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

ALIGN TECHNOLOGY, INC. *
*
VS. *
*
CLEARCORRECT OPERATING, LLC, ET AL. *

June 29, 2026

CIVIL ACTION NO. 6:24-CV-187

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

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ALIGN – EXHIBIT 2044
ClearCorrect Operating, LLC. v. Align Technology, Inc. IPR2025-00820

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08:32

08:32 (Hearing begins.)

08:32 THE BAILIFF: All rise.

08:32 THE COURT: Thank you. You may be seated.

08:32 Good morning, everyone. Hope you had a good weekend.

08:32 Allow me to start by addressing some e-mails we got over the weekend or have gotten about the parties' concerns or input on the Court's calculations on how much time you all have, have used.

08:32 The next time we get an e-mail from you all correcting our time, I've instructed the clerk to take whatever time you all have and reduce it by an hour. So we don't need your help. Okay?

08:33 MR. DURST: Understood, Your Honor.

08:33 MR. UNDERWOOD: Thank you, Your Honor.

08:33 THE COURT: So it's ridiculous that we would get an e-mail over the accuracy of two minutes of the amount of time that y'all have left, and I'm a little disappointed in it.

08:33 So let's take up the issues we have. Whoever wants to go.

08:33 MR. DURST: Yes, Your Honor. I'll go first.

08:33 We had -- we left Wednesday afternoon,

08:33 Your Honor, with two issues open from Ms. Sterling's testimony. I'm just looking to see if she's in the courtroom.

MR. UNDERWOOD: She's not.

MR. DURST: Okay. Your Honor, one issue you will recall related to Straumann's revenue. Global revenue. And I have -- we have agreed not to elicit testimony from Ms. Sterling about that, Your Honor. I have no plans to introduce that. And so the Court happily got no e-mails on that topic.

I do want to alert the Court that that information is already in evidence. So it may be that this -- that it's used from the exhibits that are already in evidence in the future, but we're not going to do that with Ms. Sterling.

MR. MUELLER: May I address that, Your Honor, before we keep going, the revenue issue?

THE COURT: Sure.

MR. MUELLER: Sure. Your Honor, on the revenue issue, there's no dispute for Ms. Sterling, as we understand it.

Your Honor did ask at the end of the day what the relevance would be and how it corresponded or did not correspond. And when I say "it," I mean Institut Straumann, the international Straumann, how

their revenues would relate to the antitrust case. The answer is they have no relevance whatsoever.

Your Honor asked about the plaintiffs to the antitrust case, or the antitrust counterclaims, I should say. The antitrust counterclaimants are ClearCorrect and Straumann USA. And the antitrust damages model is based on lost sales by ClearCorrect for clear aligners in the U.S. clear aligner market.

That's our damages case. It has nothing to do with global revenues for other product of Align's whatsoever.

So to the extent there are any documents that refer to global revenues for other product lines, we can certainly work out redaction before those go back to the jury. No one's mentioned those yet in open court, and we would certainly object to any references to those because they have utterly no relevance to the case.

The case in the phase that we're now moving into is about whether or not there's a U.S. market for doctor-directed clear aligners. We say there is. They say there is not.

If we're right about that, the question will become the conduct within that market and whether it suppressed sales by ClearCorrect. And the measure

of damages would be the number of sales and the profits on those sales for lost sales of clear aligners in the U.S. market, not the global market and not the marketplace for other product lines beyond clear aligners.

THE COURT: Yes, sir.

Any response?

MR. DURST: Yes, Your Honor. There's no issue that I believe is presented for the Court. If we -- if we raise this issue, Your Honor, it will come out of admitted exhibits that are already in evidence.

THE COURT: Well, I think what I heard Mr. Mueller say is if there's information that's in admitted documents that pertains to the global entity, they want those redacted.

MR. DURST: I understand that, Your Honor, but this is --

THE COURT: And I'm -- let me just finish. And you say they're already in the exhibits, and they shouldn't be redacted.

MR. DURST: I'm -- yes. They are in the exhibits that have been admitted and discussed in open court. Now, that number has not yet been discussed, and it will not be discussed this morning, Your Honor.

THE COURT: Okay. So why do you care,

08:37 then -- and you may -- why do you care if it's redacted
08:37 or not redacted if you're not going to discuss it?
08:37 MR. DURST: I'm not going to discuss it
08:37 this morning, Your Honor. And that's the reason I
08:37 raised this. I wanted complete transparency with --
08:37 THE COURT: So at some point it may be
08:37 raised?
08:37 MR. DURST: Yes, Your Honor.
08:37 THE COURT: Okay. So in what situation
08:37 would it be raised?
08:37 MR. DURST: I do not expect to raise it
08:37 with -- to introduce -- first, not to introduce any
08:37 additional information. And it is appropriate,
08:37 Your Honor, for the control of Straumann over these
08:37 entities that are defendants in the actions in the
08:37 case. It's relevant to the patent case too,
08:37 Your Honor, for that control.
08:37 THE COURT: Why is the amount of revenue
08:37 relevant to control?
08:37 MR. DURST: What we have heard,
08:38 Your Honor, in the record is the degree of control that
08:38 Straumann -- that Straumann exercises over
08:38 ClearCorrect, for instance, and also over Bay Materials
08:38 and the degree, the percentage.
08:38 THE COURT: I'm sorry, is that Straumann

U.S. or Straumann global?

MR. DURST: Straumann global, Your Honor, and that's --

THE COURT: I'm sorry. And who put on the evidence -- so Mr. Mueller can respond to this, who, in your opinion, put that evidence into the record of control, of clear control by the global entities?

MR. DURST: Ms. Sterling.

THE COURT: Okay. Do you have any citations of that?

MR. DURST: I can -- I can deliver those, Your Honor, yes.

THE COURT: Okay. Now, it sounds to me, but I don't want to kick the can down the road if it would harm anyone, it sounds to me like there's no problem until you want to introduce -- it would -- it would seem silly to redact it at this point if you're going to want to use it later and if you're not going to mention it. And the jury doesn't actually physically have the exhibits.

So I'm going to hold off on any decision about redaction. But before you raise the issue obviously with a witness, you'll need to raise it with me about whether or not it's admissible.

And I -- if I find that you haven't

08:39 established -- I haven't been able -- I mean, I may very well find that it's admissible. You can get me those citations, and I can look at it.

But my guess would be if I find that you -- that the plaintiff has not established that it would go to show -- it would either go to show or rebut, or whatever we want to say, control over the entity, then you'll have to have some other reason to get it in. But just let me know before you introduce it.

MR. DURST: Yes, Your Honor. Understood. And I appreciate that direction, and that's precisely why I raised it. I didn't want the Court to feel surprised --

THE COURT: No, I'm --

MR. DURST: -- when it comes up in the future.

THE COURT: That's just fine. But if you'll get those -- if you'll get the sections of the transcript that you believe support you and if you'll get those to Mr. Mueller so if he has any counter-designations, we can do this all at once and I can take it up.

MR. DURST: Indeed. And you won't hear about this in open court before the jury without

hearing from us first.

THE COURT: Okay. And what else do we have to take up this morning?

MR. DURST: The second issue, Your Honor, was the issue with respect to termination of our agreement to take scans from 3Shape in the United States.

And this issue arises, Your Honor, due -- in connection with one of the Court's pretrial rulings where we had withheld privileged information and the Court issued an order that precludes us from relying -- it's a sword and shield type -- type order.

And what has happened in the trial thus far, Your Honor, is that defendants have now introduced evidence of the patent litigation between Align and 3Shape. And that's in evidence in documents that they've used affirmatively with our witnesses already, Your Honor. And Ms. Sterling on Wednesday testified, Your Honor, that -- about the fact that Align had -- I think she said "cut off" or "terminated" the ability --

THE COURT: Who elicited that? What -- who was asking the questions that elicited that information?

MR. DURST: I believe both sides asked questions about that. I don't --

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

08:42 MR. DURST: Your Honor, I will examine her on that, but she's -- she took the stand and talked about us terminating that.

08:42 THE COURT: Well, what I'm saying is you want to put something into evidence and through a witness that may not have ever seen that exhibit. So how do you get the exhibit in?

08:43 MR. DURST: Your Honor, I have confidence I can get it in in evidence and with either her or we have a witness that can get it in as well. We have a corporate -- an employee that's still to come that can get it in.

08:43 THE COURT: Of their corporate --

08:43 MR. DURST: No. Of our corporation, Your Honor.

08:43 And the parties here have a broad stipulation. There's no other objection to this exhibit. The parties have a broad stipulation about admission of evidence. And the only objection to this press release is the Court's pretrial ruling. And this document --

08:43 THE COURT: It's not admissibility of the document?

08:43 MR. DURST: Correct.

08:43 This document does not fall within the

prohibited zone of the Court's order. So it's in evidence. They've elicited testimony about the subject.

THE COURT: Do you have a copy of the exhibit?

MR. DURST: I do. Would you like to hand it up or would you like it on the ELMO?

THE COURT: Hand it up. And if you can tell me what it is you think in the article is relevant to what -- specifically what the testimony has been that the jury's heard.

MR. DURST: Yes, Your Honor.

THE COURT: Okay.

MR. DURST: May I approach?

THE COURT: Please.

MR. DURST: Do you have it, Your Honor?

THE COURT: I do.

MR. DURST: It is right from the top, Your Honor, the reason for termination. It's the first paragraph. Here it is on the screen as well, Your Honor.

THE COURT: Anything else you want to say?

MR. DURST: Your Honor, this goes -- this adds -- this is responsive to the testimony

Mr. Underwood elicited, and it goes right to the reasons for termination.

The Court's order said a specified -- gave examples. It was an EG. Gave examples of the type of information that we could not admit, and that all related to legal strategy and privileged information.

And so here, we would be pointing to the fact -- and just to respond to what they have asserted -- the reason for the termination of this interoperability with 3Shape. That's the argument, Your Honor.

THE COURT: Okay.

A response?

MR. MUELLER: Yes, Your Honor. So as brief background before I get to what Ms. Sterling said on the stand, so very brief background, this is an issue that --

THE COURT: We have -- our -- a juror's late. So we have --

MR. MUELLER: Okay. Understood.

This is an issue that has been percolating for quite some time. During discovery we tried to take discovery of the purported rationale that Mr. Durst is referring to for the termination of

3Shape.

So 3Shape is another one of these intraoral scanners. And at one time Align allowed for interoperability --

THE COURT: Let me ask you this, and I'll let you get back to what you're arguing.

What -- assuming we had not had the spat about the discoverability, do you have a position with regard to whether or not otherwise this would be relevant under 401?

MR. MUELLER: In terms of just the relevance of the subject matter?

THE COURT: Yes.

MR. MUELLER: It is relevant to the case. It is. The issue is this: So we say that the termination of 3Shape, in terms of interoperability with Invisalign, and what that means is Align would no longer accept prescriptions based on scans through the 3Shape scanner, which we say was part of an overall plan to consolidate around iTero, their own scanner, and only accept scans from iTero. That's our argument.

Their response is no. We terminated the 3Shape because of legal advice relating to patent litigation. That's their argument.

So in discovery we said, we'd like more

information about this. Do you intend to rely on advice of counsel as a rebuttal to our argument that the termination of interoperability was for anticompetitive reasons?

