:
10:52 25 Q. This is your demonstrative.

10:52 1 And you are -- are you suggesting, Mr. Coss,
10:52 2 that Align should be taking scans from other scanners
10:52 3 to make Invisalign?
10:52 4 A. Am I supposed to be seeing a document? Sorry.
10:53 5 Q. It's on the screen right there, sir.
10:53 6 A. I don't see it. Sorry.
10:53 7 Q. It's not on your screen?
10:53 8 A. It is not.
10:53 9 Q. It is. They're telling me that it is.
10:53 10 A. Is this the -- okay. Sorry.
10:53 11 Q. Okay.
10:53 12 A. It's the same -- sorry. It is the same one as
10:53 13 before.
10:53 14 Q. Yes. It is the same one as before.
10:53 15 Are you suggesting with this to the jury, are
10:53 16 you suggesting that you believe Align should be
10:53 17 accepting scans from other companies for building
10:53 18 Invisalign?
10:53 19 A. I believe in open systems.
10:53 20 Q. That is not my question, sir.
10:53 21 Are you suggesting to the jury that Align
10:53 22 should be accepting scans from other scanners to build
10:53 23 Invisalign?
10:53 24 A. Yes.
10:53 25 Q. And you know that when the aligners go out in

10:53 1 the marketplace, when Invisalign goes out in the
10:53 2 marketplace, it has the Align logo, the Invisalign logo
10:54 3 right on it, right? You know that?
10:54 4 A. I don't know that.
10:54 5 Q. Okay. Well, let's take a look here. I'm
10:54 6 going to show you a case.
10:54 7 MR. DURST: If we can go to the ELMO real
10:54 8 quick.
9 BY MR. DURST:
10:54 10 Q. Do you see that? You recognize that logo
10:54 11 that's on that aligner case?
10:54 12 A. I don't recognize the logo. Sorry.
10:54 13 Q. You don't? Let's go back to your prior slide,
10:54 14 the one that you -- you see how the logo there matches?
10:54 15 A. I see it now. Yes.
10:54 16 Q. Okay. So we go back to what's in the market.
10:54 17 You see it has the Align logo on it?
10:54 18 A. Yes.
10:54 19 Q. Have you ever looked at an Align aligner?
10:54 20 A. I have.
10:54 21 MR. DURST: Okay. Let's put one of those
10:54 22 on the scanner.
23 BY MR. DURST:
10:54 24 Q. What's on that Align aligner there on the
10:54 25 left?

10:54 1 A. Their logo.
10:54 2 Q. And so in the marketplace --
10:54 3 MR. DURST: We can go back to the slide
10:54 4 now, Mr. Smith.
5 BY MR. DURST:
10:54 6 Q. In the marketplace, the products that go out
10:54 7 there have Invisalign's name on them and their logo on
10:54 8 them, don't they, sir?
10:54 9 A. On their aligners, yes.
10:55 10 Q. Yes.
10:55 11 A. Yes.
10:55 12 Q. It's reasonable for them to be concerned about
10:55 13 the quality of their product that goes in patients'
10:55 14 mouths, isn't it?
10:55 15 A. It's reasonable, yes.
10:55 16 Q. And you have -- if Invisalign accepted scans
10:55 17 from other scanners, you would expect Invisalign sales
10:55 18 to go up, right?
10:55 19 A. Well, it depends.
10:55 20 Q. Well, it would at least give more
10:55 21 opportunities for building Invisalign if scans were --
10:55 22 more scans were coming in --
10:55 23 A. Potentially.
10:55 24 Q. -- to Align?
10:55 25 A. Potentially, yes.

10:55 1 Q. So it would potentially raise Align's sales if
10:55 2 it accepted scans from other scanners?
10:55 3 A. It depends on a lot of factors, raising sales.
10:55 4 Q. It could potentially do that, right?
10:55 5 A. Potentially.
10:55 6 Q. And you know that in this lawsuit, your
10:56 7 company, Straumann and ClearCorrect, they're not
10:56 8 claiming any damages for the fact that Align does not
10:56 9 accept scans from other scanners.
10:56 10 Do you know that, sir?
10:56 11 A. I do not know that.
10:56 12 Q. Let's talk about the -- your own scanner
10:56 13 experience. Your own scanner experience, Straumann has
10:56 14 had -- made two attempts at the Virtuo Vivo, right?
10:56 15 A. It's the same scanner. It wasn't --
10:56 16 Q. It was relaunched, correct?
10:56 17 A. It was relaunched, yes.
10:56 18 Q. And Launch No. 1, it was in the market, and
10:56 19 then Straumann pulled it for quality reasons, right?
10:56 20 A. It was pulled based on the user experience.
10:56 21 Q. And it was pulled back from the market, right?
10:57 22 A. It was.
10:57 23 Q. And then it launched again?
10:57 24 A. Correct.
10:57 25 Q. And that was pulled back too?

10:57 1 A. Yes. As soon as we saw that the experience
10:57 2 wasn't up to par.
10:57 3 Q. And right now Straumann doesn't have its own
10:57 4 scanner, does it?
10:57 5 A. We have two.
10:57 6 Q. Right now the bulk of Straumann's scanners
10:57 7 that come into their system come from a third-party
10:57 8 system. Isn't that true, sir?
10:57 9 A. Today?
10:57 10 Q. Yes.
10:57 11 A. I don't have that data.
10:57 12 Q. You don't know?
10:57 13 A. I don't know.
10:57 14 MR. DURST: So let's -- let's -- we can
10:57 15 take that slide down, Mr. Smith.
10:57 16 BY MR. DURST:
10:57 17 Q. Let's talk about the reasons for pulling
10:57 18 Virtuo Vivo.
10:57 19 THE COURT: Mr. Durst, about how much
10:57 20 more time do you have with him?
10:57 21 MR. DURST: Just -- just a very small
10:57 22 amount of time.
10:57 23 THE COURT: Okay. Go ahead, please.
10:57 24 MR. DURST: Yeah.
10:57 25 BY MR. DURST:

10:57 1 Q. Mr. Coss, you have in front of you a
10:57 2 deposition. You remember that your deposition was
10:57 3 taken in this case?
10:57 4 A. Yes. I do.
10:57 5 Q. And you asked -- you were asked some questions
10:57 6 about Virtuo Vivo?
10:58 7 A. Yes.
10:58 8 Q. And in that deposition, sir -- and if you
10:58 9 want, you can turn to it.
10:58 10 THE COURT: You don't ask -- the
10:58 11 deposition doesn't exist until you ask him a question.
10:58 12 MR. DURST: I'm not going to ask him
10:58 13 what's in the deposition, sir -- or Judge. I'm not
10:58 14 going to ask him to say out loud. I'm asking him to
10:58 15 look at it.
10:58 16 THE COURT: Okay.
10:58 17 BY MR. DURST:
10:58 18 Q. Look at Page 43 of your deposition.
10:58 19 A. Where would I see this?
10:58 20 Q. It's in the -- it's in the binder right there.
10:58 21 A. Where?
10:58 22 Q. Your deposition.
10:58 23 A. There's -- there's only tabs with codes on
10:58 24 them. Sorry.
10:58 25 Q. It's in the final tab.

10:58 1 A. Final tab. The final tab is a PowerPoint
10:58 2 presentation.
10:59 3 Q. Mr. Coss, there were scanner -- scan quality
10:59 4 issues with Virtuo Vivo, Virtuo Vivo, that contributed
10:59 5 to the decision to pull it from the market, right?
10:59 6 A. The Virtuo Vivo provided a very quality scan.
10:59 7 Q. Is it your testimony that there was -- there
10:59 8 were no quality issues with scanning?
10:59 9 A. It was based on the user experience.
10:59 10 Q. I'd like to show you your deposition, please.
11 MR. DURST: Your Honor, may I approach?
10:59 12 THE COURT: Of course.
10:59 13 A. Page 43, I believe.
10:59 14 BY MR. DURST:
10:59 15 Q. Page 43.
10:59 16 You were under oath in this deposition just
10:59 17 like you are today, right?
11:00 18 A. I am.
11:00 19 Q. Okay. Do you see the question where you're
11:00 20 responding to questions about the Virtuo Vivo?
11:00 21 Do you see that, Mr. Coss?
11:00 22 A. No. Can you please --
11:00 23 Q. Okay. It begins -- your answer begins at
11:00 24 Line 19. The question's at 16. And you're responding
11:00 25 about Virtuo Vivo.

11:00 1 Do you see that on Page 43?
11:00 2 A. So you're saying Line 16? Sorry.
11:00 3 Q. It starts at Line 16. Yes.
11:00 4 A. Yes. I see that.
11:00 5 Q. You see that?
11:00 6 A. Yes. I do.
11:00 7 Q. Okay. And in your answer, Mr. Coss, you said
11:00 8 to us under oath that you realized that the lighting,
11:00 9 whether there was sunlight or operatory light,
11:00 10 influenced the scanning and the quality of the scans of
11:00 11 the unit.
11:00 12 Do you see that?
11:01 13 A. I don't see it on Line 16.
11:01 14 Q. It's on Line 12 of the next page, sir, in that
11:01 15 same answer. It references the quality of the scans.
11:01 16 Do you see that?
11:01 17 A. Sorry. I do not see that.
11:01 18 Q. It's on Line 15 of the page, sir.
11:01 19 A. Is it -- there's four boxes in the page, and
11:01 20 they all have lines 15. Can you please clarify what --
11:01 21 Q. Yeah. It's on Page 44.
11:01 22 A. Oh, on Page 44. Okay.
11:01 23 Page 44. Yes.
11:01 24 Q. And the question is: The quality of the scans
11:01 25 contributed to Straumann's decision to withdraw the

11:01 1 Virtuo Vivo from the market.
11:01 2 That's true, isn't it, sir?
11:01 3 A. There's -- there's four boxes in the page.
11:02 4 Sorry.
11:02 5 Q. Sir, can you read that line at --
11:02 6 A. Which line and what page?
11:02 7 Q. I'd like you to read Lines 12 through 15 on
11:02 8 Page 44. Read it out loud to the jury, please, sir.
11:02 9 A. There are several lines that have 12 to 15.
11:02 10 Q. It's on Page 44. Would you like me to come up
11:02 11 there?
11:02 12 MR. DURST: May I approach, Your Honor?
11:02 13 THE COURT: Sure.
11:02 14 A. Sorry. So there's 12 to 15, 12 to 15, 12 to
11:02 15 15, 12 to 15. Sorry.
16 BY MR. DURST:
11:03 17 Q. I certainly understand your confusion. Just
11:03 18 one second.
11:03 19 While he pulls that up, I'll move to a
11:03 20 different question.
11:03 21 Now, your demonstrative that we -- we showed
11:03 22 you just a couple minutes ago, that was about scans
11:03 23 coming in to Invisalign, correct?
11:03 24 A. The image that you showed with the arrows?
11:03 25 Yes.

11:03 1 Q. Yes. Yes. Those were scans coming in to
11:03 2 Invisalign for building Invisalign, correct? That's
11:03 3 what we were talking about?
11:03 4 A. To build clear aligners. Yes.
11:03 5 Q. Okay. You know this machine, the iTero
11:03 6 scanner, it can send scans out to other scanners, can't
11:03 7 it, or to other manufacturers?
11:03 8 A. It's very complicated, but yes.
11:03 9 Q. You know it can do it?
11:03 10 A. Yes.
11:04 11 Q. Right? And you know that ClearCorrect has
11:04 12 received 50,000 scans from an iTero device, right?
11:04 13 A. Over several years, I believe so.
11:04 14 Q. But is that true, sir?
11:04 15 A. Yes.
11:04 16 Q. And your definition of an open system is one
11:04 17 that sends scans or cases to multiple sources. You
11:04 18 told that jury -- you told the jury that just a couple
11:04 19 of minutes ago, didn't you?
11:04 20 A. I did.
11:04 21 Q. And so --
11:04 22 MR. DURST: You can take that slide down.
11:04 23 BY MR. DURST:
11:04 24 Q. I'd like to put up for you -- just a second.
11:04 25 I'd like to put up for you a statement. It's PDX -- I

11:04 1 think it's 26.1.
11:04 2 You see this? It says: The iTero in the
11:04 3 United States can send a file only to the clear aligner
11:04 4 and cannot send it anywhere else.
11:04 5 Do you see that statement?
11:04 6 A. I do see that statement.
11:05 7 Q. That is saying that this device cannot send
11:05 8 files anywhere else except to Align. That's what that
11:05 9 statements says, isn't it?
11:05 10 A. That's what is written.
11:05 11 Q. Okay. You know that statement to be untrue?
11:05 12 A. No. It's not untrue.
11:05 13 Q. 50,000 scans from this have gone to
11:05 14 ClearCorrect for building aligners, correct?
11:05 15 A. Over several years. Yes.
11:05 16 Q. That's contrary to this statement, isn't it?
11:05 17 A. That is.
11:05 18 Q. This statement that's on the screen is untrue,
11:05 19 isn't it, sir?
11:05 20 A. It's inaccurate.
11:05 21 Q. It's inaccurate. The statement on the screen
11:06 22 is inaccurate?
11:06 23 A. Yes.
11:06 24 Q. Do you know who said that?
11:06 25 A. I do not.

11:06 1 Q. Do you know that a man appeared in this
11:06 2 courtroom under oath and said that to this jury?
11:06 3 Did you know that?
11:06 4 A. I do not.
11:06 5 MR. DURST: Let's go to the next slide.
6 BY MR. DURST:
11:06 7 Q. Who is this fellow?
11:06 8 A. This is our CEO.
11:06 9 Q. Your CEO made an inaccurate -- you called it
11:06 10 an inaccurate statement to this jury by giving that
11:06 11 quote in the courtroom, didn't he?
11:06 12 A. Depends on the context.
11:06 13 Q. That statement is untrue, Mr. Coss.
11:06 14 A. I don't have the background of --
11:06 15 Q. You told me a minute ago it's inaccurate.
11:06 16 A. I did?
11:06 17 Q. All right. I'm going to go back to where we
11:06 18 were just a minute ago, and I'm going to hand you your
11:07 19 deposition back.
11:07 20 A. Thank you.
11:07 21 Q. We had it on the wrong page. Now we're on
11:07 22 Page 44 in the deposition.
11:07 23 Do you see Lines 12 through 15?
11:07 24 A. I do.
11:07 25 Q. Now, Mr. Coss, this is a question I'm asking

11:07 1 you, and it's not about what's on the page.
11:07 2 Mr. Coss, the Virtuo Vivo had scan quality
11:07 3 issues, didn't it?
11:07 4 A. The Virtuo Vivo provided a quality scan.
11:07 5 Q. Can you read -- please read for the jury what
11:07 6 you said on Lines 12 through 15 of this answer under
11:07 7 oath in your deposition, sir?
11:07 8 A. We also realized that the lighting, whether
11:07 9 that was sunlight or operatory lighting, influenced the
11:07 10 scanning and the quality of the scans of the unit.
11:07 11 Q. And thereafter you quickly pulled the unit
11:08 12 from the market, correct?
11:08 13 A. That's correct.
11:08 14 Q. Is it your position to this jury, Mr. Coss,
11:08 15 that Align should be required to accept scans from
11:08 16 subquality scanners like the Virtuo Vivo?
11:08 17 A. The quality of the scan was --
11:08 18 Q. Mr. -- Mr. Coss, can you answer my question?
11:08 19 Is it your position in this case that Align
11:08 20 should accept scans from low-quality scanners like the
11:08 21 Virtuo Vivo?
11:08 22 A. The Virtuo Vivo did not provide a low-quality
11:08 23 scan.
11:08 24 MR. DURST: Your Honor, can -- I'm sorry.
25 BY MR. DURST:

11:08 1 Q. Mr. Coss, can you please answer my question?
11:08 2 Is it your position that Align should accept
11:08 3 scans from other scanners from other companies to build
11:08 4 Invisalign aligners?
11:08 5 A. It is.
11:08 6 MR. DURST: Thank you, Your Honor. I
11:08 7 pass the witness.
11:08 8 REDIRECT EXAMINATION
11:08 9 BY MS. FERRERA:
11:09 10 Q. Mr. Coss, you were just being asked some
11:09 11 questions about the quality of the scans from the
11:09 12 Virtuo Vivo.
11:09 13 Do you recall that?
11:09 14 A. Yes. I do.
11:09 15 Q. And you were shown some testimony that you
11:09 16 gave in your deposition?
11:09 17 A. Yes.
11:09 18 Q. What issues were you talking about there?
11:09 19 A. Those are user issues. And when I say
11:09 20 "quality scan," the scanner -- if you were able to
11:09 21 scan, it would produce a quality scan. But there were
11:09 22 external factors that limited its ability to sometimes
11:09 23 scan the patient appropriately.
11:09 24 And like there was examples. Ambient light,
11:09 25 sunlight, sometimes if the patient is noncompliant,

11:09 1 again, this is all part of the user experience. It has
11:09 2 nothing to do with the quality of scan. If you were
11:09 3 able to produce a scan with the Virtuo Vivo, it was of
11:09 4 quality.
11:09 5 Q. Does Straumann make quality scanners,
11:09 6 Mr. Coss?
11:09 7 A. Yes. We do.
11:09 8 Q. Do other companies out there make quality
11:09 9 scanners?
11:10 10 A. All scanners --
11:10 11 MR. DURST: Objection, Your Honor. We've
11:10 12 got leading again of her own witness.
11:10 13 THE COURT: Overruled.
11:10 14 BY MS. FERRERA:
11:10 15 Q. Do other companies out there make quality
11:10 16 scanners, Mr. Coss?
11:10 17 A. Yes. All scanners today are of quality.
11:10 18 Q. So as a factual matter, what is your
11:10 19 perspective on whether non-Align scanners can provide
11:10 20 quality scans for ordering Invisalign?
11:10 21 A. Yes.
11:10 22 Q. I'm sorry.
11:10 23 A. Could you repeat the question?
11:10 24 Q. Sure. As a factual matter, what is your
11:10 25 perspective on whether non-Align scanners can produce

11:10 1 quality scans for purposes of ordering clear aligners?
11:10 2 A. Yes. Today -- in today's market, in the
11:10 3 United States, every scanner provides a high-quality
11:10 4 scan.
11:10 5 Q. And as a factual matter, what quality issues,
11:10 6 if any, would justify Align using a closed system?
11:10 7 A. There are no reasons today.
11:10 8 Q. You were asked a couple questions about
11:11 9 bundling in a program that Straumann had at one point
11:11 10 in time.
11:11 11 Did Straumann ever impose any kind of
11:11 12 penalties on doctors if they didn't meet the
11:11 13 requirements of that program?
11:11 14 A. No. We never.
11:11 15 Q. And is that program still in place?
11:11 16 A. No. It lasted for just a few months and we
11:11 17 pulled it.
11:11 18 Q. You were asked some questions about whether an
11:11 19 iTero user can send scans to other clear aligner
11:11 20 manufacturers for purposes of ordering clear aligners.
11:11 21 Do you recall that?
11:11 22 A. Yes. I do.
11:11 23 Q. Can an iTero user do that in theory?
11:11 24 A. In theory, they can, but it's very
11:11 25 complicated.

11:11 1 Q. And so in practice, how easy or difficult is
11:11 2 it for an iTero user to send a scan to another clear
11:11 3 aligner manufacturer?
11:11 4 A. It's very, very difficult.
11:11 5 Q. And so based on that, is the iTero and
11:11 6 Invisalign an open or a closed system, Mr. Coss?
11:11 7 A. In my opinion, it's a closed system.
11:11 8 MS. FERRERA: No further questions.
11:11 9 Thank you, Mr. Coss.
11:11 10 RECROSS-EXAMINATION
11:11 11 BY MR. DURST:
11:12 12 Q. Mr. Coss, there's been talk in this courtroom
11:12 13 about an even playing field. That is a phrase that you
11:12 14 used from time to time, isn't it?
11:12 15 A. Yes.
11:12 16 Q. You even used it in your deposition, didn't
11:12 17 you?
11:12 18 A. I don't recall.
11:12 19 Q. You know, an even playing field, it doesn't
11:12 20 mean that there are no winners, no losers. That's not
11:12 21 what an even playing field means, is it?
11:12 22 A. Well, it depends.
11:12 23 Q. Well, let's take a sports analogy. In sports,
11:12 24 those playing fields are level, aren't they?
11:12 25 A. It depends.

11:12 1 Q. What is your sport of choice, sir?
11:12 2 A. Hockey.
11:12 3 Q. Hockey.
11:12 4 A. Yes.
11:12 5 Q. And you grew up in Canada or you spend a lot
11:12 6 of time there anyway?
11:12 7 A. Yes.
11:12 8 Q. What is the greatest Canadian sports team of
11:12 9 all time?
11:12 10 A. In my opinion, it's the Montreal Canadiens.
11:12 11 Q. Canadiens. They've won like 24 Stanley Cups,
11:12 12 right?
11:12 13 A. That correct.
11:13 14 Q. They won and they won and they won and they
11:13 15 won?
11:13 16 A. They haven't won in 30 years, but yes.
11:13 17 Q. Yes. Yes. Greatest Canadian sports team of
11:13 18 all time.
11:13 19 And they played on level ice, didn't they?
11:13 20 A. Leveled ice?
11:13 21 Q. It was flat. The ice was flat. It was even.
11:13 22 A. Yes.
11:13 23 Q. It was an even playing field.
11:13 24 And yet, they came out winners over everyone
11:13 25 else in the world at least 24 times?

11:13 1 A. It's been a very long time, but yes.
11:13 2 Q. Yes. And every one of those games, there was
11:13 3 a loser too, wasn't there, sir?
11:13 4 A. No.
11:13 5 Q. Well -- well, there were some ties. Is that
11:13 6 what you mean?
11:13 7 A. That's right.
11:13 8 Q. Okay. Unless there was a tie, there was a
11:13 9 loser, wasn't there?
11:13 10 A. That's correct.
11:13 11 Q. And in all those Stanley Cups, there were
11:13 12 winners?
11:13 13 A. That's right.
11:13 14 Q. Can't have a tie in a Stanley Cup.
11:13 15 Now, the same's true in business, right?
11:13 16 A. What's the same in business?
11:13 17 Q. There are winners and losers on even playing
11:14 18 fields?
11:14 19 A. Well, it depends.
11:14 20 Q. Well, in sports, you might have better
11:14 21 players, right? That could be a reason that the
11:14 22 Canadiens were so winning?
11:14 23 A. It could.
11:14 24 Q. Could have been better coaching, right?
11:14 25 A. It could.

11:14 1 Q. It might have been a better organization.
11:14 2 Canadiens were a strong organization in those years,
11:14 3 weren't they?
11:14 4 A. Yes. They were.
11:14 5 Q. Now, those things factor into business success
11:14 6 too, don't they?
11:14 7 A. Yes.
11:14 8 Q. And sometimes -- like you told us in your
11:14 9 deposition, sometimes in an even playing field, you
11:14 10 look at it and it feels like it's an uneven playing
11:14 11 field, right?
11:14 12 You told us -- do you remember we asked you to
11:14 13 compare Straumann's implant business with the
11:14 14 ClearCorrect aligner business, and you said you didn't
11:14 15 think that was really an even playing field?
11:14 16 Do you recall that?
11:14 17 A. Those are two completely different markets.
11:14 18 Q. And -- but do you remember telling me you
11:14 19 didn't think -- telling us you didn't think that was an
11:14 20 even playing field?
11:14 21 MS. FERRERA: Your Honor, may we
11:14 22 approach?
11:15 23 THE COURT: Yes.
11:15 24 (Bench conference.)
11:15 25 MS. FERRERA: Your Honor, your order on

11:15 1 our MIL No. 2, Motion in Limine No. 2, precluded any
11:15 2 questioning or documents or evidence about the --
11:15 3 Straumann's market share in the dental implant
11:15 4 business, its market position, or the dental implant
11:15 5 business in general, and this seems to be bearing into
11:15 6 that.
11:15 7 THE COURT: Overruled.
11:15 8 (Bench conference concludes.)
11:15 9 BY MR. DURST:
11:15 10 Q. Mr. Coss, do you remember referencing --
11:15 11 referencing even playing field in connection with
11:15 12 comparing Straumann and ClearCorrect?
11:15 13 A. I don't.
11:15 14 Q. Well, look over in your deposition. You still
11:15 15 have it up there?
11:15 16 A. I do.
11:15 17 Q. Okay. Let's see if we can do our pages better
11:15 18 this time. Look at Page 18. It's not big Page 18.
11:16 19 It's 18 of the four squares. Okay? Tell me when
11:16 20 you're there.
11:16 21 A. I'm there.
11:16 22 Q. All right. Take a look at Line 23, and I'm
11:16 23 not going to ask you to read it out loud. I'll ask the
11:16 24 question again.
11:16 25 Do you see this on Page 18 -- pardon me. It's

11:16 1 Page 28 now. I'm on Page 28. So flip over there.
11:16 2 Page 28 on Line 22 and 23.
11:16 3 Do you see that?
11:16 4 A. I do.
11:16 5 Q. And you see the reference to even playing
11:16 6 field? And you say it's unfair or not appropriate in
11:16 7 your view to compare ClearCorrect with Straumann.
11:17 8 Do you see the reference to even playing
11:17 9 field, sir?
11:17 10 A. I do.
11:17 11 Q. All right. Mr. Coss, I have another question
11:17 12 for you. Okay.
11:17 13 So your comments were Straumann's been in the
11:17 14 business -- in the implant business for 70 years, a
11:17 15 long time, right?
11:17 16 A. Uh-huh.
11:17 17 Q. I'm asking you a question. You need to
11:17 18 answer --
11:17 19 A. Yes. Sorry.
11:17 20 Q. Okay. And Straumann, in your view, has a
11:17 21 really quality product?
11:17 22 A. Yes.
11:17 23 Q. And they're a market leader?
11:17 24 A. Yes.
11:17 25 Q. True?

11:17 1 A. Yes.
11:17 2 Q. And they have -- they have a very able and
11:17 3 effective sales force, right?
11:17 4 A. Yes.
11:17 5 Q. And that leads -- that has led Straumann to be
11:17 6 successful?
11:17 7 A. Amongst other things, yes.
11:17 8 Q. ClearCorrect, on the other hand, is a newer
11:17 9 business, correct?
11:17 10 A. Versus Straumann?
11:17 11 Q. Yes.
11:17 12 A. Yes.
11:17 13 Q. A smaller operation?
11:17 14 A. It's part of the same group.
11:18 15 Q. But it's a smaller business unit, isn't it?
11:18 16 It has smaller -- it has less sales?
11:18 17 A. Yes. There's less sales.
11:18 18 Q. It has fewer people dedicated directly to it,
11:18 19 right?
11:18 20 A. No.
11:18 21 Q. Now, Mr. Coss, your point was that Straumann
11:18 22 is more established, and it wins more than ClearCorrect
11:18 23 in the market, right?
11:18 24 A. No. It was not.
11:18 25 Q. That's how it was an uneven playing field,

11:18 1 right?
11:18 2 A. No.
11:18 3 Q. Is Straumann doing anything wrong with respect
11:18 4 to this even playing field thing?
11:18 5 A. Like is Straumann doing anything wrong?
11:18 6 Q. Right. Is its position in the marketplace, is
11:18 7 that evidence that it has done something wrong?
11:18 8 A. No. Straumann hasn't done anything wrong.
11:18 9 Q. Straumann has that position in the
11:18 10 marketplace, and you believe that it's done nothing
11:19 11 wrong at all; is that true?
11:19 12 A. Straumann has done nothing wrong. No.
11:19 13 MR. DURST: Thank you.
11:19 14 No further questions, Your Honor.
11:19 15 FURTHER REDIRECT EXAMINATION
11:19 16 BY MS. FERRERA:
11:19 17 Q. Mr. Coss, counsel was asking you just now
11:19 18 about the implant business.
11:19 19 Do you recall that?
11:19 20 A. I do.
11:19 21 Q. Is this case about implants?
11:19 22 A. Not at all.
11:19 23 Q. This case is about clear aligners, right?
11:19 24 A. That's correct.
11:19 25 Q. And is the U.S. market for clear aligners a

11:19 1 level playing field?
11:19 2 A. No. It is not.
11:19 3 Q. Why not?
11:19 4 A. Why not? Because, one, Invisalign has I
11:19 5 believe well over 80 percent of the market share, and
11:19 6 they do not allow clinicians to send information and
11:19 7 scans in an open form in order to be able to treat
11:19 8 those patients, limiting the ability of all the other
11:19 9 clear aligner providers to compete.
11:19 10 MS. FERRERA: Thank you, Mr. Coss.
11:20 11 MR. DURST: Nothing further, Your Honor.
11:20 12 THE COURT: You may step down, sir.
11:20 13 We're going to take a break in a second,
11:20 14 but who is your next witness?
11:20 15 MR. MUELLER: Our next witness,
11:20 16 Your Honor, is Brooks Buitta, and Mr. Zubler will
11:20 17 conduct the examination.
11:20 18 THE COURT: And I should have that, but
11:20 19 is that a fact witness or a --
11:20 20 MR. MUELLER: Fact witness, Your Honor.
11:20 21 B-U-I-T-T-A.
11:20 22 THE COURT: About how long will it --
11:20 23 MR. MUELLER: He will be about a half
11:20 24 hour or so on direct examination, Your Honor.
11:20 25 THE COURT: So ladies and gentlemen of

11:20 1 the jury, I wanted that information to figure out from
11:20 2 y'all what to do. It's almost 11:30. We could break
11:20 3 now for lunch and have a longer afternoon. We could
11:20 4 take a short recess now, come back and then have lunch.
11:20 5 I'll do whatever makes you all happy.
11:20 6 I'm -- I'm agnostic. So would you all like to take a
11:20 7 short break now and come back?
11:20 8 Okay. Let's do that.
11:20 9 We'll stand in recess for ten minutes.
11:20 10 Please don't discuss the case amongst yourselves.
11:20 11 THE BAILIFF: All rise.
11:21 12 (Jury exited the courtroom.)
11:21 13 THE COURT: Thank you. You may be
11:21 14 seated.
11:21 15 Is there anything we need to take up?
11:21 16 MR. DURST: No, Your Honor.
11:21 17 MR. MUELLER: No, Your Honor. Thank you.
11:21 18 (Recess taken.)
11:43 19 THE BAILIFF: All rise.
11:43 20 THE COURT: Please remain standing.
11:43 21 (Jury entered the courtroom.)
11:43 22 THE COURT: Thank you. You may be
11:43 23 seated.
11:43 24 You may call your next witness, please.
11:43 25 MR. ZUBLER: Your Honor, ClearCorrect

11:43 1 calls Brooks Buitta.

11:43 2 (The witness was sworn.)

11:43 3 DIRECT EXAMINATION

11:43 4 BY MR. ZUBLER:

11:44 5 Q. Good morning, Mr. Buitta. Could you please

11:44 6 introduce yourself to the jury?

11:44 7 A. Good morning. My name is Brooks Buitta.

11:44 8 Q. And what company do you work for?

11:44 9 A. I work for ClearCorrect.

11:44 10 Q. ClearCorrect. And what is your current job

11:44 11 title?

11:44 12 A. I am the senior director of special markets

11:44 13 for North America.

11:44 14 Q. Before we get into your work at ClearCorrect,

11:44 15 I'd like to ask you a few questions about your

11:44 16 background.

11:44 17 Where do you -- where are you from, sir?

11:44 18 A. I'm from a town in Massachusetts called

11:44 19 Norwell.

11:44 20 Q. And where do you live today?

11:44 21 A. I live in Norwell. I live in the same -- the

11:44 22 same place that I grew up in, same house.

11:44 23 Q. And could you describe your family briefly for

11:44 24 the jury?

11:44 25 A. Yeah. I live with my wife and kids. Lauren

11:44 1 and Stoll and Brooks, 13 and 11.
11:44 2 Q. When did you join ClearCorrect?
11:44 3 A. I joined in January of 2020.
11:44 4 Q. Before that, what did you do?
11:44 5 A. I've been in sales and marketing essentially
11:45 6 my whole career. I started in the dental industry
11:45 7 specifically around 2008.
11:45 8 Q. And why did you decide to join ClearCorrect in
11:45 9 2020?
11:45 10 A. Having been in the industry, I knew of
11:45 11 Straumann Group and ClearCorrect. I knew about the
11:45 12 company being very reputable, having a good
11:45 13 relationship with customers, taking good care of their
11:45 14 people. And specifically having to do with the clear
11:45 15 aligner market, I knew that it was a growth market
11:45 16 which was of interest as a salesperson.
11:45 17 Q. So let's go back to 2020. You joined
11:45 18 ClearCorrect. What's your first role?
11:45 19 A. I joined as what we call a TM, a territory
11:45 20 manager. So a salesperson, an outside salesperson.
11:45 21 Q. Can you describe for the jury what you did on
11:45 22 a day-to-day basis?
11:45 23 A. Sure. My job was to manage a geography, so an
11:45 24 area in Massachusetts and the state of Rhode Island,
11:45 25 bringing on new customers as well as working with our

11:46 1 existing business, our existing customers, to help them
11:46 2 grow.
11:46 3 Q. How did you go about bringing in or finding
11:46 4 new customers?
11:46 5 A. A lot of hard work, a lot of shoe leather.
11:46 6 What we call prospecting or cold calling. So knocking
11:46 7 on doors, getting in front of potential customers,
11:46 8 having been in the industry, networking and using
11:46 9 relationships that I knew.
11:46 10 Q. For how long did you work as a territory
11:46 11 manager going door to door for ClearCorrect?
11:46 12 A. Yeah. I was in that role for about three and
11:46 13 a half years.
11:46 14 Q. After that position, what was your next job at
11:46 15 ClearCorrect?
11:46 16 A. I was promoted to the director of sales
11:46 17 operations for North America.
11:46 18 Q. What does the director for sales operations
11:46 19 for North America do at ClearCorrect?
11:46 20 A. Yeah. It was a new role at the time. I
11:46 21 worked directly with the sales team and our training
11:46 22 team to look for ways to improve our processes, help
11:47 23 our sales team succeed, and also work with what we call
11:47 24 customer relationship management, helping the team do
11:47 25 better.

11:47 1 Q. How long were you the director of sales
11:47 2 operations for North America?
11:47 3 A. I was in that role up until February of this
11:47 4 year.
11:47 5 Q. And what's your current position?
11:47 6 A. I am the director of special markets for North
11:47 7 America.
11:47 8 Q. Now, today when ClearCorrect sells clear
11:47 9 aligners, who are your competitors?
11:47 10 A. We sell against other aligner manufacturers.
11:47 11 Q. And in your capacity as a -- as the director
11:47 12 of orthodontic sales operations for North America, when
11:47 13 you would generate market share analyses, what
11:47 14 competitors would you include in the pie chart or the
11:47 15 bar graph of that market share analysis?
11:47 16 A. Yeah. It was usually a pie chart. Lot of pie
11:47 17 charts, but it was the other manufacturers in the
11:47 18 aligner market. By and large, Invisalign was a big
11:48 19 part of that -- of that pie for sure.
11:48 20 Q. What percentage did Align have?
11:48 21 A. Varied at times, but usually in the 80 percent
11:48 22 range.
11:48 23 Q. When you were generating these market share
11:48 24 analyses, did you include braces as one component of
11:48 25 the market share?

11:48 1 A. No. I wouldn't have done that.
11:48 2 Q. What about direct-to-consumer companies? That
11:48 3 phrase has come up at times in this litigation. What
11:48 4 is a direct-to-consumer company and does ClearCorrect
11:48 5 compete with those companies?
11:48 6 A. Yeah. Direct-to-consumer treatment or
11:48 7 direct-to-consumer companies, talking about the actual
11:48 8 treatment to the patient, would be companies that
11:48 9 bypass the doctor for the most part and have the
11:48 10 patient receive treatment remotely.
11:48 11 At times, I've included them as aligner
11:49 12 manufacturers in that competition. More recently in
11:49 13 the U.S., they've left the market. It's not a
11:49 14 successful business model. So that sort of decreased
11:49 15 the total pie, I guess, if we're still talking about
11:49 16 those -- those pie charts. So making Align, I would
11:49 17 say, even a larger piece.
11:49 18 Q. Now, let's go back to your time as a sales
11:49 19 representative or territory manager for ClearCorrect,
11:49 20 when you were going door to door. Who were your
11:49 21 customers and potential customers?
11:49 22 A. Yeah. My customers would be dentists,
11:49 23 orthodontists. Anybody that would be either using
11:49 24 clear aligners or could be using clear aligners.
11:49 25 Q. And when you were knocking on the doors of

11:49 1 these doctors, what was your sales pitch?
11:49 2 A. I mean, like any -- any sales, I would be
11:49 3 talking about the features, benefits of my product.
11:49 4 But having done this for a long time, I knew to frame
11:49 5 it, sort of address pain points of customers.
11:50 6 You know, as a -- as a smaller player trying
11:50 7 to break in, you need to really create a story around
11:50 8 that. And I think I would talk specifically about a
11:50 9 couple of things. Choice was really important and also
11:50 10 I think being a good partner, being a good business
11:50 11 partner to our customers.
11:50 12 Q. Okay. I want to come back to a couple points
11:50 13 there.
11:50 14 First of all, you used -- you used the phrase
11:50 15 "pain points." What's a pain point in the context of
11:50 16 selling?
11:50 17 A. Yeah. Sorry. I kind of take that for
11:50 18 granted. A pain point is just something we think of as
11:50 19 an area that can be improved on or make a customer's
11:50 20 experience better. So it's an area that if you have a
11:50 21 solution for it, that can help you win in a sales role.
11:50 22 Q. You also mentioned "choice" as being part of
11:50 23 your sales message. Why was doctor choice part of your
11:50 24 sales message?
11:50 25 A. It's I think something, again, that was a pain

11:50 1 point. From being in the industry, I realized that was
11:51 2 something that would resonate for doctors and make them
11:51 3 interested in working with me. It also was something
11:51 4 that really -- I felt like I had an, you know, a
11:51 5 benefit to bring to them.
11:51 6 You know, we allowed them to use any scanner
11:51 7 they wanted in their office and work with ClearCorrect,
11:51 8 which really resonated I think with -- with a lot of
11:51 9 doctors.
11:51 10 Q. So when you were going door to door making
11:51 11 your sales pitch, how was your sales pitch generally
11:51 12 received?
11:51 13 A. I'd like to think it was received well, but
11:51 14 definitely we ran into a lot of hurdles. I, you know,
11:51 15 got a lot of -- sort of, I guess, hypothetical or
11:51 16 proverbial doors in the face. But I think a lot of
11:51 17 challenges in general, even though I think the message
11:51 18 itself was well received.
11:51 19 Q. What were the challenges you faced?
11:51 20 A. The big piece, we're talking about sort of the
11:51 21 market that I was selling into. The vast majority of
11:52 22 the customers I was selling to were Invisalign users,
11:52 23 and they almost exclusively had an iTero scanner. That
11:52 24 would oftentimes be a very big challenge and a hurdle
11:52 25 to take on.

11:52 1 Q. All right. Let's talk about the iTero
11:52 2 scanner.
11:52 3 MR. ZUBLER: And if we could pull up
11:52 4 DDX-6.3.
5 BY MR. ZUBLER:
11:52 6 Q. And I want to focus first on how dental scans
11:52 7 could get from a scanner to Invisalign to order an
11:52 8 Invisalign aligner.
11:52 9 What does this figure show, sir?
11:52 10 A. This is showing what an open system would look
11:52 11 like, so having all the scanners in the market
11:52 12 submitting cases to Invisalign.
11:52 13 Q. Okay. And what are the characteristics then
11:52 14 of an open system?
11:52 15 A. Yeah. An open system means there aren't any
11:52 16 barriers. There's no encumbrances to having those
11:53 17 scans or patients sent from any piece of equipment.
11:53 18 Q. Now, as a factual matter, based on what you've
11:53 19 seen in the field, if a doctor wants to order
11:53 20 Invisalign aligners, which scanners can the doctor
11:53 21 choose to make those scans for the Invisalign aligners?
11:53 22 A. Yeah. From my experience, it's the iTero
11:53 23 scanner. I think there's a handful of older units that
11:53 24 I didn't run into often in the field that may still be
11:53 25 available, but by and large the iTero.