THE COURT: Mr. Durst, you can sit down.

MR. DURST: Oh, yes.

MR. MUELLER: Judge Gilliland set a date in December by which they had to choose whether or not to elect to waive advice of counsel. They chose not to. Okay? They chose not to.

We sent a follow-up letter in detail --

THE COURT: And that's where I got in.

MR. MUELLER: Exactly.

THE COURT: I'm with you up to there.

MR. MUELLER: Exactly. So Your Honor had the Rule 37 motion, which you granted and precluded them from offering testimony or evidence on this very issue, this very issue.

So now the position is, as I understand it, is we have somehow opened the door to their being able to offer this rationale that Your Honor had precluded and precluded, we believe, for good reason, because they hadn't elected to waive advice of counsel -- waive privilege on advice of counsel on this issue.

So here's the testimony that Ms. Sterling offered. I'm going to quote it. This is from the transcript on Wednesday, Page 906, Line 18, through 907, Line 4. And how's the scanner --

Question: How's the scanner situation different outside the United States versus inside the United States?

Answer: So Align actually accepts scans from 3Shape TRIOS 3. Outside of the United States versus inside the United States, they only accept scans from the iTero.

Question: I want to ask one more time just so we're all clear. They accept scans from non-Align scanners outside the United States?

Answer: Yes.

And that is not true inside the United States?

Correct.

And then he went on, Mr. Underwood, to ask about some of the effects of that. But that was the total of the testimony on what happened.

As you can see, there was no questions at all about the rationale that Align had offered for. There was not even a hint of a reference to the litigation. So --

08:49 THE COURT: I'm good.

08:49 Mr. Durst, can you cite to any other testimony?

08:49 MR. DURST: The other relevant factual item from the record, Your Honor, is the exhibit that the defendants put in the record, which is Defendant's Exhibit 46 which references Align's patent lawsuit with 3Shape, Your Honor. And that's what's already -- that's what's already in the record.

08:50 MR. MUELLER: If I could respond to that.

08:50 MR. DURST: And of course, Your Honor, we're not relying on advice of counsel here. As the Court has seen by reading the first paragraph of the press release, it's public record.

08:50 Are you looking at that exhibit?

08:50 Mr. Smith, it's on Page 2.

08:50 And the situation with this e-mail, Your Honor, that Mr. Mueller has been using with our witnesses is this is post termination of the agreement with 3Shape in the United States. And you can tell the rationale they're discussing, whether it needs to go further than the United States.

08:50 THE COURT: Okay. I think I'm good.

08:51 Okay. I'm going to exclude the Align document, which is PTX-1362.

08:51 Is there anything else we need to take up?

MR. DURST: Nothing before the jury comes in. There are other pending issues, Your Honor, but I understand the jury's waiting.

THE COURT: Jen, is the jury all here?

THE CLERK: No, sir.

THE COURT: We have a juror missing. So --

MR. DURST: Okay. Our next most important issue, Your Honor, would be a witness issue that we would like to call that they're objecting to.

THE COURT: Okay.

MR. DURST: Ready to proceed with that? Ms. Durie will argue that, Your Honor.

THE COURT: Okay.

MS. DURIE: Thank you, Your Honor, and good morning.

This pertains to the testimony of Mr. Robert Stoll. We had disclosed him as an expert on Patent Office procedure.

THE COURT: On patent?

MS. DURIE: Patent Office procedure.

The defendants recently told us that they do not intend to call their corresponding expert,

Mr. Matal, and they have suggested that for that reason, we should not be permitted to call Mr. Stoll.

Mr. Stoll, however, is going to be responding to arguments that have been made over the course of the trial and suggestions, for example, that it was improper for Dr. Li to amend the declaration that she submitted when the claims changed.

We think it is important for Mr. Stoll to be able to testify consistent with the expert report that he submitted.

THE COURT: Let me see if I understand what you're saying. She is going to be responding to what the jury has heard in court?

MS. DURIE: He will be responding --

THE COURT: I'm sorry. He.

MS. DURIE: Yes. He will be responding to what the jury has heard in court.

THE COURT: And what is his background?

MS. DURIE: He was the commissioner of patents. He was a patent examiner for many years. He has a 30-year very distinguished career in the Patent Office.

THE COURT: They don't object to his qualifications.

MS. DURIE: Correct.

08:52 THE COURT: Got you. Okay.

08:52 Anything else? I think I understand what --

08:52 MS. DURIE: That's fine. Thank you, Your Honor.

08:53 THE COURT: Okay.

08:53 Mr. Mueller?

08:53 MR. MUELLER: Yes, Your Honor. So you may recall in the Daubert hearing, Align had moved to exclude our Patent Office procedure expert, Joseph Matal. And Your Honor reserved on that issue. And we said at that time this may be a moot point, we may not call Mr. Matal. We're not going to call Mr. Matal. So this is a rebuttal to an opinion that's not being offered.

08:53 The basis for the challenge that Align articulated at the Daubert phase was that this was -- the gestalt of it was that this is merely a lawyer talking about procedures that Your Honor --

08:53 THE COURT: Well, I have to say when counsel got up, I was -- I couldn't remember what I'd done. But I was skeptical -- I was going to say to her -- that I was skeptical -- more than skeptical whether or not I was going to allow your expert to get on the witness stand. And you saved me ruling on that.

But I would have the same ruling for their -- I don't see -- it reminds me of the good old days 20 years ago when you could put a willfulness expert on the witness stand and say, for your side, infringe, and the other side said didn't infringe and all that.

I don't think that kind of expert has a role. So I'm going to -- now, to protect the plaintiff, if the plaintiff at some point wants to -- outside the presence of the jury wants to put that witness on and elicit what he would have said, I'm happy to allow the plaintiff to do that.

MS. DURIE: Understood, Your Honor.

MR. MUELLER: Thank you, Your Honor.

MR. DURST: I think we will take the Court up on the tender offer in all likelihood. We'll get back -- we'll report back.

The next most important issue, Your Honor, is another witness issue. And it relates to the person I believe will be their second witness this morning, a fellow named Mr. Coss, Jason Coss.

He's an employee of Straumann in Canada who -- sales related to Straumann's implant business. And they have in discovery designated him as an expert, a nonretained expert. So he's an employee. They've

identified him under Rule 26.

THE COURT: Rule 26?

MR. DURST: Yes, under Rule 26 as an expert.

Our objection -- he's fine to testify as a fact witness. No objection to that. But, Your Honor, we do object to him being qualified as an expert under 702. The topics that they have designated him on, Your Honor --

I just want to make sure he's not in the courtroom. May I do that?

Is Coss in the courtroom?

MS. FERRERA: He's not.

MR. DURST: Okay. The topics they have designated him on, Your Honor, are comparing our scanner to alternative technologies, other scanners, and also to PVS, which is that goop we've been talking about.

He's done a goop treatment once ten years ago in a sales meeting, and he told us in his deposition --

THE COURT: I think I'm good.

MR. DURST: Okay.

THE COURT: Mr. Mueller or whoever's going to argue, I'm -- I understand him being a quasi

expert with respect to how your products work and, you know, where the line is between percipient witness and expert, but I'm skeptical about him discussing other products.

MS. FERRERA: Your Honor, well, two things. And I have a copy of his Rule 26(a)(2)(C) disclosure, if Your Honor would like to see it.

THE COURT: How long is it?

MS. FERRERA: Five pages.

THE COURT: Yeah. Sure, I'll take it.

MS. FERRERA: May I approach, Your Honor?

THE COURT: Please.

MS. FERRERA: Your Honor, Mr. Coss has been in the industry for over 30 years. He's been selling intraoral scanners for at least two decades, so he has ample basis to talk about competitive scanners in the marketplace.

The only citation that Align provides to support their position that he's not qualified is a question from his deposition transcript where he was asked a very specific question about whether or not certain features of ClearCorrect's or Straumann's own scanners, whether some of them existed in, you know, across multiple scanners. And he said: I'm not sufficiently familiar with all the details of the

scanners to answer that.

He wasn't even asked about the scanners that he was going to be testifying about here today. So that deposition testimony doesn't support precluding Mr. Coss from talking about --

THE COURT: Let me ask Mr. Durst, if he'd come back.

You didn't file a Daubert on him, did you?

MR. DURST: We did not file a Daubert.

THE COURT: Okay. And so why -- I mean, with respect to Mr. -- it's mister, not doctor, I assume?

MS. FERRERA: Yes.

MR. DURST: It's mister.

THE COURT: If Mr. Coss stays within the five pages of what he gave you, why would that not be okay?

MR. DURST: Here's the problem, Your Honor. His opinions are not his. He's here to channel hearsay, and they are trying to use a Rule 26 designation as a Trojan horse to get hearsay in this case.

The problem, Your Honor, is he says -- he's going to say that there are no alternatives to

this device. That's what he's going to say, and he has told us in his deposition --

THE COURT: Does he say that in this expert report?

MS. FERRERA: He does not say that, and that's not what he's going to say, Your Honor.

THE COURT: All right.

MR. DURST: Well, he -- as the disclosure says, he's going to say that PVS, the goop, is not an alternative and neither are scanners X and Y.

THE COURT: Well, again, he's not going to say anything that's not in the report and especially something like that. Because I don't -- I don't think he is qualified to do something like that.

And so my question is I think you may be -- I'm probably on your side, Mr. Durst. I just think you're asking for a prophylactic ruling if -- they're going to be bound by the same rules as any expert. If he tries to say something that's not in this report, and that sounds to me like a lot more of an opinion than I would let him give anyway, for example, a hard opinion about whether something is actually an alternative or not, I don't understand how he could do that. He's not qualified to do that.

What he is qualified to do, short of

that, I'm not sure. But I'm happy to hear your objections when he's on the stand.

MR. DURST: I will certainly object if he starts offering opinions and alternatives, Your Honor.

THE COURT: And I'll keep this up here and you can --

MR. DURST: Okay. And the issue will be I think the channeling of hearsay. So once he is --

THE COURT: Is the what?

MR. DURST: The channeling of hearsay.

THE COURT: Well, you can object to hearsay as well. I mean, he doesn't get to put in hearsay just because he gave a Rule 26.

MR. DURST: Right.

THE COURT: I mean, he's still just a percipient witness. And so -- and I have a feeling I'll be able to -- if you make a hearsay objection, I have a feeling I'll be able to deal with it.

MR. DURST: I'll be on my toes, Your Honor.

THE COURT: Okay. And by the way, the same rules would apply to the defendant that -- apply on any expert, which is, by and large if Mr. Durst makes an objection that something's not in the report, I expect you to be able to say immediately where it is

09:00 from your outline. And if you can't, then Mr. Durst wins.

09:00 On the other hand, if -- I've had this too. If Mr. Durst makes three or four objections that it's not in his report and it is, then he starts losing some credibility.

09:01 So that -- but I'll have -- I have it up here. I'll be able to deal with it.

09:01 MS. FERRERA: Understood, Your Honor. Thank you.

09:01 MR. MUELLER: Actually, one more for Your Honor, just in the interest of giving Your Honor a heads-up on a document that might come up today, just to tell you what we're going to do with it.

09:01 This would be something we use on cross-examination. There's no cross disclosure process, but I can put it up right now. It's DTX-308, and this is an internal Align document.

09:01 And I'm going to turn to Page 28 to show you the issue, Your Honor. On Page 28, this has an Align internal analysis of ClearCorrect. It talks about certain strengths that ClearCorrect has, pricing, made in the USA, et cetera. Also weaknesses, also mixed impressions.

09:01 The first line below the table says: In

addition to the strengths above, many felt advantage of ClearCorrect was that it was not Align.

THE COURT: I think Kristie would appreciate if you'd try to speak even faster.

MR. MUELLER: I'm sorry. I'll slow down. I'll slow down.

These doctors felt Align had become a greedy, litigious, and overly aggressive company that did not care very much about its doctor providers.

We're going to redact the word "litigious" to be -- out of an abundance of caution, Your Honor, in light of Your Honor's in limine rulings and other litigation and so on. But just wanted to give Your Honor forewarning that if that word is blacked out, that's why we're doing it.

THE COURT: Does the plaintiff have an issue with that?

MR. DURST: Your Honor, this is classic hearsay within hearsay, and we would object to it on that grounds.

I'm not quite sure how he's going to use it. I presume it will be in cross-examination of Mr. Miller.

THE COURT: So is this a document that Mr. Miller will be familiar with?

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

front with Your Honor to let you know that.

THE COURT: I think Mr. Durst is going to object to it coming in at all. I don't have a problem with you redacting the word "litigious." I understand why you're doing that.

But before I allow you to question a witness about it, you're going to have to establish that he has some knowledge of this.

MR. MUELLER: Fair enough. Fair enough.

And I'll just add, Your Honor, the document itself is an Align document. The parties have a stipulation that documents from the respective corporate files are authentic business records.

THE COURT: I'm not talking about authentic or business record. I'm not talking about admissibility. In my view, which could be wrong, you know, you could pick anyone in the audience and show them this document and say, well, what do you think about this?

And I -- you know, unless he was a recipient of the document at the time and had some reason to be charged with knowledge of this at the time, you don't get to ask him about it.

MR. MUELLER: Understood. Thank you, Your Honor.

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

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

something like 83 slides. We're objecting to --

Can I get the ELMO again, please?

We're objecting to one. And this is the one. And what you see here is some lines and a box on the right that says 84 to 92 percent market share.

Anyone looking at this chart is going to think that those lines represent market share, and they don't. It's just wrong.

These are revenue numbers, and what it looks like to anyone looking at it, that you're going from 84 to 92. That's what the blue line looks like it's doing.

You'll notice there's no description of what the Y-axis is. There's Ms and Ps. Now, maybe if you think about it, you'd say, oh. That must be revenue.

Also, importantly, this implies that market share's been going up over this time period. As they well know, market share has been going down. So it's actually 92 to 84.

Now, of course I'll cross Dr. Perryman on this if I have to, but this is totally misleading.

THE COURT: A response?

MR. HIRSCH: Good morning, Your Honor. Jordan Hirsch for ClearCorrect.

09:07 Your Honor, Dr. Perryman explains in his report and will explain that the way that you calculate market share is by looking at the respective revenues of each company as opposed to -- in contrast to the total industry, the clear aligner U.S. industry revenues.

09:08 So he's going to explain that when you look at the total market and then you look at the respective revenue of each company, that's how you calculate market share.

09:08 The blue line are revenues, as indicated on -- by the Y-axis, and he'll explain that those revenue lines, when you do the typical market share calculation, results in the 84 to 92 percent share which is calculated by year.

09:08 This is fully disclosed in his report. Both the revenue numbers and the market share numbers are disclosed in the -- in the report. And Dr. Perryman explains that this is precisely how to calculate the market share, by looking at revenues and then doing the division to turn that into the market share number.

09:08 THE COURT: This is just going to be a demonstrative, right?

09:09 MR. HIRSCH: Correct. It's just a

demonstrative as part of his testimony.

THE COURT: Does Dr. Perryman have a way -- do you all have a way technically, since you have the time -- yes, sir.

MR. TUBACH: Dr. Perryman's in court. I don't know if we should have him step out for this or if it matters.

THE COURT: It'd be helpful probably if he hears this.

So is there a way that you can put up the slide first without the 84 to 92 market share portion of it?

MR. HIRSCH: Uh-huh.

THE COURT: Have him explain what he's talking about, and then if you want to have a second slide that adds --

MR. HIRSCH: That has it.

THE COURT: -- whatever it is that he says. And then counsel can take him up on cross with -- if he has an issue about what he did.

MR. HIRSCH: That's fine. Thank you, Your Honor.

THE COURT: Okay. Anything else?

MS. DURIE: Assuming the jury's still not here --

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

was no particular challenge with respect to changing the order of the layers for enablement purposes, which was the substance of the challenge that they are now bringing.

And as I said, they raised this in one of the motions in limine, making the same arguments that they're making now, and that objection was overruled at that time.

THE COURT: I should understand, but I don't quite. Help me on how this helps on enablement. I'm --

MS. DURIE: Because the argument that I understand defendants to be making with respect to enablement is that it was too hard to be able to change the various order of layers --

THE COURT: Okay.

MS. DURIE: -- in order to be able to make the various variations on the product.

THE COURT: Okay.

MS. DURIE: And this shows that they considered flipping the order of the layers from hard-soft-hard to soft-hard-soft, and they didn't see that as presenting any particular problem.

THE COURT: So it rebuts the argument that it would have been impossible or too difficult to

do.

MS. DURIE: That it would require undue experimentation in order to be able to make the different permutations of the product.

THE COURT: And --

MS. DURIE: It is also, for what it's worth -- well, I'll leave it at that for the moment. Thank you.

THE COURT: And the witness is going to explain the way you just explained.

MS. DURIE: Correct.

THE COURT: Okay.

A response?

MR. MUELLER: So, Your Honor, a few things. Dr. Reitman is coming back on enablement and a response to the misrepresentation allegations that we made with respect to the submissions to the Patent Office, not on noninfringement.

This document, there's a couple of things I would note. Number one, Dr. Reitman has no opinion in her enablement sections of her expert reports connected to this. So there's no connection between her actual expert report and this.

Number two, there's nothing in this document. It's very short. Your Honor can see there's

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

09:14 THE COURT: Well, let me hear from -- if you can tell me where it is in her report.

09:14 MS. DURIE: It is in the section -- and I apologize. I don't have the citation right now, but I will provide it to the Court in advance of her testimony.

09:14 THE COURT: Well, and so if you can -- the ruling will be the same. If you think -- if you think that it's in her report --

09:14 MS. DURIE: It is.

09:14 THE COURT: -- and you ask the question, when they object it's not in her report, you can tell me where it is and we should be good.

09:14 MS. DURIE: I understand. Thank you, Your Honor.

09:14 MR. MUELLER: And I would just ask that it not be published to the jury until we deal with this issue.

09:14 THE COURT: I think that's fine.

Anything else?

09:14 MR. MUELLER: If we're still waiting, we have one more issue --

THE COURT: Sure.

09:14 MR. MUELLER: -- if there's time. And this relates to the '936 patent which Your Honor

granted JMOL on.

And the question is we believe it would be appropriate to give the jury a very neutrally-worded instruction akin to what you have done in other cases.

We've been discussing this over the weekend with Align, and their position is that we should not give any or you should not give any instruction at all.

I can read you the text of our proposed instruction, and we can give it to you in writing as well, Your Honor. But it's adapted from what you did in the ACQIS, if I'm pronouncing that correctly, ACQIS versus ASUSTeK case. And the language would be as follows:

Ladies and gentlemen, I'm going to read you an instruction. You heard testimony last week about the '936 patent and two products that Align accused of infringement in this case, the SIRIOS and Virtuo Vivo scanners.

On Wednesday, I addressed an issue regarding the '936 patent outside of your presence. The '936 patent is no longer a part of the case. I tell you that because I didn't want you to wonder why defendants were not discussing the '936 patent.

Defendants do not need to address the

'936 patent because it's no longer in the case, and you will not need to answer any questions about it. You should not allow the fact that the '936 patent is no longer in the case to have any impact on you with respect to any other issue in this case.

And the reason why we believe and would respectfully request -- believe this instruction's appropriate and respectfully request that Your Honor give it is we're not going to present any expert testimony responding to the infringement allegations. And we don't want the jury to think that our silence on that topic is somehow because we have no response.

And that's particularly true, Your Honor, because as you've heard earlier today, there's scanner issues for the antitrust claims. The closed system argument that we're making, that's central to our antitrust claims, and we don't want the jury to have any confusion that Align's conduct is justified vis-à-vis ClearCorrect and Straumann because of the infringement allegations that we have not responded to before them.

THE COURT: Well, ordinarily, but for your antitrust counterclaims, I would not be providing what you're suggesting.

What I -- what I'm not following, though,

is -- and I understand -- I do understand a concern on your part having an antitrust argument.

What I don't understand is unless the plaintiff makes some kind of affirmative statement about it, why -- look, juries hear a lot of things. But I don't understand why the jury would be impacted on your antitrust case by the fact that silently -- now, by saying this out loud, I'm telegraphing to the plaintiff not to intimate to the jury that there is some connection.

But I think that absent -- if we get through the trial without the plaintiff -- you being able to show where the plaintiff made some argument that is negative to your antitrust case because that patent is no longer in it, I think that's unnecessary.

MR. MUELLER: Understood.

I just have one thing, Your Honor. To the extent that does happen --

THE COURT: Let me say one more thing just to protect you.

You are certainly welcome to proffer that to protect the record and -- but I don't intend to give it, absent you being able to articulate why it's necessary based on something that -- and I'll say this one more time. Y'all are good lawyers.

But just so -- you can't bring something in and say it opened the door to them getting an instruction. I would only give that instruction if it were curative of something that the plaintiff did.

MR. MUELLER: Understood, Your Honor.

I guess the only thing I would add is that to the extent that the situation arises where we think some insinuation is being made or the like, we may actually ask for a stronger curative instruction than this.

THE COURT: You all do whatever you need to do to protect your clients.

And so anything else?

MR. MUELLER: That's all we have, Your Honor. Thanks very much.

THE COURT: Okay. We're still missing a juror. And so when she -- it's a she, right? When she gets here, I will let you know and we will commence.

THE BAILIFF: All rise.

(Recess taken.)

THE BAILIFF: All rise.

THE COURT: Please remain standing for the jury.

(Jury entered the courtroom.)

THE COURT: Thank you. You may be

seated.

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

CROSS-EXAMINATION CONTINUED

BY MR. DURST:

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

A. Yes. I do.

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

A. Yes.

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

A. No.

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

A. No.

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

A. No.

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

A. No.

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 while ClearCorrect's is shrinking.

09:37 Do you remember that?

09:37 A. I remember the slide, yes.

09:37 Q. All right. Now, Ms. Sterling, we thought we were -- we thought we were getting close to the end of your cross-examination, and I had some questions prepared to ask another witness, Mr. Kirsch.

09:37 Mr. Kirsch is your boss?

09:37 A. Yes.

09:37 Q. And last week we thought he was coming, but I learned over the weekend that he's not coming. Have you been informed that Mr. Kirsch is not coming to Waco?

09:37 A. I heard today he's not coming.

09:38 Q. You heard that this morning?