11:53 1 MR. ZUBLER: If we could go to the next
11:53 2 exhibit, DDX-6.4.
3 BY MR. ZUBLER:
11:53 4 Q. What does this demonstrative show, sir?
11:53 5 A. This is more the reality that I know and that
11:53 6 I sold against in the field.
11:53 7 Q. And what is your understanding as to why scans
11:53 8 from other scanners can't be used to order Invisalign
11:54 9 aligners?
11:54 10 A. My understanding is that that's a decision on
11:54 11 the part of Align or Invisalign.
11:54 12 Q. All right. Now I want to change the focus not
11:54 13 to the issue of how scans get to Invisalign, but let's
11:54 14 talk about how scans can go to other companies like
11:54 15 ClearCorrect.
11:54 16 MR. ZUBLER: If we could pull up DDX-6.5.
11:54 17 BY MR. ZUBLER:
11:54 18 Q. What does this demonstrative show?
11:54 19 A. Yeah. So again, this would be an open system
11:54 20 with all scanners sending to all of the other aligner
11:54 21 companies in the market.
11:54 22 Q. Okay. Now, if a doctor wants to order
11:54 23 ClearCorrect aligners, for example, which scanners will
11:54 24 ClearCorrect accept scans from for ClearCorrect
11:54 25 aligners?

11:54 1 A. To my knowledge, all scanners can be used for
11:54 2 ClearCorrect.
11:54 3 Q. Now, at a high level, though, how many of your
11:54 4 prospective customers had iTero scanners?
11:55 5 A. Would you remind repeating the question?
11:55 6 Q. Sure. Just as a high level or approximately,
11:55 7 how many of your prospective customers, when you were
11:55 8 knocking on doors, had iTero scanners?
11:55 9 A. Yeah. Especially of those prospects, the ones
11:55 10 that I would focus on being, you know, using a higher
11:55 11 volume of cases, almost all of them would have an iTero
11:55 12 scanner.
11:55 13 Q. Okay. Let's consider a doctor. He's a
11:55 14 prospective customers -- customer of yours. You knock
11:55 15 on his door. You're talking to him or her, and this
11:55 16 doctor has an iTero.
11:55 17 Could this doctor use an iTero to order
11:55 18 ClearCorrect aligners?
11:55 19 A. They could. Technically, yes. They could.
11:55 20 Q. Okay. What do you mean, "technically, yes.
11:55 21 They could"?
11:55 22 A. There are ways to send an iTero scan to
11:55 23 ClearCorrect. I say "technically" only because my time
11:56 24 in the field, we ran into a lot of trouble and
11:56 25 encumbrances just trying to make that happen. But yes.

11:56 1 You can.
11:56 2 Q. Okay. Let's suppose you're dealing with a
11:56 3 potential customer. He or she has an iTero, the
11:56 4 doctor, dentist or orthodontist.
11:56 5 What would you do to try to sell your product
11:56 6 in that situation?
11:56 7 A. Yeah. As a salesperson, you need to help your
11:56 8 customer, do the best by them for prospects, try to
11:56 9 show how they can do it, make it seem as easy as you
11:56 10 can. I would even create, you know, my own
11:56 11 step-by-step processes to help offices through the
11:56 12 process.
11:56 13 Q. And what was the actual process that a dentist
11:56 14 or orthodontist would have to go through in order to
11:56 15 export a scan from an iTero to ClearCorrect?
11:56 16 A. Yeah. I would typically think of it as a
11:57 17 couple of different pieces to the process. I would
11:57 18 start by making sure to walk them through the sort
11:57 19 of -- sort of setup, meaning that, you know, they could
11:57 20 have their IT access to have folders created to export
11:57 21 the files, make sure that all the people in the office
11:57 22 had access to log in at different workstations, so sort
11:57 23 of an initial process.
11:57 24 And then in terms of getting the scan to
11:57 25 ClearCorrect on an every-time basis, it was exporting

11:57 1 files, saving them in a particular way, unzipping zip
11:57 2 files, and then eventually getting them into the
11:57 3 ClearCorrect system.
11:57 4 Q. So for an individual scan, how long would it
11:57 5 typically take to export a scan from an iTero to
11:58 6 ClearCorrect?
11:58 7 A. It can vary, but usually a few minutes is what
11:58 8 I would run into.
11:58 9 Q. Now, based on your experience in the field, is
11:58 10 a few minutes a significant or insignificant amount of
11:58 11 time for whether a doctor would want to purchase
11:58 12 ClearCorrect aligners?
11:58 13 A. I can say significant, but again, kind of
11:58 14 thinking in a couple of different ways. You know, the
11:58 15 customers I was selling to are consumers. And so I
11:58 16 think when we think about a few minutes, when you're
11:58 17 talking about technology, it's really impactful. We
11:58 18 don't like to wait on our, you know, usernames and
11:58 19 log-ins or anything that we do now with our phones or
11:58 20 any tech.
11:58 21 So a few minutes would be a frustration, but
11:58 22 then in sort of the dental setting, if you think about
11:58 23 a dental practice, these are at least the customers I
11:58 24 was trying to bring over. We're not doing one scan or
11:59 25 one patient a day, but it could be 15 or 20.

11:59 1 So if you're talking about a few minutes, that
11:59 2 could cumulatively be an hour of time for either the
11:59 3 staff or the doctor, something we call "chair time,"
11:59 4 which is the time they really dedicate to treating
11:59 5 patients, and it's also something they look at in terms
11:59 6 of profitability.
11:59 7 Q. Now, if doctors had issues with exporting
11:59 8 scans from the iTero to ClearCorrect, what would
11:59 9 ClearCorrect do?
11:59 10 A. Yeah. Usually as the TM at the time, I would
11:59 11 be the first point of contact, so getting calls and
11:59 12 messages. But we also have a dedicated team called
11:59 13 provider services. So all different ways to
11:59 14 communicate to the team in our Round Rock facility to
11:59 15 try to triage that, either supporting the customer
11:59 16 directly or supporting the sales team.
11:59 17 Q. If you could turn to Tab 2 in your binder,
11:59 18 please.
11:59 19 There's a document there DTX-2866. What is
12:00 20 this document, sir?
12:00 21 A. This is an e-mail from Bonnie Williams on our
12:00 22 inside sales team asking for support on an export
12:00 23 process.
12:00 24 Q. Does this document relate to the provider
12:00 25 support team that you mentioned a moment ago?

12:00 1 A. Yes. So this is directly going to our
12:00 2 provider services team, again, trying to triage
12:00 3 something going on that's already been, you know, kind
12:00 4 of attempted in the field and with a number -- another
12:00 5 member of our team from the clinical advisor team.
12:00 6 MR. ZUBLER: Your Honor, we move the
12:00 7 admission of DTX-2866.
12:00 8 MR. TUBACH: No objection.
12:00 9 THE COURT: Admitted.
12:00 10 BY MR. ZUBLER:
12:00 11 Q. This e-mail chain is dated January 30th, 2023.
12:00 12 And the subject line is Provider Assistance Needed for
12:00 13 Strategic Account, Time-Sensitive.
12:00 14 Do you see that?
12:00 15 A. I do.
12:00 16 Q. And if we look at the second page, there's a
12:01 17 portion where Bonnie Williams is writing.
12:01 18 Who is Bonnie Williams?
12:01 19 A. Bonnie Williams was a member of the inside
12:01 20 sales team.
12:01 21 Q. And she writes: Can someone very familiar
12:01 22 with uploading iTero scans to the ClearCorrect lab
12:01 23 please urgently reach out to Kristy, the office manager
12:01 24 at Epic Smiles.
12:01 25 What is this referring to?

12:01 1 A. So this is, again, Bonnie trying to get
12:01 2 somebody from our support team to come in and add
12:01 3 additional support for a customer in a dental practice.
12:01 4 Q. All right. If we could go to the next page,
12:01 5 there's a sentence that begins "This morning."
12:01 6 It says: This morning I walked her through
12:01 7 Dr. Arcaro's recommendations. See below. However,
12:01 8 Kristy is still unable to save the scans to her desktop
12:01 9 to upload.
12:01 10 Do you see that, sir?
12:01 11 A. Yes.
12:01 12 Q. What is that referring to?
12:02 13 A. So Dr. Arcaro was the head of our clinical
12:02 14 advisor team, so an orthodontist on staff there to
12:02 15 support customers. Looks like Dr. Arcaro had a set of
12:02 16 steps to help do this, but the customer looks like they
12:02 17 cannot get through that first process that I mentioned,
12:02 18 which is getting the scans to her desktop.
12:02 19 Q. And reading further in the e-mail, what is the
12:02 20 response of ClearCorrect to this customer?
12:02 21 A. I think it's -- I think this -- yep. This is
12:02 22 the steps again of everything that needs to be done to
12:02 23 try to get the case to ClearCorrect.
12:02 24 Q. Now, have you seen the process for exporting a
12:02 25 scan from the iTero to Align for an Invisalign aligner?

12:03 1 A. Yes.
12:03 2 Q. How does it compare to the process for
12:03 3 exporting a scan from an iTero to ClearCorrect?
12:03 4 A. It's sort of night and day, I would say.
12:03 5 Q. In what sense is it night and day?
12:03 6 A. So the -- what you're seeing here is the
12:03 7 example of, you know, trying to break down all the
12:03 8 steps involved with getting that scan to ClearCorrect.
12:03 9 My experiencing the cases sent from the iTero to
12:03 10 Invisalign, it's seamless, almost instant.
12:03 11 Q. What about with other scanners that you've
12:03 12 seen in the field? If a doctor, if he or she has a
12:03 13 scanner from not Align, not from ClearCorrect or
12:03 14 Straumann, how long does it take to export a scan from
12:03 15 those scanners to ClearCorrect?
12:03 16 A. It's usually a few clicks. It's
12:04 17 straightforward. I dealt a lot with major scanners in
12:04 18 the market. There's one from even a competitor, the
12:04 19 Primescan from Dentsply that still had an integration.
12:04 20 So it was designed to be straightforward.
12:04 21 Q. Now, approximately what percentage of
12:04 22 ClearCorrect scans, the scans that ClearCorrect
12:04 23 receives, approximately what percentage of those scans
12:04 24 come from iTero?
12:04 25 A. Do you mind repeating the question?

12:04 1 Q. Sure. Thinking about ClearCorrect's total
12:04 2 scans that it receives from scanners across the
12:04 3 spectrum, approximately what percentage of those scans
12:04 4 come from iTero scanners?
12:04 5 A. I don't know the exact numbers, but they're
12:04 6 relatively low.
12:04 7 Q. Approximately how low, sir?
12:04 8 A. In the low single digits, I think.
12:04 9 Q. And is that a percentage, you mean, or --
12:04 10 A. Low single-digit percentages, yes.
12:04 11 Q. If we could pull up DDX-6.6, what does this
12:05 12 show?
12:05 13 A. So this is showing the limitation of getting
12:05 14 cases to all the other aligner manufacturers from the
12:05 15 iTero.
12:05 16 Q. In what sense does it show that, sir?
12:05 17 A. Well, I think this is what -- sort of the
12:05 18 reality that we -- that I saw, meaning from all the
12:05 19 other scanners in the market, cases can flow. I think
12:05 20 while there's still a technical way to get from the
12:05 21 iTero, I think it's just extremely limited.
12:05 22 Q. Now, how, sir, if at all, did the time it
12:05 23 takes to export scans from an iTero to ClearCorrect,
12:05 24 how did that affect your sales efforts with potential
12:05 25 customers?

12:05 1 A. Yeah. I mentioned that, you know, there's a
12:06 2 lot of frustration, a lot of time, a lot of issues with
12:06 3 the process.
12:06 4 So really in a -- in a couple of ways. One
12:06 5 would be sometimes not really having a chance to get in
12:06 6 front of a customer and show them ClearCorrect. Staff
12:06 7 and doctors kind of being aware of that process,
12:06 8 sometimes it would be a nonstarter to have a deeper
12:06 9 sales conversation.
12:06 10 Otherwise, with a chance to, you know, try
12:06 11 some cases with ClearCorrect. I think, you know, in
12:06 12 sales, a first impression is really very, very
12:06 13 important. And oftentimes this made that attempt or
12:06 14 first impression with me, it was fraught with a lot of
12:06 15 issues and really became a big challenge.
12:06 16 Q. When you were selling ClearCorrect aligners
12:06 17 door to door, did you feel you were playing on a level
12:06 18 playing field with Align?
12:06 19 A. No, not at the time. No.
12:07 20 Q. Other than the iTero scanner, have you faced
12:07 21 any other challenges in selling ClearCorrect aligners?
12:07 22 A. From other scanners, other work flows, no.
12:07 23 Q. Okay. What about anything from Align? Has
12:07 24 any other actions by Align affected your ability to
12:07 25 sell ClearCorrect aligners?

12:07 1 A. Yeah. I think when we talk about the scanners
12:07 2 being one area that really was a headache and a real
12:07 3 challenge, I think that's coupled when we're talking
12:07 4 about having a first impression and an opportunity. I
12:07 5 think the loyalty program that most of the larger
12:07 6 doctors that I was selling to were part of made it a
12:07 7 challenge. It's something called the Advantage
12:07 8 Program.
12:07 9 Q. What briefly is the Advantage Program from
12:07 10 Align?
12:07 11 A. Yeah. It's a -- it's a volume discount
12:08 12 program. Doctors are tasked to hit a certain number of
12:08 13 case volume every six months. The volume of cases that
12:08 14 they approved or sent to Align would then dictate their
12:08 15 status or their tier and their pricing going forward.
12:08 16 Q. For a doctor in the Advantage Program, what is
12:08 17 the magnitude of the monetary impact of being in one
12:08 18 tier versus another?
12:08 19 A. Yeah. It's based on the price of the cases.
12:08 20 The change in dropping even one step or stage can be,
12:08 21 you know, $100 to a case.
12:08 22 If we think about again volume customers, the
12:08 23 ones that I needed to win over to be successful, that's
12:08 24 multiplied by high, high volume. So a lot of money.
12:08 25 And that's just one -- one change in sort of tier or

12:09 1 status.
12:09 2 Q. So the price the dentist or orthodontist would
12:09 3 pay for Align aligners in a given period was based on
12:09 4 what, their prior purchases; is that correct?
12:09 5 A. Yeah. What a doctor would do for business in
12:09 6 a set window of six months would then dictate their --
12:09 7 the pricing they would pay going forward on everything
12:09 8 they would buy.
12:09 9 Q. And if a doctor wanted to lower the price,
12:09 10 then, that was set from their prior purchases, what
12:09 11 would they -- what could they do?
12:09 12 A. I don't -- I don't know of anything at that
12:09 13 point. I think they were locked in until the next
12:09 14 period.
12:09 15 Q. And from a sales perspective, how did this
12:09 16 Advantage Program affect your job and your ability to
12:09 17 win new customers?
12:09 18 A. Yeah. I think -- I mean, in -- in sales you
12:09 19 need opportunities. You need sort of a certain number
12:09 20 of at bats. So you just want the chance to have
12:10 21 opportunities to show what you do, show what your
12:10 22 products can do.
12:10 23 So I think doctors were extremely reluctant to
12:10 24 divert cases away from what they were doing. If they
12:10 25 know that they need to do a certain number of cases to

12:10 1 hit a -- to hit a tier, to hit to maintain a price
12:10 2 point or a status, they really were reluctant to do
12:10 3 that.
12:10 4 So if it were a couple of cases, oftentimes we
12:10 5 couldn't get over that learning or change curve. When
12:10 6 you're doing something new, that's difficult in the
12:10 7 aligner market in what we do. That really takes
12:10 8 some -- some time, some opportunity to learn the
12:10 9 nuances of a new system and be comfortable with it.
12:10 10 And you're also dealing with change management, not
12:10 11 just with a doctor or with a customer but also across
12:10 12 all of their staff, their team. Everybody involved.
12:10 13 So if a -- if a prospect is reluctant to not
12:11 14 allow more than a couple cases, it's really a big
12:11 15 challenge.
12:11 16 Q. What else has ClearCorrect done to try to get
12:11 17 its foot in the door to sell ClearCorrect aligners?
12:11 18 A. Yeah. Besides a lot of I think really hard
12:11 19 work, we've gone the route of even trying to place
12:11 20 scanners at no charge into offices to sort of get --
12:11 21 get around that closed system scenario.
12:11 22 Q. And what was this program or process you're
12:11 23 describing?
12:11 24 A. Yeah. We would -- we created a program to
12:11 25 allow a customer to get a scanner that was, you know,

12:11 1 directly connected with -- with ClearCorrect, make it
12:11 2 an easy, seamless process, unlike what they were used
12:11 3 to, at no charge. They would commit to doing a certain
12:11 4 number of ClearCorrect cases over two years to help pay
12:11 5 off our upfront cost of putting the scanner in their
12:12 6 office.
12:12 7 Q. Could you turn to Tab 3 in your binder, sir,
12:12 8 which is PTX-636?
12:12 9 A. Yep.
12:12 10 Q. What is this document, sir?
12:12 11 A. This is an e-mail from me to Andrea Hoffman on
12:12 12 our marketing team.
12:12 13 MR. ZUBLER: Your Honor, we move
12:12 14 admission of PTX-636.
12:12 15 MR. TUBACH: No objection.
12:12 16 THE COURT: Admitted.
12:12 17 BY MR. ZUBLER:
12:12 18 Q. If we could go at the end of the first
12:12 19 paragraph, you're writing this e-mail. And looking at
12:12 20 the e-mail dated April 16th, if we could scroll down to
12:12 21 further in the chain, please.
12:12 22 And you write at the end of the first
12:12 23 paragraph: This offer is especially valuable for GPs
12:12 24 doing similar case numbers currently locked into an
12:12 25 iTero workflow and the associated costs.

12:12 1 Do you see that, sir?
12:12 2 A. Yes.
12:12 3 Q. And what were you trying to accomplish here,
12:12 4 sir?
12:12 5 A. With Andrea being on the marketing team, I
12:13 6 really am just explaining the importance of this
12:13 7 program to try to break into the sort of challenge or
12:13 8 negative cycle that I mentioned with that iTero
12:13 9 lock-in. So that's what I'm explaining here.
12:13 10 Q. How did doctors who already had an iTero
12:13 11 respond to this ClearCorrect offer of a second type of
12:13 12 scanner in their office?
12:13 13 A. It was, I would say, not successful there.
12:13 14 Primarily a lot of doctors did not want to have a
12:13 15 second workflow, a different scanner to manage in that
12:13 16 way.
12:13 17 Also, because we're trying to have them have
12:13 18 an easier way to try us but also at the same time
12:13 19 committing to cases over time, it was a challenge to
12:13 20 have those higher-volume, more attractive customers for
12:13 21 us to win, you know, make that switch sight unseen
12:14 22 because of some of the issues I mentioned with having
12:14 23 an opportunity to trial our cases.
12:14 24 Q. Was this program successful?
12:14 25 A. I can't say it was successful looking back on

12:14 1 it. No.
12:14 2 Q. Very briefly. This -- the jury has heard in
12:14 3 this case testimony about ClearCorrect's high trim line
12:14 4 in its products.
12:14 5 Are you familiar with that, sir?
12:14 6 A. I'm familiar. I'm wearing my aligners now.
12:14 7 So I'm familiar.
12:14 8 Q. All right. And what is ClearCorrect's
12:14 9 approach with respect to the trim line?
12:14 10 A. The high trim line, we call it the performance
12:14 11 trim line, is something that as a salesperson in the
12:14 12 field and we as a company kind of tout as a real
12:14 13 benefit to our -- to our customers and their patients.
12:14 14 Q. And how have customers reacted to the high
12:14 15 trim line? Do you have any real-world examples to
12:14 16 that?
12:14 17 A. Yeah. I think the ability to be much more
12:14 18 retentive, to keep the aligners in place to help move
12:15 19 teeth has been really well received. I hear positive
12:15 20 feedback all the time.
12:15 21 Just about a week and a half ago, I was at a
12:15 22 large meeting and had a customer over lunch tell me how
12:15 23 happy they are about using us now. The high trim line
12:15 24 allows this doctor, who happens to be an orthodontist
12:15 25 doing a lot of cases, they treat all of their cases

12:15 1 with no attachments on their first round of treatment.
12:15 2 Q. Now, Mr. Buitta, the jury has heard testimony
12:15 3 and seen a document today, PTX-190, about some
12:15 4 performance issues that ClearCorrect had with an
12:15 5 orthodontic company called Pure Orthodontics back in
12:15 6 2023.
12:15 7 Are you familiar with those issues that
12:15 8 ClearCorrect faced in 2023?
12:15 9 A. Yes. I'm familiar.
12:15 10 Q. And did ClearCorrect resolve those issues?
12:15 11 A. Yeah. That's -- that's actually the customer
12:16 12 that I'm talking about, was a CEO of Pure.
12:16 13 Q. I'm sorry, the customer you were talking about
12:16 14 a moment ago?
12:16 15 A. Yes.
12:16 16 Q. So what is the status of the relationship
12:16 17 between ClearCorrect and Pure Orthodontics today?
12:16 18 A. They're -- they're one of our largest, most
12:16 19 successful customers.
12:16 20 MR. ZUBLER: Your Honor, I pass the
12:16 21 witness.
12:16 22 THE COURT: Ladies and gentlemen of the
12:16 23 jury, would you like to finish this witness?
12:16 24 Okay. Cross?
12:16 25 CROSS-EXAMINATION

12:16 1 BY MR. TUBACH:
12:17 2 Q. Good afternoon, Mr. Buitta.
12:17 3 A. Close enough.
12:17 4 Q. Buitta?
12:17 5 A. Buitta.
12:17 6 Q. Buitta. All right. I'm going to get that
12:17 7 right.
12:17 8 My name's Michael Tubach. I represent Align.
12:17 9 I'm going to have some questions for you. Okay?
12:17 10 A. Sure.
12:17 11 Q. Now, when you -- in February of 2026, you say
12:17 12 you moved to be director of special markets?
12:17 13 A. Yes.
12:17 14 Q. Is that another way that means you handled DSO
12:17 15 accounts?
12:17 16 A. That's part of my team, works with DSOs, yes.
12:17 17 Q. And we also talked -- you mentioned that at
12:17 18 times you had included direct-to-consumer aligners in
12:17 19 your market assessments internally; isn't that correct?
12:17 20 A. I would.
12:17 21 Q. Yeah. And that's because it's part of the
12:17 22 same market that you're in, right?
12:17 23 A. The aligner market, yes.
12:17 24 Q. Right. You would include direct to consumer,
12:17 25 right?

12:17 1 A. Yes.
12:17 2 Q. And you said the Smile Direct Club is out of
12:17 3 business, right?
12:17 4 A. I'm not -- I don't think I mentioned them
12:18 5 directly, but I -- yes.
12:18 6 Q. Oh, maybe that must have been someone else.
7 A. Yes.
12:18 8 Q. But you know they're out of business, right?
12:18 9 A. Yes. I do.
12:18 10 Q. But their SmileSet is now selling direct to
12:18 11 consumer, right?
12:18 12 A. I'm not familiar with that.
12:18 13 Q. You haven't heard of them?
12:18 14 A. Could you repeat that again?
12:18 15 Q. SmileSet.
12:18 16 A. I'm not sure I'm familiar with that -- that
12:18 17 brand.
12:18 18 MR. TUBACH: Okay. Now, let's pull up
12:18 19 DDX-6.3, if we could.
20 BY MR. TUBACH:
12:18 21 Q. You called this a system, Mr. Buitta, right?
12:18 22 A system on direct -- on your direct testimony. You
12:18 23 said this was not an -- not an open system.
12:18 24 This would be an open system if that's what we
12:18 25 were doing, right?

12:18 1 A. Yes.
12:18 2 Q. This isn't really a system, is it? This is
12:18 3 just a -- this is just what you would like Align to do
12:18 4 with how it accepts scans to sell its own product,
12:18 5 right?
12:18 6 A. I'm not sure I would agree with that.
12:19 7 Q. There's no system here, is there, sir?
12:19 8 A. I would call this an open system.
12:19 9 Q. What's the system? What is the system here on
12:19 10 this diagram? What's the system?
12:19 11 A. I -- it's just a term that we commonly use,
12:19 12 calling it an open system, meaning that's the way that
12:19 13 it's -- it's something that's designed that way, to
12:19 14 work in a certain way.
12:19 15 Q. Now, you said there are ways. And that's --
12:19 16 this is -- this is Align's own product, and they're
12:19 17 deciding from whom they're going to accept scans to
12:19 18 make their own product; isn't that right?
12:19 19 A. I think that's right.
12:19 20 Q. Now, we agree there are ways --
12:19 21 MR. TUBACH: You can take this down,
12:19 22 Mr. Smith. Thank you.
23 BY MR. TUBACH:
12:19 24 Q. There are ways to send scans from iTero to
12:19 25 order ClearCorrect. We talked -- you talked about that

12:19 1 earlier, right?
12:19 2 A. Technically, yes.
12:19 3 Q. Well, technically. You said it usually takes,
12:19 4 in your words, a few minutes, correct?
12:19 5 A. That's my experience. Yes.
12:20 6 Q. And you would agree with me, sir, that it
12:20 7 is -- every company wants to create a seamless workflow
12:20 8 between its scanner and order its own aligners. You
12:20 9 would agree with me?
12:20 10 A. I'm not sure I would agree with saying my own
12:20 11 that way.
12:20 12 Q. So you think that Straumann -- Straumann has
12:20 13 its own scanners, right?
12:20 14 A. Yes.
12:20 15 Q. Okay. And is it your testimony that Straumann
12:20 16 isn't trying to create a seamless workflow between the
12:20 17 Straumann scanner and ordering ClearCorrect aligners?
12:20 18 Is that your testimony?
12:20 19 A. And others, yes.
12:20 20 Q. Not others, sir. Listen to my question
12:20 21 carefully.
12:20 22 Is it your testimony here that Straumann is
12:20 23 not trying to create a seamless workflow between the
12:20 24 Straumann scanner and their ClearCorrect aligners?
12:20 25 A. I want to make sure I'm answering correctly

12:20 1 because there's a couple of negatives in there.
12:20 2 Q. You agree that's what they want to do, right?
12:21 3 A. Yes.
12:21 4 Q. Okay. Thank you.
12:21 5 Now, we talked about that loyalty program.
12:21 6 You mentioned that -- the Align loyalty program, right?
12:21 7 A. Uh-huh.
12:21 8 Q. And the way the program is structured is that
12:21 9 whatever a doctor buys in one six-month window
12:21 10 determines their discount in the next six-month window,
12:21 11 right?
12:21 12 A. That's my understanding, yes.
12:21 13 Q. Okay. And you used the word "tasked," that
12:21 14 the doctors are tasked with hitting certain targets.
12:21 15 No one gives them a task, right?
12:21 16 A. I probably used that term because --
12:21 17 Q. No one uses the word "task" to tell them what
12:21 18 to do; isn't that right, sir?
12:21 19 A. I used the word "task."
12:21 20 Q. But no one's telling -- a task is something
12:21 21 you give to someone that they have to do, right? You
12:21 22 task -- you have kids?
12:21 23 A. I do.
12:21 24 Q. You give them a task?
12:21 25 A. Yes.

12:21 1 Q. That's not a -- that's not a "do it if you
12:21 2 feel like it." That's take the garbage out, right?
12:21 3 All right? That's a task.
12:21 4 Does anybody give a task to the doctors to
12:22 5 determine how much Invisalign to buy?
12:22 6 A. Sometimes, in my opinion.
12:22 7 Q. So who tells them how much they have to buy?
12:22 8 A. From my experience, their local sales team can
12:22 9 say that to them.
12:22 10 Q. Can say they have to order Invisalign? Are
12:22 11 you telling us that we're forcing doctors to order
12:22 12 Invisalign? You're not saying that, right?
12:22 13 A. I wouldn't say it that way.
12:22 14 Q. Okay. Because the task that you've identified
12:22 15 is however many they buy, that is going to determine
12:22 16 what the discount is, right?
12:22 17 A. Do you mind repeating that?
12:22 18 Q. Sure. However many Invisalign they order in
12:22 19 one six-month period is going to determine how much of
12:22 20 a discount they get in the next six-month period,
12:22 21 right?
12:22 22 A. That's right.
12:22 23 Q. Okay. And that means they're paying a lower
12:22 24 price for Invisalign, right?
12:22 25 A. If they hit their tier, yes.

12:22 1 Q. Yeah. Whatever tier they hit, they're paying
12:22 2 a lower price than just paying the sticker price,
12:23 3 right?
12:23 4 A. If they hit a tier, yes.
12:23 5 Q. And you would agree with me, low prices are
12:23 6 good? Would you agree with me?
12:23 7 A. As a consumer, yes.
12:23 8 Q. Right. And you -- and as a buyer of anything,
12:23 9 you want the price to be low, right?
12:23 10 A. Yes.
12:23 11 Q. And so do doctors, right?
12:23 12 A. I agree with that.
12:23 13 Q. And there's nothing that prohibits Straumann
12:23 14 from offering a discount program that's exactly like
12:23 15 ours, is there, sir?
12:23 16 A. I'm not sure I agree with that.
12:23 17 Q. Is there any legal prohibition on Straumann
12:23 18 offering the exact same discount program or maybe even
12:23 19 a better one than what Align offers? Is there any
12:23 20 legal prohibition on that?
12:23 21 A. I'm not sure. I think when you say "program,"
12:23 22 I'm not sure.
12:23 23 Q. Sir, does Straumann offer discounts for people
12:23 24 who buy ClearCorrect?
12:23 25 A. Yes.

12:23 1 Q. Yes, they do, don't they? And the more they
12:24 2 buy, the bigger discount, right?
12:24 3 A. At times, yes.
12:24 4 Q. At times. That's the way a discount program
12:24 5 works for loyalty volume discounts. The more you buy,
12:24 6 the bigger the discount, right? Right?
12:24 7 A. Yes.
12:24 8 Q. Okay. Now, you mentioned there was -- at one
12:24 9 point you were even trying to get doctors to use
12:24 10 ClearCorrect by giving them essentially a free scanner,
12:24 11 right?
12:24 12 A. At no charge, yes.
12:24 13 Q. Let's -- no charge. Is there a difference
12:24 14 between no charge and freight?
12:24 15 A. I think there is.
12:24 16 Q. Okay. They would get it upfront at no cost,
12:24 17 right?
12:24 18 A. Okay.
12:24 19 Q. And as long as they bought -- they had to buy
12:24 20 a certain number of ClearCorrect aligners or they had
12:24 21 to pay a penalty, right?
12:24 22 A. No. Not necessarily.
12:24 23 Q. That's the way the program was structured,
12:24 24 right?
12:24 25 A. No. Not necessarily.

12:24 1 Q. Well, they could do one of two things if they
12:24 2 didn't meet their required ClearCorrect targets. They
12:25 3 could either buy vouchers to get ClearCorrect in the
12:25 4 future, or they could pay 70 percent of what they owed,
12:25 5 right? That's the way the program was structured?
12:25 6 A. In addition to a third option.
12:25 7 Q. And the third option was?
12:25 8 A. To purchase a scanner at a low price.
12:25 9 Q. The low price was $33,000, wasn't it, sir?
12:25 10 A. I think it depended on the time.
12:25 11 Q. About $33,000, right?
12:25 12 A. It was called the floor price.
12:25 13 Q. About $33,000, right?
12:25 14 A. I can't tell you the exact number, but --
12:25 15 Q. Okay. That's in the ballpark?
12:25 16 A. Could be.
12:25 17 Q. Plus Straumann took a $2,000 fee for the
12:25 18 financing if they wanted to do that, right? Right?
12:25 19 You remember that, sir, don't you?
12:25 20 A. Yes. I don't know that I would agree with a
12:25 21 fee in that way, but yes.
12:25 22 Q. Okay. They would take $2,000 from the doctor,
12:25 23 right?
12:25 24 A. Yes.
12:25 25 Q. You can call it whatever you want.

12:25 1 Now, you said Straumann's proud of its high
12:25 2 trim line, right, on the -- in their aligners, right?
12:26 3 A. Yeah.
12:26 4 Q. And you're wearing them right now?
12:26 5 A. I am.
12:26 6 Q. Okay. Straumann's basically the only company
12:26 7 that offers a high trim line, right? There aren't
12:26 8 really other big aligner companies out there that do a
12:26 9 high trim line, right?
12:26 10 A. I believe there are.
12:26 11 Q. Most of the large companies -- Align,
12:26 12 Dentsply, Sirona, Ormco -- they offer what's called a
12:26 13 scalloped trim line; isn't that right?
12:26 14 A. Yes. That's true.
12:26 15 Q. Okay. And Straumann had never -- was --
12:26 16 basically had not offered a scalloped trim line ever,
12:26 17 right?
12:26 18 A. No.
12:26 19 Q. Now, you know that just recently, on
12:26 20 April 29th of this year, your CEO announced that you're
12:26 21 going to start offering scalloped trim lines, didn't
12:26 22 he?
12:26 23 A. I believe so.
12:26 24 Q. Now, another thing about the market, you
12:26 25 testified earlier that the market wouldn't have

12:26 1 included braces, right? You say that?
12:27 2 A. That's right.
12:27 3 MR. TUBACH: All right. Let's turn to
12:27 4 PTX-1591, if we could.
12:27 5 A. Is there a tab to turn to?
12:27 6 BY MR. TUBACH:
12:27 7 Q. Sorry. Tab 1 for you, sir.
12:27 8 A. Thank you.
12:27 9 Q. 1591 is an internal e-mail titled Competitive
12:27 10 Knowledge Help, right?
12:27 11 A. Yes.
12:27 12 MR. TUBACH: Move to admit Exhibit 1591.
12:27 13 MR. ZUBLER: No objection.
12:27 14 THE COURT: Admitted.
12:27 15 BY MR. TUBACH:
12:27 16 Q. Now, 1591 is an internal document from --
12:27 17 MR. TUBACH: And publish to the jury, if
12:27 18 we could. Thank you.
19 BY MR. TUBACH:
12:27 20 Q. 1591 is titled Competitive Knowledge Help,
12:27 21 right?
12:27 22 A. Yes.
12:27 23 Q. And there at the -- the first large e-mail
12:27 24 there at the bottom, Ms. DiMattia, who works at
12:27 25 Straumann, right --

12:27 1 A. Yes.
12:27 2 Q. -- she wrote: I would like to get all of your
12:27 3 input and expertise with creating some slides on our
12:27 4 competition. A lot of you have great industry
12:28 5 knowledge and experience. So I'm calling upon you all
12:28 6 to help create two slides per competitor that I will
12:28 7 compile into a comprehensive competitive slide deck
12:28 8 review. This slide deck will be built into the new
12:28 9 higher training so they have a full understanding of
12:28 10 the industry landscape/competition.
12:28 11 That's what she wrote, right?
12:28 12 A. Yes.
12:28 13 Q. Now, she also said, down in the next
12:28 14 paragraph: Feel free to let me know if something here
12:28 15 should not be included.
12:28 16 Right?
12:28 17 A. I see that.
12:28 18 Q. Yeah. Okay.
12:28 19 MR. TUBACH: So now let's put up the list
12:28 20 of the competitors that she put on the list. And
12:28 21 that's going to be the first and second page together.
22 BY MR. TUBACH:
12:28 23 Q. So the bottom of the first page there says
12:28 24 Align, right?
12:28 25 A. Yes. I see that.

12:28 1 Q. And there's some other clear aligners there,
12:28 2 right? What's the last one there? Could you read that
12:28 3 to us?
12:28 4 A. It says: Brackets/wires.
12:28 5 Q. And that's another way of saying braces,
12:28 6 right?
12:28 7 A. Yes.
12:28 8 Q. Now, when you -- you got this e-mail, right?
12:29 9 A. Yes. I did.
12:29 10 Q. You got it along with all of the other
12:29 11 regional sales directors for ClearCorrect, right?
12:29 12 A. Yes. I was on the e-mail.
12:29 13 Q. With all the other regional sales directors of
12:29 14 ClearCorrect, right?
12:29 15 A. That's right.
12:29 16 Q. Okay. Now, you didn't write back to her and
12:29 17 say, "Wait, wait, wait, we don't want to train our
12:29 18 people on wires and brackets because they're not even
12:29 19 in our market."
12:29 20 You didn't write that back to her like that,
12:29 21 did you?
12:29 22 A. No. I didn't.
12:29 23 Q. Nobody wrote back to her like that, did they?
12:29 24 A. Not that I know of.
12:29 25 Q. In fact, the only person who wrote back was

12:29 1 the regional sales director for the northeast region,
12:29 2 who wrote, "I will take brackets and wires," right?
12:29 3 A. Yes.
12:29 4 Q. And put that document aside, sir.
12:29 5 Now, you testified earlier that there was a --
12:29 6 you did what you called -- you shoe leathered, right?
12:29 7 You were out there hustling to sell ClearCorrect,
12:29 8 right?
12:29 9 A. That's right.
12:29 10 Q. That's what sales is. It's all about
12:29 11 hustling, right?
12:30 12 A. A lot of it. Yes.
12:30 13 Q. Now, there could be lots of reasons why a
12:30 14 customer, a doctor, might not want to buy ClearCorrect
12:30 15 aligners, right?
12:30 16 A. That's right.
12:30 17 Q. They might be a loyal Invisalign customer,
12:30 18 right?
12:30 19 A. That's right.
12:30 20 Q. They could be a Spark customer or an Angel
12:30 21 customer, right?
12:30 22 A. Yes.
12:30 23 Q. They might also just be too busy to take a
12:30 24 sales call, right? You've certainly experienced that,
12:30 25 I'm sure?

12:30 1 A. Absolutely.
12:30 2 Q. Now, one other reason why a doctor might not
12:30 3 want to order ClearCorrect is because of the problems
12:30 4 with ClearCorrect products and services.
12:30 5 Would you agree with that?
12:30 6 A. That's a possibility.
12:30 7 Q. Sure. Take a look at Tab 2, PTX-618.
12:30 8 Oh, you're in Tab 2.
12:30 9 A. Thank you.
12:30 10 MR. TUBACH: This is an internal e-mail
12:30 11 entitled DSO and VIP Issues.
12:31 12 I move to admit PTX-618.
12:31 13 MR. ZUBLER: No objection.
12:31 14 THE COURT: Admitted.
12:31 15 BY MR. TUBACH:
12:31 16 Q. Now, this e-mail, sir, is an e-mail that
12:31 17 you're on, right? The bottom one there from Annette
12:31 18 Collins to a number of people including yourself,
12:31 19 right?
12:31 20 A. Yes.
12:31 21 Q. And she's recounting problems that you all
12:31 22 have had with DSO and VIP accounts, right?
12:31 23 A. What was the second thing you mentioned, DSO
12:31 24 and?
12:31 25 Q. VIP. It's in the title of the e-mail.

12:31 1 A. Yes.
12:31 2 Q. A DSO stands for dental service organization,
12:31 3 right?
12:31 4 A. That's right.
12:31 5 Q. And those are important customers because
12:31 6 they're often negotiating deals for whole groups of
12:31 7 doctors, right, rather than one doctor at a time?
12:31 8 A. Typically, yes.
12:31 9 Q. And so that's an important customer for
12:31 10 ClearCorrect because if they can get a sale with a DSO,
12:31 11 they're going to get a sale with a lot of doctors
12:31 12 potentially as opposed to having to go to them one at a
12:31 13 time, right?
12:31 14 A. I agree.
12:31 15 Q. Now, VIP, I think we all understand, stands
12:31 16 for very important person, right?
12:31 17 A. Yes.
12:31 18 Q. Okay. Now, I'm sure you would agree with me
12:32 19 that all customers are important, but VIP and DSO
12:32 20 customers might even be a little more important than
12:32 21 any other customer given the volume that they're doing,
12:32 22 right?
12:32 23 Would you agree with that?
12:32 24 A. They have a big impact. Yes.
12:32 25 Q. Okay. Now, one of the issues that they're

12:32 1 having here is that they were being promised a
12:32 2 eight-day TAT. That's turnaround time, right?
12:32 3 A. That's right.
12:32 4 Q. But they were getting their aligners three to
12:32 5 four weeks later, right?
12:32 6 A. It looks like in this instance. Yes.
12:32 7 Q. Yeah. And this was the -- some of the top
12:32 8 accounts, right?
12:32 9 That's what it says there, "top accounts," in
12:32 10 the very top of the first e-mail there.
12:32 11 Do you see that?
12:32 12 A. Yes.
12:32 13 Q. I've been in contact with Cassiti's top
12:32 14 accounts?
15 A. Yes.
16 Q. Okay. And what was happening as a result of
12:32 17 this, if you go down a little bit: Patient acceptances
12:32 18 have dropped. Frustrated patients asking for refunds
12:33 19 or to use the other competitor.
12:33 20 And at the bottom: So the confusion with not
12:33 21 knowing when their cases will actually arrive has had
12:33 22 some of the associates using Align in the last few
12:33 23 weeks.
12:33 24 Do you see that?
12:33 25 A. I do.