09:38 A. Yes.

09:38 Q. With my apologies, ma'am, I need to ask you some of the questions I was going to ask Mr. Kirsch.

09:38 A. Okay.

09:38 Q. All right. So we were looking at PTX-1615 when we left on Wednesday afternoon, and that is Straumann's annual report.

09:38 Do you remember this document, ma'am? This is Straumann's annual report from 2024.

09:38 A. Yes. I see that.

09:38 MR. DURST: Move to admit Exhibit 1615, Your Honor.

09:38 MR. UNDERWOOD: No objection, Your Honor.

09:38 THE COURT: Admitted.

BY MR. DURST:

09:38 Q. And, Ms. Sterling, if -- you can either follow along in the document that you have in front of you there or you can follow on the screen. We'll do both here.

09:38 On Page 27 of this annual report, do you see the discussion there that says: Becoming a leader -- a leading orthodontic franchise.

09:39 Do you see that, ma'am?

09:39 A. Yes.

09:39 MR. DURST: Mr. Smith, would you please highlight the sentence that begins "Clear aligners."

BY MR. DURST:

09:39 Q. Now, this is the document, this annual report is the document that Straumann gives to -- gives to its investors, right?

09:39 Right, Ms. Sterling?

09:39 A. Yes.

09:39 Q. And here, in the report to investors, it calls aligners "a discreet alternative to traditional braces."

09:39 Do you see that?
09:39 A. Yes. I see that.
09:39 Q. And do you remember that in your deposition, you also called aligners a discreet alternative to traditional braces, "an alternative modality," I think.
09:39 Do you remember that?
09:39 A. I don't remember.
09:39 Q. Do you agree with that, that clear aligners are, I think in your words, "an alternative modality to treatment with braces." That's true?
09:39 A. For a select group of patients.
09:39 Q. That's true?
09:39 A. For a select group of patients.
09:40 Q. Ma'am, is it true for -- that clear aligners are an alternative modality for treatment -- an alternative modality to braces?
09:40 A. For a select group of patients, yes.
09:40 Q. All right. And then also in this Straumann report -- this is the Straumann AG, the parent company, right?
09:40 A. Yes.
09:40 Q. Okay. That's the Swiss company?
09:40 A. The parent company, yes.
09:40 Q. Right. And that's the one that -- you're in their offices, your office, your work office is in

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

09:41 Q. So how is ClearCorrect in the United States doing relative to other geographic markets around the world?

09:41 A. Flat to declining.

09:41 Q. And compare -- I'm asking you to do a relative comparison to other markets around the world.

09:41 A. For ClearCorrect, in the United States, we are flat to declining compared to other countries around the world. Yeah.

09:42 Q. And there are reasons that things are different in those other countries, aren't there?

09:42 A. I don't understand.

09:42 Q. Well, demand is sometimes different in -- in the other countries?

09:42 A. Not necessarily.

09:42 Q. Well, let's look at Page 27 of this -- pardon me -- 39 of this annual report. And the paragraph that begins "While the orthodontic segment" is there.

09:42 This very first sentence of this part of the discussion within the annual report points to soft demand in the United States.

09:42 Do you see that? Do you see that, ma'am? Do you see that language?

09:42 A. Yes. I see the language.

09:42 MR. DURST: And if we take that blowout

09:42 down, Mr. Smith.

BY MR. DURST:

09:42 Q. We can see that we're talking about North America, that the U.S. market has soft demand.

09:42 Do you see that?

09:42 A. Yes. I see that.

09:42 Q. Okay. And if we go to Slide -- pardon me -- Page 38, there's a discussion of Europe, Middle East, and Africa.

09:43 Do you see that this is what your annual report is referencing?

09:43 A. Yes. Overall.

09:43 Q. And in this section, Straumann calls out that in the orthodontic section -- and that's clear aligners, right, for Straumann, orthodontics?

09:43 A. Yes.

09:43 Q. In the orthodontic section, execution, which means team performance, doesn't it? Team performance means execution, Ms. Sterling?

09:43 A. It can mean it.

09:43 Q. And in this market, orthodontics is making a significant contribution driven by strong execution in a more targeted approach.

09:43 Do you see that?

09:43 A. Yes. I see that.

09:43 Q. And so in the annual report, Ms. Sterling, your company is calling out differences between what's happening in the United States and around the world.

Do you agree with that?

09:43 A. Calling out differences, yes.

09:44 MR. DURST: Now, we can take that down, Mr. Smith.

BY MR. DURST:

09:44 Q. Ms. Sterling, who is the CEO? Who is Mr. Kirsch's boss?

09:44 A. Guillaume.

09:44 Q. And what is his last name?

09:44 A. Daniellot.

09:44 Q. Daniellot?

09:44 A. Daniellot, yeah.

09:44 Q. I'm going to struggle with the name a bit. So bear with me.

Does he come to the United States sometimes?

09:44 A. I believe so. Yes.

09:44 Q. Have you ever met with him in the United States?

09:44 A. Yes.

09:44 Q. And has he ever been to Texas?

09:44 A. Yes.

09:44 Q. Did you meet with him when he was in Texas?

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

09:45 Q. And do you see the RE line, the subject matter line, is Follow up on the North American Market visit?

09:45 A. Yes. I see that.

09:45 Q. Is this the same review that you participated in or a different one?

09:45 A. This is a different time.

09:45 Q. Okay. So let's look now -- if we look at this e-mail that he sends to his colleagues in the executive suite there, he -- if we go down to Page -- let's see. It's 586, Page 1, and the sentence that begins or the paragraph that begins: I would like to summarize my notes.

09:46 Do you that?

09:46 A. Yes. I see that.

09:46 Q. Okay.

09:46 MR. UNDERWOOD: Your Honor, I object.

09:46 THE COURT: Mr. Durst.

09:46 MR. DURST: Yes.

09:46 MR. UNDERWOOD: I apologize, Your Honor.

09:46 Under the Court's guidance this morning, Ms. Sterling's not cc'd on this. And she just testified that this was a different time period than the meeting she had participated in. So I'm not sure there's a foundation.

09:46 THE COURT: If you want to lay a

09:46 foundation whether or not she's seen this exhibit.
09:46 MR. DURST: Your Honor, this exhibit is
09:46 in evidence.
09:46 THE COURT: I know, but I don't even know
09:46 if she's ever seen this before today.
09:46 MR. DURST: Before today.
09:46 BY MR. DURST:
09:46 Q. Have you talked with Mr. Daniellot and his
09:46 team about the North American market, ma'am?
09:46 A. Not specifically.
09:46 Q. Never?
09:46 A. I don't remember. Not that I can remember.
09:46 Q. You've never talked to your boss' boss about
09:46 the North American market?
09:47 A. Not that I can remember.
09:47 Q. Have you seen his references to self-inflicted
09:47 wounds, ma'am?
09:47 A. I saw it in court a few days ago.
09:47 Q. He didn't tell you about that e-mail that he
09:47 sent that said in the North American market, we're
09:47 suffering from self-inflicted wounds?
09:47 A. He did not tell me.
09:47 Q. You've never heard that before?
09:47 A. He did not tell me.
09:47 Q. Now, if we go to -- if we go over to the -- up

09:47 to the first page of this e-mail, 12:27, Mr. Daniellot talks about several reasons for the shortfalls.

MR. UNDERWOOD: Your Honor, I apologize. I would just re-urge the same objection.

THE COURT: Counsel, unless you establish that she's familiar with this document, I'm not going to allow you to ask her questions about it.

MR. DURST: Okay, Your Honor.

You can take it down, Mr. Smith.

BY MR. DURST:

Q. Have you heard, Ms. Sterling, of the executive suite calling for an emergency in the leadership in North America? Has that ever been communicated to you?

A. No.

Q. By anyone?

A. No. I have not heard those words.

Q. And do you know that there were changes made in the leadership in the United States after these visits?

A. I know there were changes made. Yes.

Q. Yes. Mr. Kirsch came online, right?

A. Yes.

Q. He was hired as the new leader?

A. He was already part of the group, but --

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

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

09:52 MR. MUELLER: And we said we'd give them the expedited counter-designations this afternoon.

09:52 MR. DURST: Your Honor, may I raise another issue while we're right up here?

I understand the Court's rules is it's one riot, one ranger, and we were instructed we are to only bring one lawyer. Now, while we kind of like Mr. Mueller hopping up and running up here every time, that's kind of --

09:52 THE COURT: I was going to discuss that when we weren't all up here, but you are correct. I just like having one lawyer per side.

09:52 MR. DURST: Thank you.

09:52 MR. UNDERWOOD: Thank you, Your Honor.

09:52 (Bench conference concludes.)

09:52 BY MR. DURST:

09:52 Q. Ms. Sterling, ClearCorrect has suffered from turnaround time in manufacturing and lost business on account of that, isn't it?

09:52 A. I don't know that I would characterize it like that.

09:52 Q. ClearCorrect has suffered in the market with its customers due to manufacturing issues.

09:52 Do you agree with that part?

09:52 A. We've had manufacturing issues.

Q. And you've had complaints about turnaround times from your customers?

A. Yes. We've had complaints.

Q. And some of those complaints have gone all the way up to the Swiss CEO, Mr. Daniellot, right? You know that?

A. Yes.

Q. And have you -- have you heard that Mr. Daniellot is concerned about continuously receiving complaints? Have you heard that, ma'am?

THE COURT: I'm sorry. I just couldn't understand your question. I didn't hear it.

MR. DURST: Has she been informed that the CEO is concerned about continuously receiving complaints about manufacturing issues?

MR. UNDERWOOD: Your Honor, I would object to lack of foundation.

THE COURT: Overruled.

A. Can you restate the question? Sorry.

BY MR. DURST:

Q. Have you been informed that the CEO, the chief CEO, the boss' -- your boss' boss, has been informed about continuously receiving complaints regarding manufacturing delays and manufacturing quality?

A. I know he's received complaints. Yes.

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

09:55 Q. Who is Ms. -- who is Ms. Finzi?
09:55 THE COURT: Well, counsel, you --
09:55 MR. DURST: Yeah. I don't have the deposition to use it, Your Honor.
09:55 THE COURT: Okay.
09:55 BY MR. DURST:
09:55 Q. Who is Ms. Finzi?
09:55 A. She was the former head of the orthodontic business unit.
09:55 Q. All right. Now, let's look at this document. This document is from your business unit that you're involved with now, correct?
09:55 A. I believe so.
09:55 Q. Yes. And you've seen this document before?
09:55 A. I do not believe I've seen this document before.
09:55 Q. You've never seen this document before?
09:55 A. I don't believe so.
09:55 Q. Ms. Sterling, there was a time when ClearCorrect was suffering from and it knew it was suffering from material problems, correct, problems with its materials?
09:56 A. Not that I recall.
09:56 MR. DURST: Your Honor, may I refresh the witness' recollection with this document?

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

Yes.

Q. You knew that?

A. Yes. A previous material.

Q. And you know that in this -- this document we looked at a moment ago was in June of 2021, and you know that shortly after this, ClearCorrect moved from a single-layer material to a multi-layer material.

You know about that too, right?

A. I know that we moved to multi-layer. Yes.

Q. And that --

MR. DURST: Let's go to PTX-387, please.

I want to make sure I got 549 admitted. I believe I did. 387.

BY MR. DURST:

Q. And you recognize this document, ma'am, as a -- as material from ClearCorrect? It's a printout of your website, right?

A. Yes.

MR. DURST: Move to admit 387, Your Honor.

MR. UNDERWOOD: No objection, Your Honor.

THE COURT: Admitted.

BY MR. DURST:

Q. And do you see --

MR. DURST: Let's highlight, Mr. Smith,

09:58 the ClearQuartz tri-layer material.

BY MR. DURST:

09:58 Q. Do you see this?

09:58 A. Yes.

09:58 Q. This a reference to the tri-layer material being used for ClearCorrect. That is the material you are using now, correct?

09:58 A. Correct.

09:58 Q. And you know that ClearCorrect moved to this tri-layer material just 60 days after that internal review found materials problems with its prior material.

09:58 Do you know that?

09:58 A. No. I don't know that.

09:58 Q. Do you know that ClearCorrect started using the tri-layer material in August of 2020?

09:59 A. Yes. I learned that.

09:59 Q. And the prior document that we looked at that said we had materials problems, that was in June of 2020, wasn't it?

09:59 A. That was the date of the document. Yes.

09:59 MR. DURST: And I'd like to pull up Exhibit PTX-324.

BY MR. DURST:

09:59 Q. What is this document, ma'am? This is a

document, internal Straumann e-mail. Do you -- from 2024.

Do you see that?

A. Yes. I see this.

MR. DURST: Move to admit Exhibit 324, Your Honor.

MR. UNDERWOOD: No objection to it being admitted, but I don't see her on here. So we would object to use with the witness.

THE COURT: It'll be admitted.

BY MR. DURST:

Q. Now, Ms. Sterling, have you seen this document before?

A. No. I do not believe so.

Q. Do you know these players, Mr. Chavanne?

A. Yes. I know.

Q. And, Ms. Sterling, this document talks --

THE COURT: Counsel, she's never seen the document before. Move on.

MR. DURST: Okay.

BY MR. DURST:

Q. Ms. Sterling, the SmartTrack material that is referenced in this e-mail, SmartTrack material is Align, correct? You know that?

A. SmartTrack material is Align.

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

10:01 100 Days.

MR. DURST: Now, this is PTX-624. I move to admit PTX-624.

MR. UNDERWOOD: Your Honor, again, no objection to its admission, just to use with the witness.

THE COURT: Admitted.

BY MR. DURST:

Q. Now, Ms. Sterling, what does OBU mean?

A. Orthodontic Business Unit.

Q. And what does the first line right below the title, what does that say? Can you read that language?

A. No. Sorry.

Q. All right. This document, I'll represent to you, ma'am, is Mr. Kirsch's 100-day review.

Have you seen this document before?

A. I have not.

MR. DURST: I would like to go specifically, Mr. Smith, to Page No. 11.

BY MR. DURST:

Q. And the first question, Ms. Sterling, is have you seen this -- whether in this document or not, have you seen this rating of product delivery and reliability and clinic treatment reliability?

A. I don't believe so.

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

10:04 Align as the leader.

Do you see that?

A. Yes. That's what it says.

Q. This document and this review, Ms. Sterling, are the result of a thorough analysis by Bain & Company, an outside consulting firm, that then reported back to the management of Straumann, correct?

A. I disagree.

Q. It is an analysis that Straumann hired Bain to do of its orthodontic business, true?

A. Yes.

Q. And if you go to the -- let's go to Page No. 24 of this document.

Part of what Bain did was do some ratings of ClearCorrect versus competitors, right? Ma'am?

10:05 A. That's what that -- this page, yes.

Q. And Bain did this?

A. Bain did this. Yes.

Q. And you see that this is the distant follower slide that Bain prepared, right?

A. Yes.

Q. And under the Assessment line, under Assessment column, this is assessing ClearCorrect on all these various categories, right?

10:05 A. Yes.

10:05 Q. And in Bain's review, the slide bar, the diamond being far to the left or being left of center, is low on the Bain assessment scale, correct?

10:05 A. That's how I read this. Yes.

10:05 Q. And so Bain found ClearCorrect to be low on targeting the right customer segment, correct?

10:05 A. In this document, yes.

10:05 Q. Delivering a best-in-class product, correct?

10:05 A. What was the question?

10:05 Q. Bain found ClearCorrect to be low on the scale compared to competitors about best-in-class products?

10:06 A. After two weeks, yes.

10:06 Q. And we go on down. All -- each of these is Bain's assessment on those areas, correct?

10:06 A. Yes.

10:06 Q. Now, if we go -- Bain did more work than just this first report, didn't they?

10:06 A. Yes. I believe so.

10:06 MR. DURST: Let's go to PTX-125.

BY MR. DURST:

10:06 Q. And this is another Bain report. Do you recognize that, Ms. Sterling?

10:06 A. I don't know that I've seen this one.

10:06 Q. Do you recognize that to be the Straumann report?

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

10:07 A. I've seen this type of chart before.
10:07 Q. And the way we read this chart is the dots that are connected by the lines, that's Bain's ranking of where ClearCorrect stands on all these scales, correct?
10:08 A. That's Bain's ranking, correct.
10:08 Q. Now, including on costs and lead time after ordering, right?
10:08 A. Yes. That's Bain's ranking.
10:08 Q. And the other dots, they show where ClearCorrect stands relative to the competition, don't they?
10:08 A. Yes, in Bain's ranking.
10:08 Q. And so each of the dots to the right of the ClearCorrect dot show a competitor who is better, in Bain's view, than ClearCorrect; is that true?
10:08 A. Not exactly.
10:08 Q. In Bain's view, all of the dots on the right, they all represent competitors, right?
10:08 A. Yes.
10:08 Q. And the way Bain ranked this, if a dot is to the right of where ClearCorrect is, it is closer to being a leader than it is a laggard, correct?
10:09 A. Sorry. Can you resay that?
10:09 Q. In Bain's view, each of these dots that is to

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

10:10 to admit that, Your Honor.

10:10 MR. UNDERWOOD: No objection.

10:10 THE COURT: Admitted.

10:10 BY MR. DURST:

10:10 Q. Okay. And he took -- you know that he took many of these Bain findings and reported them to the management, the board of directors of a company, correct?

10:10 A. I don't know that.

10:10 Q. You know he gave a report. Did he talk to you about the report that he gave to the board? Did you know that he was giving a report?

10:10 A. I didn't know he was giving, but I knew about this.

10:10 Q. You knew about that -- about that document?

10:10 A. Yes.

10:10 Q. All right. So this document is in December of '23.

10:10 Now, Ms. Sterling, we have talked about the three Bain reports starting in April of 2020 -- I'm sorry -- Mr. Kirsch's 100-day presentation starting in April of 2024. Then we've talked about the Bain reports in September and November and then this December presentation to the board of directors.

10:11 And at least some of those documents you are

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

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

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

10:14 Q. And does it indicate what period of time this study lasted for?

10:14 A. This says after two weeks.

10:14 Q. And Mr. Durst asked you about some statements here towards the -- on the left-hand side of the page, Align Technology.

10:14 Do you see that one?

10:14 A. Yes. I see it.

10:14 Q. And it says: Align Technology is the undisputed scale and profit leader in a winner takes all market.

10:15 Right?

10:15 A. Yes. I see that.

10:15 Q. Now, do you agree that Align is in fact the biggest player in the market?

10:15 A. Yes. I agree.

10:15 Q. And below that, it says: ClearCorrect is a loss making distant follower.

10:15 Do you see that?

10:15 A. Yes.

10:15 Q. And do you agree that ClearCorrect has experienced some troubles certainly in the United States?

10:15 A. Yes. I agree.

10:15 Q. And why is that?

10:15 A. And for a variety of reasons. But as we've talked about, one of the main reasons is Align's practices of locking out customers, forcing them to buy an iTero, to do business with them, making it difficult to get the STL files off of the scanner, and requiring them to purchase a certain number of cases in order to avoid penalties.

Q. Thank you, Ms. Sterling.

MR. UNDERWOOD: Mr. Lee, you can take that down.

BY MR. UNDERWOOD:

Q. Does ClearCorrect offer a high-quality product?

A. Absolutely.

Q. Were you here last week during the testimony of Mr. Kossol?

A. Yes. I was.

Q. Do you recall him speaking to the complaint rate for ClearCorrect?

A. Yes.

Q. Do you recall that being about 2 percent?

A. Yes.

Q. Is that a normal or an abnormal volume of complaints that ClearCorrect has experienced?

A. Based on my own experience, it's a normal

volume.

Q. 2 percent is a normal volume in this industry?

A. Yes.

Q. Nothing unusual about that at all?

A. No. Nothing unusual.

MR. UNDERWOOD: Let's go to PTX-126.

BY MR. UNDERWOOD:

Q. Now, this was a document I believe you got some questions about last week before we broke for the week.

Do you remember those?

A. Yes.

MR. UNDERWOOD: And can we go to Page 33?

BY MR. UNDERWOOD:

Q. All right. You got some questions about the column here that says "Weaknesses."

Do you see that?

A. Yes.

Q. Was this document a United States-only document, or was this document a global document?

A. This was a global document.

Q. And how do we know that? Who created this document?

A. Two members of my team who are on the global team.

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

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

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

10:20 Q. And this one has a very low number of submissions. Do you recall getting questions about this low volume of submissions?

10:20 A. Yes. I do.

10:20 Q. Why is the volume of submissions so low for this scanner?

10:20 A. Because it wasn't fully released until 2024.

10:20 Q. And so what are these submissions here, the one in each year?

10:20 A. It's test data.

10:20 Q. This is just test data?

10:20 A. Correct.

10:20 Q. You also got questions -- and just to close the loop on that, Ms. Sterling, so the Virtuo Vivo and the SIRIOS, those were the Straumann ones?

10:21 A. Correct.

10:21 Q. All right. You also got questions about the iTero scanner.

Do you recall those?

10:21 A. Yes.

10:21 Q. And the iTero scanner is offered by who?

10:21 A. Align Technology.

10:21 Q. That's Align's scanner?

10:21 A. Yes.

10:21 Q. And the questions were about the volume of

10:21 submissions from iTero.

Do you remember that?

A. Yes. I remember.

Q. And in total, there have been 50,000 submissions, fair?

A. Fair.

Q. And that's out of how many?

A. 1.5 million.

Q. Which is about 3 to 5 percent, I believe?

MR. DURST: Objection, Your Honor. I would request that the counselor stop leading his witness.

THE COURT: Sustained.

MR. UNDERWOOD: Thank you, Your Honor.

BY MR. UNDERWOOD:

Q. What's the percentage?

A. 3 to 5 percent.

Q. Does this reflect an open or a closed system?

A. Does what?

Q. The fact that only 3 to 5 percent of the iTero scan -- or strike that.

The fact that only 3 to 5 percent of all the submissions come from iTero.

Maybe I could ask a better question, Ms. Sterling.

10:22 What is the most commonly used scanner in the market?

A. TRIOS.

Or sorry. In the total market, it is Align iTero.

Q. Thank you.

In the total United States market --

A. Yep.

Q. -- what is the most commonly used scanner?

A. It's the iTero.

Q. And despite being the most commonly used scanner, what is the percentage of submissions that ClearCorrect receives from iTero?