12:33 1 Q. And those two that are mentioned there, Amara
12:33 2 Dental and Jantinder Singh Rooprai, they're no longer
12:33 3 buying ClearCorrect, are they?
12:33 4 A. I'm not sure that's true.
12:33 5 Q. They're -- they're diamond Invisalign sellers,
12:33 6 right?
12:33 7 A. I believe so.
12:33 8 Q. Okay. At the bottom of the e-mail, it says:
12:33 9 These are just a few of the case complaints and time
12:33 10 frames.
12:33 11 Do you see that?
12:33 12 A. I do.
12:33 13 Q. Now, at the very bottom there, it says: Along
12:33 14 with that KOL, Dr. Mark Lowe has grown frustrated with
12:33 15 his treatment setups. I've attached screenshots of his
12:33 16 gripes.
12:33 17 KOL stands for key opinion leader, right?
12:33 18 A. Yes.
12:33 19 Q. A key opinion leader is a doctor whose job it
12:33 20 is to go out there and try to convince other doctors to
12:34 21 start using your product, right?
12:34 22 A. Often. Yes.
12:34 23 Q. That's why you have key opinion leaders,
12:34 24 right?
12:34 25 A. I agree with that.

12:34 1 Q. Okay. And let's look at his gripes. Why
12:34 2 don't we go to Tab 3?
12:34 3 MR. TUBACH: PTX-193.
4 BY MR. TUBACH:
12:34 5 Q. This is an internal e-mail regarding the Mark
12:34 6 Lowe that we just talked about, the Dr. Lowe.
12:34 7 MR. TUBACH: Move to admit PTX Align
12:34 8 0193. Move to admit PTX-0193.
12:34 9 MR. ZUBLER: No objection.
12:34 10 THE COURT: Admitted.
12:34 11 MR. TUBACH: Okay. And publish to the
12:34 12 jury.
12:34 13 BY MR. TUBACH:
12:34 14 Q. Let's start with the second page. This is a
12:34 15 screenshot someone has taken of a computer, right?
12:34 16 Probably easier for you to look on the screen,
12:34 17 although you're welcome to look in your binder if you
12:34 18 want.
12:34 19 This is an e-mail from Dr. Lowe, correct?
12:35 20 And it says: We have a serious issue.
12:35 21 And he talks about two patients: The
12:35 22 technician just free-lanced the case and added round
12:35 23 trips galore; changed IPR when not asked to do so;
12:35 24 added an engager for God knows what course they took.
12:35 25 They are wasting my time and my patience. They are

12:35 1 killing your numbers. This is not a one-off problem.
12:35 2 This is a major issue. How will I convince any
12:35 3 orthodontist or anyone using Invisalign to use
12:35 4 ClearCorrect/Straumann if I don't have a team focused
12:35 5 on VTP or at least just following my preferences and/or
12:35 6 my instructions?
12:35 7 You see that?
12:35 8 A. I do see it.
12:35 9 Q. VTP is virtual treatment planning, right?
12:35 10 A. I believe so.
12:35 11 Q. Okay. And if you go to the first page of this
12:35 12 e-mail, Kent Braud of Straumann says, the last
12:35 13 sentence: The frustrating thing here is that Dr. Lowe
12:36 14 is a major advocate who wants to recommend our brand.
12:36 15 He doesn't feel the confidence to recommend
12:36 16 ClearCorrect to other orthodontists.
12:36 17 You see that, right?
12:36 18 A. I see that.
12:36 19 Q. And did you -- have you ever met Dr. Lowe?
12:36 20 A. I have.
12:36 21 MR. TUBACH: Can we pull up his -- do we
12:36 22 have his website available? And while you get that
12:36 23 ready, Mr. Smith, I'll go on to the next document.
12:36 24 BY MR. TUBACH:
12:36 25 Q. Why don't we take a look at PTX-583. That's

12:36 1 Tab 4 in your binder, sir.
12:36 2 This is an internal ClearCorrect document
12:36 3 relating to DSOs that we've just been talking about.
12:36 4 MR. TUBACH: I move the admission of
12:36 5 PTX-583. I move the admission of PTX-583.
12:36 6 MR. ZUBLER: Your Honor, we have no
12:36 7 objection to the admission, but we're not sure -- we
12:37 8 think he needs to lay a foundation to use it with the
12:37 9 witness.
12:37 10 THE COURT: It'll be admitted.
12:37 11 BY MR. TUBACH:
12:37 12 Q. Mr. Buitta, you're currently working with DSO
12:37 13 accounts, right?
12:37 14 A. I am. That's right.
12:37 15 Q. And the person before you who did that was
12:37 16 Bettina Cantrell, wasn't it?
12:37 17 A. Yes.
12:37 18 Q. And you worked with her?
12:37 19 A. I did work with her.
12:37 20 Q. There were several e-mails that we've seen
12:37 21 where both you and she are on those, right?
12:37 22 A. Sure.
12:37 23 Q. And she prepared this document that you have
12:37 24 before you, right?
12:37 25 A. I'm not familiar with this document.

12:37 1 Q. Have you never seen this document before?
12:37 2 A. I don't think I've ever seen it.
12:37 3 Q. Okay. Well, let's look at the fourth page.
12:37 4 MR. ZUBLER: Your Honor?
12:37 5 THE COURT: Let's hear the question.
12:37 6 MR. ZUBLER: Yes. We object. He's not
12:37 7 laid a foundation.
12:37 8 THE COURT: I understand.
12:37 9 MR. TUBACH: I'm going to ask him whether
12:37 10 he can identify certain items that are referenced in
12:37 11 the document.
12:37 12 THE COURT: Okay.
12:37 13 BY MR. TUBACH:
12:37 14 Q. Can you turn to Page -- actually, sorry. It's
12:37 15 Page 5. There's a -- there's a reference here to Bela
12:38 16 Family Dentistry.
12:38 17 You're familiar with them, are you?
12:38 18 A. Just vaguely.
12:38 19 Q. Okay. And you understood that they were very
12:38 20 frustrated with the kind of service they were getting,
12:38 21 right?
12:38 22 A. I'm not familiar with this situation. No.
12:38 23 Q. Okay. So you don't know anything about the
12:38 24 problems they were having?
12:38 25 A. I can't speak to Bela.

12:38 1 Q. Okay. Let's look at the next one, Simply
12:38 2 Beautiful Smiles, the next page.
12:38 3 You're familiar with them?
12:38 4 Sorry, it's the very top. If you look on the
12:38 5 screen, it might be easier. Sorry.
12:38 6 Do you know that -- do you know that account,
12:38 7 sir?
12:38 8 A. I am -- I am not familiar with Simply
12:38 9 Beautiful Smiles.
12:38 10 Q. Okay. You are familiar, though, with the fact
12:38 11 that at some point ClearCorrect started charging
12:38 12 doctors' personal credit cards without their
12:38 13 authorization, right?
12:38 14 A. I don't know anything about that.
12:38 15 Q. You don't know anything about that?
12:38 16 A. No.
12:38 17 MR. TUBACH: All right. Let's turn to
12:38 18 PTX-61 -- PTX-3002. This is an internal document from
12:39 19 ClearCorrect. Move its admission.
12:39 20 MR. ZUBLER: Excuse me. What tab would
12:39 21 that be?
12:39 22 MR. TUBACH: Oh. For you, it's Tab 6.
12:39 23 MR. ZUBLER: Your Honor, we do not see
12:39 24 Mr. Buitta on this --
12:39 25 THE COURT: I can't hear you.

12:39 1 MR. ZUBLER: We do not see Mr. Buitta as
12:39 2 being on this document. We don't object to its
12:39 3 admission, but there would need to be a foundation
12:39 4 laid.
12:39 5 THE COURT: Okay. I'll admit it, but it
12:39 6 won't be shown to the jury until you establish whether
12:39 7 or not he's seen this.
8 BY MR. TUBACH:
12:39 9 Q. Well, let's look at the second page of the
12:39 10 document, sir.
12:39 11 At the bottom, whose name appears at the very
12:39 12 bottom as the sender of the e-mail?
12:39 13 A. I see my name.
12:39 14 Q. That's you, isn't it?
12:39 15 A. Yes.
12:39 16 Q. And you say: According to the doctor's office
12:40 17 manager, additional incorrect charges hit his credit
12:40 18 card.
12:40 19 Right?
12:40 20 A. That's what it says.
12:40 21 MR. TUBACH: Your Honor, we'd like to
12:40 22 publish this document to the jury.
12:40 23 THE COURT: I'll allow you to publish it.
12:40 24 BY MR. TUBACH:
12:40 25 Q. Now, going up the chain, you forwarded that to

12:40 1 someone else, and it said: Another set of
12:40 2 unexplainable charges being flagged by the doctor's
12:40 3 AmEx.
12:40 4 Right? Sorry. We're on --
12:40 5 A. You've lost me a little bit. I apologize.
12:40 6 Where are we?
12:40 7 Q. This is, I think, the wrong -- 3002. We're on
12:40 8 Page 2 of 3002. There we go. Right in the middle
12:40 9 there.
12:40 10 You sent an e-mail to Ms. Modlin that says:
12:40 11 Another set of unexplainable charges being flagged by
12:40 12 the doctor's AmEx?
12:40 13 Do you see that?
12:40 14 A. I see that.
12:40 15 Q. Now, farther up in the chain, Ms. Modlin says:
12:40 16 My entire team is dealing with ghost charges on credit
12:40 17 cards the last week. I spoke to some Straumann
12:40 18 regional sales directors and it appears to be across
12:40 19 the organization.
12:40 20 Do you see that?
12:40 21 A. I see that here.
12:40 22 Q. Now, farther up in the first page, Andrew
12:40 23 Pelleymounter says -- and he's with ClearCorrect
12:41 24 America, right, North America? He says: We seem to
12:41 25 have a huge uptick in incorrect charges.

12:41 1 Brooks -- that's you, right?
12:41 2 A. Yeah.
12:41 3 Q. Brooks now has a doctor saying he plans to
12:41 4 cancel his account and call the BBB on Straumann.
12:41 5 Do you see that?
12:41 6 A. I see that.
12:41 7 Q. BBB stands for Better Business Bureau, doesn't
12:41 8 it?
12:41 9 A. That's my understanding.
12:41 10 Q. So do you now recall that you had issues with
12:41 11 doctors' credit cards being charged?
12:41 12 A. In this instance, yes.
12:41 13 Q. Across the organization, ghost credit card
12:41 14 charges across the organization?
12:41 15 A. I just don't remember that.
12:41 16 Q. Okay. Now, let's look at Tab 7, which is
12:41 17 PTX-3003.
12:41 18 A. Yes.
12:41 19 Q. This is an internal e-mail -- set of e-mails
12:42 20 at ClearCorrect.
12:42 21 MR. TUBACH: And I move its admission.
12:42 22 MR. ZUBLER: No objection.
12:42 23 THE COURT: Admitted.
12:42 24 MR. TUBACH: Publish it to the jury.
25 BY MR. TUBACH:

12:42 1 Q. And if we look at the third page of this,
12:42 2 there's an e-mail at the top that says: We have to
12:42 3 stop being so difficult to log into. Just in general
12:42 4 overall, our doctors, with exceptions, are intelligent
12:42 5 adaptable people. Yet every single day, multiple
12:42 6 times, I'm fielding complaints and support requests
12:42 7 about not being able to log into the doctor portal.
12:42 8 You see that?
12:42 9 A. Yeah. I'm just trying to follow in -- in --
12:42 10 Q. It's probably easier on the screen, but you're
12:42 11 welcome to do whatever you want.
12:42 12 A. Okay.
12:42 13 Q. And if you look at the one page, farther back
12:42 14 on the second page, Mr. Braud writes in the middle
12:43 15 there: This is the kind of nagging ankle-biter-type
12:43 16 thing that we just can't seem to work through.
12:43 17 You see that?
12:43 18 A. I don't. Sorry. I'm just -- because I'm
12:43 19 making sure I understand who's sending the e-mail and
12:43 20 who's receiving it.
12:43 21 Q. It's in the middle of the second page, sir.
12:43 22 A. Yes.
12:43 23 Q. And it's highlighted there on the screen for
12:43 24 you: This is the kind of nagging ankle-biter-type
12:43 25 thing that we just can't seem to work through.

12:43 1 You see that?
12:43 2 A. Yes.
12:43 3 Q. Let's go to the first page. You write that
12:43 4 the scary ones are those that don't reach out, the
12:43 5 silently frustrated dropped accounts, right?
12:43 6 A. Yeah.
12:43 7 Q. Okay. And then the last e-mail, which is the
12:43 8 one at the very top, it says: This issue is a nagging
12:43 9 thing that simply makes it a challenge to work with us
12:43 10 despite so many practices agreeing to give us a shot.
12:43 11 You see that?
12:43 12 A. I do.
12:43 13 Q. So there were a lot of practices that were
12:43 14 willing to give ClearCorrect a shot in trying to do
12:44 15 business with you, right? That's what he wrote, right?
12:44 16 A. That's what I wrote, yep.
12:44 17 Q. Okay. Now, none of the issues we've gone
12:44 18 through here -- and I'm not saying any of them are your
12:44 19 fault personally, but none of the issues that we went
12:44 20 through here are Align's fault, right?
12:44 21 A. Not these, no.
12:44 22 Q. And Align didn't block any of those doctors
12:44 23 from doing business with you, right, any of the ones
12:44 24 we've looked at here?
12:44 25 A. Not that I know of.

12:44 1 Q. Okay. In fact, ClearCorrect had their
12:44 2 business, most of them, right?
12:44 3 A. I'm not sure I know the specifics on each of
12:44 4 these.
12:44 5 Q. But at least in these instances, it just
12:44 6 couldn't execute on basic tasks like getting the
12:44 7 product there on time and not charging doctors' credit
12:44 8 cards with ghost charges, right? In these instances,
12:44 9 right?
12:44 10 A. In these instances, yes.
12:44 11 Q. Now, you said earlier that there was a --
12:45 12 there was a -- you bundled the scanner, right, with
12:45 13 a -- with aligners, right? We talked about that
12:45 14 earlier. This is not talking about that document now,
12:45 15 right?
12:45 16 And you described it. That bundle is not
12:45 17 successful, right?
12:45 18 A. Correct. Yes.
12:45 19 Q. Now, there's been testimony in here that
12:45 20 Straumann didn't have any penalties it would impose on
12:45 21 doctors if they didn't meet the requirements, right?
12:45 22 You didn't hear that. I'm just telling you that.
12:45 23 Do you agree with that?
12:45 24 A. Would you mind repeating the question?
12:45 25 Q. Sure. That there were no penalties imposed on

12:45 1 doctors who didn't meet the requirements that they had
12:45 2 to meet with that bundle deal?
12:45 3 A. I would agree with that.
12:45 4 MR. TUBACH: Okay. Let's take a look at
12:45 5 PTX-0627.
12:45 6 If I could approach, Your Honor. 0627.
12:46 7 BY MR. TUBACH:
12:46 8 Q. This is an internal e-mail from you dated
12:46 9 March 5, 2024.
12:46 10 MR. TUBACH: I move its admission.
12:46 11 MR. ZUBLER: No objection.
12:46 12 THE COURT: Admitted.
12:46 13 BY MR. TUBACH:
12:46 14 Q. Mr. Buitta, this is the results of that bundle
12:46 15 program, right?
12:46 16 A. This is -- this is a list of customers in the
12:46 17 program. Yes.
12:46 18 Q. Well, and the list of customers says that
12:46 19 70 -- that they had to pay -- either team, they had to
12:46 20 buy either vouchers or pay a 70 percent penalty, right?
12:46 21 A. That is what the Excel says, yes.
12:46 22 Q. Okay. And in fact, a number of the 70 percent
12:46 23 penalties were past due, weren't they?
12:46 24 A. Yes. That's right.
12:47 25 MR. TUBACH: Do we have that website we

12:47 1 can pull up, Mr. Smith? Oh, it's PDX-24. I'd like to
12:47 2 do the website, if I can.
3 BY MR. TUBACH:
12:47 4 Q. Now, this is PDX-24.1. And I believe this
12:47 5 should be on your --
12:47 6 MR. TUBACH: With the Court's indulgence,
12:47 7 could I confer with opposing counsel?
12:47 8 (Conference between counsel.)
12:47 9 MR. TUBACH: It appears we did not
12:47 10 provide a copy of this. I don't have a copy --
12:47 11 physical copy to provide to counsel. This is -- if you
12:47 12 could scroll down so we could see -- scroll down
12:47 13 farther.
14 BY MR. TUBACH:
12:47 15 Q. So this is Dr. Lowe's website, right? Do you
12:47 16 know what Dr. Lowe looks like?
12:47 17 A. What he looks like?
12:47 18 Q. Yeah.
12:48 19 A. Yes.
12:48 20 MR. TUBACH: And if we could scroll down
12:48 21 farther, if we have that, or we don't have the full
12:48 22 website up, Mr. Smith? Let's stick with this.
23 BY MR. TUBACH:
12:48 24 Q. Now, Mr. Lowe's website, if you go to the very
12:48 25 left, he's offering Invisalign, right?

12:48 1 A. It looks like it, yes.
12:48 2 Q. And the next one to the right, he's offering
12:48 3 OrthoFX.
12:48 4 That's another clear aligner company, right?
12:48 5 A. Yes. It is.
12:48 6 Q. And the next one on the right is ClearCorrect,
12:48 7 right?
12:48 8 A. Yes.
12:48 9 Q. And the next one on the right is Child
12:48 10 Orthodontics. And then the bottom one on the left side
12:48 11 is Traditional Braces.
12:48 12 Do you see that?
12:48 13 A. I see that.
12:48 14 Q. The next one is Clear Braces, right?
12:48 15 A. I see that.
12:48 16 Q. And the next one is LightForce Braces.
12:48 17 Do you know what those are?
12:49 18 A. I do.
12:49 19 Q. Yeah. We'll talk about that in a minute.
12:49 20 The last one is Adult Orthodontics, right?
12:49 21 A. Yes.
12:49 22 Q. And so LightForce braces, they're 3D
12:49 23 custom-printed braces, right?
12:49 24 A. Yes. They are.
12:49 25 Q. And Dr. Lowe is offering all of these options

12:49 1 to patients, right?
12:49 2 A. That is what it looks like.
12:49 3 Q. And you would agree that Align isn't in any
12:49 4 way foreclosing or blocking ClearCorrect from selling
12:49 5 its aligners through Dr. Lowe.
12:49 6 Would you agree with that?
12:49 7 A. I don't know if I'd put it that way.
12:49 8 Q. It's offered on his website for anyone to buy
12:49 9 if they want to buy it.
12:49 10 Do you agree with that, sir, at least?
12:49 11 A. I think so. Yes.
12:49 12 Q. Okay.
12:49 13 MR. TUBACH: I have no further questions,
12:49 14 Your Honor. Thank you.
12:49 15 Sorry, move the admission of PTX-24.
12:49 16 MR. ZUBLER: Your Honor, it's a
12:49 17 demonstrative exhibit. We would object to that.
12:49 18 THE COURT: I will -- I will not admit
12:49 19 it. It can be used as a demonstrative.
12:50 20 MR. TUBACH: Thank you, Your Honor.
12:50 21 REDIRECT EXAMINATION
12:50 22 BY MR. ZUBLER:
12:50 23 Q. Mr. Buitta, a few questions to address some of
12:50 24 the issues that came up on your cross-examination.
12:50 25 First of all, Mr. Tubach raised some questions

12:50 1 about the loyalty programs of Align, and he asked about
12:50 2 discounting programs that ClearCorrect might engage in.
12:50 3 Sir, at a high level, how would you compare
12:50 4 the terms of Align's Advantage Program in comparison
12:50 5 with the types of discounting that ClearCorrect engages
12:50 6 in?
12:50 7 A. Yeah. I think the big differences are the
12:50 8 flexibility, the ability for custom pricing to be
12:50 9 designed at the customer level, exceptions to be made
12:51 10 to typical discounting and volume based on the
12:51 11 situation. I think really night and day.
12:51 12 Q. As someone with experience in the sales
12:51 13 industry and the dental aligner -- clear aligner
12:51 14 market, would you say that those programs are similar
12:51 15 or dissimilar, sir?
12:51 16 A. Very dissimilar.
12:51 17 Q. Another topic was about trim lines and about
12:51 18 the ClearCorrect high trim line. And Mr. Tubach asked
12:51 19 you questions about the fact that ClearCorrect is now
12:51 20 offering or starting to offer a scalloped trim line; is
12:51 21 that correct?
12:51 22 A. Yes.
12:51 23 Q. Now, I want to ask you another question, sir.
12:51 24 Do you know one way or another is Align today offering
12:51 25 a high trim line?

12:51 1 A. My understanding is that they are beginning to
12:52 2 offer a higher trim line. I think it was just
12:52 3 announced in one of the -- one of the larger meetings.
12:52 4 Q. When did Align begin to offer this higher trim
12:52 5 line, before or after ClearCorrect offered a high trim
12:52 6 line?
12:52 7 A. After.
12:52 8 Q. Now, do you believe, Mr. Buitta, that
12:52 9 ClearCorrect offers a good product overall?
12:52 10 A. Absolutely.
12:52 11 Q. Mr. Tubach asked you some questions about some
12:52 12 customer complaints and billing issues. I wanted to
12:52 13 ask you about those. He showed you a few e-mails about
12:52 14 billing charges.
12:52 15 Do you recall those questions?
12:52 16 A. I do.
12:52 17 Q. If we could actually use the overhead camera
12:52 18 here, I'd like to show PTX-3002, which is a document
12:52 19 that Mr. Tubach used with you. And if we could focus
12:52 20 here on the e-mail, Wednesday, May 25th, 2022.
12:53 21 Do you see that, sir?
12:53 22 A. I do.
12:53 23 Q. And I don't believe Mr. Tubach showed you this
12:53 24 language and particularly the language at the end of
12:53 25 this e-mail. It says: Have we identified a root

12:53 1 cause? It seems to have been in the last week or two.
12:53 2 Do you see that language, sir?
12:53 3 A. Yes. I do.
12:53 4 Q. Is that your recollection, or does that
12:53 5 refresh your recollection about the nature of the
12:53 6 issues being addressed in this e-mail?
12:53 7 A. Yeah. I mean, it was a while ago, so this was
12:53 8 maybe a blip that I don't remember in full detail. But
12:53 9 it doesn't -- it doesn't surprise me that there's this
12:53 10 amount of chatter, I guess. Because I think we always
12:53 11 want to address things right away, put resources behind
12:53 12 it to fix things. So that, I think, makes sense to me.
12:53 13 Q. Is this issue of billing charges, is this a
12:53 14 typical or widespread issue that ClearCorrect has --
12:53 15 ClearCorrect has faced over the years you've been at
12:54 16 the company?
12:54 17 A. No. I really didn't remember it until seeing
12:54 18 this document about this -- this instance.
12:54 19 Q. And as far as you're aware, sir, today, is
12:54 20 ClearCorrect dealing with any customer complaints or
12:54 21 issues on billing charges as a systematic matter?
12:54 22 A. No. Nothing like that.
12:54 23 Q. More generally about customer complaints, sir,
12:54 24 based on your experience in the dental and orthodontic
12:54 25 industries, is it common or uncommon for customers --

12:54 1 strike that.
12:54 2 Is it common or uncommon for clear aligner
12:54 3 companies to get customer complaints?
12:54 4 A. It's really common, from my experience. I
12:54 5 mean, we're making custom devices so we're making
12:54 6 things that are specific to every single patient.
12:55 7 They're being delivered at very specific times for the
12:55 8 case treatment.
12:55 9 So there's a -- there's a lot of complexity
12:55 10 involved. So it's not uncommon to get, you know,
12:55 11 concerns.
12:55 12 Q. What is ClearCorrect's philosophy for
12:55 13 addressing customer complaints?
12:55 14 A. Yeah. As I -- as I mentioned, I think
12:55 15 ClearCorrect, Straumann Group as a whole, is really
12:55 16 focused on something we call player/learner. It's
12:55 17 really focused around extreme ownership, really
12:55 18 controlling the controllable.
12:55 19 So anytime that there's something that we can
12:55 20 do better, it's taking ownership, making sure that
12:55 21 there's a lot of communication. We have a pretty flat
12:55 22 organization, so some of the communication you see here
12:55 23 is from, you know, an individual salesperson. And I
12:55 24 can speak from experience when you are in your
12:55 25 territory and you get one complaint about one thing, it

12:55 1 can feel like a -- like a really big issue.
12:55 2 And so to see that going to, you know,
12:56 3 somebody that's maybe two or three sort of points away
12:56 4 in the group, it's really common. And that tends to be
12:56 5 the culture that I've experienced.
12:56 6 Q. On a level playing field in an open system, is
12:56 7 ClearCorrect able to compete?
12:56 8 A. On a level playing field with an open system,
12:56 9 absolutely.
12:56 10 Q. Today, is there an open system and a level
12:56 11 playing field in the clear aligner industry?
12:56 12 A. I can't say there is.
12:56 13 Q. And have Align's business practices blocked
12:56 14 ClearCorrect from competing for a substantial portion
12:56 15 of the clear aligner market?
12:56 16 MR. TUBACH: Objection. It's a legal
12:56 17 conclusion he's asking for.
12:56 18 THE COURT: Leading?
12:56 19 MR. TUBACH: A legal.
20 THE COURT: Overruled.
21 MR. ZUBLER: I'll repeat the question.
12:56 22 BY MR. ZUBLER:
12:56 23 Q. Have Align's business practices blocked
12:56 24 ClearCorrect from competing for a substantial portion
12:56 25 of the clear aligner market?

12:56 1 THE COURT: I will -- I will sustain the
12:56 2 objection to that question.
12:56 3 BY MR. ZUBLER:
12:56 4 Q. Okay. Sir, how would you describe the impact
12:57 5 of Align's business practices on the ability of
12:57 6 ClearCorrect to compete in the clear aligner market?
12:57 7 A. I would say it's locked in potential customers
12:57 8 and blocked -- blocked ClearCorrect.
12:57 9 MR. ZUBLER: Pass the witness.
12:57 10 MR. TUBACH: No further questions. Thank
12:57 11 you, Your Honor.
12:57 12 THE COURT: You may step down, sir.
12:57 13 Ladies and gentlemen of the jury, do you
12:57 14 think you could be back by 2:00? It's 1:00.
12:57 15 You don't count because you just have to
12:57 16 walk two blocks.
12:57 17 You count. We all count. Can we get
12:57 18 back by 2:00?
12:57 19 Okay. We'll stand in recess until a
12:57 20 little bit before 2:00. We'll start back up then.
12:57 21 THE BAILIFF: All rise.
12:57 22 (Jury exited the courtroom.)
12:58 23 THE COURT: Thank you. You may be
12:58 24 seated.
12:58 25 Is there anything we need to take up?

12:58 1 MR. MUELLER: Not from the defendants,
12:58 2 Your Honor. Thank you.
12:58 3 MR. DURST: Nor from plaintiffs.
12:58 4 THE COURT: Okay.
12:58 5 (Recess taken.)
02:03 6 THE BAILIFF: All rise.
02:03 7 THE COURT: Please remain standing for
02:03 8 the jury.
02:03 9 (Jury entered the courtroom.)
02:03 10 THE COURT: Thank you. You may be
02:04 11 seated.
02:04 12 MR. MUELLER: Your Honor, at this point,
02:04 13 we will play by deposition testimony from Ms. Lisa
02:04 14 Barry, senior director of global iTero services for
02:04 15 Align Technology.
02:04 16 And, Your Honor, the exhibits referred to
02:04 17 in the video are the following: DTX-12, DTX-13,
02:04 18 DTX-14, and DTX-15.
02:04 19 THE COURT: Are there objections?
02:04 20 MR. DURST: There are no objections,
02:04 21 Your Honor.
02:04 22 THE COURT: They'll be admitted.
02:04 23 (Video deposition of Lisa Barry played as follows:
02:04 24 Q. Can you please state your full legal name for
02:04 25 the record?

02:04 1 A. My full legal name is Lisa Splitt Barry.
02:04 2 Q. And are you currently employed?
02:04 3 A. Yes.
02:04 4 Q. Where are you employed?
02:04 5 A. At Align Technology.
02:04 6 Q. And what is your current role?
02:04 7 A. My current role is senior director of global
02:04 8 iTero services.
02:04 9 Q. So I've handed you what's been marked as Barry
02:04 10 Exhibit 7. It consists of an e-mail with an
02:05 11 attachment. The Bates stamp on the e-mail is
02:05 12 ALGNAT-PURCH000760125.
02:05 13 And the e-mail is from Misty Clark to you on
02:05 14 December 31st, 2018.
02:05 15 Do you see that?
02:05 16 A. Yes.
02:05 17 Q. Who is Misty Clark?
02:05 18 A. Misty Clark was the director of North America
02:05 19 Invisalign marketing.
02:05 20 Q. Is Misty still with Align Technologies?
02:05 21 A. No.
02:05 22 Q. Do you recognize the document?
02:05 23 A. Yes.
02:05 24 Q. Misty writes: Lisa, here is a stab at our
02:05 25 main stage.

02:05 1 Do you see that?
02:05 2 A. Yes.
02:05 3 Q. What is a "main stage" in this context?
02:05 4 A. We have an annual sales meeting, and we have a
02:05 5 general session, and there's a big main stage where all
02:05 6 attendees go to for different presentations.
02:06 7 Q. And you and Misty were presenting at the main
02:06 8 stage?
02:06 9 A. Yes.
02:06 10 Q. And do you see that throughout the document,
02:06 11 the paragraphs begin Misty, Lisa, Misty, Lisa?
02:06 12 A. Yes.
02:06 13 Q. Is that to indicate who's speaking?
02:06 14 A. Yes.
02:06 15 Q. And so it begins: Misty, and for every
02:06 16 practice that buys a competing scanner, means that we
02:06 17 leave an opening for a competitive aligner to come in.
02:06 18 Do you see that?
02:06 19 A. Yes.
02:06 20 Q. Do you understand what she meant by that?
02:06 21 A. What I'll say with this -- I remember this.
02:06 22 This is -- I was quite annoyed because we were supposed
02:06 23 to put our script together, develop it together, and
02:06 24 she did this on her own. And it's not -- it's not the
02:06 25 final, and it changed quite a bit.

02:06 1 So some of these types of things that she's
02:06 2 saying here were not final and not exactly everything I
02:06 3 agree with. So I just wanted to let you know that this
02:07 4 is not the final document.
02:07 5 Q. The next sentence begins: Lisa.
02:07 6 That's you, correct?
02:07 7 A. Yes.
02:07 8 Q. That's right. We are your competitive moat.
02:07 9 Do you see that?
02:07 10 A. Yes.
02:07 11 Q. What does "competitive moat" mean?
02:07 12 A. That was Misty's marketing speak. Apparently
02:07 13 she read some book that had that word and she -- she
02:07 14 was using it. It was the first time I heard it. She
02:07 15 was putting that in there just for some visual perhaps.
02:07 16 I don't know. But I do believe we took it out of the
02:07 17 final presentation.
02:07 18 Q. It's listed here as something you would say,
02:07 19 correct?
02:07 20 A. Correct.
02:07 21 Q. Did you want to understand what it meant
02:07 22 before you said it?
02:07 23 A. Well, again, I was quite annoyed that she did
02:07 24 this on her own without me being involved with it.
02:07 25 So I was supposed to be a coauthor of this. So I

02:07 1 didn't ask her because I said we need to do a total
02:08 2 rewrite.
02:08 3 Q. Did you provide edits in the response to this?
02:08 4 A. I did. We were editing up until the night
02:08 5 before -- of the presentation.
02:08 6 Q. So I've handed you what's been marked as Barry
02:08 7 Exhibit 8. It is a three-page document beginning with
02:08 8 the Bates number ALGNAT-PURCH00616283. I'll just point
02:08 9 you to the very last page of the packet I handed you.
02:08 10 That is not a Bates-stamped document. That is a
02:08 11 printout of metadata associated with this file when it
02:08 12 was produced to us by your counsel.
02:08 13 Do you recognize this document?
02:08 14 A. Still referring to the last one, or the whole
02:08 15 document?
02:08 16 Q. The whole document. I wouldn't expect you to
02:08 17 recognize the metadata.
02:09 18 A. Okay. I was going to say because my name's
02:09 19 spelled wrong. I don't recognize this. No.
02:09 20 Q. Let's look briefly at that last page, the
02:09 21 metadata.
02:09 22 Do you see there are items in bold at the top
02:09 23 of the page?
02:09 24 A. Yes.
02:09 25 Q. The fourth of which says "File Name"?

02:09 1 A. Uh-huh.
02:09 2 Q. Underneath it, it says: Main Stage_Lisa+Misty
3 Script-LBedits.docx.
02:09 4 Do you see that?
02:09 5 A. Yes.
02:09 6 Q. Your initials are LB, correct?
02:09 7 A. Correct.
02:09 8 Q. If you look at the document itself, do you see
02:09 9 that it appears to be a redline of the main stage
02:09 10 script?
02:09 11 A. Yes.
02:09 12 Q. Would you agree that based on the title of the
02:09 13 document, these are your edits to Misty's script?
02:09 14 A. My edits at that time, yes. There were more.
02:09 15 Q. Do you see the next paragraph after your name,
02:09 16 you've edited what used to say "We are your competitive
02:10 17 moat" to "iTero is Invisalign's competitive moat"?
02:10 18 Do you see that?
02:10 19 A. Yes.
02:10 20 Q. Did you make that change?
02:10 21 A. I assume so.
02:10 22 Q. So you didn't remove the phrase "competitive
02:10 23 moat."
02:10 24 Do you see that?
02:10 25 A. Not at this time, I didn't. This was not the

02:10 1 final draft, and all final drafts had to go through
02:10 2 legal review, and I do believe that was removed.
02:10 3 Q. Do you believe that -- I'm sorry. I didn't
02:10 4 mean to interrupt you.
02:10 5 A. I believe it was removed from the final
02:10 6 presentation. I don't know who removed it. I was
02:10 7 not -- I was not -- I don't like the whole moat thing.
02:10 8 It's just not how I talk, and I didn't want to say it.
02:10 9 It was something new again, marketing fluff that Misty
02:10 10 put in. So --
02:10 11 Q. Your edit to that sentence, you removed the
02:10 12 text "we are your" and replaced it with "iTero is
02:10 13 Invisalign's."
02:10 14 Do you see that?
02:10 15 A. Yes.
02:10 16 Q. What does the sentence "iTero is Invisalign's
02:10 17 competitive moat" mean?
02:10 18 A. Using her terminology of competitive moat, it
02:11 19 was just that we are working together with Invisalign.
02:11 20 We sell -- we're a two -- actually, more than two now.
02:11 21 We're a four-product company, but back at this time, we
02:11 22 were Invisalign and iTero.
02:11 23 So we -- when we sell iTeros, we would like
02:11 24 for people also to do Invisalign. When we sell
02:11 25 Invisalign, we'd also like for people to do our -- to

02:11 1 buy our other product. So together as a company, you
02:11 2 know, we are separate -- you can buy them separately.
02:11 3 You can buy them together.
02:11 4 It's always -- marketing 101, you know,
02:11 5 easiest to sell to your current customers than to go
02:11 6 out and find new ones. So that's what we're saying
02:11 7 here in this, that we can help each other out.
02:11 8 Q. What is your understanding of what a moat is?
02:11 9 A. I believe a moat is that little river around a
02:11 10 castle.
02:11 11 Q. And what do you understand the purpose of a
02:12 12 moat to be?
02:12 13 A. In any sense? I mean, well, not in any sense,
02:12 14 but in my castle sense, it's a barrier.
02:12 15 Q. Is that the goal?
02:12 16 A. What I will say is this was Misty's wording,
02:12 17 and Misty's no longer here with our company. And then
02:12 18 we did -- as far as I know, we changed this wording.
02:12 19 So again, this was what she authored.
02:12 20 It was -- so I would say that this is what she
02:12 21 wanted us to say, but it's not really indicative of
02:12 22 what our company looks at for competitors. We do
02:12 23 not -- we sell our products based on a value prop and
02:12 24 not really go tit for tat on -- about the competition.
02:12 25 We know what's out there in the market, as any

02:12 1 good marketing and sales company would know, but we do
02:12 2 not go and try to -- I think your word -- to prevent or
02:13 3 to -- the barrier, that's not what we do as a company.
02:13 4 Q. And you said these words are Misty's words,
02:13 5 correct?
02:13 6 A. Yes.
02:13 7 Q. This document reflects your edits to Misty's
02:13 8 document, right?
02:13 9 A. Yes.
02:13 10 Q. And it doesn't delete the words "competitive
02:13 11 moat," correct?
02:13 12 A. At this time, no. In this version, no.
02:13 13 Q. I've handed you what's been marked as Barry
02:13 14 Exhibit 9. It consists of a cover e-mail and
02:13 15 attachment, the cover e-mail beginning with the Bates
02:13 16 number ALIGNAT-PURCH00377107.
02:13 17 It's an e-mail from William Donnelly to you
02:13 18 and others on January 3rd, 2019, with the subject
02:13 19 Formatting Review - KO19 Pre-Learn Deck.
02:13 20 Do you see that?
02:13 21 A. Yes.
02:14 22 Q. What is KO19?
02:14 23 A. Kickoff 2019. It was our annual sales
02:14 24 meeting.
02:14 25 Q. Is this the same conference at which you and

02:14 1 Misty were exchanging scripts for a main stage?
02:14 2 A. Yes.
02:14 3 Q. So if you turn your attention to Slide 7,
02:14 4 which ends in the Bates number 7114. You see the title
02:14 5 of the slide is Build the Moat Around Your Business?
02:14 6 A. Yes.
02:14 7 Q. And do you see underneath there's an image?
02:14 8 A. Yes.
02:14 9 Q. What is the image of?
02:14 10 A. A castle.
02:14 11 Q. What is around the castle?
02:14 12 A. Water.
02:14 13 Q. And is that water a moat?
02:14 14 A. Yes.
02:14 15 Q. Did you draft this slide?
02:14 16 A. No.
02:14 17 Q. Do you know who did?
02:14 18 A. Not 100 percent sure, but I would bet it was
02:14 19 Misty.
02:14 20 Q. And just turning your attention briefly back
02:14 21 to Mr. Donnelly's e-mail, the cover e-mail, he said
02:15 22 that he had reviewed this document with you and Misty,
02:15 23 right?
02:15 24 A. Yes.
02:15 25 Q. Did you understand what "Build the Moat Around

02:15 1 Your Business" meant?
02:15 2 A. Again, same as before with Misty's marketing
02:15 3 buzzword, yes.
02:15 4 Q. And what did it mean?
02:15 5 A. She's -- again, if you look at the script,
02:15 6 when we say that we want to make sure that some of the
02:15 7 competitors that have a scanner don't bring in, you
02:15 8 know, their own aligners, we need to make sure that we
02:15 9 sell both of our products.
02:15 10 Q. And you didn't ask anyone to remove this
02:15 11 picture of the castle and the moat, did you?
02:15 12 A. I don't have the veto power on Invisalign
02:15 13 marketing. And this is Invisalign marketing content,
02:15 14 not mine. So yeah.
02:15 15 Q. What makes you say this is Invisalign
02:16 16 marketing content?
02:16 17 A. Because my team in iTero didn't write this
02:16 18 document. And it says: You Go Beyond. That is
02:16 19 Invisalign Go. And if you look through the
02:16 20 presentation, it's talking -- for instance, Slide 8,
02:16 21 Competition is Here. These are all clear aligner
02:16 22 competition. And then it's all about how to use
02:16 23 Invisalign Go with prerestorative dental treatments.
02:16 24 So this is -- and Will Donnelly is an Invisalign sales
02:16 25 manager. So --

02:16 1 Q. I've handed you what's been marked as
02:16 2 Exhibit 10. It is an e-mail with an attachment. The
02:16 3 e-mail begins with Bates number ALIGNAT-PURCH00377261.
02:16 4 And it's an e-mail from William Donnelly to you and
02:17 5 others on January 4th, 2019, with the subject Final GP
02:17 6 Pre-Learn Deck.
02:17 7 Do you see that?
02:17 8 A. Yes.
02:17 9 Q. I'm just going to turn your attention to
02:17 10 Slide 7 again, ends in the Bates number 7268.
02:17 11 Do you see that?
02:17 12 A. Yes.
02:17 13 Q. The text on this slide is still Build the Moat
02:17 14 Around Your Business; is that right?
02:17 15 A. Yes.
02:17 16 Q. A different picture, though, right?
02:17 17 A. Yes.
02:17 18 Q. Still a castle?
02:17 19 A. Yes.
02:17 20 Q. Still with water around it?
02:17 21 A. Yes. I will say, though, that this -- don't
02:17 22 know if this had gone through legal or not, because he
02:17 23 doesn't talk about the legal review. So, again, I
02:17 24 can't verify that that is final or not.
02:17 25 Q. You would agree we've reviewed multiple

02:17 1 documents that contain the word "moat"?
02:17 2 A. Yes.
02:17 3 Q. For each of those documents, you told me it
02:18 4 was Misty's term, correct?
02:18 5 A. Correct.
02:18 6 Q. Have you ever heard anyone else at Align
02:18 7 Technologies use the term "moat" or "competitive moat"?
02:18 8 A. Not that I recall.
02:18 9 Q. Do you know if you used the term "moat" or
02:18 10 "competitive moat" during the main stage?
02:18 11 A. I do not believe I did.
02:18 12 (End of video deposition.)
02:18 13 MR. MUELLER: Your Honor, we call as our
02:18 14 next witness Matthew Miller from Align Technology.
02:18 15 (The witness was sworn.)
02:18 16 DIRECT EXAMINATION
02:18 17 BY MR. MUELLER:
02:19 18 Q. Good afternoon, sir. My name is Joe Mueller.
02:19 19 Nice to meet you.
02:19 20 A. Nice to meet you too.
02:19 21 Q. Could you please state your name for the
02:19 22 record?
02:19 23 A. Matthew Miller.
02:19 24 Q. And, Mr. Miller, you are currently employed at
02:19 25 Align Technology, correct?