A. 3 to 5 percent.

Q. If it were an open system, would you expect that number to be higher?

A. Absolutely.

Q. All right.

10:23 MR. UNDERWOOD: Let's go to -- oh, can we go to DTX-2236, please, Mr. Lee?

BY MR. UNDERWOOD:

Q. All right. Last week you got some questions about this document.

Do you recall that?

A. Yes.

Q. You also received some questions in the context of this document about direct to consumer.

Are you familiar with direct to consumer?

A. I am.

Q. What is direct to consumer?

A. It's where a company promotes their products directly to the end user, the patient.

MR. UNDERWOOD: And can we go to Page 4, please? And can we zoom in on that direct to consumer, the bottom row there? Okay.

BY MR. UNDERWOOD:

Q. Are you familiar with the first company shown here, Smile Direct?

A. I am.

Q. Are they in business?

A. They are not.

Q. When did they go out of business? Do you recall?

A. In past year, two years.

Q. Okay. The next company, SnapCorrect, do you see that?

A. Yes.

Q. Are you familiar with them?

A. I'm not.

Q. Okay. You're unfamiliar with SnapCorrect.

10:24 Are you familiar with any of the other companies here, SmileLove or Candid?

A. Candid, yes.

Q. And is Candid at all doing direct to consumer these days?

A. Not direct to consumer.

Q. Okay. Thank you.

Do you recall Mr. Daniellot's testimony last week via deposition? Do you remember that?

A. Yes.

Q. Do you recall that Mr. Daniellot, his deposition was played to the ladies and gentlemen of the jury? Do you remember that?

A. Yes. I remember.

Q. And I believe he testified that ClearCorrect does not compete with direct to consumer.

Do you remember that?

A. Yes. I remember.

Q. And do you agree with him?

A. I agree.

MR. UNDERWOOD: Let's go to -- can we go to PTX -- let's go to -- strike that, Mr. Lee.

PDX-1.79.

BY MR. UNDERWOOD:

Q. Okay. Last week during your testimony, do you

10:25 recall Mr. Durst asking you some questions about this slide?

A. Yes.

Q. And this was something that the plaintiff prepared for their opening statement?

A. Yes.

Q. Does this tell the whole story?

A. No.

Q. Of the competitors listed on this slide, who's missing?

A. Invisalign.

Q. Invisalign is not shown on this slide?

A. Correct.

MR. UNDERWOOD: Can we go to DDX-3? All right. And let's just go to DDX-3.

BY MR. UNDERWOOD:

Q. Now, if you were to add Invisalign, where would they fall?

A. Significantly higher than the rest of the companies in the market.

Q. Now, if you look at the last slide, I think they were suggesting that ClearCorrect was below the others?

A. Correct.

Q. On this slide, how does ClearCorrect fare

compared to the others, pretty close?

A. Pretty close.

Q. And how do all of those compare to Invisalign?

A. Significantly lower.

Q. And Invisalign operates what type of system?

A. Closed system.

Q. ClearCorrect operates what type of system?

A. An open system.

Q. Ms. Sterling, if Invisalign offered an open system, is ClearCorrect ready, willing, able, and prepared to compete on an even playing field with them?

A. Absolutely.

MR. UNDERWOOD: Thank you very much.

I pass the witness.

MR. DURST: Let's go back to JTX-60, Mr. Smith.

RECROSS-EXAMINATION

BY MR. DURST:

Q. Just a couple more questions, ma'am.

Virtuo Vivo is a Straumann scanner?

A. Yes.

Q. And it was on the market for all of these years fully up through 2023 I think was your testimony?

A. Yes. So it was on the market --

Q. And sometime after 2023, it came off the

market?

A. Correct.

Q. And it came off the market because there were problems with the scanner, didn't it, Ms. Sterling?

A. Yes.

Q. And the Straumann SIRIOS scanner, that's not on the market right now either, is it?

A. It's on the market.

Q. There were problems with the SIRIOS scanner as well, right?

A. Not that I'm aware.

Q. Now, Ms. Sterling, your testimony is that even though according to this slide some 50,000 scans came to ClearCorrect from an iTero scanner, your testimony is that's a closed system?

A. Yes.

Q. Now, I want to show you Exhibit No. 190, please.

This is -- you recognize this to be one of your e-mails, correct? Go down to the bottom. At the bottom, it's your e-mail, Ms. Sterling.

A. Yes. At the bottom.

Q. In October of 2023, right? You were in Round Rock then, right?

A. Yes.

10:28 Q. Had you taken some global responsibilities at that point?

10:28 A. Yes.

10:28 Q. So at that point, you were wearing both a United States hat and a global hat?

10:28 A. Yes.

10:28 Q. And if we go to the body -- actually, before we leave that, you wrote this, and it is -- the topic is Pure Orthodontics and an "urgent" in all caps with two exclamation points.

10:29 Do you see that?

10:29 A. Yes. I see that.

10:29 Q. Now, if we go down into what you were writing here, so we'll need to go to the next page, you're forwarding -- you're forwarding this message, right?

10:29 A. Yes. I'm forwarding.

10:29 Q. And can you read to the jury what you wrote to your team there in the first paragraph of the e-mail? Just read it out loud.

10:29 A. See this e-mail chain below. We are losing the confidence of the customers in the field. Our full attention on these issues has to be our biggest priority. Nothing else we do will matter if we cannot solve this.

10:29 Q. You were in an urgent situation with a big

priority item because you were losing customer confidence, right?

A. We could lose customer confidence, yes.

Q. It doesn't say "could." It says "we are," doesn't it, ma'am?

A. That's what it says.

Q. And you were in Round Rock wearing a global hat?

A. Yes.

MR. DURST: Your Honor, I'll conclude the examination.

MR. UNDERWOOD: Just a couple more questions on this, Your Honor.

And I apologize. Can we get that exhibit back up? Was it 190?

MR. DURST: It is Exhibit PTX-190. And I move to admit it.

MR. UNDERWOOD: No objection.

THE COURT: Admitted.

MR. UNDERWOOD: And can we go back down to the e-mail that was just discussed?

FURTHER REDIRECT EXAMINATION

BY MR. UNDERWOOD:

Q. Okay. Ms. Sterling, is ClearCorrect always looking to improve?

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

10:31 BY MS. FERRERA:

10:32 Q. Good morning, sir.

10:32 A. Good morning.

10:32 Q. Can you please introduce yourself to the jury?

10:32 A. Sure. My name is Jason Coss. I'm the vice president of sales for Straumann North America. I live in a town called Still, Massachusetts, for almost three years now with my family, which is my wife, my 17-year-old daughter, and my 14-year-old son.

10:32 Q. And can you tell us a little bit about your work history before you joined Straumann?

10:32 A. Sure. I basically grew up in the dental world. My father was a business owner, had a dental distribution company when I was a little boy. He used to take me to different trade shows and help him set up tables.

10:33 And when I was coming out of school, he had been out of the dental market for a few years. I wanted to get back in and started our own dental distribution company that was called Denesca. So I worked there for 14 years.

10:33 And after 14 years, we sold that company to a large dental distribution company called Patterson Dental. I worked for them for approximately five years, and then I joined Straumann Group.

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

scanners already in this case, Mr. Coss, but could you just remind us briefly, what is an intraoral scanner?

A. An intraoral scanner is basically a handheld wand that acts as a camera, that the clinician would hover over the patient's teeth in order to take a 3D rendering of their teeth.

Q. And what intraoral scanners has Straumann sold or does it currently sell?

A. We've sold the entire 3Shape portfolio, which includes the TRIOS 3, the TRIOS Basic, the TRIOS Core, the TRIOS 4, the TRIOS 5, and the TRIOS 6.

We also distributed Medit scanners, which include the i500, the i700.

We had our proprietary scanner called the Virtuo Vivo, and now we have our own proprietary scanners called the SIRIOS and the X3.

Q. Does Straumann still sell the Virtuo Vivo?

A. No. We no longer sell the Virtuo Vivo.

Q. Now, Mr. Coss, in your role, do you have occasion to visit doctors' offices?

A. I do on a regular basis.

Q. And why do you do that?

A. I'll travel with our field sales teams and visit just different customers in different markets.

I also attend a lot of trade shows on an

annual basis. We host over 1,500 educational events on an annual basis. I obviously don't attend all of them, but I try to attend as many as I can.

And we also host customers in our headquarters in Massachusetts.

Q. So how often are you meeting or speaking to doctors?

A. I speak to customers every week.

Q. And so all told, Mr. Coss, how many years have you networked in the dental industry?

A. It's been over 30 years.

Q. Now, we've heard a lot in this case about open and closed systems. Are you familiar with the term "open system" in the dental space?

A. Yes. I am.

Q. And what do you understand that term to mean in the dental space?

A. Simply I would say it allows the clinician the freedom and the flexibility to send scans or cases in an open environment to multiple sources.

Q. And did you help prepare some slides to assist your testimony here today, Mr. Coss?

A. Yes. I did.

MS. FERRERA: Could we pull up Slide No. 2, please?

BY MS. FERRERA:

Q. So let's look at this first from the perspective of a doctor who wants to order Invisalign. What would an -- as a factual matter, what would an open system look like for them?

A. It would allow users of not only the iTero scanners but all other scanners that offer STL files to Invisalign.

Q. And then if we look at it from the perspective of a doctor who has a third-party scanner, what would an open system look like for them?

A. This would allow those clinicians to not only send their scans to Invisalign but also to other clear aligner providers.

Q. So if we put it all together, what would an open system look like in the context of clear aligners and intraoral scanners?

A. As I mentioned, I think it allows the clinician the flexibility to send to multiple sources in every direction.

Q. I want to ask you a little bit about how Straumann does things. Are the scanners that Straumann sells open or closed systems?

A. Yes. Every scanner Straumann sells is an open system.

10:37 Q. So how can a user of a SIRIOS scanner, for example, export a scan file to another clear aligner manufacturer?

10:37 A. It's really simple. It's a few clicks, and you click send.

10:37 Q. And is there a term that's used for those scan files?

10:37 A. Yes. It's called an STL file.

10:38 MS. FERRERA: Let's pull up the next slide.

BY MS. FERRERA:

10:38 Q. And can you show us how the STL export process works on the SIRIOS?

10:38 A. Yeah. So what you see here on the screen is basically the image you would -- the clinician would see right after scanning the patient. So this is what we call the review phase.

10:38 They review their scans. They would click on next. Then they would decide if they wanted to keep it within the Straumann ecosystem or click on local to export that as an open scan. And then they would simply click on send, and you're done.

10:38 Q. So how many total steps is it?

10:38 A. That's three clicks and two steps.

10:38 Q. And how does the process that you just showed

10:38 us for the SIRIOS scanner compare to the STL export process on other scanners that you're aware of?

A. It's very similar to all other scanners in the marketplace with the exception of the iTero scanner.

MS. FERRERA: Let's pull up Slide 8.

BY MS. FERRERA:

Q. And again, this is what an open system would look like for users who want to order Invisalign; is that right?

A. That's correct.

Q. So I want to now ask you about the scanners that can be used to order Invisalign.

If you turn to Tab 3 in your binder, and DTX-109.

A. Yep.

Q. And can you tell us what that document is, Mr. Coss?

A. This is Align's public policy on what impressions are accepted.

Q. What's the date of that document?

A. November 2019.

Q. And where did this policy come from?

A. It comes from their website.

Q. Are you familiar with the policy that's reflected in DTX-109?

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

10:40 Q. And then if I can have you look at the second paragraph that starts "Please note," can you read that paragraph for us?

10:40 A. Sure. Please note that this -- that the list below is a comprehensive list of third-party intraoral scanners that can be used for Invisalign aligner case submission.

10:40 Q. And what scanners are on this comprehensive list?

10:40 A. The first is 3M True Definition scanner; Dentsply Sirona CEREC Omnicam scanner; 3Shape TRIOS 2, TRIOS 3 scanners, including TRIOS 3 Basic, only accepted outside of the U.S., Japan, and China.

10:41 Q. So I want to talk about each of the options that are listed in this document starting with physical impressions or a PVS.

And we've heard a little bit about PVS already, Mr. Coss, but could you describe what your experience with PVS is?

10:41 A. Yes. I have experience as a patient and as a demonstrator of how to use the product in many educational events.

Like I mentioned, it's like -- it's a putty-like material. So the clinician would apply this putty into what we call an impression tray. It has the

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

that their impression is inaccurate or they can't use it. And then that clinician needs to call back the patient and repeat those same steps with zero certainty that the next impression will be accurate.

Q. Now, does ClearCorrect still receive PVS impressions for purposes of ordering clear aligners?

A. Less and less, but yes.

Q. And so based on your awareness of ClearCorrect's experience and your own experience, is PVS a commercially-viable option for ordering clear aligners?

MR. DURST: Objection, Your Honor. This is a -- this is an opinion question, and we object to him offering opinions at this stage.

MS. FERRERA: Your Honor, I'd direct you to Paragraph 2 in the disclosure that we submitted.

THE COURT: Mr. Durst?

MR. DURST: I see it in the report, Your Honor. I think it's a matter of qualification.

THE COURT: Overruled.

BY MS. FERRERA:

Q. So, Mr. Coss, based on your experience, is PVS a commercially-viable option for ordering clear aligners?

A. No. It is not.

10:44 Q. So that's PVS, Option No. 1.

10:44 Let's talk about the devices that Align says are part of its comprehensive list of third-party intraoral scanners that it accepts.

10:44 MS. FERRERA: And actually, if I can -- you have it on the screen. That's fine.

BY MS. FERRERA:

10:44 Q. So the first item or machine that's listed there is the 3M True Definition scanner.

10:44 Do you see that?

10:44 A. Yes. I do.

10:44 Q. And do you know of any company today that still sells the 3M True Definition?

10:44 A. No. It's been discontinued since early 2019.

10:44 Q. And in the past six years, say, have you visited a doctor's office that had a 3M True Definition?

10:44 A. No. I have not seen that in several years.

10:44 Q. And so as a factual matter, is the True Definition listed in Align's policy actually an option for ordering Invisalign in the United States?

10:44 A. No. It is not.

10:45 Q. The next scanner that's listed here is the Dentsply Sirona CEREC Omnicam scanner.

10:45 Do you see that?

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

United States?

A. Well, two out of those three have been discontinued as well for several years, and none of them are accepted in the United States from Align.

Q. And so as a factual matter, are any of the third-party intraoral scanners listed in Align's comprehensive list actually an option to order Invisalign in the United States?

A. No. Hasn't been for several years.

Q. All right. I want to ask you about the possibility of having an iTero scanner to order Invisalign and then buying another scanner to order clear aligner brands from other manufacturers.

In visiting dental offices, have you encountered doctors' offices or practices that have multiple scanners?

A. I have, but it's pretty rare for two main reasons.

The first reason is it's a huge capital investment. Scanners cost tens of thousands of dollars. So that would be Point No. 1.

Point No. 2 is when you have a second system, you need to learn a second system. You need to learn a second software. And just like many other businesses, in dental practices, there's a lot of turnover of

staff.

And every time, you know, there's a different assistant, a new hygienist, even a new clinician that joins that practice, having to learn multiple systems is very complicated and not efficient.

Q. And in your experience, how often do doctors typically keep a scanner before investing in a new one?

A. I would say the average is between three to four years.

MS. FERRERA: So if we could turn to the next slide, DTX-10.15, please.

BY MS. FERRERA:

Q. Based on what we've just seen, Mr. Coss, is Invisalign an open or a closed system?

A. I would say it's a closed system.

MS. FERRERA: And we can take that down, please.

BY MS. FERRERA:

Q. Now, I'd like to talk about ClearCorrect.

What scanners can doctors use to order ClearCorrect clear aligners?

A. Every intraoral scanner in the marketplace.

Q. And does ClearCorrect have concerns about the quality of scans that it receives from third-party scanners?

10:48 A. No. All scanners today provide a quality scan.

10:48 Q. And if we can focus on other clear aligner manufacturers.

10:48 What companies accepted scans from the Virtuo Vivo when it was on the market?

10:48 A. Every clear aligner company with the exception of Align.

10:48 Q. And did you ever hear complaints about the Virtuo Vivo while Straumann was selling it?

10:48 A. I did. Primarily on the user experience side of it.

10:48 Q. Did you ever hear complaints about the quality of scans from the Virtuo Vivo?

10:48 A. No. The Virtuo Vivo provided a quality scan.

10:48 Q. And how did Straumann address the complaints about the user experience with the Virtuo Vivo?

10:48 A. Well, we take a lot of pride in everything that we do, not just our intraoral scanners. We're always trying to be better, trying to improve. And the customer experience, the user experience is super important. So when we saw that the Virtuo Vivo was not providing that experience, we pulled it from the market.

10:48 Q. And what scanners does Straumann make and sell

10:49 today?
10:49 A. We offer the SIRIOS Straumann scanner and the
10:49 X3.
10:49 Q. And what clear aligner companies accept scans
10:49 taken using the SIRIOS and the X3?
10:49 A. Every clear aligner company accepts those
10:49 scans, with the exception of Align.
10:49 Q. We've talked a little bit about the 3Shape
10:49 scanners that Straumann used to sell. What clear
10:49 aligner company -- or currently sells.
10:49 What clear aligner company accepts scans taken
10:49 using a 3Shape?
10:49 A. Every clear aligner provider accepts 3Shape
10:49 scans, with the exception of Align.
10:49 Q. And then you also mentioned that Straumann
10:49 used to distribute a Medit scanner; is that right?
10:49 A. That's correct.
10:49 Q. And what clear aligner companies accept the
10:49 Medit scanners?
10:49 A. Every clear aligner company accepts Medit
10:49 scans, with the exception of Align.
10:49 Q. So as someone who's sold intraoral scanners
10:49 for several decades now, are you aware of any clear
10:49 aligner company that only accepts scan files from its
10:49 own scanner?

10:49 A. No. I do not.

10:49 MS. FERRERA: Thank you, Mr. Coss.

10:49 Pass the witness.

10:49 CROSS-EXAMINATION

10:49 BY MR. DURST:

10:50 Q. Good morning, Mr. Coss.

10:50 A. Good morning.

10:50 Q. My name is Tim Durst. I represent Align.

10:50 A. Nice to meet you.

10:50 Q. Nice to meet you too. Nice to meet you too.

10:50 Now, Mr. Coss, on your direct examination, you talked about your experience, and part of that is promoting and selling your company's scanners?

10:51 A. That's correct.

10:51 Q. And your company has a practice of -- or has had programs, at least in the past, where you offered discounts to doctors and dentists on scanners that you were -- you were proposing, right?

10:51 A. We have, yes.

10:51 Q. And you call them bundles sometimes?

10:51 A. We have, yes.

10:51 Q. And what's in the bundles, scanners and what?

10:51 A. Could be a multitude of different products.

10:51 Q. Including potentially aligners?

10:51 A. Yes. It could --

10:51 Q. And if you sell your scanner into a doctor's office, your hope is that you're also going to -- you're going to sell more aligners, right?

10:51 A. Yes.

10:51 Q. And the expectation is they have your scanner. You hope you get more business for the aligners that ClearCorrect makes. All true?

10:51 A. Well, it depends.

10:51 Q. Yeah. This is in a program that you've attempted, right?

10:52 A. For a very small amount of time.

10:52 Q. And when you were doing that, when you were doing that for Straumann, when you were offering to them your scanners at a discount to try to sell more aligners, did you think you were doing something wrong?

10:52 A. No.

10:52 Q. Did you think you were doing something illegal?

10:52 A. Definitely not.

10:52 Q. Now, you have defined an open system to be a -- actually, I'll hold that for just a moment.

10:52 Now, Mr. Coss, incoming scans to Invisalign.

10:52 MR. DURST: If we could get DDX-10.2 up.

BY MR. DURST:

10:52 Q. This is your demonstrative.

10:52 And you are -- are you suggesting, Mr. Coss, that Align should be taking scans from other scanners to make Invisalign?

A. Am I supposed to be seeing a document? Sorry.

Q. It's on the screen right there, sir.

A. I don't see it. Sorry.

Q. It's not on your screen?

A. It is not.

Q. It is. They're telling me that it is.

A. Is this the -- okay. Sorry.

Q. Okay.

A. It's the same -- sorry. It is the same one as before.

Q. Yes. It is the same one as before.

Are you suggesting with this to the jury, are you suggesting that you believe Align should be accepting scans from other companies for building Invisalign?

A. I believe in open systems.

Q. That is not my question, sir.

Are you suggesting to the jury that Align should be accepting scans from other scanners to build Invisalign?

A. Yes.

Q. And you know that when the aligners go out in

10:53 the marketplace, when Invisalign goes out in the
10:53 marketplace, it has the Align logo, the Invisalign logo
10:54 right on it, right? You know that?
10:54 A. I don't know that.
10:54 Q. Okay. Well, let's take a look here. I'm
10:54 going to show you a case.
10:54 MR. DURST: If we can go to the ELMO real
10:54 quick.
BY MR. DURST:
10:54 Q. Do you see that? You recognize that logo
10:54 that's on that aligner case?
10:54 A. I don't recognize the logo. Sorry.
10:54 Q. You don't? Let's go back to your prior slide,
10:54 the one that you -- you see how the logo there matches?
10:54 A. I see it now. Yes.
10:54 Q. Okay. So we go back to what's in the market.
10:54 You see it has the Align logo on it?
10:54 A. Yes.
10:54 Q. Have you ever looked at an Align aligner?
10:54 A. I have.
10:54 MR. DURST: Okay. Let's put one of those
10:54 on the scanner.
BY MR. DURST:
10:54 Q. What's on that Align aligner there on the
10:54 left?

10:54 A. Their logo.
10:54 Q. And so in the marketplace --
10:54 MR. DURST: We can go back to the slide now, Mr. Smith.
BY MR. DURST:
10:54 Q. In the marketplace, the products that go out there have Invisalign's name on them and their logo on them, don't they, sir?
10:54 A. On their aligners, yes.
10:55 Q. Yes.
10:55 A. Yes.
10:55 Q. It's reasonable for them to be concerned about the quality of their product that goes in patients' mouths, isn't it?
10:55 A. It's reasonable, yes.
10:55 Q. And you have -- if Invisalign accepted scans from other scanners, you would expect Invisalign sales to go up, right?
10:55 A. Well, it depends.
10:55 Q. Well, it would at least give more opportunities for building Invisalign if scans were -- more scans were coming in --
10:55 A. Potentially.
10:55 Q. -- to Align?
10:55 A. Potentially, yes.