02:19 1 A. Yes.
02:19 2 Q. You are the vice president of the Americas for
02:19 3 commercial operations, right?
02:19 4 A. Correct.
02:19 5 Q. And you're responsible for overseeing sales
02:19 6 operations for Canada and the United States, true?
02:19 7 A. Correct.
02:19 8 Q. And that includes both sales of the Invisalign
02:19 9 clear aligners as well as the iTero scanners, correct?
02:19 10 A. Correct.
02:19 11 Q. Now, sir, you are one of the top executives at
02:19 12 Align, correct?
02:19 13 A. A vice president.
02:20 14 Q. And you deal with the chief executive officer,
02:20 15 Joe Hogan, on occasion, right?
02:20 16 A. Correct.
02:20 17 Q. Now, Mr. Hogan speaks on behalf of the company
02:20 18 on occasion, right?
02:20 19 A. Yes.
02:20 20 Q. Earnings, calls with investors, for example?
02:20 21 A. Yes.
02:20 22 Q. He appears on programs like CNBC financial
02:20 23 programs as another example?
02:20 24 A. Yes.
02:20 25 Q. Okay. Now, sir, I'm going to play a video of

02:20 1 Mr. Hogan.
02:20 2 MR. MUELLER: And, Your Honor, this is
02:20 3 DTX-2868, and the parties have resolved any remaining
02:20 4 objections on this video.
02:20 5 So I'd offer, Your Honor, DTX-2868, and
02:20 6 then I'm going to play it.
02:20 7 MR. DURST: Your Honor, we object on
02:20 8 foundation grounds.
02:20 9 MR. MUELLER: I just asked one moment
02:20 10 ago. It's the CNBC of Joe Hogan. I'm happy to show a
02:20 11 screenshot of it to the witness.
02:20 12 THE COURT: Okay. Show a screenshot.
02:20 13 MR. MUELLER: Sure.
14 BY MR. MUELLER:
02:20 15 Q. If we could just show a screenshot, and if you
02:20 16 can confirm this is -- and this still shot is actually
02:20 17 Tab 2 in your binder. I think we had one for you.
02:21 18 Sir, if you turn to your binder right in front
02:21 19 of you, if you'd turn to Tab 2. This is indeed
02:21 20 Mr. Hogan; am I right, sir?
02:21 21 A. Yes.
02:21 22 MR. MUELLER: Okay. Your Honor, we offer
02:21 23 it.
02:21 24 MR. DURST: Your Honor, I object on
02:21 25 foundation grounds. Yes, he can identify a picture of

02:21 1 the CEO. That doesn't mean he can say anything at all
02:21 2 about this video.
02:21 3 MR. MUELLER: Well, Your Honor --
02:21 4 THE COURT: What makes you think he knows
02:21 5 what this gentleman's about to say?
02:21 6 MR. MUELLER: Your Honor, these are
02:21 7 positions that Mr. Hogan took on behalf of the company.
02:21 8 And my intent was to ask him questions about those
02:21 9 positions that the CEO took.
02:21 10 THE COURT: Have we -- have we heard
02:21 11 those positions in court?
02:21 12 MR. MUELLER: Not yet, but we have
02:21 13 disclosed a video and resolved any remaining objections
02:21 14 that Align had to it.
02:21 15 THE COURT: But I'm saying have we heard
02:21 16 evidence of what he's about to say other than through
02:21 17 this?
02:21 18 MR. MUELLER: Not yet. Your Honor.
02:21 19 THE COURT: Okay. Well, then I'll
02:21 20 sustain the objection.
02:21 21 BY MR. MUELLER:
02:21 22 Q. All right. Sir, if we could, if you could
02:21 23 turn to Tab 49 in your binder. And let me know when
02:22 24 you're there.
02:22 25 A. I'm here.

02:22 1 Q. Sir, this is an e-mail between you and two
02:22 2 other folks, Mu Li, M-U, L-I, and Daniel Stubbs, right?
02:22 3 A. Yes.
02:22 4 MR. MUELLER: This is DTX-2882, Your
02:22 5 Honor. I offer it.
02:22 6 MR. DURST: No objection, Your Honor.
02:22 7 THE COURT: Admitted.
02:22 8 BY MR. MUELLER:
02:22 9 Q. And if we could put this up. This is
02:22 10 forwarding to you an e-mail chain that includes e-mails
02:22 11 from Mr. Hogan, the chief executive officer, right?
02:22 12 A. Yes.
02:22 13 Q. Now, the title of the e-mail is LightForce,
02:22 14 correct?
02:22 15 A. Yes.
02:22 16 Q. LightForce is a manufacturer of customized
02:23 17 brackets, true?
02:23 18 A. Yes.
02:23 19 Q. And I'd like to direct your attention, if I
02:23 20 could, sir, to Page 1, a little bit further down the
02:23 21 page where it says, "What is LightForce."
02:23 22 And before we get there, who is Mu Li?
02:23 23 A. Mu Li is our vice president of global business
02:23 24 development.
02:23 25 Q. I'm sorry, sir?

02:23 1 A. Vice president of global business development.
02:23 2 Q. Thank you.
02:23 3 And who is Raj Pudipeddi?
02:23 4 A. Raj Pudipeddi at the time was a chief
02:23 5 marketing officer.
02:23 6 Q. And now, do you see below there it says, "Who
02:23 7 is LightForce," and right below that it says, "Uses 3D
02:23 8 printing to manufacture customized brackets," right?
02:23 9 A. Correct.
02:23 10 Q. Now, if we go up a little further in the
02:23 11 e-mail chain, do you see Mr. Pudipeddi said: Excellent
02:23 12 summary, Mu. Thanks for pulling it together. No add
02:23 13 from my end.
02:23 14 Do you see that, sir?
02:23 15 A. Yes.
02:23 16 Q. And then it goes on to say: Joe, my belief is
02:23 17 that this whole digital braces area will have a slow
02:24 18 death as they are focused on better feed for horses as
02:24 19 we expand our cars.
02:24 20 Do you see that, sir?
02:24 21 A. Yes.
02:24 22 Q. And this is analogizing braces to horses and
02:24 23 clear aligners to cars. That was the analogy offered
02:24 24 by Mr. Pudipeddi, true?
02:24 25 A. I can't speak to his analogy. I can read the

02:24 1 words and say they're there.
02:24 2 Q. Fair enough.
02:24 3 But you do see the words here are: The
02:24 4 digital braces area will have a slow death as they are
02:24 5 focused on better feed for horses as we expand our
02:24 6 cars.
02:24 7 Do you see that, sir?
02:24 8 A. I see that. Yes.
02:24 9 Q. And then above that, Mr. Hogan said: I agree,
02:24 10 Raj. Thanks for the thoughts.
02:24 11 Do you see that, sir?
02:24 12 A. Yes.
02:24 13 Q. Do you agree?
02:24 14 A. I do not.
02:24 15 Q. Okay. So you don't agree with the CEO, and
02:24 16 you don't agree with the director of marketing. Do I
02:24 17 have that right, sir?
02:24 18 A. In this particular instance, I think digital
02:24 19 brackets were an innovative solution to the market. So
02:25 20 I don't agree.
02:25 21 Q. Now, if we could go to Tab 4 in your binder.
02:25 22 And before we do, who's Daniel Diederich?
02:25 23 A. Daniel -- sorry, Daniel Diederich reports to
02:25 24 Mu Li, business development.
02:25 25 Q. Now, let's go to Tab 4 of your binder. This

02:25 1 is DTX-136.
02:25 2 Do you see the correspondence between
02:25 3 Mr. Diederich and Mr. Li?
02:25 4 A. Yes.
02:25 5 MR. MUELLER: Your Honor, I offer it.
02:25 6 THE WITNESS: I have not seen this
02:25 7 before.
02:25 8 THE COURT: I think --
02:25 9 MR. DURST: I object on foundation, Your
02:25 10 Honor.
02:25 11 MR. MUELLER: Well, Your Honor, the first
02:25 12 point is just to get this in. And, Your Honor, I would
02:25 13 offer it as the stipulated business record pursuant to
02:25 14 the parties' stipulation.
02:25 15 I'll then ask some questions, and if he
02:25 16 doesn't have any foundation to answer questions, I'll
02:25 17 move on.
02:25 18 THE COURT: The same way I did -- I'll
02:25 19 admit it, but you have to lay a foundation for him to
02:25 20 be asked questions about the content.
02:25 21 MR. MUELLER: Understood.
02:25 22 THE COURT: And it won't be shown to the
02:25 23 jury until --
02:25 24 MR. MUELLER: Fair enough.
02:25 25 BY MR. MUELLER:

02:26 1 Q. Sir, I'd like you to turn, if you could -- and
02:26 2 I'm not going to show it to the jury. But I'd like you
02:26 3 to turn, if you could, to Page 1 of this, and do you
02:26 4 see the e-mail from Mr. Diederich to Mu Li?
02:26 5 A. Yes.
02:26 6 Q. And do you see his description of the
02:26 7 doctor-directed aligner market? Are you familiar with
02:26 8 that back-and-forth between Mr. Diederich and Mu Li
02:26 9 with regard to a doctor-directed aligner market?
02:26 10 A. This is the first time I'm seeing this. I
02:26 11 wasn't part of this.
02:26 12 Q. Have you ever used or heard used the term
02:26 13 "doctor-directed aligner market" at Align?
02:26 14 A. We use "doctor-directed." That's a meaning
02:26 15 like doctors treat the patient.
02:26 16 Q. So, sir, if I could, have you ever seen or
02:26 17 heard the term "doctor-directed aligner market" in your
02:26 18 time at Align?
02:26 19 A. Yes.
02:26 20 Q. Let's go to DTX-1369, if you could, please,
02:27 21 sir. This is Tab 10. And let me know when you're
02:27 22 there.
02:27 23 A. I'm here.
02:27 24 Q. This is an executive management quality system
02:27 25 review presentation from April 8th, 2020. I'm going to

02:27 1 offer it and then ask you some questions about it.
02:27 2 MR. MUELLER: Your Honor, I offer this.
02:27 3 This is DTX-1369.
02:27 4 MR. DURST: Your Honor, no objection to
02:27 5 admission, but we have foundation objections to this
02:27 6 testimony.
02:27 7 THE COURT: It'll be admitted.
02:27 8 BY MR. MUELLER:
02:27 9 Q. Now, sir, on this one I'd like you to turn, if
02:27 10 you could -- first of all, have you heard of the Boston
02:27 11 Consulting Group?
02:27 12 A. Yes.
02:27 13 Q. And that's a consulting group that does
02:27 14 consulting work for various companies in various
02:27 15 industries, true?
02:27 16 A. Yes.
02:27 17 Q. And they did some consulting work to evaluate
02:27 18 the quality management systems of Align, right?
02:27 19 A. I'm unaware and wouldn't be privy to this type
02:27 20 of stuff at Align.
02:27 21 Q. I'm sorry, sir?
02:27 22 A. I wouldn't be like on these type of work
02:28 23 streams or on top of it. So I can't answer that.
02:28 24 Q. So you've never heard of the Boston Consulting
02:28 25 Group studying the quality management systems of Align?

02:28 1 A. Correct.
02:28 2 Q. All right. Let me just ask you one more
02:28 3 question, and then we'll move on.
02:28 4 If you go to Slide 9 -- I'm not going to
02:28 5 publish it. But if you go to Slide 9, do you see the
02:28 6 section titled Primary Areas of Concern Highlighted by
02:28 7 Align Employees?
02:28 8 Do you see that, sir?
02:28 9 A. The slide, yes, I see it.
02:28 10 Q. And are you familiar with the areas of concern
02:28 11 described here including lack of quality, inefficient
02:28 12 processes, and few accountability measures?
02:28 13 A. No.
02:28 14 Q. All right. Let's go, if we could -- let me
02:29 15 take you, sir, to Tab 44 in your binder which is
02:29 16 DTX-308.
02:29 17 Now, this is a global intelligence -- global
02:29 18 competitive intelligence update generated by Align's
02:29 19 global intelligence team in March of 2020.
02:29 20 Do you see that, sir?
02:29 21 A. Yes. I see it.
02:29 22 MR. MUELLER: Your Honor, I offer it.
02:29 23 This is DTX-308.
02:29 24 MR. DURST: No objection, Your Honor, to
02:29 25 admission, but Mr. Miller has no knowledge about this.

02:29 1 So I object on grounds of foundation, or at least not
02:29 2 that's been established.
02:29 3 THE COURT: It'll be admitted.
4 BY MR. MUELLER:
02:29 5 Q. All right. Sir, this document, I'm going to
02:29 6 take you to Page 28, and let me know when you're there.
02:29 7 We're not going to publish it, but let me know when
02:29 8 you're there on Page 28.
02:29 9 A. Just to clarify, there's the Slide No. 28, or
02:30 10 do you mean Exhibit -- Page 28 of 37?
02:30 11 Q. It's 28. And if it helps, sir, there's a --
02:30 12 the -- there's a table that has CC strengths in the
02:30 13 left-hand side.
02:30 14 A. Yes.
02:30 15 Q. Okay. Now, just to be clear, "CC" stands for
02:30 16 ClearCorrect, right?
02:30 17 A. I would presume, but to say that, this is the
02:30 18 first time I'm seeing this document.
02:30 19 Q. All right. So I'm just going to ask you a
02:30 20 couple of questions to see if you can tell me more
02:30 21 about this. It lists various CC strengths, including
02:30 22 attractive pricing and made in the USA.
02:30 23 And right below that it says: In addition to
02:30 24 the strengths above, many felt an advantage of
02:30 25 ClearCorrect was that it was not Align.

02:30 1 Do you see that, sir?
02:30 2 A. Can you redirect me? I'm sorry.
02:31 3 Q. Sure. Take your time.
02:31 4 In the table it lists various strengths of CC,
02:31 5 ClearCorrect, including attractive pricing, made in the
02:31 6 USA.
02:31 7 And then below that there's a note that says:
02:31 8 In addition to the strengths above, many felt an
02:31 9 advantage of ClearCorrect was that it was not Align.
02:31 10 Do you see that, sir?
02:31 11 A. I'm sorry. I was on the wrong page. Now I'm
02:31 12 seeing it.
02:31 13 Q. And are you familiar with any discussion
02:31 14 within Align that you were part of in which
02:31 15 ClearCorrect's strengths were identified as including
02:31 16 attractive pricing, made in the USA, and not being
02:31 17 Align?
02:31 18 A. No. This is -- this would be a global report
02:31 19 that I wasn't part of.
02:31 20 Q. And my last question on this is there's a
02:31 21 sentence -- the very next sentence that talks about:
02:31 22 Doctors feeling Align had become greedy, overly
02:31 23 aggressive, and didn't care about the doctor providers.
02:31 24 Are you familiar with any such discussion in
02:31 25 your time at Align?

02:31 1 A. No.
02:31 2 Q. Let's go to DTX-299. This is Tab 6. I'm
02:32 3 sorry, sir. Tab 6. And let me know when you're there,
02:32 4 if you could, sir.
02:32 5 A. I'm there.
02:32 6 Q. This is a e-mail chain among various folks,
02:32 7 including Mr. Pudipeddi, who we discussed a little
02:32 8 while ago.
02:32 9 Do you recall that, sir?
02:32 10 A. Yes.
02:32 11 Q. It's DTX-299.
02:32 12 MR. MUELLER: I offer it.
02:32 13 MR. DURST: No objection to admission,
02:32 14 Your Honor.
02:32 15 THE COURT: Okay. Admitted.
02:32 16 BY MR. MUELLER:
02:32 17 Q. Now, this includes an attachment, sir, and I'd
02:32 18 like to take you to the attachment at Page 23. And
02:32 19 please let me know when you're there.
02:32 20 And to be clear, the attachment is an Align
02:33 21 presentation; am I right?
02:33 22 A. Yes.
02:33 23 Q. So if you could please turn to Page 23 of the
02:33 24 Align presentation.
02:33 25 Are you there, sir?

02:33 1 A. Yes. I am.
02:33 2 Q. Now, let me ask you about this. You see where
02:33 3 it says --
02:33 4 MR. DURST: Your Honor, I object to
02:33 5 Mr. Mueller just reading in a document for which there
02:33 6 is no foundation for this. He's just reading things
02:33 7 off the page, Your Honor, and we have objected on the
02:33 8 grounds of foundation.
02:33 9 THE COURT: I couldn't hear you at the
02:33 10 end, but I think I know what you said.
02:33 11 Mr. Mueller, if you'll make sure -- if
02:33 12 you'll just point to the part of the page and if the
02:33 13 witness is clear on what you're asking about, and just
02:33 14 make sure he understands what it is that you're
02:33 15 discussing.
16 MR. MUELLER: Understood.
02:33 17 THE COURT: And then you're free -- if he
02:33 18 is, you're free to read from that page.
02:33 19 MR. MUELLER: Understood. Understood.
02:33 20 BY MR. MUELLER:
02:33 21 Q. Do you see the title of this? I won't read
02:33 22 any more than the title.
02:33 23 Do you see where it says: User data.
02:33 24 ClearCorrect patient scores came back eerily similar to
02:34 25 Invisalign?

02:34 1 Are you familiar with this table of data in
02:34 2 the Align presentation?
02:34 3 A. I'm not familiar with this. It's the first
02:34 4 time I'd be seeing this.
02:34 5 Q. Okay. All right. You can put that aside,
02:34 6 sir.
02:34 7 Now, you understand that in 2018, a company
02:34 8 called Bay Materials released a material known as
02:34 9 Zendura FLX to the marketplace for clear aligners,
02:34 10 right?
02:34 11 A. Yes.
02:34 12 Q. And do you know, sir, that Align conducted
02:34 13 certain testing of that material after it was released?
02:34 14 A. I did not know that.
02:34 15 Q. Did you know one way or the other whether
02:34 16 Align conducted what is known as reverse engineering of
02:34 17 that material?
02:34 18 A. No.
02:34 19 Q. Did you know one way or the other -- and I'm
02:34 20 going to show you DTX-2867. This is an admitted
02:34 21 exhibit.
02:34 22 Did you know one way or the other, if you go
02:34 23 to Page 2 --
02:34 24 A. What tab number? Sorry.
02:35 25 Q. Tab 8. I apologize. I didn't give it to you.

02:35 1 Tab 8.
02:35 2 A. Okay. I'm here.
02:35 3 Q. Did you know one way or the other what Align
02:35 4 concluded with respect to Bay Materials' hard-soft-hard
02:35 5 structure at that time?
02:35 6 A. No. And this is another document that I
02:35 7 wouldn't be privy to, is the EMC meetings, and I'm not
02:35 8 part of those.
02:35 9 Q. Haven't seen that one either?
02:35 10 A. Correct.
02:35 11 Q. Okay. Let's go to DTX-1388, which is in
02:35 12 evidence. It's Tab 11 in your binder. And I'd like
02:35 13 you to turn to Page 46. And actually, first, if you go
02:35 14 to Slide 7 first.
02:36 15 A. Okay. I'm here.
02:36 16 Q. Do you see the picture of the moat?
02:36 17 A. Yes.
02:36 18 Q. And you have seen pictures like that in your
02:36 19 time at Align, true?
02:36 20 A. Yes.
02:36 21 MR. MUELLER: Can we put that up,
02:36 22 Your Honor? May we publish that, Your Honor? He
02:36 23 confirmed he's seen pictures of moats before. This is
02:36 24 an admitted exhibit, and I want to --
02:36 25 THE COURT: Yes. You can proceed.

02:36 1 BY MR. MUELLER:
02:36 2 Q. So we have here the Build the Moat Around Your
02:36 3 Business. And I'd like to take you, if I could, sir,
02:36 4 to Page 46. Actually, before I do -- before I do, if
02:36 5 we go back to the cover page for a moment. DTX-1388.
02:36 6 This is KO19 in the center of the page.
02:36 7 Do you see that?
02:36 8 A. Yes.
02:36 9 Q. What does KO19 stand for?
02:36 10 A. The sales kickoff meetings we have each year.
02:37 11 This would be the 2019 version of that, and it'd be a
02:37 12 pre -- prelearn where you send the prereads to the
02:37 13 sales force of what they need to --
02:37 14 Q. I'm sorry. I didn't catch the last thing you
15 said, Mr. Miller.
02:37 16 A. Sorry. The sales force would typically
02:37 17 receive these ahead of the meeting. So their job is to
02:37 18 preread it, come prepared, understanding the document
02:37 19 in its entirety for the meeting.
02:37 20 Q. Fair enough.
02:37 21 So just to make sure the record is clear here,
02:37 22 for the sales force at Align, there's a kickoff meeting
02:37 23 each year, right?
02:37 24 A. Correct.
02:37 25 Q. And the sales folks who are on the sales force

02:37 1 receive these materials before the meeting as what you
02:37 2 called a preread?
02:37 3 A. Correct.
02:37 4 Q. And then there would be discussion of these
02:37 5 materials at the kickoff meeting itself as well?
02:37 6 A. Correct.
02:37 7 Q. Okay. And you've been part of such meetings;
02:37 8 am I -- is that fair to say?
02:37 9 A. Yes.
02:37 10 Q. Okay. Let's take a look, if we could, sir, at
02:37 11 Page 46. And we can put this up, and I want to ask you
02:37 12 about some talking points here.
02:37 13 MR. DURST: Your Honor, this should not
02:38 14 be on the screen. There is a foundation objection of
02:38 15 this document. The picture of the moat was up because
02:38 16 Mr. Miller said that he had seen the picture of a moat
02:38 17 before. And that was the only foundation that was laid
02:38 18 for that. There's no foundation for this substance,
02:38 19 Your Honor.
02:38 20 MR. MUELLER: Well, Your Honor, I just
02:38 21 asked him --
02:38 22 THE COURT: I heard.
02:38 23 The objection's overruled.
02:38 24 MR. MUELLER: Page 46, please. If you
02:38 25 could put it up here, there's some speaker notes.

02:38 1 BY MR. MUELLER:
02:38 2 Q. Here we go. I want to direct your attention,
02:38 3 if I could, sir. Do you see there's the text
02:38 4 "Competition is here..." in the middle, right?
02:38 5 A. Yes.
02:38 6 Q. And that's referring to a slide that referred
02:38 7 to other clear aligner suppliers, right?
02:38 8 A. What slide number? I'm not following how to
02:38 9 follow the speaker notes. Sorry.
02:38 10 Q. Sure. We can take you back just to make sure
02:39 11 we're here. It's Slide 8. In the same deck, Slide 8.
02:39 12 "Competition is here..."
02:39 13 Do you see that?
02:39 14 A. Yes. I'm on that slide.
02:39 15 Q. And one of the competitors listed here is
02:39 16 ClearCorrect, true?
02:39 17 A. Yes.
02:39 18 Q. All right. Let's go back to Page 46. And the
02:39 19 speaker notes say: Competition is here... Remember -
02:39 20 getting general dentists to adopt and utilize the iTero
02:39 21 digital scanner builds a moat.
02:39 22 Do you see that, sir?
02:39 23 A. Yes.
02:39 24 Q. So part of this kickoff presentation to the
02:39 25 sales force of Align included the speaker note that

02:39 1 getting general dentists to adopt and utilize the iTero
02:39 2 digital scanner builds a moat. Correct?
02:39 3 A. I can see that there. What was said at the
02:39 4 presentation, I don't recall or, you know, I can say --
02:39 5 I'm happy to explain kind of how these things work, if
02:39 6 you want me to.
02:39 7 Q. Mr. Miller, you're not here to deny that the
02:40 8 2019 kickoff meeting of the Align sales force, they
02:40 9 were shown this presentation, and the speaker notes for
02:40 10 what was said to the sales force included this,
02:40 11 correct?
02:40 12 A. Correct.
02:40 13 Q. Okay. So getting general dentists to adopt
02:40 14 and utilize the iTero digital scanner builds a moat.
02:40 15 The next sentence says: We know the
02:40 16 competition is out there and will only increase.
02:40 17 Do you see that, sir?
02:40 18 A. Yes.
02:40 19 Q. And then the final sentence of these speaker
02:40 20 notes to the sales force of Align, the 2019 kickoff
02:40 21 meeting, states: The iTero scanner will block
02:40 22 competition from gaining business in your accounts and
02:40 23 help your doctors keep and grow treatment with
02:40 24 Invisalign clear aligners rather than seeking out
02:40 25 another option.

02:40 1 Have I read that correctly, sir?
02:40 2 A. Yes. And it's an inaccurate statement.
02:40 3 Q. Sir, these are the speaker notes. This is a
02:41 4 true and authentic copy of the speaker notes for the
02:41 5 kickoff presentation for the 2019 kickoff meeting of
02:41 6 the Align sales force, correct?
02:41 7 A. Correct.
02:41 8 Q. Okay. Now, 2019 is the year after Zendura FLX
02:41 9 was announced to the market, right?
02:41 10 A. I don't have a timeline in front of me, but I
02:41 11 trust that you're connecting --
02:41 12 Q. Did you know that in 2020, ClearCorrect began
02:41 13 incorporating that Zendura FLX hard-soft-hard material
02:41 14 into the ClearCorrect clear aligners?
02:41 15 A. No. That's not -- nothing I'd be aware of.
02:41 16 Q. Now, scanners are incredibly important for a
02:41 17 clear aligner business, true?
02:41 18 A. Yes, and in all of digital dentistry.
02:41 19 Q. And, in fact, sir, it's a fact that Align
02:41 20 itself gets about 10 times as many of its prescriptions
02:41 21 from digital scanners as it does from the putty that
02:42 22 can be used inside a patient's mouth, the PVS putty,
02:42 23 right?
02:42 24 A. I don't know the exact statistic, but we
02:42 25 receive -- the majority of our business comes off a

02:42 1 digital scanner.
02:42 2 Q. Well, let me show you the exact statistic. If
02:42 3 you could go to Tab 22 in your binder. This is
02:42 4 DTX-2783.
02:42 5 A. I'm sorry. So you said Tab 22?
02:42 6 Q. Tab 22, sir, please.
02:42 7 A. Yes. I'm here.
02:42 8 Q. This is DTX-2783, titled Summary of Quarterly
02:42 9 Number of New Invisalign Case Submissions Since 2014 by
10 Source.
02:42 11 MR. MUELLER: Your Honor, we offer it.
02:42 12 MR. DURST: No objection to admission,
02:42 13 Your Honor.
02:42 14 THE COURT: Admitted.
02:42 15 BY MR. MUELLER:
02:42 16 Q. And, sir, you know, you know as part of your
02:42 17 work at Align, the general ratio between PVS
02:42 18 submissions to Align versus intraoral scanner
02:42 19 submissions, right?
02:42 20 A. Yes.
02:43 21 MR. MUELLER: Okay. Your Honor, may I
02:43 22 publish this? This is --
02:43 23 THE COURT: No objection?
02:43 24 MR. DURST: Yes, Your Honor. Object to
02:43 25 foundation.

02:43 1 THE COURT: Overruled.
02:43 2 BY MR. MUELLER:
02:43 3 Q. All right. Let's take a look here. Sir, if
02:43 4 you look at this, and do you see in the center we have
02:43 5 scan type.
02:43 6 Do you see that, sir?
02:43 7 A. Yes.
02:43 8 Q. Now, PVS is the putty, right?
02:43 9 A. That is correct.
02:43 10 Q. So if we look down here, do you see that the
02:43 11 numbers for PVS are less than for iTero, right, in the
02:43 12 years -- I'm sorry. PVS was greater than iTero back in
02:43 13 2014.
02:43 14 Do you see that?
02:43 15 A. Yes.
02:43 16 Q. Now, let's fast-forward to 2017 Q4. Do you
02:43 17 see at that point the iTero submissions eclipsed or
02:43 18 went out ahead of the PVS ones?
02:43 19 A. Yes. I can see that here.
02:43 20 Q. And that trend continued as the years
02:44 21 continued, right, sir?
02:44 22 A. Sorry. This is the first time I'm seeing
02:44 23 this. I'm just trying to --
02:44 24 Q. Well, let me ask you to focus. For example,
02:44 25 if we go all the way down to the bottom, this is 2024

02:44 1 Q2.
02:44 2 Do you see that, sir?
02:44 3 A. Yes.
02:44 4 Q. The iTero scans, there was 282,676 in 2024 Q2,
02:44 5 right?
02:44 6 A. Yes.
02:44 7 Q. The PVS scans in that same time period,
02:44 8 17,444, right?
02:44 9 A. Yes.
02:44 10 Q. That's actually a lot less than 1/10 of the
02:44 11 iTero scans, true?
02:44 12 A. Mathematically I think, yeah, trying to do
02:44 13 quick mental math. Sorry.
02:44 14 Q. Fair enough.
02:44 15 And, Mr. Miller, it is consistent with your
02:44 16 own experience that the number of Invisalign
02:44 17 submissions that come from the iTero is far, far
02:44 18 greater today than for the putty that you can put in
02:45 19 someone's mouth, true?
02:45 20 A. Yes.
02:45 21 Q. Okay. Now, the iTero, the iTero is something
02:45 22 that you also supervise the sales of, correct?
02:45 23 A. The -- just to clarify, the sales operations.
02:45 24 Q. The sales operations; am I right, sir?
02:45 25 A. Yes.

02:45 1 Q. And it's also correct that Align provides
02:45 2 support for its iTero scanners with dentists and
02:45 3 orthodontists, true?
02:45 4 A. Yes.
02:45 5 Q. And you have what's called an end-of-support
02:45 6 policy for those folks?
02:45 7 A. Can you clarify that?
02:45 8 Q. Sure. ELS. You've heard the term "ELS"?
02:45 9 A. Sure. Yes.
02:45 10 Q. And what is the ELS policy?
02:45 11 A. The best way to explain it is when technology
02:45 12 becomes outdated and is no longer supported with
02:45 13 updates, it's hard to continue to support it without
02:45 14 upgrades.
02:45 15 Q. And for -- for Align, the ELS is five years
02:45 16 from the date of purchase of an iTero, correct?
02:45 17 A. I believe that's as stated in the contract,
02:45 18 but they've lasted much longer than that.
02:45 19 Q. It could be longer?
02:45 20 A. Yes.
02:45 21 Q. ITero receives support from Align for at least
02:46 22 five years; is that fair?
02:46 23 A. Yes.
02:46 24 Q. And it could be longer?
02:46 25 A. Yes.

02:46 1 Q. Okay. Take a look, if you could, sir, at
02:46 2 DTX-2877. This is in evidence as Tab 20 in your
02:46 3 binder.
02:46 4 Let me know when you're there, sir.
02:46 5 A. I'm on Tab 20.
02:46 6 Q. And do you see that this is an e-mail, the
02:46 7 title of which is iTero Support After Five Years.
02:46 8 Do you see that?
02:46 9 A. I see that.
02:46 10 Q. This is the same policy that we were just
02:46 11 discussing; is that right?
02:46 12 A. I wouldn't -- if you don't mind, I have to
02:46 13 read through it. I wasn't part of this.
02:46 14 Q. Sure. Take your time. It's --
02:46 15 (Simultaneous conversation.)
02:46 16 BY MR. MUELLER:
02:46 17 Q. There's a bold statement about a five-year
02:46 18 support.
02:46 19 A. That's what that subject line looks like.
02:46 20 Q. Okay.
02:47 21 MR. MUELLER: And, actually,
02:47 22 Your Honor --
23 BY MR. MUELLER:
02:47 24 Q. You're at Tab 20; is that right, sir?
02:47 25 A. Yes.

02:47 1 MR. MUELLER: Okay. Your Honor, I offer
02:47 2 DTX-2877.
02:47 3 MR. DURST: No objection to admission.
02:47 4 THE COURT: Admitted.
02:47 5 BY MR. MUELLER:
02:47 6 Q. Now, you also are familiar, of course, with
02:47 7 Invisalign at times receiving certain complaints from
02:47 8 doctors of -- who prescribe Invisalign for their
02:47 9 patients, right?
02:47 10 A. Yes.
02:47 11 Q. And over the years, Align has had a complaint
02:47 12 rate of around 2 percent; is that fair?
02:47 13 A. That, I don't know.
02:47 14 Q. Okay. But you would agree with me that Align
02:47 15 receives complaints, correct?
02:47 16 A. Yes.
02:47 17 Q. And Align has sold millions of Invisalign
02:47 18 units, true?
02:47 19 A. Yes.
02:47 20 Q. And over the years, Align has received
02:47 21 thousands of complaints, which is only a fraction of
02:47 22 the millions sold, but they've received thousands of
02:47 23 complaints from doctors, true?
02:47 24 A. Again, I don't know the number. We have a --
02:47 25 we have a dedicated customer support line that receives

02:48 1 calls every day.
02:48 2 So to answer your question, yes. We receive
02:48 3 calls and complaints and try to resolve them.
02:48 4 Q. And I can show you some data in just a moment,
02:48 5 sir, but you are -- you know that in this industry, in
02:48 6 the clear aligner industry, it's not uncommon to
02:48 7 receive complaints, correct?
02:48 8 A. Correct.
02:48 9 Q. And in fact, if we had the time, I could show
02:48 10 you document after document after document after
02:48 11 document in which someone over the years has expressed
02:48 12 a complaint about Invisalign, true?
02:48 13 A. I would -- I don't know.
02:48 14 Q. And, sir, the truth is, if I were to take all
02:48 15 of the complaints that Align has received over the
02:48 16 years about Invisalign, it would probably touch the
02:48 17 ceiling. I could probably make several stacks of such
02:48 18 complaints that would touch the ceiling; isn't that
02:48 19 true?
02:48 20 A. Never tried to do it that way, but with 23, 24
02:48 21 million successfully completed cases with doctors and
02:49 22 patients, you'd have calls coming in.
02:49 23 Q. Well, that's precisely my point, sir. If you
02:49 24 sold that many units, you're going to get some
02:49 25 complaints over the years, correct?

02:49 1 A. Yes.
02:49 2 Q. And in fact, you're not here to dispute, okay,
02:49 3 you're not here to dispute that Align has received
02:49 4 thousands and thousands of complaints over the years of
02:49 5 selling Invisalign, correct?
02:49 6 A. Correct.
02:49 7 Q. And the fact that Align has received thousands
02:49 8 and thousands of complaints about Invisalign, does that
02:49 9 make Invisalign a bad product?
02:49 10 A. No.
02:49 11 Q. And in fact, if I were to show you thousands
02:49 12 of complaints for Invisalign, would that change your
02:49 13 opinion as to whether Invisalign is a good product?
02:49 14 A. No.
02:49 15 Q. And in fact, if I were to do that, show you
02:49 16 thousands of complaints about Invisalign, would you
02:49 17 consider that fair or not fair on the question of
02:49 18 whether Invisalign is a good product?
02:49 19 A. I consider it fair because that's how we've
02:49 20 developed our product over the years with customers
02:49 21 helping us improve it.
02:49 22 Q. So you get complaints. You spot issues, and
02:50 23 you try to improve it, right?
02:50 24 A. Correct.
02:50 25 Q. And that's the way it should be done?

02:50 1 A. That's the way we've operated. Yes.
02:50 2 Q. And the fact that another company might
02:50 3 receive a complaint and work on improving it, is that
02:50 4 consistent or inconsistent with how the industry
02:50 5 operates, in your own experience?
02:50 6 A. I don't have any experience outside of Align
02:50 7 within our industry.
02:50 8 Q. Okay. But at Align, it's sold millions of
02:50 9 units of Invisalign, correct?
02:50 10 A. Yes.
02:50 11 Q. Received thousands of complaints also,
02:50 12 correct?
02:50 13 A. Yes.
02:50 14 Q. And the same is true for iTero. Align has
02:50 15 received complaints over the years about iTero, true?
02:50 16 A. Yes.
02:50 17 Q. And has sold many iTero units to various
02:50 18 dentists and orthodontists across the country, correct?
02:50 19 A. Yes.
02:50 20 Q. And some of them complained about it, right?
02:50 21 A. Yes.
02:50 22 Q. In fact, there's been many complaints over the
02:50 23 years about iTero, true?
02:50 24 A. I don't know how you define "many."
02:50 25 Q. Fair enough.

02:50 1 On a volume basis, if we were just to count
02:51 2 the number of complaints, there would be a high
02:51 3 absolute number of complaints, true?
02:51 4 A. I think it's pretty normal with any medical
02:51 5 device the complaint volume that comes through.
02:51 6 Q. It's normal, and you still consider iTero a
02:51 7 good product, correct?
02:51 8 A. Yes.
02:51 9 Q. Now, on occasion you've also had some billing
02:51 10 issues with certain doctors, true?
02:51 11 A. Yes.
02:51 12 Q. And some doctors have complained to you about
02:51 13 certain Align bills, true?
02:51 14 A. Yes.
02:51 15 Q. Over the years that's probably happened
02:51 16 thousands of times as well, right?
02:51 17 A. Yes.
02:51 18 Q. And again, does that mean that Align has bad
02:51 19 billing practices?
02:51 20 A. No.
02:51 21 Q. The fact that you receive thousands of billing
02:51 22 complaints, does that mean Align has bad billing
02:51 23 practices?
02:51 24 A. No.
02:51 25 Q. Let me ask you to turn to DTX-47. It's in

02:52 1 your binder at Tab 23.
02:52 2 A. I'm here.
02:52 3 Q. And this is an e-mail chain between Simon
02:52 4 Beard and Abhishek Ganguly. I'm not sure I'm
02:52 5 pronouncing that correctly, but do you know those
02:52 6 folks?
02:52 7 A. I do know them. Yes.
02:52 8 Q. They are the senior vice president and
02:52 9 managing director of Europe, the Middle East, and
02:52 10 Africa in the case of Mr. Beard, right?
02:52 11 A. Yes.
02:52 12 MR. MUELLER: Your Honor, I offer the
02:52 13 document. This is DTX-47.
02:52 14 MR. DURST: No objection to admission,
02:52 15 Your Honor.
02:52 16 THE COURT: Admitted.
02:52 17 BY MR. MUELLER:
02:52 18 Q. And have you seen this particular e-mail chain
02:52 19 before, sir?
02:52 20 A. Not before the litigation.
02:52 21 Q. Okay.
02:52 22 A. I'm not in the chain or I would have received
02:52 23 this.
02:52 24 Q. Now, let's talk a little bit about the iTero.
02:52 25 If I'm using the iTero, I'm a dentist or a doctor -- a

02:53 1 dentist or orthodontist, I can use the intraoral
02:53 2 scanner to scan a patient's mouth, right?
02:53 3 A. Yes.
02:53 4 Q. And there's a wand that actually performs the
02:53 5 scanning, correct?
02:53 6 A. Correct.
02:53 7 Q. And that's connected to a console, right?
02:53 8 A. Yes.
02:53 9 Q. Now, the console has a drop-down menu on it,
02:53 10 true?
02:53 11 A. Yes.
02:53 12 Q. So after I perform a scan with the iTero
02:53 13 scanner, I can use that drop-down menu, right?
02:53 14 A. Yes.
02:53 15 Q. And one option I can use that drop-down menu
02:53 16 for is I can send the scan to Align, correct?
02:53 17 A. Yes.
02:53 18 Q. So on the drop-down menu, one of the options
02:53 19 is Align, true?
02:53 20 A. It's called Invisalign Scan.
02:53 21 Q. Fair enough.
02:53 22 It says Invisalign is one of the options,
02:53 23 right?
02:53 24 A. Yes.
02:53 25 Q. That will take the scan of the patient's mouth

02:53 1 and send it for Invisalign prescription, true?
02:53 2 A. Yes.
02:53 3 Q. Now, there's some other options that are
02:53 4 available on this drop-down menu, correct?
02:54 5 A. Yes.
02:54 6 Q. For example, restorative laboratories can be
02:54 7 listed on that menu?
02:54 8 A. Yes.
02:54 9 Q. And restorative laboratories do restoration of
02:54 10 certain teeth, correct?
02:54 11 A. Yes.
02:54 12 Q. Okay. But, sir, you would agree with me one
02:54 13 thing we wouldn't find on that drop-down menu are other
02:54 14 clear aligner companies, correct?
02:54 15 A. No.
02:54 16 Q. So is that correct or incorrect?
02:54 17 A. It's incorrect.
02:54 18 Q. ClearCorrect is not on that drop-down menu,
02:54 19 correct?
02:54 20 A. Straumann is.
02:54 21 Q. Sir, ClearCorrect -- ClearCorrect clear
02:54 22 aligners are not on that menu, correct?
02:54 23 A. Correct.
02:54 24 Q. And for ClearCorrect, what needs to happen is
02:54 25 the scan data needs to be sent to a separate computer,

02:54 1 true?
02:54 2 A. That, I don't know. I'm not sure what
02:54 3 Straumann does to it.
02:54 4 Q. You don't know one way or the other?
02:54 5 A. Correct.
02:54 6 Q. All right. Let me ask you to turn to
02:55 7 DTX-1393. It's at Tab 25 in your binder. Take your
02:55 8 time and let me know when you're there.
02:55 9 A. I'm here.
02:55 10 Q. This is an e-mail chain that includes you,
02:55 11 right, sir?
02:55 12 A. Yes.
02:55 13 MR. MUELLER: DTX-1393, we offer it,
02:55 14 Your Honor.
02:55 15 MR. DURST: No objection, Your Honor.
02:55 16 THE COURT: Admitted.
02:55 17 BY MR. MUELLER:
02:55 18 Q. So up here we have you as one of the
02:55 19 recipients of this e-mail, correct?
02:55 20 A. Yes.
02:55 21 Q. And let's go to Page 2. I want to go to an
02:55 22 earlier e-mail from Ms. Kerri Kling.
02:55 23 Who is she?
02:55 24 A. Kerri Kling worked on the iTero side of the
02:55 25 business.

02:55 1 Q. All right. Do you see below there's a section
02:55 2 titled Lab Account Naming Criteria?
02:56 3 A. Yes.
02:56 4 Q. And Ms. Kling was asking about follow-up with
02:56 5 the legal team. And before I get into this, I just
02:56 6 want to be very, very clear about one thing. I'm not
02:56 7 going to ask you for any communication you or one of
02:56 8 your colleagues had with lawyers or what they told you.
02:56 9 So please know that I'm not asking for that at all,
02:56 10 okay, sir?
02:56 11 A. Okay.
02:56 12 Q. All right. So here, we see Ms. Kling asking
02:56 13 about the follow-up with the legal team on the
02:56 14 implementation of the lab account naming criteria.
02:56 15 Do you see that?
02:56 16 A. Yes.
02:56 17 Q. And if we go up to the next one, the next
02:56 18 e-mail, this is an e-mail from you, right, sir?
02:56 19 A. Correct.
02:56 20 Q. And you said: Sid from AMS side is currently
02:56 21 leading that work stream and is in the process of
02:56 22 submitting for legal review.
02:56 23 Do you see that?
02:56 24 A. Yes.
02:56 25 Q. Now, let's go to the next e-mail up.

02:56 1 This is the gentleman you referred to as Sid?
02:56 2 A. Correct.
02:56 3 Q. And he said: Do you know what the Angel Lab
02:57 4 name is for iTero scan submissions? They do not have
02:57 5 an account. Any doctor using them would STL export
02:57 6 from the doctor's MIDC account and send on their own.
02:57 7 Do you see that?
02:57 8 A. I do.
02:57 9 Q. Angel is another clear aligner company,
02:57 10 correct?
02:57 11 A. That is correct.
02:57 12 Q. And in the next paragraph, Mr. Mishra said:
02:57 13 Additionally, are there any other major labs apart from
02:57 14 Ormco_Spark that are worth flagging? Nathan and I are
02:57 15 working on a framework proposal for legal, and it would
02:57 16 be good to proactively identify labs of material
02:57 17 threat.
02:57 18 Do you see that, sir?
02:57 19 A. I do.
02:57 20 Q. And it goes on to say: ClearCorrect,
02:57 21 SureSmile.
02:57 22 Right?
02:57 23 A. Yes. I see that.
02:57 24 Q. And packaging these insights within legal's
02:57 25 boundaries.

02:57 1 So here, Mr. Mishra is identifying as a
02:57 2 material threat ClearCorrect, right?
02:57 3 A. He is. And he's just an analytics and data
02:58 4 scientist. So he would be qualified for that
02:58 5 statement.
02:58 6 Q. Whatever his position, what he said was
02:58 7 material threat, ClearCorrect, right?
02:58 8 A. He did say that, yes.
02:58 9 Q. And in fact, ClearCorrect, as we just
02:58 10 discussed, is not on that drop-down menu for iTero,
02:58 11 true?
02:58 12 A. That is correct.
02:58 13 Q. Let's take a look at DTX-1421. This is Tab 26
02:58 14 in your binder. This is an e-mail chain between
02:58 15 Raphael Pascaud -- if I'm pronouncing that correctly --
02:58 16 and Joe Hogan.
02:58 17 Are you there, sir?
02:58 18 A. Yes.
02:58 19 MR. MUELLER: Your Honor, we offer
02:58 20 DTX-1421.
02:58 21 MR. DURST: No objection.
02:58 22 A. Sorry. This is a document I wouldn't have
02:58 23 been privy to or part of either.
02:58 24 BY MR. MUELLER:
02:58 25 Q. You've not seen it before?

02:58 1 A. Correct.
02:58 2 Q. Okay. Let's go to DTX-402. This is Tab 27 in
02:58 3 your binder. And let me know when you're there, sir.
02:58 4 A. I'm here.
02:59 5 Q. This is another e-mail chain. And you are on
02:59 6 the e-mail on Page 4. So if you want to flip there for
02:59 7 a minute, I just want to let you know where I'm going
02:59 8 to be going.
02:59 9 Do you see your name on Page 4?
02:59 10 A. Yes.
02:59 11 MR. MUELLER: Your Honor, I offer
02:59 12 DTX-402.
02:59 13 MR. DURST: No objection to admission,
02:59 14 Your Honor.
02:59 15 THE COURT: Admitted.
02:59 16 BY MR. MUELLER:
02:59 17 Q. Now, this is an e-mail chain. You see here,
02:59 18 here's your name. Matthew Miller, right?
02:59 19 A. Yes.
02:59 20 Q. Now, there's a gentleman named Leon Rasovsky
02:59 21 on this e-mail.
02:59 22 Who is that?
02:59 23 A. Leon at the time, if I recall right, worked on
02:59 24 the iTero side of the business.
02:59 25 MR. DURST: Your Honor, we have

02:59 1 foundation objections to this document, and it's on the
02:59 2 screen. So we request -- we have foundation
02:59 3 objections.
02:59 4 THE COURT: He hasn't asked a question
02:59 5 yet on that.
02:59 6 MR. DURST: He has it on the screen,
02:59 7 Your Honor.
02:59 8 THE COURT: You have a question --
02:59 9 MR. MUELLER: You can take that page
02:59 10 down. I did ask him about the page he was on. There's
03:00 11 an e-mail that he's listed on, Mr. Miller.
03:00 12 THE COURT: Okay.
03:00 13 BY MR. MUELLER:
03:00 14 Q. Have you read any other e-mails in this chain
03:00 15 aside from the ones that you were listed on?
03:00 16 A. No. And I was removed after that. I wouldn't
03:00 17 have seen that ever again.
03:00 18 Q. All right. We'll put that aside.
03:00 19 Let's take a look at DTX-208. This is Tab 28
03:00 20 in your binder.
03:00 21 Are you there, sir?
03:00 22 A. Yes. Sorry.
03:00 23 Q. This is another e-mail between Mr. Pudipeddi
03:00 24 and Mu Li; is that right, sir?
03:00 25 A. Correct.

03:00 1 MR. MUELLER: Your Honor, I offer it,
03:00 2 DTX-208.
03:00 3 MR. DURST: No objection to admission,
03:00 4 Your Honor. None.
03:00 5 BY MR. MUELLER:
03:00 6 Q. Have you seen this before, sir?
03:00 7 A. No. I have not.
03:00 8 Q. All right. Let's go to DTX-329, Tab 29 in
03:00 9 your binder.
03:00 10 This is between Michael Smith and Michael
11 Flanagan.
03:00 12 Who are those folks?
03:00 13 A. Michael Smith was the -- I think VP of global
03:01 14 ortho at the time of this, and Michael Flanagan was --
03:01 15 I might get this wrong, but if I recall correctly, he
03:01 16 was in the treatment planning side of the business
03:01 17 operationally.
03:01 18 MR. MUELLER: Your Honor, we offer
03:01 19 DTX-329.
03:01 20 MR. DURST: No objection to admission,
03:01 21 Your Honor.
03:01 22 THE COURT: Admitted.
03:01 23 BY MR. MUELLER:
03:01 24 Q. And have you seen this e-mail before, sir, or
03:01 25 the data reflected in it before?

03:01 1 A. The first time I saw this was in my
03:01 2 depositions.
03:01 3 Q. Okay. And you have no personal knowledge of
03:01 4 it?
03:01 5 A. Correct.
03:01 6 Q. All right. Now, you know, sir, that the -- if
03:01 7 a doctor wants to use iTero for output, exporting scan
03:01 8 information to a third party that's not on the
03:01 9 drop-down menu, that data needs to go through another
03:01 10 computer first, right?
03:01 11 A. Correct.
03:01 12 Q. Whereas for Invisalign, the Invisalign data
03:01 13 can go directly from the iTero scanner to Align,
03:01 14 correct?
03:01 15 A. Correct.
03:01 16 Q. Okay. Just so we're crystal clear with this
03:02 17 jury, that iTero scanner can send data directly to
03:02 18 Invisalign, the scanner itself, correct?
03:02 19 A. Yes.
03:02 20 Q. And for other clear aligner companies not
03:02 21 listed on the drop-down menu, the data needs to go
03:02 22 through a separate computer, correct?
03:02 23 A. I believe so, if I'm following you correctly.
03:02 24 Q. Rather than from the iTero directly, correct?
03:02 25 A. Yes. They'd go to the myitero.com, download

03:02 1 the file, and then move it.
03:02 2 Q. And myitero.com is a website that needs to be
03:02 3 accessed by the separate computer, true?
03:02 4 A. Yes.
03:02 5 Q. All right. Those files are sometimes called
03:02 6 STL files, correct?
03:02 7 A. Correct.
03:02 8 Q. And the truth is, sir, that Align monitors the
03:02 9 usage of doctors when they export those STL files
03:02 10 through myitero.com, correct?
03:02 11 A. That's incorrect.
03:02 12 Q. Align tracks the data; isn't that true?
03:03 13 A. Align might have the data. But at least from
03:03 14 my understanding on the commercial side, we don't have
03:03 15 tracking mechanisms in place to monitor.
03:03 16 Q. You've never seen any reference to Align
03:03 17 tracking the data sent by doctors through those
03:03 18 external STL exports?
03:03 19 A. Nothing to act on in a consistent or, you
03:03 20 know, basic manner.
03:03 21 Q. Well, sir, that wasn't my question.
03:03 22 Have you ever seen anything about Align
03:03 23 tracking data from doctors' exports of STLs to clear
03:03 24 aligner companies other than Align?
03:03 25 A. It's not possible to track it once you

03:03 1 download the STL file to where it goes.
03:03 2 Q. It's a yes or no. Are you aware of Align
03:03 3 tracking the exports of STL files to non-Invisalign
03:03 4 prescriptions?
03:03 5 A. The only one I'm aware of is when you do the
03:03 6 drop-down. That's what I'm trying to clarify.
03:03 7 The answer is yes if you're taking the
03:03 8 drop-down, the company would know that. But if it's
03:03 9 the third computer you were describing, then it's not
03:03 10 possible.
03:03 11 Q. All right. Let's go to Tab 33, DTX-35.
03:04 12 A. I'm there.
03:04 13 Q. Again, Angel Aligner is a competitor aligner,
03:04 14 before I get into this, right?
03:04 15 A. Yes.
03:04 16 Q. All right. This is DTX-35. It's an e-mail
03:04 17 exchange that includes you. In fact, it's from you,
03:04 18 right, sir?
03:04 19 A. I'm sorry. You say Tab 35?
03:04 20 Q. I said Tab 33, DTX-35.
03:04 21 A. Okay. Thank you.
03:04 22 Q. I misspoke. I apologize.
03:04 23 A. Okay. I'm here.
03:04 24 Q. Okay. So DTX-35 is an e-mail from you to
03:04 25 Mr. Beard and Mr. Taylor, correct?

03:04 1 A. Yes.
03:04 2 MR. MUELLER: Your Honor, we offer it.
03:04 3 MR. DURST: No objection, Your Honor.
03:04 4 THE COURT: Admitted.
03:04 5 BY MR. MUELLER:
03:04 6 Q. The first e-mail in the chain is from a
03:04 7 territory manager named Alex Sakai, right?
03:04 8 A. From John Ramko to Alex Sakai, am I on the
03:04 9 right page?
03:05 10 Q. If we go all the way down -- oh, yes, you're
03:05 11 right. It's from John Ramko to Alex Sakai.
03:05 12 A. Yes.
03:05 13 Q. And if we go down, do you see there's a
03:05 14 section that is reporting on a doctor, Dr. Richard
15 Ting.
03:05 16 Do you see that?
03:05 17 A. Yes.
03:05 18 Q. Who had been asked to consider switching to
03:05 19 Angel, right?
03:05 20 A. Yes.
03:05 21 Q. Now, let's look at what Mr. Beard said about
03:05 22 this situation where a doctor was considering switching
03:05 23 to Angel.
03:05 24 Mr. Beard -- if we scroll a little bit further
03:05 25 up, Mr. Beard said to you and Mr. Taylor: Bottom line

03:05 1 here is that we cannot allow Angel to get a foothold in
03:05 2 the market. Raj was clear with me that if we allow
03:05 3 them to build a foundation, it will be difficult to
03:05 4 stop them.
03:05 5 Right?
03:05 6 A. Yes.
03:05 7 Q. And let's go a little further up. You wrote
03:06 8 in response: We are actively trying to identify their,
03:06 9 quote, lab naming convention so we can pull immediate
03:06 10 red flags to our sales team the moment one single scan
03:06 11 gets exported from an iTero. Once we have that, these
03:06 12 accounts will be addressed same day by the sales rep.
03:06 13 Do you see that, sir?
03:06 14 A. I do. Yes.
03:06 15 Q. So here's an example of you suggesting the
03:06 16 iTero could be used to track doctors' usage of the
03:06 17 scanner and what they were using it for, true?
03:06 18 A. Yes. That's how I could have answered your
03:06 19 question that it's not possible.
03:06 20 Q. Okay. Well, you say right here: We're
03:06 21 actively trying, actively trying to identify their lab
03:06 22 naming convention so we can pull immediate red flags to
03:06 23 our sales team the moment one single scan gets exported
03:06 24 from an iTero.
03:06 25 Right?

03:06 1 A. Yes. That was -- that was the hope, and we
03:06 2 failed.
03:06 3 Q. Right. And the genesis of this e-mail from
03:06 4 you was Mr. Pudipeddi saying, "We can't let Angel get a
03:07 5 foothold," correct?
03:07 6 A. Yeah. I was trying to understand do they have
03:07 7 a --
03:07 8 THE COURT: Just answer his question,
03:07 9 please.
03:07 10 THE WITNESS: Sorry.
03:07 11 THE COURT: Thank you.
03:07 12 A. Yes.
03:07 13 BY MR. MUELLER:
03:07 14 Q. What Mr. Beard said is: Raj was clear with me
03:07 15 that if we allow them to build a foundation, it will be
03:07 16 difficult to stop them.
03:07 17 Correct?
03:07 18 A. Yes.
03:07 19 Q. Let's go to DTX-209. This is Tab 34 in your
03:07 20 binder.
03:07 21 A. I'm sorry. Did you say 44?
03:07 22 Q. Tab 34.
03:07 23 A. 34. Thank you.
03:07 24 Q. This is from Mr. Hogan to Mr. Chris Puco.
03:07 25 Who's Mr. Chris Puco?

03:07 1 A. Chris -- Chris Puco was the -- I believe the
03:07 2 EVP of the Americas at this time.
03:07 3 MR. MUELLER: Your Honor, I offer
03:07 4 DTX-209.
03:07 5 MR. DURST: No objection, Your Honor, to
03:07 6 admission.
7 THE COURT: Admitted.
03:07 8 BY MR. MUELLER:
03:07 9 Q. And have you seen any of the content of this
03:07 10 correspondence between the chief executive officer and
03:08 11 Mr. Puco before today?
03:08 12 A. No. This looks like the executive management
03:08 13 team on the thread here, and I wouldn't have seen
03:08 14 these.
03:08 15 Q. Mr. Miller, in the clear aligner industry or
03:08 16 clear aligner market, do you believe in open systems or
03:08 17 closed systems, you personally?
03:08 18 A. Are you referring to the iTero or the
03:08 19 Invisalign?
03:08 20 Q. Just generally. In the clear aligner system,
03:08 21 what do you think is -- let me withdraw the question.
03:08 22 In the clear aligner market in the United
03:08 23 States -- are you with me?
03:08 24 A. Yes.
03:08 25 Q. In the clear aligner market in the United

03:08 1 States, do you believe, you personally, that the best
03:08 2 thing for that market is that companies use open
03:08 3 systems or closed systems, in your view?
03:08 4 A. Yeah. I believe in expanding access to care
03:08 5 for patients, which means the more iTeros that are out
03:08 6 there, the more people can receive clear aligner
03:08 7 therapy.
03:08 8 Q. Open or closed?
03:08 9 A. It's an open system.
03:09 10 Q. So you say it's open?
03:09 11 A. The iTero is open.
03:09 12 Q. Let's take a look at DTX-1059.
03:09 13 And you're certainly privy to global business
03:09 14 strategy in your role at Align, correct?
03:09 15 A. It depends.
03:09 16 Q. Let's take a look at Tab 35, DTX-1059. This
03:09 17 is already in evidence.
03:09 18 And do you see at the bottom of the first page
03:09 19 there's a reference to open and closed systems?
03:09 20 A. I do. And this would be the first time I'd be
03:09 21 seeing this.
03:09 22 Q. You haven't seen that before?
03:09 23 A. Correct.
03:09 24 Q. All right. Now, you understand that Align
03:09 25 enters into contracts with various practitioners as

03:09 1 well as what are called dental service organizations,
03:09 2 true?
03:09 3 A. Yes.
03:09 4 Q. Let's take a look at DTX-144 -- 1444. Three
03:09 5 4s. This is Tab 37 in your binder.
03:09 6 A. I'm there.
03:10 7 Q. And DTX-1444 is an agreement between Align
03:10 8 Technologies and Heartland Dental, right?
03:10 9 A. Yes.
03:10 10 MR. MUELLER: Your Honor, we offer
03:10 11 DTX-1444.
03:10 12 MR. DURST: No objection, Your Honor.
03:10 13 THE COURT: Admitted.
03:10 14 BY MR. MUELLER:
03:10 15 Q. And of course, sir, you've seen many of these
03:10 16 agreements over the years, correct?
03:10 17 A. Yes.
03:10 18 Q. So let's take a look at a couple provisions.
03:10 19 These agreements offer certain terms to
03:10 20 organizations or doctors if they remain in what's
03:10 21 called good standing according to the agreements, true?
03:10 22 A. This particular contract is between Align and
03:10 23 the dental service organization, not the doctors.
03:10 24 Q. And let's take a look at Paragraph 14 which is
03:10 25 Page 8.

03:10 1 And in Paragraph 14, it says: Align provides
03:11 2 the Find a Doctor functionality on Invisalign.com.
03:11 3 Right?
03:11 4 A. Yes.
03:11 5 Q. It goes on to say: In order for Invisalign
03:11 6 providers to be listed within the Find a Doctor tool,
03:11 7 Invisalign providers must maintain good standing as
03:11 8 solely determined by Align.
03:11 9 Right?
03:11 10 A. Yes.
03:11 11 Q. Not maintaining good standing may include
03:11 12 without limitation.
03:11 13 And it lists certain things, right?
03:11 14 A. Yes.
03:11 15 Q. One of them, diversion of prospective patients
03:11 16 into non-Invisalign treatment, correct?
03:11 17 A. Yes.
03:11 18 Q. And so one of the criteria by which Align
03:11 19 judges whether or not an organization and its doctors
03:11 20 are in good standing is whether those folks are
03:11 21 diverting prospective patients into non-Invisalign
03:11 22 treatment, true?
03:11 23 A. Yes. From a layman's term, we refer to that
03:11 24 as a bait and switch.
03:11 25 Q. Sir, I'm asking about what it says on paper

03:12 1 right here. "Diversion of prospective patients into a
03:12 2 non-Invisalign treatment."
03:12 3 Right?
03:12 4 A. Yes.
03:12 5 Q. And let me ask you, sir, you used the term
03:12 6 "bait and switch." If a dentist or an orthodontist
03:12 7 chooses to offer another clear aligner to their
03:12 8 patients, they're allowed to do that even if they're
03:12 9 also offering Invisalign, correct?
03:12 10 A. Yes.
03:12 11 Q. And once -- once a doctor decides to take on
03:12 12 Invisalign and offer Invisalign as a service, you're
03:12 13 not here to say that the doctor should be forbidden
03:12 14 from ever prescribing something else, are you?
03:12 15 A. Not at all.
03:12 16 Q. Yet this contract says right here that
03:12 17 diversion of prospective patients into non-Invisalign
03:12 18 treatment would be criteria to be found not in good
03:12 19 standing, true?
03:12 20 A. No.
03:12 21 Q. Sir, does this say "bait and switch" in this
03:12 22 provision?
03:12 23 A. That's what it means.
03:12 24 Q. Does it -- I'm not asking you what it means.
03:12 25 Does it say "bait and switch," sir?

03:12 1 A. No. The words are not written there.
03:12 2 Q. Does it say a doctor shall not falsely provide
03:12 3 a patient with the impression that they're receiving
03:13 4 Invisalign when they're not? Does it say that?
03:13 5 A. It's not written there.
03:13 6 Q. Doesn't say anything about false advertising
03:13 7 right here?
03:13 8 A. No.
03:13 9 Q. What it says is: Diversion of prospective
03:13 10 patients into non-Invisalign is one of the grounds
03:13 11 under which the organization can be found not in good
03:13 12 standing. Correct?
03:13 13 A. That's what it says.
03:13 14 Q. Now, these agreements have terms, right?
03:13 15 A. Yes.
03:13 16 Q. And the terms are five years, right?
03:13 17 A. Depends on the agreement. Yes. Two to five
03:13 18 years.
03:13 19 Q. Two to five years. There are agreements like
03:13 20 this with a five-year period, correct?
03:13 21 A. Yes.
03:13 22 Q. Now, sir, there's not just this one agreement.
03:13 23 In fact, sir, isn't it true, isn't it true that there
03:13 24 are thousands of agreements that Align has entered with
03:13 25 good standing provisions like the one that we're

03:13 1 looking at right here?
03:13 2 A. I've never counted them, but that wouldn't
03:13 3 surprise me.
03:13 4 Q. Well, I'll represent to you, I have one box
03:13 5 right here.
03:13 6 Do you see that, sir?
03:13 7 A. Yes.
03:13 8 Q. And I've got another box right here.
03:14 9 And is it surprising to you that there are
03:14 10 that volume or more of contracts with these types of
03:14 11 provisions?
03:14 12 A. I've never -- it surprises me to see them in
03:14 13 the boxes like that, yes.
03:14 14 Q. But you don't dispute that Align has entered
03:14 15 into thousands of agreements with provisions like the
03:14 16 one that we see right here, true?
03:14 17 A. I trust that if you say they're in that box,
03:14 18 then they're in the box.
03:14 19 Q. Let's take a look at DTX-210. This is at
03:14 20 Tab 38 in your binder.
03:14 21 And this is an e-mail chain between Mr. Hogan,
03:14 22 the chief executive officer, and Brad Jergenson.
03:14 23 Who's Mr. Jergenson?
03:14 24 A. At the time, he was the vice president and
03:14 25 general manager for the U.S. business.

03:14 1 MR. MUELLER: Your Honor, I offer it.
03:14 2 MR. DURST: No objection to admission,
03:14 3 Your Honor.
03:14 4 THE COURT: Admitted.
03:14 5 BY MR. MUELLER:
03:14 6 Q. And, sir, I'd like you to focus your
03:14 7 attention, before I show this, to Page 2, and if you
03:14 8 just take a look at it, there's a section on a report
03:15 9 of a doctor wanting to try an alternative to
10 Invisalign.
03:15 11 My question to you is: Have you seen that
03:15 12 before or the correspondence about it?
03:15 13 A. No. I was not involved in this communication
03:15 14 or -- or thread.
03:15 15 Q. Let's go to Tab 39 in your binder. This is
03:15 16 DTX-2019.
03:15 17 Do you see this global white paper from Align?
03:15 18 A. Yes.
03:15 19 MR. MUELLER: Your Honor, I offer it.
03:15 20 MR. DURST: No objection to admission,
03:15 21 Your Honor.
03:15 22 THE COURT: Admitted.
03:15 23 BY MR. MUELLER:
03:15 24 Q. Have you seen this before, sir?
03:15 25 A. No.

03:15 1 Q. Let's go to Tab 43. DTX-309. And let me know
03:16 2 when you're there, sir.
03:16 3 A. I'm here.
03:16 4 Q. This is e-mail correspondence among various
03:16 5 Align executives with an attachment titled Align
03:16 6 Competitive Qual Analysis March of 2021.
03:16 7 Do you see that, sir?
03:16 8 A. I do.
03:16 9 MR. MUELLER: Your Honor, I offer it.
03:16 10 MR. DURST: No objection to admission,
03:16 11 Your Honor.
03:16 12 THE COURT: Admitted.
03:16 13 BY MR. MUELLER:
03:16 14 Q. And are you familiar with this document or the
03:16 15 attachment?
03:16 16 A. No.
03:16 17 Q. Mr. Miller, Align does some advertising to the
03:16 18 general public, correct?
03:16 19 A. Yes.
03:16 20 Q. Has Align in -- well, Align uses, for example,
03:16 21 sports figures, Patrick Mahomes, other folks to speak
03:16 22 on its behalf in certain paid advertising, correct?
03:16 23 A. Yes.
03:16 24 Q. Has Align ever told the public in any form or
03:16 25 fashion that the iTero scanner is needed -- is needed

03:16 1 to receive an Invisalign prescription?
03:16 2 A. In a commercial or?
03:17 3 Q. In the general marketing it does to the
03:17 4 general market -- you with me?
03:17 5 A. Yes.
03:17 6 Q. Okay. So in that market -- withdraw the
03:17 7 question.
03:17 8 In the general public advertising that Align
03:17 9 conducts -- are you with me, sir?
03:17 10 A. Yes.
03:17 11 Q. Does Align ever tell the general public that
03:17 12 their doctors are going to have to have an iTero
03:17 13 scanner if they're going to be able to prescribe
03:17 14 Invisalign?
03:17 15 A. So I can't speak on all the consumer
03:17 16 advertising because I see just kind of what I see as a
03:17 17 consumer from the consumer team, but if they say that,
03:17 18 it wouldn't be accurate because you can receive it from
03:17 19 a PVS impression.
03:17 20 Q. Okay. Does Align tell the consumers in this
03:17 21 general advertising that the only ways to get
03:17 22 Invisalign are putty in your mouth or Align's own iTero
03:17 23 scanner? Does that appear in the sports advertising or
03:17 24 anything else?
03:17 25 A. Not that I've seen.

03:17 1 MR. MUELLER: Thank you, sir.
03:17 2 I pass the witness, Your Honor.
03:17 3 Your Honor, I'm sorry. Before we start,
03:18 4 I just was handed a note. I read one exhibit number
03:18 5 incorrectly. I moved in DTX-2783, and the exhibit
03:18 6 number I was showing the witness in the binder was
03:18 7 2873. So I want to make that clarification.
03:18 8 THE COURT: Thank you.
03:18 9 MR. DURST: Your Honor, we will, of
03:18 10 course, move at the Court's and the jury's preference.
03:18 11 This is our direct examination of Mr. Miller, and so
03:18 12 we're going to be at it for a little while. Happy to
03:18 13 start.
03:18 14 We're going to be at this for a little
03:18 15 while. This is our direct examination of him. Just
03:18 16 inquiring about the break, whether you would let us go
03:19 17 ahead.
03:19 18 THE COURT: Please.
03:19 19 CROSS-EXAMINATION
03:19 20 BY MR. DURST:
03:19 21 Q. Good afternoon, sir.
03:19 22 A. Good afternoon.
03:19 23 Q. Okay. So let's go back to the beginning a
03:19 24 little bit of talking about yourself for just a couple
03:19 25 minutes, and then we'll get into some other topics.

03:19 1 So, Mr. Miller, where do you live and work?
03:19 2 A. I work for Align Technology and live in
03:19 3 Raleigh, North Carolina.
03:19 4 Q. And before you were in Raleigh, where were
03:19 5 you?
03:19 6 A. I was in Houston.
03:19 7 Q. And what were you doing in Houston?
03:19 8 A. I was the sales manager for Align for South
03:19 9 Texas.
03:19 10 Q. Now, before being sales manager for Align in
03:19 11 South Texas, what were you doing for a living?
03:19 12 A. I worked for -- same geography, but I worked
03:19 13 for a company called Abbott.
14 Q. Is that a pharmaceutical company?
15 (Simultaneous conversation.)
03:19 16 A. -- medical device side. Covering the Texas,
03:19 17 you know, health center down in, you know, Houston and
03:19 18 then Louisiana.
03:19 19 BY MR. DURST:
03:19 20 Q. Okay. I'll do my part of this, and we'll have
03:19 21 to ask you to. I won't talk until you're finished.
03:20 22 And so give me a chance to finish, okay?
03:20 23 A. Sorry.
03:20 24 Q. No worries at all. We just don't want
03:20 25 Ms. Davis to ring that bell on us.

03:20 1 So you were at Abbott. You moved to Align.
03:20 2 How did that happen and why?
03:20 3 A. So that's kind of a random story. I had
03:20 4 received a LinkedIn message from the sales director of
03:20 5 Align saying, hey, I'm in town. We have an opening in
03:20 6 Houston. Would you like to have dinner with me?
03:20 7 But I never responded to anybody. I was
03:20 8 actually doing quite well at Abbott, enjoyed it, but I
03:20 9 was -- I'd seen people popping the Invisalign aligners
03:20 10 out of their mouths, you know, at lunch, and
03:20 11 colleagues. So I was kind of curious about the
03:20 12 technology.
03:20 13 So I decided, you know, what do I have to
03:20 14 lose? Worst case, I ask this person a lot of questions
03:20 15 about the product and learn something about the medical
03:20 16 technology that they invented.
03:20 17 Really liked the conversation, liked where the
03:20 18 company was heading, and really what his vision for the
03:20 19 future was and then why he thought I'd be a good fit
03:21 20 there. So one thing led to another, and I decided to
03:21 21 make a lateral move over, you know, out of the
03:21 22 traditional medical device space into the, you know,
03:21 23 orthodontic and general dentistry space.
03:21 24 Q. What enthused you about going to work for
03:21 25 Align?

03:21 1 A. It was a personal thing. Growing up, I had
03:21 2 braces as a kid, never wore my retainer, knew I needed
03:21 3 teeth straightened a little bit to get back to where I
03:21 4 needed to. You know, I had -- was born with three
03:21 5 teeth missing. From an adult side. So -- sorry.
03:21 6 Personal. So I lacked confidence. So Align gives
03:21 7 people confidence.
03:21 8 Q. You have water there if you need it, sir, if
03:21 9 you need a drink.
03:21 10 A. Thank you.
03:21 11 Q. Now, Mr. Miller, you have had responsibilities
03:22 12 for some marketing responsibilities --
03:22 13 A. Yes.
03:22 14 Q. -- in your time at Align.
03:22 15 Why is marketing important to Align?
03:22 16 A. Well, it's a downstream business model, and
03:22 17 what that means is you need to have marketing awareness
03:22 18 for patients, prospective patients to know I can get my
03:22 19 teeth straightened, and I need to go find a doctor and
03:22 20 where can I find my doctor.
03:22 21 So you can't just deploy a bunch of field
03:22 22 sales personnel at doctors' practices if patients
03:22 23 aren't coming and asking for the product.
03:22 24 So you have to have consumer marketing efforts
03:22 25 creating awareness for the category so that demand

03:22 1 is -- you know, they're essentially going to the
03:22 2 stores, which is orthodontic practices and dentist
03:22 3 offices asking for the product.
03:22 4 Q. And back in the early days of Align, what were
03:22 5 the marketing challenges and the company challenges?
03:22 6 A. Yeah. So I joined in 2015, so I wasn't there
03:22 7 for the early days. But from what I had heard and
03:22 8 understood is Align spent more money on marketing than
03:22 9 they had revenue coming in.
03:22 10 So times were tight. There was many times the
03:23 11 company might not have survived or made it. So, you
03:23 12 know, the company had to build consumer awareness to
03:23 13 drive demand into the practices so doctors would both
03:23 14 want to learn how to use the product and treat the
03:23 15 patients.
03:23 16 Q. So in the early days of Align when they were
03:23 17 working to expand their -- their sales, they spent more
03:23 18 money on marketing than they did on -- than they
03:23 19 received in revenue?
03:23 20 A. Yes.
03:23 21 Q. And in those early days of the company, what
03:23 22 were the -- what was the head-to-head competition like?
03:23 23 A. It was fighting for legitimacy that a clear
03:23 24 piece of plastic can move teeth like braces can. So
03:23 25 it's creating that trust of consumers and doctors

03:23 1 willing to give it a try on there.
03:23 2 So they had to spend a lot of time and effort
03:23 3 to prove the technology could do what it said it could.
03:23 4 Q. And who were they -- what product were they
03:23 5 competing against?
03:23 6 A. Braces.
03:23 7 Q. And who is the number one competitor against
03:23 8 Align today?
03:23 9 A. Braces.
03:24 10 Q. Now, is marketing -- does it continue to be
03:24 11 important for the company?
03:24 12 A. Yes.
03:24 13 Q. In addition to the direct-to-patient
03:24 14 marketing, is there another audience to which Align
03:24 15 markets?
03:24 16 A. The -- there's -- we have a -- outside of the
03:24 17 consumer marketing side, we have a healthcare
03:24 18 practitioner marketing, which is pretty traditional in
03:24 19 any major medical device company. So trade journals,
03:24 20 doctor advertisements, showing clinical conditions can
03:24 21 be treated by Invisalign.
03:24 22 And that's evolved over the years. It's
03:24 23 evolved from very simple cases to now extremely complex
03:24 24 cases. So they have to constantly advertise and
03:24 25 educate and train doctors that you can treat patients

03:24 1 today that you otherwise maybe couldn't have a decade
03:24 2 ago.
03:24 3 Q. And in that group, Mr. Miller, the folks that
03:24 4 are out in the field talking to -- talking to doctors,
03:24 5 how many people does Align employ in that role in the
03:25 6 United States?
03:25 7 A. In the -- in the U.S. and Canada, it's 812
03:25 8 people.
03:25 9 Q. Now, in terms of tools of connecting with
03:25 10 patients, let's start with the patients first.
03:25 11 And Mr. Mueller mentioned to you the NFL. Are
03:25 12 you involved in Align's relationship with the National
03:25 13 Football League?
03:25 14 A. Yes.
03:25 15 Q. Can you tell us about the origins of that
03:25 16 relationship?
03:25 17 A. Yes. So I started the program with the
03:25 18 National Football League. It started with, you know,
03:25 19 the iTero they were using for scanning with
03:25 20 mouthguards. They were trying to do --
03:25 21 Q. Pardon me, they were scanning -- the NFL was
03:25 22 using the iTero for what?
03:25 23 A. Yeah. Sorry. The iTero -- it's a digital
03:25 24 impression for players to receive their mouthguard
03:25 25 study. So the player health and safety division was

03:25 1 basically putting microchips in the mouthguard so when
03:25 2 there was impacts, they could measure what is the
03:25 3 impact like to try to avoid concussions.
03:26 4 And so we started conducting the scanning for
03:26 5 them. And throughout that process, we found out a lot
03:26 6 of players actually were in treatment or inquiring
03:26 7 about treatment. And the conversation, you know, with
03:26 8 the player health and safety evolved into, you know,
03:26 9 figuring out how can Align and Invisalign become a
03:26 10 sponsor. And that quickly evolved into we were, at one
03:26 11 point, one of six on-field approved products as an
03:26 12 official partner of the NFL.
03:26 13 Q. And do you -- Mr. Mueller mentioned Patrick
03:26 14 Mahomes. Did the company -- were you involved or was
03:26 15 the company involved in introducing Mr. Mahomes to
03:26 16 Invisalign?
03:26 17 A. No. That's -- I think that's the funny thing
03:26 18 about the players with the National Football League, is
03:26 19 before we started working with them, Patrick Mahomes
03:26 20 was already in Invisalign treatment.
03:26 21 So if anyone watches the Kansas City Chiefs,
03:26 22 he's chewing on what looks like a mouthguard.
03:26 23 That's -- that's actually, over the last six or seven
03:26 24 years, actually Invisalign. He's very comfortable with
03:26 25 it. He prefers it over a traditional mouthguard.

03:27 1 So he was already in treatment before we did
03:27 2 the deal with the National Football League.
03:27 3 Q. Have you brought to court today, Mr. Miller,
03:27 4 or helped us bring to court today a demonstration of
03:27 5 the type of promotion that Align uses with NFL players?
03:27 6 A. Yes. This is a -- would be a 30-second
03:27 7 commercial that we ran during kind of the Super Bowl
03:27 8 weeks and throughout the season of last year.
03:27 9 MR. DURST: Mr. Smith, let's play PDX-33.
03:27 10 (Video played.)
03:27 11 BY MR. DURST:
03:28 12 Q. Mr. Miller, what is that "it starts with a
03:28 13 click" saying that Patrick Mahomes said at the end?
03:28 14 A. It's really nothing too creative. It's just
03:28 15 when you pop the Invisalign in, it's typically left
03:28 16 with a click. And if you're taking it out, you feel a
03:28 17 click, which -- which is a sign it's a good fit.
03:28 18 Q. Now, Mr. Mahomes, was he wearing his
03:28 19 Invisaligns when he was the Super Bowl MVP for the
03:28 20 Kansas City Chiefs?
03:28 21 A. Yes.
03:28 22 Q. Now, I'd like to talk to you just a little bit
03:28 23 about what distinguishes Invisalign, what gives -- what
03:28 24 gives it the competitive edge in the marketplace?
03:28 25 A. Yeah. Trust, you know, brand trust and

03:28 1 recognition. So the National Football League is a good
03:28 2 example. The player health and safety division would
03:28 3 not allow a product unless it had a proven track record
03:28 4 and they trusted it to be helpful to their players
03:28 5 instead of harmful and had a proven track record of
03:28 6 successful completion with the doctors that provide the
03:29 7 treatment.
03:29 8 So, you know, brand integrity and trust is the
03:29 9 most important currency we have.
03:29 10 Q. Mr. Miller, does Align have an estimate of the
03:29 11 percentage of cases that it can treat, that Invisalign
03:29 12 can -- Invisalign can treat, that overlaps with braces
03:29 13 or competes with braces?
03:29 14 A. Yes.
03:29 15 Q. What is that?
03:29 16 A. I'm told from our scientists it's upwards of
03:29 17 98 to 100 percent now.
03:29 18 Q. 98 to 100 percent of cases that can be treated
03:29 19 with braces can also be treated with -- with
03:29 20 Invisalign?
03:29 21 A. Correct.
03:29 22 Q. Now, there's been some discussion including
03:29 23 you mentioned a moment ago the iTero. Why does Align
03:29 24 provide the iTero out to doctors in the
03:29 25 teeth-straightening industry?

03:29 1 A. The high-resolution image file helps us
03:29 2 provide a very high-quality Invisalign aligner. And
03:30 3 that's -- that's the most important part of the
03:30 4 process, is having a high-quality image, much like
03:30 5 you'd have like, you know, a CT scan for brain surgery.
03:30 6 It starts with the image. If you can trust the image,
03:30 7 you can manufacture and get a good treatment plan.
03:30 8 Q. And do doctors use the iTero scanner for uses
03:30 9 other than clear aligners?
03:30 10 A. Yes.
03:30 11 Q. Can you describe some of those, please?
03:30 12 A. Yeah. It's evolved to now it can detect
03:30 13 cavities without an x-ray. You know, doctors can order
03:30 14 simple things like nightguards, retainers. If they're
03:30 15 getting implants, you can get a really good scan which
03:30 16 gives a really good crown and a really good fit for the
03:30 17 patient.
03:30 18 So it's just anytime -- anything that was
03:30 19 physically taken with an impression with the putty
03:30 20 historically can now get a high-quality image, you
03:30 21 know, for the laboratory to use in a digital format.
03:30 22 Q. Now, Mr. Miller, why does Align limit the
03:31 23 inputs that the scanners -- that can be used in making
03:31 24 the Invisalign aligners?
03:31 25 A. It goes back to the quality. So the

03:31 1 Invisalign product is the output of a high-quality
03:31 2 scan. So our brand is entirely dependent on having a
03:31 3 successful prescription from the doctor. If we have a
03:31 4 substandard scan and it goes through, we still
03:31 5 manufacture. The unfortunate part is you might not
03:31 6 know that there was a scan problem until the end of
03:31 7 treatment when the treatment never actually closed out
03:31 8 and reached its ideal state.
03:31 9 Q. Now, Mr. Miller, is the situation with
03:31 10 accepting scans from other scanners, is that the same
03:31 11 in the United States as it is in other countries around
03:31 12 the world?
03:31 13 A. No.
03:31 14 Q. And why not?
03:31 15 A. That, I don't know. I don't -- something --
03:31 16 there's different laws in different countries,
03:31 17 different requirements, different governing bodies. In
03:31 18 the U.S. we have the FDA, you know. You know, I don't
03:32 19 know what's -- what's out there in the other European
03:32 20 or Asia-Pacific parts of the world.
03:32 21 Q. Now, what would happen -- and let's focus back
03:32 22 on what this lawsuit is about, which is the United
03:32 23 States.
03:32 24 What would happen if Align accepted scans from
03:32 25 subquality scanners? What would happen to Align, and

03:32 1 what would happen to the patients?
03:32 2 A. Yeah. The worst -- the worst fear is the
03:32 3 patients don't receive a proper treatment. They would
03:32 4 ultimately suffer. They could be in treatment for
03:32 5 years, not successfully get the proper bite, which is
03:32 6 the most important thing. It's not just aesthetics.
03:32 7 With -- with Invisalign, it's actually having the teeth
03:32 8 bite together to prevent damage.
03:32 9 So if we don't have the proper scan, then we
03:32 10 don't have the quality control. It could lead to a bad
03:32 11 product as the output.
03:32 12 Q. And the product's going where, patient's
03:32 13 mouth?
03:32 14 A. Patient's mouth.
03:32 15 Q. Now, Mr. Miller, you heard some -- you got
03:33 16 some questions earlier about a picture of a moat.
03:33 17 Do you remember that?
03:33 18 A. Yes.
03:33 19 Q. Okay. And I think I heard you say you would
03:33 20 like to explain what that means to you. Would you do
03:33 21 so now to the jury, please?
03:33 22 A. Yes. The -- so the moat picture, it was in a
03:33 23 document. What that document was is a training deck,
03:33 24 and it was talking how we're going to partner with
03:33 25 businesses and how we're going to work with the iTero

03:33 1 and help dentists make the digital comprehensive
03:33 2 dentistry switch. And it's teaching reps how to
03:33 3 actually message and talk to doctors of how they can
03:33 4 leverage this technology.
03:33 5 It's not about I view a moat as like you're
03:33 6 trapped into someplace. That's not at all what that
03:33 7 document was. I think it's a very poor choice of words
03:33 8 and a poor image by one of our employees.
03:33 9 I personally subscribe like to a shiny castle,
03:33 10 if -- people want to be there because they like to be
03:33 11 there. We want customer service. We want a
03:33 12 high-quality product that they trust and believe, and
03:33 13 we earn their business every day.
03:34 14 At Align, we don't have recurring business.
03:34 15 It's once the patient receives their prescription, we
03:34 16 hope we did a good job so the doctor trusts us for the
03:34 17 next one.
03:34 18 So there's -- there's nothing that traps
03:34 19 people in with our sales force. We don't train them to
03:34 20 do that. I oversee sales training. I know for a fact
03:34 21 we don't train our people that way.
03:34 22 Q. Is the outcome simulator one of the features
03:34 23 that is made available to doctors on the iTero scanner?
03:34 24 A. Yes.
03:34 25 Q. And do you have a demonstrative exhibit, a

03:34 1 video, PDX-35?

03:34 2 MR. DURST: Mr. Smith, don't start it,

03:34 3 please, but have it ready.

4 BY MR. DURST:

03:34 5 Q. Do you have a demonstration of how the outcome

03:34 6 simulator on the iTero works?

03:34 7 A. Yes.

03:34 8 Q. We're going to show a film that you have

03:34 9 identified. If you need to stop it so you can explain

03:34 10 it to the jury, just ask Mr. Smith to pause. Okay?

03:34 11 A. Okay.

03:34 12 MR. DURST: All right. Mr. Smith, can

03:34 13 you start to play, please?

03:35 14 (Video played.)

03:35 15 A. So what you're seeing is the Invisalign

03:35 16 outcome simulator. So it's after the scan's completed

03:35 17 with a patient, the doctor will have a discussion. And

03:35 18 it will do a simulation before and after.

03:35 19 So on the left, you see here's your current

03:35 20 state of the teeth. On the right is the after. And

03:35 21 it's a simulated outcome of after treatment with the

03:35 22 Invisalign product. Here's where you're going to get

03:35 23 to.

03:35 24 So we're on a simulation in stages, and a

03:35 25 stage can be one aligner set to the next. So you

03:35 1 typically change those out every week.
03:35 2 The doctor can actually change the tooth if
03:35 3 they want to have a conversation with the patient
03:35 4 aesthetically, bite, function. They can walk through a
03:35 5 consult one-on-one with that doctor and that patient at
03:35 6 the chair side.
03:35 7 The reason this video's important is before
03:35 8 that -- this was invented, doctors would typically use
03:35 9 shadow puppets with their hands, trying to describe
03:35 10 what's wrong with your teeth, how they're hitting each
03:35 11 other. They might show some pictures or a mirror at
03:35 12 that point.
03:35 13 So the iTero helps doctors educate the
03:35 14 patients in a more meaningful way, and they can see why
03:36 15 they need their teeth straightened and what's the --
03:36 16 you know, potential solution would look like with
03:36 17 Invisalign.
03:36 18 BY MR. DURST:
03:36 19 Q. So this is called a simulation. It's a
03:36 20 computer model?
03:36 21 A. Yes.
03:36 22 Q. And is the assumption in the computer model
03:36 23 that the patient, the teeth -- the mouth that's being
03:36 24 demonstrated, is the assumption in the model that an
03:36 25 Invisalign treatment is being given to that patient?

03:36 1 A. That's correct. It's called the Invisalign
03:36 2 outcome simulator, and it's based off the Invisalign
03:36 3 sequencing and technology behind it.
03:36 4 Q. And if there were other treatments that might
03:36 5 be given to a patient, would that simulator be an
03:36 6 accurate representation of what would happen?
03:36 7 A. It would not be.
03:36 8 Q. Now, Align has some programs to support
03:36 9 doctors who want to buy iTeros, right?
03:36 10 A. Yes.
03:36 11 Q. iTeros may be -- the company may provide
03:36 12 financing for doctors; is that accurate?
03:36 13 A. Yes.
03:36 14 Q. And if a doctor or a practice buys an iTero,
03:37 15 they get the benefits of the scanning and the
03:37 16 simulator.
03:37 17 Are there other advantages that doctors get as
03:37 18 well?
03:37 19 A. I'm sorry. Could you repeat the question?
03:37 20 Q. Yes.
03:37 21 What advantages do doctors get by buying the
03:37 22 iTero?
03:37 23 A. Yeah. It updates their practice technology in
03:37 24 many regards. So instead of -- from a patient
03:37 25 experience, instead of PVS impressions, right, you can

03:37 1 actually -- you're using digital technology.
03:37 2 You know, it improves their workflows. I
03:37 3 think there are a lot of benefits with it.
03:37 4 Q. And, Mr. Miller, the jury's heard some
03:37 5 about -- we don't need to go into great detail for them
03:37 6 to hear it all again, but they've heard some about the
03:37 7 Advantage Program.
03:37 8 What is the Align Advantage Program in a
03:37 9 sentence or two?
03:37 10 A. To simplify it, it's nothing more than a
03:37 11 loyalty program you'd find with, you know, pretty much
03:37 12 out in our daily lives. Starbucks have them. Airlines
03:37 13 have them. Hotels have them.
03:37 14 So the more you buy, the more points you get,
03:37 15 and the points, you know, essentially reduce your fixed
03:38 16 costs as a doctor.
03:38 17 Q. Is it effectively a discount program?
03:38 18 A. It is.
03:38 19 Q. And does it amount to a bulk discount program?
03:38 20 A. Yeah. So if I can elaborate on --
03:38 21 Q. Please do.
03:38 22 A. -- on that statement. The bulk, when we are
03:38 23 competing against bracket and wire, they sell it in
03:38 24 bulk, meaning you can physically buy parts. And the
03:38 25 more you buy, the cheaper your price. They can

03:38 1 warehouse that.
03:38 2 So in order for us to compete effectively, we
03:38 3 only do one prescription at a time, one patient at a
03:38 4 time. So in order to do that, the best solution for us
03:38 5 was to give them a bulk discounting program. It was
03:38 6 kind of retroactive, meaning here's your -- how much
03:38 7 volume you buy over a six-month period, here's your net
03:38 8 effective discount price based on that volume.
03:38 9 So it allows us to compete against braces in a
03:38 10 more effective way, which is what the industry was used
03:38 11 to.
03:38 12 Q. And does Align have other discount programs
03:38 13 that they offer in addition to Advantage from time to
03:38 14 time?
03:38 15 A. We'll try things. Yes.
03:38 16 Q. And the jury has heard a little bit about
03:39 17 something called DSOs. I'm not sure anyone's taken the
03:39 18 time to explain what is a dental service organization.
03:39 19 Can you tell the jury just in general terms
03:39 20 what is a DSO?
03:39 21 A. Yeah. So the way I relate to it, because I
03:39 22 worked in health systems, you know, like in Houston
03:39 23 Memorial Herman or Methodist were health systems, and
03:39 24 they owned, you know, 15, 20 locations.
03:39 25 The same thing in dental is starting to catch

03:39 1 on, where it's not as proliferated as you find in
03:39 2 health, but it's dental service organizations I would
03:39 3 view as more like your health system, and they have
03:39 4 satellite clinics around, you know, the geographies
03:39 5 that they own and operate.
03:39 6 Q. Now, Mr. Mueller showed you a contract by a
03:39 7 group called Heartland.
03:39 8 Is that a DSO?
03:39 9 A. It is. Yes.
03:39 10 Q. And he focused you on the good standing
03:39 11 provision.
03:39 12 Do you recall that?
03:39 13 A. Yes.
03:39 14 Q. And that provision has in it a clause that
03:39 15 said that Heartland would not divert prospective
03:40 16 patients.
03:40 17 Do you remember seeing that?
03:40 18 A. Yes.
03:40 19 Q. You call that a bait and switch clause, I
03:40 20 believe. Did I hear you right?
03:40 21 A. Yes.
03:40 22 Q. What do you mean by "bait and switch"?
03:40 23 A. So bait and switch from what we mean is if
03:40 24 someone comes in and wants to buy Invisalign, they sign
03:40 25 a contract for Invisalign, and they show up to receive

03:40 1 the delivery of the Invisalign. The assumption is, in
03:40 2 the patient's mind, they have Invisalign in their
03:40 3 mouth, and that's what they're being treated with.
03:40 4 Bait and switch is they do not actually have
03:40 5 Invisalign in their mouth. It could be something else.
03:40 6 That's what we want to prevent.
03:40 7 Q. Now, Mr. Miller, has Align encountered
03:40 8 problems with -- I guess you might call them a bad egg
03:40 9 dentist or a bad egg doctor doing a bait and switch as
03:40 10 it relates to that simulator that you demonstrated for
03:40 11 the -- for the jury?
03:40 12 A. Yes.
03:40 13 Q. And some of those complaints that Mr. Mueller
03:41 14 was talking about that pile up, does Align receive
03:41 15 complaints from patients that have been baited and
03:41 16 switched?
03:41 17 A. Yes.
03:41 18 Q. Are there some -- what resources have you had
03:41 19 to deploy to deal with this problem?
03:41 20 A. Yeah. We've had to staff a hotline for
03:41 21 patients. So we have employees that sit on phones and
03:41 22 take inbound phone calls for patient complaints.
03:41 23 And on there, that's where we typically find
03:41 24 that someone's calling in for a complaint about the
03:41 25 product. We try to identify and locate them. We don't

03:41 1 have any record of that patient, and then they'll
03:41 2 typically find that it's not an Invisalign product.
03:41 3 Q. Now, Mr. Miller, you called this a bait and
03:41 4 switch clause or a bait and switch language.
03:41 5 By that, are you saying that the contract is
03:41 6 intended to prevent doctors and DSOs from baiting and
03:41 7 switching?
03:41 8 A. It is. Yes. If they want to use another
03:41 9 product, that's fine. That's completely normal. We
03:42 10 just want them being honest and truthful with the
03:42 11 patient of what product they're receiving.
03:42 12 Q. Now, Mr. Miller, do you have any personal
03:42 13 experience with this bait and switch problem?
03:42 14 A. I do. Yeah.
03:42 15 Q. Can you tell us about the personal experience
03:42 16 you had with the bait and switch problem?
03:42 17 A. Yeah. It started when I first started here at
03:42 18 Align in 2015. My mother-in-law lives in Ohio. She
03:42 19 called me and --
03:42 20 Q. Where were you at the time? She was in Ohio,
03:42 21 mother-in-law's in Ohio.
03:42 22 Where are you?
03:42 23 A. Houston.
03:42 24 Q. Okay.
03:42 25 A. Yep. So she calls and says, hey, I started

03:42 1 Invisalign. Can you help me? I'm having problems with
03:42 2 it.
03:42 3 Q. How long had she been your mother-in-law at
03:42 4 that point?
03:42 5 A. Nine -- nine years.
03:42 6 Q. Okay. You need to know that answer.
03:42 7 A. Yeah.
03:42 8 So she -- she's like, can you help me?
03:42 9 And I was like, okay. Sure. I know how to
03:42 10 find -- let me find you. So I go into the patient
03:42 11 database and try to find her by name. Couldn't locate
03:43 12 her. So I'm asking for the doctor's name. Couldn't
03:43 13 locate the doctor.
03:43 14 And so I reached out to the doctor. I go,
03:43 15 what's the website? So I went to the doctor's website.
03:43 16 It showed Invisalign. So I was like, okay. I must be
03:43 17 doing something wrong because I'm in my first year.
03:43 18 So I asked her just to -- if she could take
03:43 19 out her aligner, because on there it identifies the
03:43 20 patient ID on there. There's unique numbers on each
03:43 21 aligner.
03:43 22 And that way I could find her. I could hand
03:43 23 it over to our clinical team, and they could -- they
03:43 24 could let us know like, oh. We found her case. We
25 know how to solve the problem. And the pain she's

1 experiencing, we can address.
03:43 2 When she took it out, it turns out it was not
03:43 3 Invisalign at all at that point in time, which explains
03:43 4 why I couldn't find her.
03:43 5 Q. What -- had your mother-in-law been baited and
03:43 6 switched?
03:43 7 A. She had. She signed an Invisalign contract.
03:43 8 Her contract said "Invisalign" on it. She was shocked,
03:43 9 as I was, coming out of major medical hospital
03:43 10 environments with NICUs, that it was even something
03:43 11 that could happen.
03:43 12 Q. And, Mr. Miller, what aligner did your
03:44 13 mother-in-law, was she baited and switched into?
03:44 14 A. She was baited and switched into ClearCorrect.
03:44 15 MR. DURST: Pass the witness, Your Honor.
03:44 16 MR. MUELLER: Nothing further for
03:44 17 Mr. Miller, Your Honor.
03:44 18 THE COURT: May he be excused?
03:44 19 MR. MUELLER: He may be.
03:44 20 THE COURT: Ladies and gentlemen of the
03:44 21 jury, let's take our afternoon recess. If we would
03:44 22 break for 10 or 15 minutes. Please remember my
03:44 23 instructions not to discuss the case with each other.
03:44 24 THE BAILIFF: All rise.
03:44 25 (Jury exited the courtroom.)

03:44 1 THE COURT: Thank you. You may be
03:44 2 seated.
03:44 3 You may step down, sir, and you're free
03:44 4 to stay in the court or leave, whichever you care to.
03:44 5 THE WITNESS: Thank you, Your Honor.
03:44 6 THE COURT: You're welcome.
03:44 7 Who -- who's next?
03:45 8 MR. MUELLER: Yes, Your Honor. So the --
03:45 9 THE COURT: Bryan Taylor.
03:45 10 MR. MUELLER: I'm sorry?
03:45 11 THE COURT: Is it Bryan Taylor?
03:45 12 MR. MUELLER: It is, Your Honor.
03:45 13 Before we do, I would like to address the
03:45 14 two videos that we were going to play with Mr. Miller
03:45 15 and request Your Honor's permission to play those in a
03:45 16 standalone basis. These are DTX --
03:45 17 THE COURT: No. You can do that.
03:45 18 MR. MUELLER: I can? Okay. So we'll do
03:45 19 that first and then call Dr. Taylor.
03:45 20 And then the final thing, Your Honor,
03:45 21 there were two exhibits --
03:45 22 MR. DURST: Your Honor, we object to that
03:45 23 on a standalone basis. I'm not sure what that means.
03:45 24 Those -- those videos have not been
03:45 25 played at this point because there is no foundation for

03:45 1 them.
03:45 2 MR. MUELLER: Well, that's just not true.
03:45 3 So these are --
03:45 4 THE COURT: Well, okay.
03:45 5 MR. MUELLER: I can explain what they
03:45 6 are, Your Honor.
03:45 7 THE COURT: Explain what they are and
03:45 8 then why you think they're coming in, and then I can
03:45 9 hear from Mr. Durst.
03:45 10 MR. MUELLER: Sure. So two things,
03:45 11 Your Honor. These are exhibits that we've been
03:45 12 discussing with Align's counsel the last few days.
03:45 13 There's no further objection we'd understood before
03:45 14 today. They're statements of a party opponent. It's
03:46 15 the CEO of the plaintiff. They've been authenticated.
03:46 16 At his deposition, we confirmed with the
03:46 17 CEO at his deposition that those were in fact
03:46 18 statements he made. So the foundation is they're
03:46 19 genuine.
03:46 20 THE COURT: Mr. Durst, if they at their
03:46 21 deposition got him to admit that these were his
03:46 22 statements, what -- what is your objection?
03:46 23 MR. DURST: My objection, Your Honor, is
03:46 24 that they have in a crafty manner not designated his
03:46 25 deposition.

03:46 1 THE COURT: Well --
03:46 2 MR. DURST: And it's too late for them to
03:46 3 designate that deposition under our procedures,
03:46 4 Your Honor.
03:46 5 So they chose not to designate the
03:46 6 deposition which might have provided the authentication
7 for this. But they chose not to do that. So they're
03:46 8 avoiding --
03:46 9 THE COURT: Well, here's the problem, and
10 I have no way of resolving this.
03:46 11 Mr. Mueller, I'm going to speak for you
03:46 12 for a second. But Mr. Mueller seems to think that
03:46 13 there was -- they had done everything they needed to do
03:46 14 to get these admitted without having to go through the
03:47 15 steps of playing the dep.
03:47 16 Mr. Mueller, I assume your team thought
03:47 17 that they would be admissible without you going through
03:47 18 the steps of actually showing the deposition with him
03:47 19 admitting that.
03:47 20 MR. MUELLER: Correct. And in fact,
03:47 21 Your Honor, I'll give you one example what we did to
03:47 22 make sure there was no issue here.
03:47 23 We removed the questions so it's just
03:47 24 statements by Mr. Hogan. We discussed with the
03:47 25 plaintiff's team whether they had any further objection

03:47 1 to the exhibits which have been on our exhibit list for
03:47 2 months containing --
03:47 3 THE COURT: So you disclosed these as
03:47 4 exhibits?
03:47 5 MR. MUELLER: We did.
03:47 6 THE COURT: You disclosed this as an
03:47 7 exhibit?
03:47 8 MR. MUELLER: We did.
03:47 9 THE COURT: So what -- Mr. Durst, what do
03:47 10 you lose by them not going through the step of showing
03:47 11 the deposition of him putting them into evidence when
03:47 12 they were on their exhibit list?
03:47 13 I'm not finding any surprise on -- I was
03:47 14 going to say, if you didn't know they might be played,
03:47 15 but if they're on his exhibit list, what -- how are you
03:47 16 prejudiced? How is this unfair?
03:47 17 MR. DURST: Yeah. We have -- one of the
03:47 18 problems we have, Your Honor, is that last night I
03:48 19 think, it might have been the night before, they
03:48 20 changed the videos. So they did have videos on their
03:48 21 exhibit list.
03:48 22 THE COURT: So these videos are not
03:48 23 the same. Are they less? Are they -- are they less?
03:48 24 MR. MUELLER: I got to correct the record
03:48 25 on that. What we changed -- I'll give you an example.

03:48 1 There was a question that said: Mr. Hogan, you've had
03:48 2 a 20-year monopoly in this industry.
03:48 3 THE COURT: And you took that out?
03:48 4 MR. MUELLER: We took it out.
03:48 5 THE COURT: Mr. Durst, do you want to put
03:48 6 that back in?
03:48 7 MR. DURST: I don't like that one coming
03:48 8 in, Your Honor.
03:48 9 (Laughter.)
03:48 10 THE COURT: Mr. Durst, I'm overruling
11 your objections. I'm going to let the videos be
03:48 12 played.
03:48 13 MR. MUELLER: So we'll play those, Your
03:48 14 Honor, and then we'll have Dr. Taylor.
03:48 15 The only final thing I had, Your Honor,
03:48 16 was there were two exhibits that there was no
03:48 17 objection. I got a note from the folks here there was
03:48 18 no objection when I offered them, but I think there may
03:48 19 not be a formal recognition of admission.
03:48 20 Those are DTX-208 and DTX-1421 from the
03:48 21 examination we just completed, 208 and 1421.
03:48 22 THE COURT: Those will be admitted.
03:48 23 Anything else we need to take up before
03:48 24 the next witness?
03:48 25 MR. MUELLER: Nothing further, Your

03:48 1 Honor. Thank you.
03:48 2 THE COURT: And Mr. Durst?
03:48 3 MR. DURST: Nothing here, Your Honor.
03:49 4 THE COURT: And who is Dr. Taylor?
03:49 5 MR. MUELLER: I'm sorry, Your Honor?
03:49 6 THE COURT: Who is Dr. Taylor? Is he a
03:49 7 fact witness?
03:49 8 MR. MUELLER: He is an expert witness.
03:49 9 Orthodontist.
03:49 10 THE COURT: Okay. So I have -- this
03:49 11 doesn't need to be on the record.
03:49 12 (Off-the-record discussion.)
03:54 13 THE COURT: Tomorrow when Dr. Perryman
03:54 14 finishes, hopefully I'll remember, but failing that, if
03:54 15 you will remind me, we will break before we start with
03:54 16 Dr. Reitman. And we will do the Rule 50 motion. As
03:54 17 always, you're welcome to make a Rule 50 motion orally
03:54 18 and submit something in writing, either simultaneously
03:54 19 or after that. And we'll take it up.
03:54 20 And then after your case-in-chief, again,
03:54 21 if you, Mr. Mueller, if you will remind me, I'll give
03:54 22 you the opportunity -- I'll give you both the
03:54 23 opportunities to do Rule 50 motions since it's
03:54 24 bilateral.
03:54 25 Also, again, I'll put on the record, I

03:54 1 don't know what it is, I had some glitch. As you know,
03:55 2 we do the jury charge off the record. And when we're
03:55 3 all done, but before I do my closing, you do -- before
03:55 4 I read the charge, remind me, and I will give you all
03:55 5 the opportunity to make your objections on the record
03:55 6 to the jury charge which -- and there may be some this
03:55 7 time given that I'll have to make some decisions
03:55 8 probably on the antitrust stuff.
03:55 9 But I'm not purposely trying to prevent
03:55 10 you from doing it, but I have a glitch. So if you
03:55 11 all -- I've taken up your time. If y'all will get back
03:55 12 as quickly as possible, we'll resume -- unless there's
03:55 13 something else, we'll resume.
03:55 14 MR. MUELLER: Nothing from us,
03:55 15 Your Honor.
03:55 16 MR. DURST: Nothing further from us.
03:55 17 THE BAILIFF: All rise.
03:55 18 (Recess taken.)
04:05 19 THE BAILIFF: All rise.
04:05 20 THE COURT: Please remain standing for
04:05 21 the jury.
04:05 22 (Jury entered the courtroom.)
04:05 23 THE COURT: Thank you. You may be
04:05 24 seated.
04:05 25 MR. MUELLER: Your Honor, at this point,

04:06 1 as we discussed with Your Honor, we'll offer DTX-2868,
04:06 2 an excerpt of an interview with Joe Hogan, the chief
04:06 3 executive officer of Align.
04:06 4 (Video played.)
04:07 5 MR. MUELLER: Next, Your Honor, we offer
04:07 6 DTX-2869, another excerpt of an interview with
04:07 7 Mr. Hogan.
04:07 8 (Video played.)
04:08 9 MR. MUELLER: Your Honor, at this point,
04:08 10 we call Dr. Bryan Taylor, and Mr. Underwood will
04:08 11 conduct the examination.
12 (The witness was sworn.)
04:08 13 DIRECT EXAMINATION
04:08 14 BY MR. UNDERWOOD:
04:09 15 Q. Good afternoon, Dr. Taylor. How are you
04:09 16 doing?
04:09 17 A. Doing great.
04:09 18 Q. Could you please introduce yourself to the
04:09 19 ladies and gentlemen of the jury?
04:09 20 A. You bet. I'm Dr. Bryan Taylor. I'm an
04:09 21 orthodontist. Been practicing -- or recently retired
04:09 22 but practiced here in Waco for over 35 years and live
04:09 23 here and grew up and was raised here.
04:09 24 Q. And do you have a family?
04:09 25 A. I do. I have a wife of -- celebrating

04:09 1 40 years of wedding, of our marriage this summer in
04:09 2 just a few weeks. And I have two daughters, beautiful
04:09 3 daughters.
04:09 4 Q. And did you prepare a set of PowerPoint slides
04:10 5 to assist your testimony this afternoon?
04:10 6 A. I did.
04:10 7 MR. UNDERWOOD: All right. Let's get
04:10 8 those up.
9 BY MR. UNDERWOOD:
04:10 10 Q. And let's turn first, if we could, to your
04:10 11 background, Dr. Taylor, beginning -- you alluded to
04:10 12 this, but where did you grow up?
04:10 13 A. So raised here in Waco. Spent elementary
04:10 14 school through high school here in the Waco area, first
04:10 15 at Midway and then at Bruceville-Eddy.
04:10 16 Q. Did you graduate from Bruceville-Eddy High
04:10 17 School?
04:10 18 A. I did.
04:10 19 Q. What'd you do after high school?
04:10 20 A. After high school I started at McLennan County
04:10 21 Community College, then transferred over to Baylor
04:10 22 University, where I did my predental undergraduate
04:10 23 work.
04:10 24 Q. And what after that?
04:10 25 A. After that I went to the University of Texas

04:10 1 Health Science Center in San Antonio, where I went to
04:10 2 my four-year dental school in which I received a
04:10 3 doctorate of dental surgery.
04:10 4 Q. And after you got your doctorate of dental
04:10 5 surgery or DDS degree, what'd you do after that?
04:10 6 A. Well, if you want to call yourself an
04:11 7 orthodontist or hold yourself out as an orthodontic
04:11 8 specialist, you need to do additional training. And so
04:11 9 I went to Columbia University for my orthodontic
04:11 10 training in New York City.
04:11 11 Q. What was that like having grown up in Waco and
04:11 12 Bruceville-Eddy, then moving up to New York City?
04:11 13 A. You can imagine it was a pretty big transition
04:11 14 for me and for them as well. I moved there in a pickup
04:11 15 truck and a cattle trailer.
04:11 16 Q. Did you get any questions about that in New
04:11 17 York?
04:11 18 A. Yes. I had a big Charolais sticker on the
04:11 19 side of the truck, and if I had one person ask me, I
04:11 20 had ten ask me. You got horses in there?
04:11 21 Q. What'd you do after your time at Columbia
04:11 22 University in New York?
04:11 23 A. After Columbia, I came back to Waco. That had
04:11 24 always been the plan, since junior high, to go back
04:11 25 into practice with my father, who was an orthodontist

04:11 1 here in Waco. He'd been here for 40 years.
04:11 2 And in fact, I was a third generation dentist.
04:11 3 My grandfather, while not an orthodontist, was a
04:11 4 dentist up in the Dallas area.
04:12 5 Q. And how long did you practice with your
04:12 6 father?
04:12 7 A. We practiced about two years together before I
04:12 8 opted to move out and become a friendly competitor.
04:12 9 Q. And what -- did you start your own practice?
04:12 10 A. I did.
04:12 11 Q. And what was that practice like at the very
04:12 12 beginning?
04:12 13 A. Well, that practice, at that point, I went by
04:12 14 my name, Bryan E. Taylor, DDS. And it was a very small
04:12 15 practice, small office, a couple of -- just two staff
04:12 16 members. I had three treatment chairs, and those
04:12 17 weren't full all the time for sure.
04:12 18 Q. And were you able to grow the practice over
04:12 19 time?
04:12 20 A. Oh, yes. And I have to call out my wife here.
04:12 21 She was a big driving factor in helping me do this.
04:12 22 But yes. We grew the practice. It became much larger
04:12 23 than what the building would accommodate. So I built a
04:12 24 new office and continued to grow.
04:12 25 Q. And that practice was Brazos Braces?

04:12 1 A. It was.
04:12 2 Q. How many locations did you end up having of
04:13 3 Brazos Braces?
04:13 4 A. By the time we finished, I had three. I
04:13 5 started off -- the day I came to Waco, when I was still
04:13 6 practicing with my father, I had an office in
04:13 7 Gatesville, Texas. And so I'd been going there for my
04:13 8 entire career.
04:13 9 And then had the Waco -- the new Waco office.
04:13 10 And then after a few years, I thought, you know, this
04:13 11 China Spring area sure seems to be growing. Lot of
04:13 12 houses, kids out there. So I opened a China Spring
04:13 13 location.
04:13 14 Q. You mentioned earlier that you're retired?
04:13 15 A. I am.
04:13 16 Q. When did you retire from practice?
04:13 17 A. I retired the summer of 2024.
04:13 18 Q. And about how many folks were working at
04:13 19 Brazos Braces when you retired?
04:13 20 A. At the time I quit, we had 15 employees. A
04:13 21 couple of those were part time.
04:13 22 MR. UNDERWOOD: And let's go to the next
04:13 23 slide, please.
04:13 24 BY MR. UNDERWOOD:
04:13 25 Q. During your career, did you hold any

04:13 1 leadership roles in any orthodontic or dental societies
04:13 2 or organizations?
04:13 3 A. I did. I was -- the Central Texas Dental
04:14 4 Society is the local organization of Waco and Temple
04:14 5 dentists, and I was president of that. I was chairman
04:14 6 of a couple of committees that dealt with ethics.
04:14 7 Q. And I see here the Texas Association of
04:14 8 Orthodontists.
04:14 9 What was your role with that organization?
04:14 10 A. Well, I was on the board and then eventually
04:14 11 became president, and that is, of course, obviously the
04:14 12 Texas orthodontists. And that's about 550 to 600
04:14 13 members.
04:14 14 Q. And then what's the bottom organization here
04:14 15 on the screen?
04:14 16 A. Well, the Southwest Society of Orthodontists,
04:14 17 I was also a board member there for a number of years,
04:14 18 and that is the regional five-state area of those kind
04:14 19 of state organizations.
04:14 20 Q. So, Dr. Taylor, what issues are you here to
04:14 21 address today?
04:14 22 A. I'm here to address Align's conduct and
04:14 23 policies as they relate to working orthodontists.
04:14 24 Q. And do you have experience with Align,
04:15 25 including Invisalign?

04:15 1 A. I do.
04:15 2 Q. What is that experience?
04:15 3 A. Well, as we've heard, Align came to market
04:15 4 with their Invisalign product in 1999, and I was a very
04:15 5 early adopter. I started in around the year 2000, and
04:15 6 at one point early on, I was told that I was one of the
04:15 7 top 100 Invisalign orthodontists in America.
04:15 8 Q. And are you also familiar with what the jury's
04:15 9 heard about called the Advantage Program?
04:15 10 A. I am.
04:15 11 Q. And when you were practicing, were you in the
04:15 12 Advantage Program?
04:15 13 A. I was.
04:15 14 Q. The jury's also heard about this iTero
04:15 15 scanner. Do you see that here?
04:15 16 A. I do.
04:15 17 Q. And do you have experience and does your
04:15 18 practice have experience with that scanner?
04:15 19 A. Yes. I do. I purchased one of those in 2015.
04:15 20 MR. UNDERWOOD: Your Honor, we offer
04:15 21 Dr. Bryan Taylor as an expert in the field of
04:15 22 orthodontics and orthodontic practice management,
04:15 23 including on doctor choice.
04:15 24 MR. DURST: No objection, Your Honor.
04:16 25 THE COURT: He'll be admitted as such.

04:16 1 BY MR. UNDERWOOD:
04:16 2 Q. Now, Dr. Taylor, are you being compensated for
04:16 3 your time spent working on this case?
04:16 4 A. I am.
04:16 5 Q. And are you paid regardless of who wins or who
04:16 6 loses this case?
04:16 7 A. Yes. I am.
04:16 8 Q. No financial stake in the outcome of this
04:16 9 case?
04:16 10 A. Not at all.
04:16 11 Q. What type of work did you do to analyze the
04:16 12 issues in this case?
04:16 13 A. Well, primarily, I rely on my 35 years of
04:16 14 experience as a private practicing orthodontist. I
04:16 15 also -- if I really want to add in, I've got about
04:16 16 another 15 years where I worked with my dad before I
04:16 17 got my license.
04:16 18 I reviewed a lot of documents regarding
04:16 19 information about this case, depositions, and did some
04:16 20 review and exploration on my own.
04:16 21 Q. Have you ever testified as an expert witness
04:16 22 in a lawsuit before?
04:16 23 A. Never have.
04:16 24 Q. Have you ever given any testimony of any sort
04:16 25 in a lawsuit before?

04:16 1 A. Never have.
04:16 2 Q. This is the first time?
04:16 3 A. This is my first time.
04:16 4 Q. All right, Dr. Taylor, at a high level, can
04:17 5 you tell the ladies and gentlemen of this jury what
04:17 6 your opinions are in this case, beginning with the
04:17 7 first one?
04:17 8 A. You bet. So No. 1 is that clear aligners --
04:17 9 Invisalign is what we've been talking about here a lot,
04:17 10 but clear aligners in a larger sense, and wires and
04:17 11 brackets, traditional braces as I refer to them, are
04:17 12 not interchangeable. They're not the same thing. They
04:17 13 don't do the same things, and they're really not close
04:17 14 substitutes.
04:17 15 Q. What's your second opinion?
04:17 16 A. That Align's iTero-only policy in which you're
04:17 17 forced to use an iTero if you want to order Invisalign
04:17 18 products is -- forces doctors to purchase an iTero.
04:17 19 Q. And your third opinion?
04:17 20 A. That iTeros' process called the STL export
04:17 21 process, where you take the information and send it to
04:17 22 whatever companies you want, is time consuming and
04:17 23 complicated. And in the end, that deters doctors from
04:18 24 even trying other kinds of aligners.
04:18 25 Q. And your fourth opinion?

04:18 1 A. My fourth opinion is workflow and efficiency
04:18 2 are critical to an orthodontic practice. It's
04:18 3 profitability.
04:18 4 Q. And finally, what is your fifth opinion?
04:18 5 A. That Align's loyalty program, the Advantage
04:18 6 Program you mentioned, creates a risk of financial
04:18 7 penalties to doctors. And that, again, discourages
04:18 8 them from trying competing aligners.
04:18 9 Q. All right. Thank you, Dr. Taylor. Let's turn
04:18 10 to your first opinion in this case.
04:18 11 And again, what is that opinion?
04:18 12 A. Basically, that clear aligners and braces are
04:18 13 not the same.
04:18 14 Q. Based on your experience, Dr. Taylor, what are
04:18 15 the major differences between clear aligners and
04:18 16 traditional wire and bracket braces?
04:18 17 A. Well, probably the first and most obvious is
04:18 18 that brackets and wires, traditional braces, are very
04:19 19 visible. And clear aligners are invisible, discreet.
04:19 20 They don't show up, and that's a big difference.
04:19 21 Q. What else?
04:19 22 A. Secondly, I would say the fact that they're
04:19 23 removable. So that definitely is a benefit for clear
04:19 24 aligners. You can pop those out for important events,
04:19 25 weddings, presentations, things like that. And of

04:19 1 course traditional braces, those are not coming off.
04:19 2 Q. And does the fact that clear aligners are
04:19 3 removable have any impact on oral hygiene?
04:19 4 A. They do. They do. That's one of the big
04:19 5 benefits of clear aligner treatment. You've got braces
04:19 6 and wires, and you can imagine it's difficult -- not
04:19 7 impossible but difficult to keep those really good and
04:19 8 adequately clean.
04:19 9 I had a lot of problems with that, with my
04:19 10 patients either not putting in the effort or just not
04:19 11 physically being able to do it well. The fact that you
04:20 12 can pop that aligner out gives people the ability to
04:20 13 brush and clean those teeth just as well as if they
04:20 14 weren't going through orthodontic treatment, and floss,
04:20 15 if I can talk them into doing that.
04:20 16 Q. And finally, I see here: Fewer in-office
04:20 17 visits.
04:20 18 What does that mean?
04:20 19 A. The way that we normally treat orthodontic
04:20 20 patients is that we see people kind of each section.
04:20 21 So we'll say a traditional orthodontic patient in my
04:20 22 office with braces and wires would be seen on a six- to
04:20 23 seven-week rotation. Every -- we schedule them every
04:20 24 six to seven weeks.
04:20 25 With clear aligners, we look at that case, and

04:20 1 we make a lot of the decisions before treatment so that
04:20 2 we don't have to have that period where we are
04:20 3 adjusting and making -- deciding what our plan for the
04:20 4 next appointment is. That's already predetermined by
04:20 5 our work beforehand.
04:20 6 So that means that we can move patients out to
04:21 7 a longer time. Invisalign or clear aligner cases could
04:21 8 be seen every 12, 15 weeks, as opposed to 6 or 7.
04:21 9 Q. And in your clinical experience, Dr. Taylor,
04:21 10 did your patients care about these differences?
04:21 11 A. Oh, absolutely. Those were all factors in the
04:21 12 decision process.
04:21 13 Q. In your experience, would patients who wanted
04:21 14 clear aligners accept wire and bracket braces instead?
04:21 15 A. Not normally. The vast majority of my
04:21 16 patients that desired clear aligners, which were a lot
04:21 17 of adults, they were unwilling to accept clear -- I
04:21 18 mean to accept wires and brackets as an alternative
04:21 19 treatment.
04:21 20 Q. Were there ever situations in your practice
04:21 21 where a patient came in asking about clear aligners and
04:21 22 you did not give clear aligners to the patient?
04:22 23 A. Yes. Yes. It happened fairly often.
04:22 24 Q. Why is that?
04:22 25 A. Well, there are -- like everything, there are

04:22 1 really great benefits to each one of those treatment
04:22 2 modalities. And although clear aligner treatment is
04:22 3 very good, it does not address all of the problems that
04:22 4 traditional wires and braces do.
04:22 5 So a certain set of patients that would be
04:22 6 interested in clear aligner treatment, I would have to
04:22 7 tell them, I'm sorry. I don't believe you're a good
04:22 8 candidate for that.
04:22 9 Maybe it was that they just felt like they
04:22 10 weren't going to be compliant themselves. And so at
04:22 11 that point, I would present the alternative options.
04:22 12 But most of them walked out the door.
04:22 13 Q. You mentioned compliance, which I'll come back
04:22 14 to in a minute, but are there any other examples in
04:22 15 your experience why a patient may not be a good
04:22 16 candidate for a clear aligner?
04:22 17 A. There are several problems. One thing that we
04:23 18 talk about with clear aligner treatment is the problems
04:23 19 that would be considered unpredictable.
04:23 20 So yes. It's a problem that might work with
04:23 21 clear aligners but not necessarily. It was
04:23 22 unpredictable. And I never felt comfortable with
04:23 23 unpredictable when somebody was paying me to straighten
04:23 24 their teeth.
04:23 25 One of the specifics would be vertical

04:23 1 movements, movements up and down. You can imagine
04:23 2 you've got a tooth. You need to move it down, what we
04:23 3 call extrusion. It needs to come down.
04:23 4 Well, the plastic fits up over it, and then
04:23 5 do-do-do-do-do, you know, over the course of the plan,
04:23 6 the plastic comes down. But even with little bumps
04:23 7 glued on the teeth, it didn't work as well at catch and
04:23 8 hold and moving -- physically moving that tooth down.
04:23 9 Q. And then coming back to patient compliance,
04:23 10 can you explain what that is and why that's relevant?
04:23 11 A. You bet. With clear aligner treatment, a
04:24 12 critical -- I couldn't -- I can't stress it enough now
04:24 13 and I couldn't stress it enough to my patients -- is
04:24 14 patient compliance with that clear aligner is critical.
04:24 15 We need to have that in for 22-plus hours a day. And
04:24 16 if you don't wear it as directed, then things are not
04:24 17 going to work well. They may not work at all.
04:24 18 Q. After clear aligners were released, did you
04:24 19 notice any changes in adult patients?
04:24 20 A. I did. There was a substantial, you know,
04:24 21 opening of adult patients that began to call and
04:24 22 request examinations. That's the appointment where I
04:24 23 would evaluate the patient. So that -- the number of
04:24 24 adults that were coming in seeking an opinion about
04:24 25 treatment really, really grew with clear aligner once

04:24 1 clear aligners were on the market.
04:24 2 MR. UNDERWOOD: And let's go to the next
04:24 3 slide.
4 BY MR. UNDERWOOD:
04:24 5 Q. We've heard briefly in this case about ceramic
04:25 6 braces and briefly about lingual braces.
04:25 7 Are either of those substitutes for clear
04:25 8 aligners?
04:25 9 A. Not in my opinion.
04:25 10 Q. Why not?
04:25 11 A. Well, as we talk about the ceramic braces, is
04:25 12 that more aesthetic than traditional braces? Sure. It
04:25 13 does look better.
04:25 14 My standard line for people that came in when
04:25 15 we were discussing ceramic brackets was, "You're not
04:25 16 going to fool anybody." You still see the wires. The
04:25 17 little -- there's a little rubber ring that holds the
04:25 18 wire into the brace, and we change those each time.
04:25 19 But depending on habits like smoking, coffee drinking,
04:25 20 wine drinking, those little rubber rings discolor.
04:25 21 So over the course of that six-week period,
04:25 22 they may look beautiful day one. But by the end of the
04:25 23 five or six weeks, they're very visible.
04:25 24 So ceramic brackets, while better, are not a
04:25 25 substitute.

04:25 1 Q. And lingual braces?
04:26 2 A. Oh, lingual braces were one of those things I
04:26 3 was so excited about. I thought, This is going to be
04:26 4 my answer. This is going to be an aesthetic answer.
04:26 5 It doesn't show up for patients, and I'm going to get
04:26 6 all those benefits of traditional wires and brackets.
04:26 7 But sadly, that did not work out to be the
04:26 8 case.
04:26 9 Q. Have you ever made a treatment decision as
04:26 10 between clear aligners and wire and brackets based on
04:26 11 the relative price between the two?
04:26 12 A. Never.
04:26 13 Q. Have you had the opportunity to sit in the
04:26 14 gallery watching this trial?
04:26 15 A. I have.
04:26 16 Q. And did you see the plaintiff Align's opening
04:26 17 statement?
04:26 18 A. I did.
04:26 19 Q. And did you notice a familiar face in their
04:26 20 opening statement?
04:26 21 A. It was different than the one I saw in the
04:26 22 mirror this morning, but yes, it was me.
04:26 23 Q. That was your face?
04:26 24 A. Ten years ago.
04:26 25 MR. UNDERWOOD: Can we get PDX-1.71,

04:26 1 Mr. Lee?
2 BY MR. UNDERWOOD:
04:26 3 Q. Is that your younger face on the left-hand
04:26 4 side of the screen?
04:26 5 A. It is.
04:26 6 Q. And is this a screenshot from your website?
04:27 7 A. It is.
04:27 8 Q. And is there a page on your website called
04:27 9 "Types of braces"?
04:27 10 A. There is.
04:27 11 Q. I just want to ask you point-blank,
04:27 12 Dr. Taylor, are clear aligners a type of braces?
04:27 13 A. Not in my opinion.
04:27 14 Q. Then why do you have a website, a web page
04:27 15 that says "Types of braces" that list clear aligners?
04:27 16 A. That's a -- that's a very good question.
04:27 17 There's a couple of reasons for that.
04:27 18 One is I didn't actually write and produce
04:27 19 this page. It was a third party that we hire to
04:27 20 develop our web page. They do a lot of orthodontists.
04:27 21 And -- and that was something that came to us. I
04:27 22 didn't really look to think that that needed editing.
04:27 23 But -- but in a practical sense, it also -- it
04:27 24 works well for my -- for the laypeople that are looking
04:27 25 at what -- what are their options.

04:27 1 So it is something that -- it kind of gives
04:28 2 them what might potentially be a -- be a choice for
04:28 3 them.
04:28 4 MR. UNDERWOOD: Can we go to the next
04:28 5 slide, Mr. Lee?
04:28 6 BY MR. UNDERWOOD:
04:28 7 Q. Did you hear during Mr. Mueller's opening
04:28 8 statement when he talked about a car dealership
04:28 9 offering trucks and vans and cars and all sorts of
04:28 10 types of vehicles?
04:28 11 A. I did.
04:28 12 Q. And is that at all like your website
04:28 13 situation?
04:28 14 A. I think it can be, yeah, related to that.
04:28 15 Q. Can you explain?
04:28 16 A. Well, you go into, quote, a car dealership,
04:28 17 but they don't just have cars. They also have trucks.
04:28 18 And so while it says car dealership, it really -- there
04:28 19 are variations of that that are available.
04:28 20 Q. What type of vehicle do you drive, Dr. Taylor?
04:28 21 A. A truck.
04:28 22 Q. Why do you drive a truck?
04:28 23 A. Well, couple of reasons. One is I need to
04:28 24 haul lawnmowers. I need to pull a boat. But also
04:28 25 that's really what I want.

04:29 1 Q. Is that a common sentiment among truck
04:29 2 drivers, you think?
04:29 3 A. Absolutely.
04:29 4 Q. And so if we can just bring that back to the
04:29 5 situation in this case. How is that like the clear
04:29 6 aligners versus wires and bracket braces situation?
04:29 7 A. Well, when you -- when you go in, you want to
04:29 8 have a choice about what things fit your needs. What
04:29 9 you want is certainly important. You want to have the
04:29 10 option to choose what you want but within reason. You
04:29 11 have to know what the needs are as well.
04:29 12 Q. Thank you, Dr. Taylor.
04:29 13 Let's go to your second opinion. What is that
04:29 14 opinion?
04:29 15 A. That's that Align forces doctors to use an
04:29 16 iTero.
04:29 17 Q. And can you explain what you mean by that?
04:29 18 A. Certainly. So if we're going in an
04:29 19 orthodontic practice, especially in today's world,
04:29 20 there's a strong desire from the market for some form
04:29 21 of clear aligner treatment. You want to have that in
04:29 22 your bag of tricks to offer people.
04:29 23 Invisalign is the biggest in -- in decision
04:30 24 there with the most marketing, so people recognize
04:30 25 that. So if you're going to offer Invisalign, you're

04:30 1 going to -- you would like to be able to offer that,
04:30 2 you're going to have to use an iTero because iTero is
04:30 3 the only scanner that Invisalign will accept scans from
04:30 4 to provide that service, that Invisalign.
04:30 5 Q. Now, even though that's the only scanner they
04:30 6 accept scans from, isn't there technically another way
04:30 7 to submit an Invisalign case?
04:30 8 A. There -- there is technically.
04:30 9 Q. What is that way?
04:30 10 A. And that is PVS, or polyvinyl siloxane,
04:30 11 impression material, and that's the goop that we've
04:30 12 talked about here several times in court. And that is
04:30 13 an option that used to be done routinely. And in fact,
04:30 14 I've done thousands and thousands of PVS impressions
04:31 15 starting from dental school. And in fact, the first
04:31 16 15 years that I did Invisalign, I only used PVS
04:31 17 material because I didn't have a scanner.
04:31 18 Q. Now, in this day and age, is PVS commonly used
04:31 19 as much as it was back then?
04:31 20 A. I don't know any orthodontist that routinely
04:31 21 uses PVS impressions.
04:31 22 Q. Why is that?
04:31 23 A. Well, it's objectionable on a couple of
04:31 24 levels.
04:31 25 First for the patient. I'm sure many people

04:31 1 here have had impressions done and, you know, it
04:31 2 doesn't taste great. You have to put it in there, hold
04:31 3 it for several minutes.
04:31 4 Some people have a strong gag reflex. I
04:31 5 certainly have had more than my share of patients that
04:31 6 have actually thrown up while I'm trying to get this
04:31 7 impression. So it's really -- it's not desirable from
04:31 8 a patient standpoint, a patient experience standpoint.
04:31 9 And then secondly, from the doctor's
04:31 10 standpoint, while it seems simple to just put that goop
04:32 11 in there and get a mold, it's actually difficult to get
04:32 12 all of the teeth all perfectly captured in that
04:32 13 material. It has a tendency to run a little bit or you
04:32 14 get a saliva bubble or an air bubble. That
04:32 15 impression's no good.
04:32 16 So then you have to do it again. I routinely
04:32 17 had to do multiple sets, sometimes as many as five or
04:32 18 six impressions, for a single arch to try to get that.
04:32 19 So that is expensive, time consuming for the
04:32 20 doctor, and again, it's a terrible patient experience.
04:32 21 Q. Now, if we can turn back to Align's iTero-only
04:32 22 policy. Based on your review of the evidence in this
04:32 23 case that the jury's seen, what has Align had to say
04:32 24 about this policy?
04:32 25 A. Well, their -- Daniel Stubbs, their director

04:32 1 of business development, said, quote, "If you want to
04:32 2 do Invisalign, you're forced to buy iTero and live with
04:33 3 it."
04:33 4 MR. UNDERWOOD: And that's DTX-141,
04:33 5 already in evidence.
6 BY MR. UNDERWOOD:
04:33 7 Q. Do you agree with that statement based on your
04:33 8 experience?
04:33 9 A. I do.
04:33 10 Q. Thank you, Dr. Taylor.
04:33 11 Let's turn to your third opinion. What
04:33 12 opinion is that?
04:33 13 A. That the iTero STL export process -- and we've
04:33 14 heard about that -- that's taking the raw data from
04:33 15 your iTero scan and being able to send that to another
04:33 16 company. It deters the use of competing aligners, of
04:33 17 even trying competing companies.
04:33 18 Q. Now, I want to first ask you about the process
04:33 19 of using an iTero to place an order with Invisalign.
04:33 20 Okay?
04:33 21 A. Okay.
04:33 22 Q. What is that process like?
04:33 23 A. You seat the patient, put in a little bit of
04:33 24 patient information, do your scan, review it. Okay.
04:33 25 Everything looks great, submit.

04:33 1 Q. And how does that process you just described
04:34 2 compare to the process for using an iTero to order a
04:34 3 competing company's clear aligner?
04:34 4 A. Completely different. Completely different
04:34 5 with more -- much more complex and time consuming to
04:34 6 send to another company.
04:34 7 Q. Could we briefly walk through that more
04:34 8 complex and time-consuming process, Dr. Taylor?
04:34 9 A. Sure. I'd love to.
04:34 10 Q. All right. What is the first step in that
04:34 11 process?
04:34 12 A. So the first step is you need to know that
04:34 13 you're selecting Study iModel/Record and not
04:34 14 Invisalign.
04:34 15 Q. And what is the second step in that process?
04:34 16 A. The second step is performing that scan we
04:34 17 talked about and reviewing it, making sure that
04:34 18 everything's just the way you want it.
04:34 19 Q. And the third step?
04:34 20 A. The third step is now you need to go over to
04:34 21 your desktop computer and log into Align's website,
04:34 22 which is myitero.com, and wait for that to load.
04:34 23 Q. And Step No. 4?
04:34 24 A. Now you click on patient from the main menu.
04:35 25 Q. And what's after that?

04:35 1 A. Well, you need to enter the patient name, type
04:35 2 in the name again, and then it navigates, and then
04:35 3 navigate to that correct patient.
04:35 4 Q. And what do you do next?
04:35 5 A. Next, then you need to move over and click the
04:35 6 ID number, and that'll take you to the order
04:35 7 information page.
04:35 8 Q. And then what?
04:35 9 A. Then you're there. You see a little button
04:35 10 that says "export." You click on export.
04:35 11 Q. All right. Now, this process is called the
04:35 12 STL export process. You just said we click on export.
04:35 13 Does that mean we're done?
04:35 14 A. I wish we were, but we're not.
04:35 15 Q. All right. What do you do next?
04:35 16 A. Well, we've got to go in. A pop-up window
04:35 17 pops up, and you need to start selecting drop-down
04:35 18 choices. The first one is Export Type: Open Shell.
04:35 19 Q. What do you do next?
04:35 20 A. Well, then you have another one, so another
04:35 21 drop-down file, and you choose Arches Oriented in
04:36 22 Occlusion.
04:36 23 Q. And then what?
04:36 24 A. Then you need to select what type file it is.
04:36 25 You have several options, and you choose STL.

04:36 1 Q. Now, I see here there's actually two options
04:36 2 that say STL. One is STL (No Color), and one is
04:36 3 STL+PLY.
04:36 4 Do you see that?
04:36 5 A. I do see that.
04:36 6 Q. And you have to know which one to click?
04:36 7 A. Yes. You do.
04:36 8 Q. All right. And after clicking that top one,
04:36 9 then what do you do?
04:36 10 A. Now you're back to hitting the export button
04:36 11 again.
04:36 12 Q. Okay. So now that we've clicked
04:36 13 export again, are we done?
04:36 14 A. I wish we were, but we're still not quite
04:36 15 there.
04:36 16 Q. Okay. What's the next step?
04:36 17 A. After that, a zip folder comes up. You're
04:36 18 probably familiar with zip files. You need to unzip
04:36 19 it, and then I think, you know, ten or so files appear,
04:36 20 and you need to start working through those.
04:36 21 Q. Okay. What do you do after that?
04:36 22 A. Well, you need to figure out which ones are
04:37 23 the files that you need, and that's really only two to
04:37 24 three of the ten to ten-plus that popped up. And then
04:37 25 you'll need to save that file, the relevant files to

04:37 1 your computer.
04:37 2 Q. All right. And then what after that?
04:37 3 A. Well, now -- now you're ready to send that
04:37 4 information to a new company and begin their process of
04:37 5 getting the information.
04:37 6 MR. UNDERWOOD: Okay. Can we get the
04:37 7 next slide, Mr. Lee?
8 BY MR. UNDERWOOD:
04:37 9 Q. All in, how many steps are there in this
04:37 10 process?
04:37 11 A. I count that to be 14 steps.
04:37 12 Q. And about how long does that take start to
04:37 13 finish?
04:37 14 A. At a minimum, a couple of minutes and probably
04:37 15 more.
04:37 16 MR. UNDERWOOD: And if we can go to the
17 next slide.
18 BY MR. UNDERWOOD:
04:37 19 Q. Again, how long does it take to do the iTero
04:37 20 order with Invisalign instead of a competing aligner?
04:37 21 A. As we said, perform the scan and click submit.
04:37 22 What's that, a few seconds?
04:37 23 MR. UNDERWOOD: Can we go back one slide?
04:38 24 BY MR. UNDERWOOD:
04:38 25 Q. Does Align provide any instructions in the

04:38 1 instruction manual on how to do this process displayed
04:38 2 here on the screen?
04:38 3 A. They do not.
04:38 4 MR. UNDERWOOD: And can we advance two
04:38 5 slides now, Mr. Lee?
04:38 6 BY MR. UNDERWOOD:
04:38 7 Q. Has anyone at Align acknowledged what the
04:38 8 effect of this STL export process would be?
04:38 9 A. They have. Their vice president of product
04:38 10 and design said, quote: It is highly manual and time
04:38 11 consuming and thus will never be widely adopted.
04:38 12 Q. And this is DTX-402.
04:38 13 Do you agree with this sentiment?
04:38 14 A. I do.
04:38 15 MR. UNDERWOOD: If we go to the next
16 slide.
17 BY MR. UNDERWOOD:
04:38 18 Q. Dr. Taylor, do you have any personal
04:38 19 experience trying to use an iTero to order a clear
04:38 20 aligner from a competing company?
04:38 21 A. I do.
04:38 22 Q. What -- can you explain what that process was
04:38 23 like?
04:38 24 A. Well, I was a big 3M user. That's who I
04:38 25 bought all my brackets, wires, things from. So I was a

04:39 1 very good customer. So when they introduced their
04:39 2 Clarity clear aligner solution, they came to me and
04:39 3 said, hey, Dr. Taylor. We'd love for you to try these.
04:39 4 Why don't you do ten cases? No charge. Ten free
04:39 5 cases.
04:39 6 And so I started that process. I did a couple
04:39 7 of cases. I think it was two cases that I went through
04:39 8 that upload procedure, and I decided it was just too
04:39 9 time consuming and annoying and painful and stopped and
04:39 10 didn't even utilize the other eight free cases.
04:39 11 Q. So you got ten free cases?
04:39 12 A. I did.
04:39 13 Q. Used two of them?
04:39 14 A. Yes.
04:39 15 Q. And gave up?
04:39 16 A. I gave up. I liked free. And I still gave
04:39 17 up.
04:39 18 Q. And why did you give up?
04:39 19 A. It was just annoying and time consuming, and
04:39 20 it impacted the flow of -- the flow of my practice. So
04:39 21 it just wasn't something that -- just didn't end up
04:40 22 being worth it.
04:40 23 Q. Well, let's -- you mentioned the flow of your
04:40 24 practice. So that's a perfect segue. Let's turn to
04:40 25 your fourth opinion, which is what, Dr. Taylor?

04:40 1 A. That the business of orthodontics -- in the
04:40 2 business of orthodontics, really workflow and
04:40 3 efficiency are critical.
04:40 4 Q. And can you explain what you mean by that?
04:40 5 A. Yes. Workflow would be, in a simple
04:40 6 description, kind of the time from when a patient comes
04:40 7 through the front door, they see the front desk, you
04:40 8 get them back, put them into the chair, work on them,
04:40 9 send them back to the front, they make their next
04:40 10 appointment, and out the door. And we're always
04:40 11 looking for ways to improve the efficiency of that
04:40 12 process.
04:40 13 Q. I heard Mr. Buitta earlier today use the term
04:40 14 "chair time." Is that a term you're familiar with?
04:40 15 A. Yes. It is.
04:40 16 Q. Can you explain that term to the jury, please?
04:40 17 A. You bet. So within that time, you know, the
04:40 18 workflow, chair time is really the critical factor that
04:41 19 we look at, try to measure, make sure that we're paying
04:41 20 attention to. And that is how long that specific
04:41 21 patient is in a specific chair.
04:41 22 I have six treatment chairs. I can only have
04:41 23 one patient in that chair at a time. So that is -- the
04:41 24 chair time is the time that patient is in that chair.
04:41 25 Q. All right. Now, earlier you said that the STL

04:41 1 export process took at least a couple minutes?
04:41 2 A. It did.
04:41 3 Q. On a busy day, how many scans might your
04:41 4 office have conducted?
04:41 5 A. Probably 15 to 20.
04:41 6 Q. All right. Can we do a little math?
04:41 7 A. Let's do.
04:41 8 Q. Okay. Let's assume a busy week.
04:41 9 A. Uh-huh.
04:41 10 Q. 15 scans a day.
04:41 11 A. Uh-huh.
04:41 12 Q. Two extra minute per scan.
04:41 13 A. Okay.
04:41 14 Q. All right. How many extra minutes a day is
04:41 15 that for your office to devote to this scanning
04:42 16 process?
04:42 17 A. I think that comes out to 30 minutes.
04:42 18 Q. All right. And then over the course of a
04:42 19 week, how might -- how much additional time might that
04:42 20 be that your office is having to devote just to this
04:42 21 STL export scanning process?
04:42 22 A. If you spread that or kind of multiply that
04:42 23 over the days of a workweek, you're going to come out
04:42 24 with at least a couple hours, two-plus hours.
04:42 25 Q. And if you had a few extra hours each week,

04:42 how might you spend that time if you weren't having to
04:42 devote it to this STL export process?
04:42 A. Oh, you could do a lot of things. You could
04:42 spend time off. You could market your practice to
04:42 dentists. So there's a lot of things you could do with
04:42 a couple of hours.
04:42 Q. What about in terms of meeting with your
04:42 patients?
04:42 A. So each of those STL uploads is only a couple
04:42 of minutes. And you say, oh, what's a couple of
04:42 minutes? But a couple of minutes is really -- in an
04:43 orthodontic practice, or at least in my practice, that
04:43 was kind of where the good stuff happened.
04:43 That was the time that I had to sit down, say,
04:43 hey, Bobby. Heard y'all played Midway last week. Man,
04:43 that's a big school. You beat them. Yeah, how's the
04:43 change to third base going for you?
04:43 And that's when they really make -- you make a
04:43 connection and they realize they're more than just a
04:43 set of teeth.
04:43 Q. So, Dr. Taylor, just to sum up this fourth
04:43 opinion, how does the importance of workflow and chair
04:43 time affect doctor choice?
04:43 A. So doctors are always looking for the best
04:43 treatment for the patient. Of course that's the first

04:43 1 and critical thing. Whatever is best for the patient
04:43 2 is going to always drive the decision.
04:43 3 But assuming that I have a couple of options
04:43 4 or three options that give me that same result, I'm
04:43 5 going to look and choose the one that is the most
04:43 6 efficient and cost effective for me to help my
04:43 7 profitability as a small business.
04:44 8 MR. UNDERWOOD: And can we go to Slide
04:44 9 37, Mr. Lee?
04:44 10 BY MR. UNDERWOOD:
04:44 11 Q. All right, Dr. Taylor. What is your fifth and
04:44 12 final opinion?
04:44 13 A. That Align's Advantage Program deters doctors
04:44 14 from even trying other aligners.
04:44 15 Q. And can you explain what the Advantage Program
04:44 16 is?
04:44 17 A. I think we've heard a little bit about that,
04:44 18 but that is the program within Invisalign in which you
04:44 19 are sorted into tiers based on how much work you've
04:44 20 done during a six-month period.
04:44 21 MR. UNDERWOOD: Can you go to the next
04:44 22 slide, Mr. Lee?
04:44 23 BY MR. UNDERWOOD:
04:44 24 Q. And how does the process work?
04:44 25 A. So Invisalign looks at the number of case

04:44 1 submissions you've done for six months and assigns you
04:44 2 then one of these different categories, and that is
04:44 3 your, quote, status.
04:44 4 Q. So what happens if a doctor wants to try a
04:44 5 competing clear aligner's company while they're
04:44 6 involved -- or a member, rather, of this program?
04:44 7 A. Well, the important thing to kind of get in
04:45 8 mind for the doctor is that you have a cutoff number.
04:45 9 You've got to hit that cutoff number to maintain your
04:45 10 same status or else you'll be down into a lower status.
04:45 11 You know, you'd love to be able to do enough
04:45 12 to get up into a higher status, but there's a certain
04:45 13 number that you know you're going to have to meet, and
04:45 14 that's over a fairly long period of time, over six
04:45 15 months.
04:45 16 So in Month 1 or 2, you don't really know
04:45 17 what's going to happen in the future. So you're very
04:45 18 hesitant to take a patient away. That could be an
04:45 19 Invisalign case or, say, ClearCorrect case. You're
04:45 20 hesitant to take that away because you don't know
04:45 21 what's going to happen in the next six months.
04:45 22 And as you get closer to the end, you may
04:45 23 start looking at, well, is this patient's not going to
04:45 24 be ready to start until after, you know, that's going
04:45 25 to be one in the next six-month period.

04:45 1 So that and the fact that what occurs with
04:45 2 your status is that it sets the price that you're going
04:46 3 to pay for all Invisalign products for the future six
04:46 4 months.
04:46 5 MR. UNDERWOOD: Can we go to PDX-1.74,
04:46 6 Mr. Lee?
04:46 7 BY MR. UNDERWOOD:
04:46 8 Q. All right. Do you recall seeing this slide in
04:46 9 Align's opening statement?
04:46 10 A. I do.
04:46 11 Q. How is the Align Advantage Program different
04:46 12 than these other programs, like let's take the
04:46 13 Starbucks one, for example.
04:46 14 A. You bet. The Starbucks one is that sort of
04:46 15 system that we're all familiar with. It's kind of the
04:46 16 little punch card-type concept where you do nine
04:46 17 free -- not -- you pay for nine cups of coffee, you get
04:46 18 the tenth one free.
04:46 19 With the awards program with Invisalign, it
04:46 20 doesn't work that way. So you don't get a free one for
04:46 21 a certain number that you do. You have to make sure
04:46 22 you meet that number, and then that's going to move
04:46 23 forward for the whole six months.
04:47 24 So if, heaven forbid, you miss that by one or
04:47 25 two, you've significantly increased your cost of all

04:47 1 the Invisalign cases for the next six months. So your
04:47 2 overhead goes up, and that's a disadvantage that we're
04:47 3 trying to keep from happening.
04:47 4 MR. UNDERWOOD: And you can pull that
04:47 5 down, Mr. Lee.
04:47 6 BY MR. UNDERWOOD:
04:47 7 Q. Does this have an impact on doctor choice?
04:47 8 A. It does. It does. Again, as I talked about,
04:47 9 when the time comes and you're looking at your cases,
04:47 10 there's never a good time to pull away from Invisalign
04:47 11 and try something else. You wanted to try ten cases,
04:47 12 say, to really get a feel for it. Wow. That would
04:47 13 really be putting it at risk for the -- for meeting
04:47 14 your tier level.
04:47 15 Q. And, Dr. Taylor, what's the importance of
04:47 16 choice for doctors and patients in your industry?
04:47 17 A. Well, again, I hate to keep harping on it, but
04:48 18 always the first thing is what's best for the patient.
04:48 19 So once we get that cut out of the way, then having
04:48 20 more choice is good for the patient.
04:48 21 If they can get equal treatment with a couple
04:48 22 of different ways, great for them to have the choice
04:48 23 of -- after learning about the pros and cons about
04:48 24 which one they want.
04:48 25 And choice is really great for doctors as well

04:48 1 because if I can provide the good service in a way
04:48 2 that's more advantageous for me as a businessman,
04:48 3 that's great. That's the choice I'm going to make.
04:48 4 MR. UNDERWOOD: Thank you, Dr. Taylor.
04:48 5 Your Honor, I pass the witness.
04:48 6 MR. DURST: Your Honor, may we hand
7 Dr. Taylor a notebook?
8 THE COURT: Of course.
04:48 9 CROSS-EXAMINATION
04:48 10 BY MR. DURST:
04:49 11 Q. Afternoon, Dr. Taylor.
04:49 12 A. Good afternoon.
04:49 13 Q. My name is Tim Durst. The only time we have
04:49 14 spoken is out in the hallway when we were talking about
04:49 15 you and Travis Underwood knowing each other; isn't that
04:49 16 right?
04:49 17 A. We did. It's nice to meet you.
04:49 18 Q. Good to see you.
04:49 19 Your practice, Brazos Braces, uses an iTero
04:49 20 scanner?
04:49 21 A. It does.
04:49 22 Q. And, Dr. Taylor, your practice, Brazos Braces,
04:49 23 offers both braces and aligners, correct?
04:49 24 A. That is correct.
04:49 25 Q. Patients come into your office after

04:49 1 consulting with you or your partner. A decision is
04:49 2 made at some point along the way, either by the patient
04:49 3 or with respect to the advice you've given, the choice
04:50 4 between braces or aligners, correct?
04:50 5 A. 100 percent.
04:50 6 Q. Both are treated in that same new office
04:50 7 building that you talked about building, right?
04:50 8 A. They're both done in that same spot.
04:50 9 Q. All right. Now, your personal experience as a
04:50 10 dentist is that you know that it is possible to order
04:50 11 aligners other than Invisalign by using this iTero
04:50 12 scanner, right? You know that's true?
04:50 13 A. Yes.
04:50 14 Q. And you have limited experience doing scans
04:50 15 yourself, right?
04:50 16 A. I think that's fair.
04:50 17 Q. Is "limited" a fair word?
04:50 18 A. I think that's fair.
04:50 19 Q. It's about five in all of your years of
04:50 20 practice, right?
04:50 21 A. Of me physically doing the scan, correct.
04:50 22 Q. And the last time you did it -- pardon me.
04:50 23 And you also have used an iTero scanner -- I
04:51 24 think you talked about this with Mr. Underwood. You've
04:51 25 used the iTero scanner to export STL files, right?

04:51 1 A. I have.
04:51 2 Q. And the last time you did that was seven or
04:51 3 eight years ago, '18 or 2019?
04:51 4 A. That's correct.
04:51 5 Q. Haven't tried that what you call the
04:51 6 cumbersome and time-consuming process for the last
04:51 7 seven or eight years, true?
04:51 8 A. That is true.
04:51 9 Q. Now, Dr. Taylor, you have never actually timed
04:51 10 that process of doing an STL export, have you?
04:51 11 A. I have not. I did not do it when I was doing
04:51 12 the STL exports.
04:51 13 Q. And in 2021, so now five years ago about, you
04:51 14 started transitioning your practice away from aligners
04:51 15 to focus only on braces, right?
04:52 16 A. That is correct.
04:52 17 Q. And the only thing you've been doing the last
04:52 18 five years, you personally, is braces or being retired,
04:52 19 right?
04:52 20 A. Close, but not quite correct.
04:52 21 Q. In your practice, most of what you have been
04:52 22 doing for at least the last five years is braces?
04:52 23 A. Correct.
04:52 24 Q. Have you ever heard that old saying,
04:52 25 Dr. Taylor, that when all you have is -- when you have

04:52 1 a hammer, everything looks like a nail?
04:52 2 A. I have heard that.
04:52 3 Q. Now, you know this market. You've been around
04:52 4 here a long time. Grew up. You know folks. And you
04:52 5 know the other dentists in the area, don't you?
04:52 6 A. I do.
04:52 7 Q. And you know the folks over at Central Texas
04:52 8 Dental Care?
04:52 9 A. I do.
04:52 10 Q. They're down there -- I guess they're in
04:52 11 Hewitt is where they are, right?
04:52 12 A. Yes. They are.
04:52 13 Q. And I'd like to show you a PDX-31F. This is
04:52 14 the Central Texas Dental Care website.
04:53 15 Do you see that?
04:53 16 A. I do see that.
04:53 17 Q. And if we go to the -- this page right here on
04:53 18 the website of this local dentist or the dentist down
04:53 19 in Hewitt, we see that they're offering two different
04:53 20 types of clear aligners, aren't they?
04:53 21 MR. UNDERWOOD: Your Honor, I'm going to
04:53 22 object to this as hearsay. This isn't his website.
04:53 23 I'm not sure whose website this is.
04:53 24 MR. DURST: He knows who it is, Judge.
04:53 25 He said -- we did lay that foundation, and he talked

04:53 1 about his experience in the local market.
04:53 2 THE COURT: Overruled.
04:53 3 A. Could you repeat the question?
4 BY MR. DURST:
04:53 5 Q. Yeah. These folks at Central Texas, they're
04:53 6 offering two different types of clear aligners, aren't
04:53 7 they?
04:53 8 A. That's what it says on their website.
04:53 9 Q. Invisalign and SureSmile. SureSmile you know
04:53 10 to be another clear aligner?
04:53 11 A. Yes.
04:53 12 Q. If we are to believe their website, they're
04:53 13 not locked into Invisalign, are they?
04:53 14 A. I see that they offer two options.
04:53 15 Q. And you know the people also over at Fusion
04:54 16 Dental and Braces, right?
04:54 17 A. I -- it's hard to keep track of those dentists
04:54 18 because it's a DSO that has a lot of turnover.
04:54 19 Q. But you know of that practice, don't you, sir?
04:54 20 A. I know of that practice.
04:54 21 Q. And you know the name of it, right? Even in
04:54 22 the name of it, it says "braces," right? Like your
04:54 23 practice, it says "braces" right in the name?
04:54 24 A. It does.
04:54 25 Q. And they have an iTero scanner. Did you know

04:54 1 that?
04:54 2 A. I did not.
04:54 3 Q. Well, let's check out their website, 31D, and
04:54 4 see if you recognize this to be the Fusion Dental and
04:54 5 Braces practice. It also looks like they have an
04:54 6 office in Hewitt but also in Waco and Harker Heights
04:54 7 and Killeen.
04:54 8 See that?
04:54 9 A. I do.
04:54 10 Q. And if we go over to the technology page of
04:54 11 this website, we find ourselves -- you have to kind of
04:54 12 page through, looking at all their pictures.
04:54 13 MR. DURST: Keep going, Mr. Smith. We
04:55 14 are going to -- keep going I think one more. And one
04:55 15 more. It is -- it's the technology page of this
04:55 16 website.
04:55 17 And here we go. There we go.
04:55 18 BY MR. DURST:
04:55 19 Q. This -- the folks at Fusion Dental and Braces,
04:55 20 they say they have an iTero scanner.
04:55 21 You see that?
04:55 22 A. I see they say that.
04:55 23 Q. And then if we go over to their aligners that
04:55 24 they offer, let's do that. It's 31E.
04:55 25 You see here -- which aligner is this local

04:55 1 dentist that has the Align scanner, which aligner are
04:55 2 they advertising on their website?
04:56 3 A. It appears they're advertising Angel Aligner.
04:56 4 Q. And they have -- if we believe their website,
04:56 5 they've got an iTero scanner and they're offering
04:56 6 Angel, right?
04:56 7 A. They may have an iTero scanner, but they
04:56 8 didn't say that's the only scanner they have.
04:56 9 Q. That's correct. But they are offering on
04:56 10 their website Angel?
04:56 11 A. Yes.
04:56 12 Q. So this local dentist practice with an iTero
04:56 13 scanner, they don't seem to be locked in either, do
04:56 14 they?
04:56 15 A. Depending -- yes. Depending.
04:56 16 Q. Now, are you familiar with an outfit called
04:56 17 Bear Braces?
04:56 18 A. I am.
04:56 19 Q. I see them when I drive back home to Dallas.
04:56 20 They've got that big billboard on 35.
04:56 21 Have you seen that?
04:56 22 A. Big. Yes.
04:56 23 Q. And if we look on their Facebook page, we can
04:56 24 go to PDX-23B, you see that Bear Braces says that they
04:56 25 offer braces or Invisalign, another local practice

04:56 1 offering aligners and braces, right?
04:57 2 A. Correct.
04:57 3 Q. And if Bear Braces' advertising is to be
04:57 4 believed, they sell them for nearly the same price or
04:57 5 as low as the same price, don't they, sir?
04:57 6 A. Yes.
04:57 7 Q. Dr. Taylor, you have testified that the
04:57 8 process --
04:57 9 MR. DURST: We can drop that slide down.
04:57 10 BY MR. DURST:
04:57 11 Q. The process of uploading an STL scanner, an
04:57 12 STL scan from the iTero, was "time consuming," I think
04:57 13 was the word you used?
04:57 14 A. It was.
04:57 15 Q. Dr. Taylor, how fast would be fast enough?
04:57 16 A. That's a good question. I don't have an
04:57 17 answer for that.
04:57 18 Q. So you don't know whether it's four minutes or
04:57 19 three minutes?
04:57 20 A. I would not venture a guess at what fast
04:57 21 means.
04:57 22 Q. You don't have an opinion on that?
04:57 23 A. In that context.
04:57 24 Q. Right.
04:57 25 Now, if we go to your website, the Brazos

04:57 1 Braces website, we see on PTX Trial Exhibit 1933,
04:58 2 there's that picture of the younger Dr. Taylor again.
04:58 3 Do you see him?
04:58 4 A. I do see him.
04:58 5 MR. DURST: Your Honor, I move to admit
04:58 6 PTX-1933.
04:58 7 MR. UNDERWOOD: No objection.
04:58 8 THE COURT: Admitted.
04:58 9 MR. DURST: And then if we go to PTX-1937
04:58 10 and Page 2.
11 BY MR. DURST:
04:58 12 Q. This is the slide that Mr. Underwood showed
04:58 13 you about types of braces, right?
04:58 14 A. It is.
04:58 15 Q. And this has -- this particular page, types of
04:58 16 braces, listing clear aligners along with ceramic
04:58 17 braces and metal braces, that particular part of your
04:58 18 website's been up there for quite some time, hasn't it?
04:58 19 A. It has.
04:58 20 Q. And my colleague, he asked you about this in
04:58 21 his deposition, didn't he?
04:58 22 A. He did.
04:58 23 Q. Yeah. And you got some questions about that
04:58 24 then. That was last year, right?
04:58 25 A. Earlier this year.

04:58 1 Q. Yeah. A few months ago at least?
04:58 2 A. Yes. Yes.
04:58 3 Q. And this website is still up there today?
04:59 4 A. I believe so. It's my --
04:59 5 Q. It still calls clear aligners "a type of
04:59 6 braces"?
04:59 7 A. It's no longer my website. I'm retired.
04:59 8 Q. Now, if we go into what is on the Brazos
04:59 9 Braces website and look under "Clear Aligners," I'd
04:59 10 like you to read that sentence that says: Aligners --
04:59 11 the first sentence, let's just read it together. Clear
04:59 12 aligners are a series of invisible, removable,
04:59 13 comfortable acrylic trays that straighten your teeth
04:59 14 like braces.
04:59 15 Right?
04:59 16 A. I see that.
04:59 17 Q. And the aligners are comfortable, and it gives
04:59 18 some advantages there, right?
04:59 19 A. I believe so. Yes.
04:59 20 Q. Now, let's keep going a little bit more on
04:59 21 your website, Doctor. And there is a -- there's a
05:00 22 provision you have -- a page you have on your website
05:00 23 that talks about -- it's PTX-3009.
05:00 24 MR. DURST: Can we put that up, please?
25 BY MR. DURST:

05:00 1 Q. Your website declares Invisalign aligners to
05:00 2 be the most advanced clear aligner in the world.
05:00 3 Do you see that?
05:00 4 A. I do.
05:00 5 Q. And you personally, sir, you don't know of any
05:00 6 clear aligner that is more advanced than Invisalign,
05:00 7 true?
05:00 8 A. True.
05:00 9 Q. You sold Invisalign when you were in practice,
05:00 10 and you achieved some very high status, it sounded
05:00 11 like, from the number of Invisalign aligners that you
05:00 12 sold?
05:00 13 A. I did.
05:00 14 Q. You did that by choice?
05:00 15 A. I did.
05:00 16 Q. And you received discounts and were enrolled
05:01 17 in that Advantage Program, right?
05:01 18 A. I was.
05:01 19 Q. You decided on your own to join it --
05:01 20 A. Yeah.
05:01 21 Q. -- correct?
05:01 22 A. Yes.
05:01 23 Q. And you decided on your own to leave it,
05:01 24 correct?
05:01 25 A. I don't know that I ever left it.

05:01 1 Q. Well, you left it when you retired, I guess,
05:01 2 then?
05:01 3 A. Yes. Yes. Good point.
05:01 4 Q. And that Advantage Program didn't
05:01 5 contractually bind you to maintain any particular
05:01 6 advantage tier, did it, sir?
05:01 7 A. No. It did not.
05:01 8 Q. And by this program, you were able to lower
05:01 9 the prices that you paid for the aligners that you gave
05:01 10 to your patients, right?
05:01 11 A. Yes. They were lower prices depending on the
05:01 12 status.
05:01 13 Q. Now, when you got lower prices, did you pass
05:01 14 those along to your patients?
05:01 15 A. No.
05:01 16 Q. You kept that. You increased the margin in
05:01 17 your practice?
05:01 18 A. I did.
05:01 19 Q. Now, did you ever prescribe Invisalign instead
05:01 20 of braces to maintain your Advantage Program status,
05:01 21 sir?
05:01 22 A. I did not.
05:01 23 Q. Now, Mr. Taylor -- Dr. Taylor, pardon me, you
05:02 24 have never used or prescribed ClearCorrect aligners; is
05:02 25 that accurate?

05:02 1 A. That is accurate.
05:02 2 Q. You never, in all your years of practice, had
05:02 3 a patient come in and ask you for clear aligners, did
05:02 4 you -- or pardon me -- ClearCorrect aligners, did you?
05:02 5 A. I do not remember that happening.
05:02 6 Q. Dr. Taylor, you've never had a patient come in
05:02 7 and say, I want ClearCorrect aligners, right?
05:02 8 A. I don't believe so. Yes. I believe you're
05:02 9 correct.
05:02 10 Q. Now, you mentioned a pickup truck and showed
05:02 11 the Ford dealership there.
05:02 12 Do you drive a Ford?
05:02 13 A. I do.
05:03 14 Q. Did you buy it from that --
05:03 15 A. First time ever. But yes.
05:03 16 Q. Did you buy it from that dealership?
05:03 17 A. I'm not sure which one it showed. It's a Waco
05:03 18 dealership. I shop local.
05:03 19 Q. And you've had a pickup for a long time?
05:03 20 A. Yes. I have.
05:03 21 Q. Probably bought a number of those over the
05:03 22 years?
05:03 23 A. Yeah.
05:03 24 Q. You know this case is not about pickups?
05:03 25 A. I do.

05:03 1 Q. This case is about a serious medical device,
05:03 2 isn't it, Dr. Taylor?
05:03 3 A. It is.
05:03 4 Q. It's about a device that goes in patients'
05:03 5 bodies, in their mouth?
05:03 6 A. It does.
05:03 7 Q. It's about a device that parents sometimes
05:03 8 make the decision to put in the mouths of their
05:03 9 children, correct?
05:03 10 A. Absolutely.
05:03 11 Q. That's a serious matter, isn't it, Dr. Taylor?
05:03 12 A. It is.
05:03 13 Q. And, Dr. Taylor, doctors like you have an
05:03 14 obligation to do what's best for their patients, don't
05:03 15 they?
05:03 16 A. Without a doubt.
05:03 17 Q. You reckon the Ford salesman that sold you the
05:03 18 pickup, you think he had that same professional
05:04 19 obligation, sir?
05:04 20 A. To a lesser degree, I'm sure.
05:04 21 MR. DURST: Thank you, Dr. Taylor.
05:04 22 REDIRECT EXAMINATION
05:04 23 BY MR. UNDERWOOD:
05:04 24 Q. Just a few more questions, if that's okay,
05:04 25 Dr. Taylor.

05:04 1 A. You bet.
05:04 2 Q. All right. Mr. Durst asked you about your
05:04 3 experience personally operating the iTero scanner.
05:04 4 Do you remember that?
05:04 5 A. I do.
05:04 6 Q. I think you said you'd done about five scans?
05:04 7 A. That's fair.
05:04 8 Q. About how many scans has your office done?
05:04 9 A. Thousands.
05:04 10 Q. Mr. Durst showed you a couple examples of
05:04 11 other dental practices in the area?
05:04 12 A. He did.
05:04 13 Q. I think there were two he showed?
05:04 14 A. He did.
05:04 15 Q. How many dentists and orthodontists are there
05:04 16 nationwide?
05:04 17 A. Oh, gosh. Hundred thousands. I don't know.
05:04 18 Q. Couple more than you saw?
05:04 19 A. Definitely.
05:04 20 Q. Now, if Align made it just as easy to use an
05:04 21 iTero scanner to get ClearCorrect as it is to get
05:05 22 Invisalign, do you think there might be more of those
05:05 23 doctors using ClearCorrect?
05:05 24 A. Absolutely.
05:05 25 MR. UNDERWOOD: Can we go to the Brazos

05:05 1 Braces website, Mr. Lee? And Wearing Braces, at the
05:05 2 top, About Orthodontics, if you go down to Appliances.
05:05 3 BY MR. UNDERWOOD:
05:05 4 Q. Now, Mr. Durst didn't show you this section of
05:05 5 the website, did he?
05:05 6 A. He did not.
05:05 7 Q. Can you please read what it says there?
05:05 8 A. About where the cursor is?
05:05 9 Q. Yes, sir, where it says "Appliances."
05:05 10 A. Appliances. Depending on your needs, your
05:05 11 orthodontist may recommend traditional braces, clear
05:05 12 aligners, or other specialized appliances.
05:05 13 Q. What does that first part mean, "depending on
05:05 14 your needs"?
05:05 15 A. That I am definitely not committed to
05:05 16 anything -- any choice of treatment until after I've
05:05 17 evaluated that patient, seen what their problems are,
05:05 18 and know from my experience what are the options and
05:06 19 what would be the pros and cons to each so that I can
05:06 20 discuss them with the patient.
05:06 21 Q. Is that because different choices of treatment
05:06 22 might be better for different patients?
05:06 23 A. Exactly.
05:06 24 Q. Some would work for others but not others?
05:06 25 MR. DURST: Your Honor,

05:06 1 Mr. Underwood's -- this is his witness. He's leading
05:06 2 him. I'd like to hear from the doctor.
05:06 3 THE COURT: Sustained.
05:06 4 MR. UNDERWOOD: Thank you.
5 BY MR. UNDERWOOD:
05:06 6 Q. Can you explain how different patients might
05:06 7 have different needs as it relates to the choice of
05:06 8 clear aligners versus braces?
05:06 9 A. Sure. A multiple of factors would go into
05:06 10 that decision-making. I would look at first what are
05:06 11 the specific problems. As we had talked about a little
05:06 12 bit, there are many, many things that clear aligners
05:06 13 are not recommended for, but one would be vertical
05:06 14 movement.
05:06 15 So if I saw a patient that had large vertical
05:06 16 movements that were going to be needed, I'm going to --
05:07 17 I'm going to explain to -- well, I would actually
05:07 18 probably still explain clear aligners with the caveat
05:07 19 that I do not believe this is a good answer for you for
05:07 20 these reasons.
05:07 21 Q. Now, Dr. Taylor, last set of questions. You
05:07 22 got some questions about your time prescribing
05:07 23 Invisalign?
05:07 24 A. Yes.
05:07 25 Q. Did you ever experience any complaints or

05:07 1 quality issues with Invisalign?
05:07 2 A. I did.
05:07 3 Q. And did that mean that Invisalign wasn't a
05:07 4 good option for certain patients?
05:07 5 A. No. It's still a good product. There were
05:07 6 just occasions when something went wrong. I had one
05:07 7 situation where we got boxes of aligners. They come in
05:07 8 packages of three. We got 9, 10, and 11, but 12, 13,
9 and 14 were missing, things like that.
05:07 10 MR. UNDERWOOD: Thank you, Dr. Taylor.
05:07 11 I pass the witness.
05:07 12 RECROSS-EXAMINATION
05:07 13 BY MR. DURST:
05:08 14 Q. Dr. Taylor, you -- your practice stuck with
05:08 15 iTero and Align, didn't it?
05:08 16 A. It did.
05:08 17 Q. It bought one scanner, correct?
05:08 18 A. It did.
05:08 19 Q. And it bought another?
05:08 20 A. It did.
05:08 21 Q. You looked at a lot of documents when you were
05:08 22 preparing your work in this case, you said.
05:08 23 Did I hear that right?
05:08 24 A. A lot.
05:08 25 Q. Okay. One of them was DTX-141, which you put

05:08 1 on one of your slides.
05:08 2 MR. DURST: I'm going to ask Mr. Smith to
05:08 3 pull it up.
4 BY MR. DURST:
05:08 5 Q. Now, in the middle of this, there is the -- or
05:08 6 it's sort of in the bottom third, it says: If you want
05:08 7 to do Invisalign, you're forced to buy iTero and live
8 with it.
05:08 9 You put that on one of your slides, didn't
05:08 10 you?
05:08 11 A. I did.
05:08 12 Q. Did you read the whole document, sir?
05:08 13 A. I don't recall.
05:08 14 Q. Well, let's look at the next e-mail in time.
05:08 15 Dr. Taylor, read that -- read that first
05:08 16 sentence in the next e-mail after the one you displayed
05:09 17 to the jury. Read that first sentence. Read it out
05:09 18 loud, please.
05:09 19 A. I think Dan meant the iTero integration with
05:09 20 Invisalign is so compelling that customers by default
05:09 21 choose iTero.
05:09 22 Q. Were you in the courtroom when Mr. Miller
05:09 23 talked about the shiny castle?
05:09 24 A. I was.
05:09 25 Q. People are -- Align hopes dentists are

05:09 1 incentivized to go to the shiny castle, right?
05:09 2 A. I believe they are.
05:09 3 Q. You understood that analogy?
05:09 4 A. I thought that's what he was attempting to
05:09 5 convey.
05:09 6 Q. And this sentence that's right here on this
05:09 7 page, that's consistent with that, isn't it,
05:09 8 Dr. Taylor?
05:09 9 Sir?
05:09 10 A. I said I think that's what they're hoping.
05:09 11 Q. Now, you have this document if you want in
05:09 12 front of you. Mr. Underwood handed it to you. I'd
05:09 13 like to go to the attachment. The first page of the
05:09 14 attachment --
05:09 15 A. This would be in --
05:09 16 Q. It's in that white notebook.
05:09 17 A. -- in yours or in his?
05:09 18 Q. It should be in yours.
05:09 19 A. Okay.
05:09 20 Q. And it's DTX-141.
05:10 21 MR. DURST: And, Mr. Smith, let's go to
05:10 22 the first page of the attachment, not this page. So it
05:10 23 would be 26 pages earlier, Mr. Smith, right after
05:10 24 the -- there we go.
05:10 25 One more. Right there.

05:10 1 BY MR. DURST:
05:10 2 Q. Is that -- you see that page? You can look at
05:10 3 it on the --
05:10 4 A. Okay.
05:10 5 Q. It's a market update and review that was
05:10 6 attached to that e-mail.
05:10 7 Do you see that?
05:10 8 A. Okay.
05:10 9 Q. Okay. Well, this is some of the material you
05:10 10 reviewed in getting ready for your testimony, right,
05:10 11 sir?
05:10 12 A. It could have been.
05:10 13 Q. In this market review, it talks about and
05:10 14 reviews Align and the iTero, doesn't it?
05:10 15 A. It does.
05:10 16 Q. Okay. And if we go to Page 12 of this
05:10 17 attachment --
05:10 18 MR. DURST: Mr. Smith, can you move to
05:10 19 Page 12 of the attachment? Gone a little too far, I
05:10 20 think.
05:11 21 There we go, Page 12.
05:11 22 BY MR. DURST:
05:11 23 Q. Now, do you see that headline?
05:11 24 MR. DURST: And let's blow that up so
05:11 25 everybody can see it, Mr. Smith.

1 BY MR. DURST:
05:11 2 Q. Open or closed system.
05:11 3 Now, in this document that talks about Align
05:11 4 and other scanners in the marketplace, what does that
05:11 5 first full sentence there -- actually, the second full
05:11 6 sentence -- that's bolded, what does that say,
05:11 7 Dr. Taylor?
05:11 8 A. What you've just highlighted for me to read?
05:11 9 Q. Yes, sir.
05:11 10 A. All scanners are now open, allowing the export
05:11 11 of at least one of the following files: STL, OBJ
05:11 12 and/or PLY.
05:11 13 Q. And that description describes iTero, doesn't
05:11 14 it?
05:11 15 Sir, based on your experience?
05:11 16 A. Globally, yes, it's open.
05:11 17 Q. It's open.
05:11 18 MR. DURST: Thank you, Your Honor. No
05:11 19 further questions.
05:12 20 FURTHER REDIRECT EXAMINATION
05:12 21 BY MR. UNDERWOOD:
05:12 22 Q. All right, Dr. Taylor. So I'm showing you --
05:12 23 this is that e-mail chain that's DTX-141 that you just
05:12 24 got questions about.
05:12 25 Do you see that?

05:12 1 A. I do.
05:12 2 Q. This is between Align employees?
05:12 3 A. It is.
05:12 4 Q. And if we go down here, can you please read
05:12 5 what I have underlined in blue?
05:12 6 A. Buy iTero only if you're an Invisalign-focused
05:12 7 practice (because no one else works with Invisalign).
05:12 8 Q. So as a practical matter, is this an open or a
05:12 9 closed system?
05:12 10 A. Practically, it's a closed system.
05:12 11 MR. UNDERWOOD: Thank you, Dr. Taylor.
05:12 12 MR. DURST: Your Honor, I referenced one
05:12 13 exhibit, PTX-1937, that I failed to move into evidence.
05:12 14 I move to admit.
05:12 15 MR. UNDERWOOD: No objection.
05:12 16 THE COURT: It's admitted.
05:12 17 Are we through with the doctor?
05:13 18 You may step down, Doctor. Thanks for
05:13 19 being here.
05:13 20 THE WITNESS: Thank you.
05:13 21 MR. UNDERWOOD: Thank you, Your Honor.
05:13 22 THE COURT: Do you have another witness?
05:13 23 MR. MUELLER: We do, Your Honor. We call
05:13 24 Dr. Ray Perryman, and Mr. Hirsch will conduct the
05:13 25 examination.

05:13 1 (The witness was sworn.)

05:13 2 DIRECT EXAMINATION

05:13 3 BY MR. HIRSCH:

05:13 4 Q. Afternoon, sir.

05:13 5 A. Good afternoon.

05:13 6 Q. Can you please introduce yourself and tell us

05:13 7 a little bit about yourself?

05:14 8 A. Yes, sir. My name is Ray Perryman. I'm an

05:14 9 economist. I've worked in Waco for almost 50 years.

05:14 10 For the last 35 years, although I've still worked in

05:14 11 Waco, I've lived in Odessa. And the reason is 35 years

05:14 12 ago or so, I married the mayor of Odessa. And when you

05:14 13 marry the mayor, you move. But I have five kids and

05:14 14 five wonderful grandkids.

05:14 15 Q. All right. Now, sir, did you help prepare

05:14 16 some slides for your testimony?

05:14 17 A. Yes, sir. I did.

05:14 18 MR. HIRSCH: Let's pull those up.

19 BY MR. HIRSCH:

05:14 20 Q. And to start, can you tell us about your

05:14 21 educational background, please?

05:14 22 A. Yes, sir. I graduated -- I grew up in a small

05:14 23 town in East Texas and then was fortunate enough to get

05:14 24 to attend Baylor as an undergrad and received a degree

05:14 25 in mathematics. And then I went to Rice University

05:14 1 down in Houston and received a Ph.D. in economics.
05:14 2 Q. Now, Dr. Perryman, where do you currently
05:14 3 work?
05:14 4 A. I work at a company called The Perryman Group.
05:15 5 We're located out on Valley Mills in what used to be
05:15 6 called Triangle Tower. It has a bunch of different
05:15 7 names.
05:15 8 Q. And did you start The Perryman Group?
05:15 9 A. I did. Yes, sir.
05:15 10 Q. What type of work does The Perryman Group do?
05:15 11 A. We do all types of economic consulting. We do
05:15 12 the kind of stuff we're about here today. We do
05:15 13 regulatory work for businesses. We do work for like
05:15 14 cities and chambers of commerce, government agencies,
05:15 15 impact studies, policy studies, forecasts, economic
05:15 16 development work. A variety of things.
05:15 17 Q. And what types of companies have you done
05:15 18 those -- that type of work for?
05:15 19 A. Well, we've had over 3,000 clients over a long
05:15 20 period of time. That's included most of the Fortune
05:15 21 100, so a lot of larger companies.
05:15 22 We also work with a lot of small businesses.
05:15 23 We work with local governments, state governments,
05:15 24 federal government, chambers of commerce, economic
05:15 25 development organizations, trade groups. So a wide

05:16 1 variety.
05:16 2 Q. In total, sir, how long have you been an
05:16 3 economic consultant?
05:16 4 A. In one form or another, almost 50 years. I've
05:16 5 had the company a little over 40 years.
05:16 6 Q. In the course of your career, have you done
05:16 7 any teaching?
05:16 8 A. Yes, sir. I have. When I first left graduate
05:16 9 school at Rice, for the first 17 years I was a
05:16 10 professor over at Baylor and was a full professor with
05:16 11 a research chair. And then I also was a professor for
05:16 12 a few years at SMU, and consulting took over my life.
05:16 13 So I can't be anywhere every Monday, Wednesday, Friday
05:16 14 at 9 o'clock now or something like that.
05:16 15 So I -- but I do guest lecture and have some
05:16 16 honorary titles at a few places including Baylor.
05:16 17 Q. Dr. Perryman, have you done any writing? Have
05:16 18 you authored any articles or publications regarding
05:16 19 economic issues?
05:16 20 A. Yes, sir. I have. Quite a few, in fact. As
05:17 21 you can tell, I've been around a few days. Written 5
05:17 22 books, about 400 academic papers. Those are papers you
05:17 23 might write for other economists or mathematicians or
05:17 24 statisticians or whatever. I've written about 3,000
05:17 25 trade articles which is the kind of thing that might

05:17 1 appear in a magazine or even a newspaper or for a trade
05:17 2 group, something like that.
05:17 3 I have a monthly newsletter. I have a
05:17 4 weekly -- excuse me, weekly newspaper column and a
05:17 5 daily, very brief one-minute radio commentary as well.
05:17 6 Q. Can you tell us about the experience you have
05:17 7 analyzing economics in the healthcare industry
05:17 8 specifically?
05:17 9 A. Yes, sir. Quite a bit. Over the course of my
05:17 10 life, I've analyzed a number of healthcare products and
05:17 11 services and that type of thing. I've helped with a
05:17 12 number of healthcare laws that have been passed at the
05:18 13 federal and state level doing economic analysis for
05:18 14 those.
05:18 15 I have done impact analysis and similar work
05:18 16 for just about every major hospital or medical school
05:18 17 in Texas and many other places as well including
05:18 18 several for Baylor Scott & White, which is active here
05:18 19 locally, including one that's ongoing right now, in
05:18 20 fact.
05:18 21 Q. Now, Dr. Perryman, I don't want to ask you to
05:18 22 brag on yourself, but have you received any awards or
05:18 23 accolades for your work as an economist over the course
05:18 24 of your career?
05:18 25 A. I have been very fortunate in that regard.

05:18 1 Some -- some folks at least have been very kind.
05:18 2 A few years ago I was privileged to be named
05:18 3 Texan of the Year by the Texas Legislative Conference.
05:18 4 That was primarily because of the -- helping write the
05:18 5 State's economic development plans and programs and
05:18 6 that sort of thing that we now use in the state. That
05:18 7 award's been around about 60 years. It's been won by
05:19 8 presidents and senators and athletes and singers and a
05:19 9 variety of folks who have made some contribution. I
05:19 10 think Robert Earle King won this year.
05:19 11 And then Baylor has given me just about every
05:19 12 award they have. A few years ago I was given the
05:19 13 Distinguished Service Medal. And to be honest, you
05:19 14 can't tell it by looking at me, but that one was about
05:19 15 football. I helped -- I helped them put together all
05:19 16 the structure to allow the stadium to be built. Waco
05:19 17 had never done anything like that before. And then I
05:19 18 also helped with some of the studies and some of the
05:19 19 work to kind of keep the Big 12 together back when that
05:19 20 was a problem.
05:19 21 There have been a number of them throughout my
05:19 22 career. I've been very lucky. Lately I won a couple
05:19 23 of Lifetime Achievement Awards, and I have to say those
05:19 24 bother me a little bit. I'm afraid they're trying to
05:19 25 tell me something.

05:19 1 Q. Dr. Perryman, you've been at trial for the
05:19 2 course of the last few days?
05:19 3 A. Yes, sir. I have.
05:19 4 Q. You've seen the trial since the beginning,
05:20 5 have you not?
05:20 6 A. I have. Yes, sir.
05:20 7 Q. And there's been a lot of discussion about
05:20 8 patents, true?
05:20 9 A. Yes, sir.
05:20 10 Q. What experience, if any, sir, do you have
05:20 11 valuing patents?
05:20 12 A. Oh, over the course of my career, probably at
05:20 13 least the last 35 years or so, I've been working in
05:20 14 that area, valued thousands of patents, some inside
05:20 15 litigation like we're talking about here, some -- out
05:20 16 in the real world, at times I've helped to negotiate
05:20 17 licenses or sale of patents as well. So quite a bit.
05:20 18 Q. And how about antitrust issues, what
05:20 19 experience do you have analyzing antitrust issues?
05:20 20 A. Well, there again, as I say, I've been around
05:20 21 a while. I've done a lot of that over the last 30,
05:20 22 35 years or so as well, looking at a number of
05:20 23 industries. Several in the health field, health
05:20 24 resources of various types, medical equipment and
05:20 25 medical devices, that type of thing.

05:20 1 But I've also studied cellular phone towers
05:21 2 and beverages and newspapers and any -- a number of
05:21 3 other things.
05:21 4 Q. What experience, Dr. Perryman, do you have
05:21 5 analyzing the relevant market for purposes of an
05:21 6 antitrust analysis?
05:21 7 A. Well, relevant markets have a -- kind of a
05:21 8 special meaning when you get into antitrust analysis,
05:21 9 and just about every time you do antitrust analysis,
05:21 10 you have to start with defining a market. So I have --
05:21 11 I've done that on a number of occasions.
05:21 12 Q. And relatedly, what experience do you have
05:21 13 analyzing whether companies have engaged in
05:21 14 anticompetitive behavior to maintain monopoly power?
05:21 15 A. Well, again, normally when you're involved in
05:21 16 an antitrust issue, that's one of the things you look
05:21 17 at. So I've done that in just about every opportunity
05:21 18 I've been involved in over the years.
05:21 19 Q. All right. Finally, sir, what experience do
05:21 20 you have analyzing damages that result from antitrust
05:22 21 violations?
05:22 22 A. Well, again, virtually every time you do this
05:22 23 type of analysis, that's one of the questions that
05:22 24 comes up. And so consequently, I've had about
05:22 25 35 years' experience doing that on a number of

05:22 1 occasions as well.
05:22 2 MR. HIRSCH: All right. At this time, we
05:22 3 would offer Dr. Perryman as an expert in patent
05:22 4 valuation as well as analysis of market definition,
05:22 5 monopoly power, and antitrust damages.
05:22 6 MR. TUBACH: No objection, Your Honor.
05:22 7 THE COURT: He'll be admitted as such.
05:22 8 MR. HIRSCH: Thank you, Your Honor.
05:22 9 Your Honor, given the time and the issues
05:22 10 I'm about to transition to, I'd suggest that we break
05:22 11 for the day, if Your Honor's inclined.
05:22 12 THE COURT: Since we got a late start,
05:22 13 you guys good with going maybe another 20 minutes or
05:22 14 so? Okay.
05:22 15 MR. HIRSCH: Sure.
05:22 16 BY MR. HIRSCH:
05:22 17 Q. Dr. Perryman, who retained you in this case?
05:22 18 A. I was retained by ClearCorrect.
05:22 19 Q. Before this case, had you been retained by
05:23 20 ClearCorrect on any other matters?
05:23 21 A. No, sir. I had not.
05:23 22 Q. All right. And how are you being compensated
05:23 23 for the time that you've spent working on the case?
05:23 24 A. Well, my company just bills for the time that
05:23 25 I spend and the staff spends on the case.

05:23 1 Q. And what's your hourly rate, sir?
05:23 2 A. My personal rate the company bills me for is
05:23 3 $900 an hour. The staff members are progressively
05:23 4 less.
05:23 5 Q. And does your rate or your payment depend in
05:23 6 any way on the outcome of the case?
05:23 7 A. Oh, no, sir. Just the amount of time that we
05:23 8 spend.
05:23 9 Q. All right. Dr. Perryman, I want to start
05:23 10 briefly with patent damages, and then we'll turn to
05:23 11 antitrust. Does that sound okay?
05:23 12 A. Yes, sir.
05:23 13 Q. All right. Now, to start, can you remind us,
05:23 14 sir, what's the correct patent damages amount if the
05:23 15 ladies and gentlemen of the jury find that ClearCorrect
05:23 16 does not satisfy the elongation at break requirement of
05:24 17 the asserted claims and does not infringe?
05:24 18 A. Well, if you folks find that the patents are
05:24 19 not infringed, then the damages are zero.
05:24 20 Q. Now, Align's patent damages expert was
05:24 21 Mr. Lasinski, correct?
05:24 22 A. Yes, sir. That's correct.
05:24 23 Q. And you heard his testimony?
05:24 24 A. I did. Yes, sir.
05:24 25 Q. And you heard his testimony about damages in a

05:24 1 hypothetical world where there is infringement being
05:24 2 more than $73 million?
05:24 3 A. Yes, sir. I recall that.
05:24 4 Q. Now, I want to ask you a few questions about
05:24 5 that, Dr. Perryman.
05:24 6 A. Yes, sir.
05:24 7 Q. First, you heard Mr. Lasinski is seeking a
05:24 8 royalty on the Zendura FLX material, correct?
05:24 9 A. Yes, sir. I did.
05:24 10 Q. And did you also hear that Mr. Lasinski
05:24 11 calculated damages on clear aligners that use the
05:24 12 Zendura FLX material?
05:24 13 A. Yes, sir. I did.
05:24 14 Q. And what is your reaction to that -- to that
05:25 15 claim by Mr. Lasinski, seeking royalties on both of
05:25 16 those items?
05:25 17 A. Well, in that case, in some of his
05:25 18 calculations he was double counting, because you pay
05:25 19 for the -- to use the material, to use the material to
05:25 20 make the clear aligner, and you pay again for the
05:25 21 aligners. So you're being -- you're paying for the
05:25 22 same technology twice in some of his calculations.
05:25 23 Q. All right. Now, I want to focus for a moment
05:25 24 on Mr. Lasinski's calculation of just the Zendura FLX
05:25 25 material.

05:25 1 Do you have that in mind?
05:25 2 A. Yes, sir. I do.
05:25 3 Q. Remind us, sir, what profitability data did
05:25 4 Mr. Lasinski use for that calculation?
05:25 5 A. Well, he used the average profit rate in
05:25 6 NAICS, which stands for North American Industry
05:25 7 Classification System, a particular code which the --
05:25 8 which was the one for the plastics industry as a whole.
05:26 9 And 30 years ago almost, I was involved in helping put
05:26 10 those codes together at the beginning. And that's a
05:26 11 code that includes a lot of things besides just the
05:26 12 material you would use for clear aligners.
05:26 13 Q. And what happens to Mr. Lasinski's number if
05:26 14 companies in that industry spend more on costs like
05:26 15 cars?
05:26 16 A. Well, that was -- really one of the unusual
05:26 17 things about his calculation. If those companies spent
05:26 18 money on anything, whether it was directly related to
05:26 19 their products, much less anything that had to do with
05:26 20 the products that are accused, just because they bought
05:26 21 a car or whatever, the damage number would change and
05:26 22 go up.
05:26 23 Q. And what's your reaction to that model, sir?
05:26 24 A. Well, he -- he's totally separated his
05:26 25 calculation from what he was about. He was supposed to

05:26 1 be determining the value of these patents, and yet it
05:26 2 would change in his calculation if some other company
05:26 3 that makes something else bought a car.
05:27 4 Q. Now, you also heard Mr. Lasinski's testimony
05:27 5 regarding his calculation of damages on clear aligners,
05:27 6 correct, sir?
05:27 7 A. Yes, sir.
05:27 8 Q. And for this one, can you remind us of the
05:27 9 operating expenses that Mr. Lasinski used?
05:27 10 A. Yes, sir. In this case he used the operating
05:27 11 expenses for another one of these NAICS codes. In this
05:27 12 case it was one for dental equipment, which again
05:27 13 includes chairs and cement and a lot of things that
05:27 14 are -- that are not related to these aligners that
05:27 15 we're talking about here.
05:27 16 Q. Now, using ClearCorrect's actual operating
05:27 17 expenses, not industry operating expenses but
05:27 18 ClearCorrect's operating expenses, were ClearCorrect's
05:27 19 profits positive or negative?
05:27 20 A. Their overall profits were negative.
05:27 21 Q. And we're going to get into why, but can you
05:27 22 give us a preview -- a quick preview, sir, as to why
05:28 23 ClearCorrect's profits were negative?
05:28 24 A. Yes, sir. A major part of it is -- as we'll
05:28 25 talk about is the fact that they've been foreclosed

05:28 1 from a big piece of the market and not able to compete
05:28 2 effectively and gain the scale it takes to make
05:28 3 investments and be profitable in this industry.
05:28 4 Q. And what -- what would happen to
05:28 5 Mr. Lasinski's damages number if he had used
05:28 6 ClearCorrect's actual operating expenses rather than
05:28 7 industry data?
05:28 8 A. Well, if he -- if he would have used the
05:28 9 actual operating expenses, they would have actually
05:28 10 been negative.
05:28 11 Q. So what is your conclusion as to the
05:28 12 reliability of this damages model from Mr. Lasinski?
05:28 13 A. Well, again, he just hasn't tied it to the
05:28 14 facts and the products at issue, and so these numbers
05:28 15 are unreliable.
05:28 16 Q. And, sir, you said you were compensated for
05:28 17 your work on this case; is that right?
05:28 18 A. Yes, sir.
05:28 19 Q. And were you compensated for the work that you
05:29 20 did analyzing Mr. Lasinski's damages claim for the
05:29 21 materials-related patents?
05:29 22 A. Yes, sir. I was.
05:29 23 Q. And you know that ClearCorrect had other
05:29 24 experts like Dr. Spiegelberg, who we heard from last
05:29 25 week, also working on the analysis of the

05:29 1 materials-related patents, true?
05:29 2 A. Yes, sir. That's correct.
05:29 3 Q. And for example, you heard Dr. Spiegelberg's
05:29 4 testimony concluding that Align made false statements
05:29 5 to the Patent Office in connection with the materials
05:29 6 patents, true?
05:29 7 A. Yes, sir. I heard that.
05:29 8 Q. You understand that Dr. Spiegelberg was
05:29 9 compensated for that work, right, sir?
05:29 10 A. Yes, sir.
05:29 11 Q. Fair to say ClearCorrect has incurred costs
05:29 12 responding to Align's claims regarding the materials
05:29 13 patents, right?
05:29 14 A. Yes, sir. Absolutely.
05:29 15 Q. All right. Last thing on patent damages,
05:29 16 Dr. Perryman. Remind us once more. If there's no
05:29 17 infringement, if the ladies and gentlemen of the jury
05:29 18 find no infringement, what's the correct patent damages
05:30 19 number?
05:30 20 A. Well, if you folks find there's no
05:30 21 infringement, then the correct number is zero.
05:30 22 Q. All right. I want to transition to your
05:30 23 antitrust analysis, okay?
05:30 24 A. Yes, sir.
05:30 25 Q. And can you walk through with us at a high

05:30 1 level the analysis that you performed relating to the
05:30 2 antitrust issues? And then we'll dive into each one.
05:30 3 A. Yes, sir. There's basically five buckets
05:30 4 here. The first question we have to ask ourselves is
05:30 5 what is the relevant market? And again, that has a
05:30 6 special meaning. We all use the word "market" all the
05:30 7 time, but when you get to antitrust, it does have a
05:30 8 special meaning.
05:30 9 So the first thing we have to do is define
05:30 10 what is the appropriate market to be talking about.
05:30 11 Once we have that defined, the next question
05:30 12 is: Does Align possess monopoly power in that market?
05:30 13 And again, that has some specific meanings when we get
05:30 14 into antitrust.
05:30 15 If you answer that question that they do, then
05:31 16 the next question would be: Did Align engage in
05:31 17 anticompetitive conduct? And that gets into some
05:31 18 specific things as well.
05:31 19 And then Item 4 is if they engaged in
05:31 20 anticompetitive conduct, did it harm ClearCorrect?
05:31 21 And then the final question would be: If so,
05:31 22 how much did it harm ClearCorrect? What would an
05:31 23 appropriate level of damages be?
05:31 24 Q. All right. And we'll go through each one.
05:31 25 A. Yes, sir.

05:31 1 Q. But before we do, when you refer to a
05:31 2 monopoly, what does that mean?
05:31 3 A. Well, again, it has sort of a special meaning
05:31 4 here, but a monopolist and a monopoly is a company that
05:31 5 has enough power in the market that they can raise
05:31 6 prices and still make a profit or they can keep other
05:31 7 people from entering the market or keep those that are
05:31 8 in the market from reaching any reasonable scale.
05:31 9 Q. And as an economic matter, what is the problem
05:32 10 with monopolies?
05:32 11 A. Well, the biggest problem is if we have
05:32 12 competition, which is kind of what we're -- our whole
05:32 13 system is based on, if we have competition, you tend to
05:32 14 have more companies coming in. They invest, they try
05:32 15 to create things, they try to do things better, they
05:32 16 try to price better.
05:32 17 And you have this constant thing going on, all
05:32 18 of which benefits consumers. And so -- and when you
05:32 19 have a monopolist, you don't tend to have that. You
05:32 20 don't tend to have all those other companies pushing
05:32 21 one another, so to speak.
05:32 22 And so -- and so basically you have a
05:32 23 situation where it's not beneficial to consumers.
05:32 24 Q. So I want to start, Dr. Perryman, by talking a
05:32 25 little bit more about that market that you described

05:32 1 where there is competition.
05:32 2 Do you have that in mind?
05:32 3 A. Yes.
05:32 4 Q. When there is competition and there's no
05:32 5 monopolist, tell us what that market looks like.
05:32 6 A. Yes, sir. I have a diagram I put together
05:32 7 here of just basically four lines representing four
05:33 8 different companies in a market. And what you see is
05:33 9 some of them go up, and then they go back down a little
05:33 10 bit. Some of them enter later. At least one of them
05:33 11 enters later and comes in, and its revenue starts
05:33 12 growing.
05:33 13 And so you have a situation where every
05:33 14 company's trying to do what they can to make us, as
05:33 15 customers, buy their product. And so consequently,
05:33 16 they'll bring out a new product and they'll have more
05:33 17 sales, or they'll lower price and they'll have more
05:33 18 sales, or they'll figure out a better way to do
05:33 19 something or a better way to market it and have more
05:33 20 sales.
05:33 21 Other companies see the opportunity, and they
05:33 22 come into the market and push the others. So you have
05:33 23 this constant churn of activity that's seeking to
05:33 24 improve, ultimately improve things for consumers.
05:33 25 Q. So now let's compare that competitive market

05:33 1 to what you found in this case. All right?
05:33 2 A. Yes, sir.
05:33 3 Q. What are we -- what are you showing here, sir?
05:33 4 A. Well, what we're seeing here is that --
05:33 5 obviously the top line is Invisalign, and obviously
05:34 6 it's had significant growth in revenues over a long
05:34 7 period of time and has a very large percentage of the
05:34 8 market.
05:34 9 And then down below that, I've got the
05:34 10 revenues of the other companies that have come in, many
05:34 11 of the other companies that have come in, you've heard
05:34 12 about some of them, ClearCorrect and others, that have
05:34 13 come into the market and tried to compete. And they're
05:34 14 sort of down there at the bottom fighting over the
05:34 15 scraps at this point.
05:34 16 Q. Dr. Perryman, have you heard of market share?
05:34 17 A. Yes, sir. I have.
05:34 18 Q. What does "market share" mean?
05:34 19 A. Well, market share is just the percentage of
05:34 20 the market that one company has. And that is, of all
05:34 21 the revenues in the market, how much of it does it --
05:34 22 do individual companies have.
05:34 23 Q. How do you calculate market share, sir?
05:34 24 A. Well, you can look at the revenues of a single
05:34 25 company, and then you take the revenues of all the

05:34 1 companies in the industry and you just divide.
05:34 2 Q. And did you calculate Align's market share in
05:34 3 this case?
05:34 4 A. Yes, sir. I did.
05:34 5 Q. What did you find?
05:35 6 A. Over the past several years, it's fluctuated
05:35 7 between about 84 and 92 percent.
05:35 8 Q. Now, what data did you use to create this
05:35 9 analysis, this chart, sir?
05:35 10 A. For this piece of it, I used market data on
05:35 11 the revenues of the various companies, data that became
05:35 12 available in the course of this matter.
05:35 13 Q. And in the course of your work on this case,
05:35 14 did you also look at other data to do your antitrust
05:35 15 analysis?
05:35 16 A. Yes, sir. I did.
05:35 17 Q. I want to hand you, Dr. Perryman, a laptop
05:35 18 that has a number of files on it. We've disclosed
05:35 19 these to counsel for Align.
05:35 20 MR. HIRSCH: May I approach, Your Honor?
05:35 21 BY MR. HIRSCH:
05:35 22 Q. If you take a look at those files, sir, and
05:35 23 tell me: Do you recognize them?
05:35 24 A. Yes, sir. I do.
05:35 25 Q. Have you reviewed those files in the course of

05:35 1 your work on the case?
05:36 2 A. Yes, sir. I have.
05:36 3 Q. And did you rely --
05:36 4 MR. TUBACH: I'm sorry. Could we just
05:36 5 have someone identify what exact file he's looking at?
05:36 6 There are lots of files that appear to be on there, and
05:36 7 there's nothing being displayed on the screen.
05:36 8 MR. HIRSCH: Yeah. I'll -- I can read
05:36 9 the JTX.
05:36 10 MR. TUBACH: That would be great.
11 BY MR. HIRSCH:
05:36 12 Q. And, Dr. Perryman, if you can just confirm for
05:36 13 me that the folder that's open on that laptop includes
05:36 14 JTX-21, JTX-25 through 51, JTX-54 through 56, JTX-59,
05:36 15 JTX-61, JTX-64, JTX-65, JTX-67, JTX-68, JTX-71, JTX-76,
05:37 16 JTX-80, JTX-81, and DTX-1078.
05:37 17 You see each of those?
05:37 18 A. It does. Did you mention JTX-50? I'm sorry,
05:37 19 JTX-60? It's on there as well. I just want to make
05:37 20 sure.
05:37 21 Q. Great. Thank you. Yeah, I should have.
05:37 22 Thank you, sir.
05:37 23 All right. And you've reviewed those files in
05:37 24 the course of your work, sir?
05:37 25 A. Yes, sir. I have.

05:37 1 Q. And relied on them to reach your conclusions?
05:37 2 A. Yes, sir.
05:37 3 Q. All right.
05:37 4 MR. HIRSCH: At this time, we would move
05:37 5 to admit each of those documents, JTX-21, 25
05:37 6 through 51, 54 through 56, 59, 60, 61, 64, 65, 66, 68,
05:37 7 71, 76, 80, 81, and DTX-1078.
05:37 8 MR. TUBACH: I believe there's -- some
05:37 9 numbers were missed, but we can make that -- we don't
05:37 10 have to do this in front of the jury.
05:37 11 THE COURT: They're admitted.
05:37 12 MR. HIRSCH: All right. Thank you, sir.
05:38 13 Your Honor, I'm about to move to a
05:38 14 section that's going to take a bit of time.
05:38 15 THE COURT: I'm going to cry uncle.
05:38 16 (Laughter.)
05:38 17 THE COURT: Ladies and gentlemen of the
05:38 18 jury, thank you very much. If you'd be back here
05:38 19 tomorrow by 8:45, we'll start at 9:00.
05:38 20 THE BAILIFF: All rise.
05:38 21 (Jury exited the courtroom.)
05:38 22 THE COURT: You may be seated.
05:38 23 MR. DURST: Your Honor, may I raise one
05:38 24 housekeeping item?
05:38 25 THE COURT: Of course.

05:38 1 MR. DURST: I missed an exhibit in my
05:38 2 admissions. Move to admit PTX-3009 that was used in
05:39 3 Dr. Taylor's examination.
05:39 4 MR. MUELLER: We'll have to double-check
05:39 5 which one that is. I'm sure we'll have no objection,
05:39 6 if we could --
05:39 7 THE COURT: It'll be admitted.
05:39 8 MR. DURST: Thank you.
05:39 9 THE COURT: Anything else to take up for
05:39 10 plaintiff?
05:39 11 MR. DURST: No, Your Honor. Thank you.
05:39 12 MR. MUELLER: Nothing from defendants,
05:39 13 Your Honor.
05:39 14 (Off-the-record discussion.)
05:40 15 (Hearing adjourned.)
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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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4
5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
8 correct transcript from the record of proceedings in
9 the above-entitled matter.
10 I certify that the transcript fees and
11 format comply with those prescribed by the Court and
12 Judicial Conference of the United States.
13 Certified to by me this 12th day of July
14 2026.
15
16 /s/ Kristie M. Davis
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