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

10:57 A. Yes. As soon as we saw that the experience wasn't up to par.

10:57 Q. And right now Straumann doesn't have its own scanner, does it?

10:57 A. We have two.

10:57 Q. Right now the bulk of Straumann's scanners that come into their system come from a third-party system. Isn't that true, sir?

10:57 A. Today?

10:57 Q. Yes.

10:57 A. I don't have that data.

10:57 Q. You don't know?

10:57 A. I don't know.

10:57 MR. DURST: So let's -- let's -- we can take that slide down, Mr. Smith.

10:57 BY MR. DURST:

10:57 Q. Let's talk about the reasons for pulling Virtuo Vivo.

10:57 THE COURT: Mr. Durst, about how much more time do you have with him?

10:57 MR. DURST: Just -- just a very small amount of time.

10:57 THE COURT: Okay. Go ahead, please.

10:57 MR. DURST: Yeah.

10:57 BY MR. DURST:

10:57 Q. Mr. Coss, you have in front of you a deposition. You remember that your deposition was taken in this case?

10:57 A. Yes. I do.

10:57 Q. And you asked -- you were asked some questions about Virtuo Vivo?

10:58 A. Yes.

10:58 Q. And in that deposition, sir -- and if you want, you can turn to it.

10:58 THE COURT: You don't ask -- the deposition doesn't exist until you ask him a question.

10:58 MR. DURST: I'm not going to ask him what's in the deposition, sir -- or Judge. I'm not going to ask him to say out loud. I'm asking him to look at it.

10:58 THE COURT: Okay.

10:58 BY MR. DURST:

10:58 Q. Look at Page 43 of your deposition.

10:58 A. Where would I see this?

10:58 Q. It's in the -- it's in the binder right there.

10:58 A. Where?

10:58 Q. Your deposition.

10:58 A. There's -- there's only tabs with codes on them. Sorry.

10:58 Q. It's in the final tab.

10:58 A. Final tab. The final tab is a PowerPoint presentation.

10:59 Q. Mr. Coss, there were scanner -- scan quality issues with Virtuo Vivo, Virtuo Vivo, that contributed to the decision to pull it from the market, right?

10:59 A. The Virtuo Vivo provided a very quality scan.

10:59 Q. Is it your testimony that there was -- there were no quality issues with scanning?

10:59 A. It was based on the user experience.

10:59 Q. I'd like to show you your deposition, please.

MR. DURST: Your Honor, may I approach?

10:59 THE COURT: Of course.

10:59 A. Page 43, I believe.

10:59 BY MR. DURST:

10:59 Q. Page 43.

10:59 You were under oath in this deposition just like you are today, right?

11:00 A. I am.

11:00 Q. Okay. Do you see the question where you're responding to questions about the Virtuo Vivo?

11:00 Do you see that, Mr. Coss?

11:00 A. No. Can you please --

11:00 Q. Okay. It begins -- your answer begins at Line 19. The question's at 16. And you're responding about Virtuo Vivo.

Do you see that on Page 43?

A. So you're saying Line 16? Sorry.

Q. It starts at Line 16. Yes.

A. Yes. I see that.

Q. You see that?

A. Yes. I do.

Q. Okay. And in your answer, Mr. Coss, you said to us under oath that you realized that the lighting, whether there was sunlight or operatory light, influenced the scanning and the quality of the scans of the unit.

Do you see that?

A. I don't see it on Line 16.

Q. It's on Line 12 of the next page, sir, in that same answer. It references the quality of the scans.

Do you see that?

A. Sorry. I do not see that.

Q. It's on Line 15 of the page, sir.

A. Is it -- there's four boxes in the page, and they all have lines 15. Can you please clarify what --

Q. Yeah. It's on Page 44.

A. Oh, on Page 44. Okay.

Page 44. Yes.

Q. And the question is: The quality of the scans contributed to Straumann's decision to withdraw the

Virtuo Vivo from the market.

That's true, isn't it, sir?

A. There's -- there's four boxes in the page. Sorry.

Q. Sir, can you read that line at --

A. Which line and what page?

Q. I'd like you to read Lines 12 through 15 on Page 44. Read it out loud to the jury, please, sir.

A. There are several lines that have 12 to 15.

Q. It's on Page 44. Would you like me to come up there?

MR. DURST: May I approach, Your Honor?

THE COURT: Sure.

A. Sorry. So there's 12 to 15, 12 to 15, 12 to 15, 12 to 15. Sorry.

BY MR. DURST:

Q. I certainly understand your confusion. Just one second.

While he pulls that up, I'll move to a different question.

Now, your demonstrative that we -- we showed you just a couple minutes ago, that was about scans coming in to Invisalign, correct?

A. The image that you showed with the arrows? Yes.

11:03 Q. Yes. Yes. Those were scans coming in to Invisalign for building Invisalign, correct? That's what we were talking about?

11:03 A. To build clear aligners. Yes.

11:03 Q. Okay. You know this machine, the iTero scanner, it can send scans out to other scanners, can't it, or to other manufacturers?

11:03 A. It's very complicated, but yes.

11:03 Q. You know it can do it?

11:03 A. Yes.

11:04 Q. Right? And you know that ClearCorrect has received 50,000 scans from an iTero device, right?

11:04 A. Over several years, I believe so.

11:04 Q. But is that true, sir?

11:04 A. Yes.

11:04 Q. And your definition of an open system is one that sends scans or cases to multiple sources. You told that jury -- you told the jury that just a couple of minutes ago, didn't you?

11:04 A. I did.

11:04 Q. And so --

11:04 MR. DURST: You can take that slide down.

11:04 BY MR. DURST:

11:04 Q. I'd like to put up for you -- just a second. I'd like to put up for you a statement. It's PDX -- I

11:04 think it's 26.1.

11:04 You see this? It says: The iTero in the United States can send a file only to the clear aligner and cannot send it anywhere else.

11:04 Do you see that statement?

11:04 A. I do see that statement.

11:05 Q. That is saying that this device cannot send files anywhere else except to Align. That's what that statements says, isn't it?

11:05 A. That's what is written.

11:05 Q. Okay. You know that statement to be untrue?

11:05 A. No. It's not untrue.

11:05 Q. 50,000 scans from this have gone to ClearCorrect for building aligners, correct?

11:05 A. Over several years. Yes.

11:05 Q. That's contrary to this statement, isn't it?

11:05 A. That is.

11:05 Q. This statement that's on the screen is untrue, isn't it, sir?

11:05 A. It's inaccurate.

11:05 Q. It's inaccurate. The statement on the screen is inaccurate?

11:06 A. Yes.

11:06 Q. Do you know who said that?

11:06 A. I do not.

11:06 Q. Do you know that a man appeared in this courtroom under oath and said that to this jury?

Did you know that?

A. I do not.

MR. DURST: Let's go to the next slide.

BY MR. DURST:

Q. Who is this fellow?

A. This is our CEO.

Q. Your CEO made an inaccurate -- you called it an inaccurate statement to this jury by giving that quote in the courtroom, didn't he?

A. Depends on the context.

Q. That statement is untrue, Mr. Coss.

A. I don't have the background of --

Q. You told me a minute ago it's inaccurate.

A. I did?

Q. All right. I'm going to go back to where we were just a minute ago, and I'm going to hand you your deposition back.

A. Thank you.

Q. We had it on the wrong page. Now we're on Page 44 in the deposition.

Do you see Lines 12 through 15?

A. I do.

Q. Now, Mr. Coss, this is a question I'm asking

you, and it's not about what's on the page.

Mr. Coss, the Virtuo Vivo had scan quality issues, didn't it?

A. The Virtuo Vivo provided a quality scan.

Q. Can you read -- please read for the jury what you said on Lines 12 through 15 of this answer under oath in your deposition, sir?

A. We also realized that the lighting, whether that was sunlight or operatory lighting, influenced the scanning and the quality of the scans of the unit.

Q. And thereafter you quickly pulled the unit from the market, correct?

A. That's correct.

Q. Is it your position to this jury, Mr. Coss, that Align should be required to accept scans from subquality scanners like the Virtuo Vivo?

A. The quality of the scan was --

Q. Mr. -- Mr. Coss, can you answer my question?

Is it your position in this case that Align should accept scans from low-quality scanners like the Virtuo Vivo?

A. The Virtuo Vivo did not provide a low-quality scan.

MR. DURST: Your Honor, can -- I'm sorry.

BY MR. DURST:

11:08 Q. Mr. Coss, can you please answer my question?
Is it your position that Align should accept scans from other scanners from other companies to build Invisalign aligners?
A. It is.
MR. DURST: Thank you, Your Honor. I pass the witness.

REDIRECT EXAMINATION

BY MS. FERRERA:
11:09 Q. Mr. Coss, you were just being asked some questions about the quality of the scans from the Virtuo Vivo.
Do you recall that?
A. Yes. I do.
Q. And you were shown some testimony that you gave in your deposition?
A. Yes.
Q. What issues were you talking about there?
A. Those are user issues. And when I say "quality scan," the scanner -- if you were able to scan, it would produce a quality scan. But there were external factors that limited its ability to sometimes scan the patient appropriately.
And like there was examples. Ambient light, sunlight, sometimes if the patient is noncompliant,

again, this is all part of the user experience. It has nothing to do with the quality of scan. If you were able to produce a scan with the Virtuo Vivo, it was of quality.

Q. Does Straumann make quality scanners, Mr. Coss?

A. Yes. We do.

Q. Do other companies out there make quality scanners?

A. All scanners --

MR. DURST: Objection, Your Honor. We've got leading again of her own witness.

THE COURT: Overruled.

BY MS. FERRERA:

Q. Do other companies out there make quality scanners, Mr. Coss?

A. Yes. All scanners today are of quality.

Q. So as a factual matter, what is your perspective on whether non-Align scanners can provide quality scans for ordering Invisalign?

A. Yes.

Q. I'm sorry.

A. Could you repeat the question?

Q. Sure. As a factual matter, what is your perspective on whether non-Align scanners can produce

quality scans for purposes of ordering clear aligners?

A. Yes. Today -- in today's market, in the United States, every scanner provides a high-quality scan.

Q. And as a factual matter, what quality issues, if any, would justify Align using a closed system?

A. There are no reasons today.

Q. You were asked a couple questions about bundling in a program that Straumann had at one point in time.

Did Straumann ever impose any kind of penalties on doctors if they didn't meet the requirements of that program?

A. No. We never.

Q. And is that program still in place?

A. No. It lasted for just a few months and we pulled it.

Q. You were asked some questions about whether an iTero user can send scans to other clear aligner manufacturers for purposes of ordering clear aligners.

Do you recall that?

A. Yes. I do.

Q. Can an iTero user do that in theory?

A. In theory, they can, but it's very complicated.

11:11 Q. And so in practice, how easy or difficult is it for an iTero user to send a scan to another clear aligner manufacturer?

11:11 A. It's very, very difficult.

11:11 Q. And so based on that, is the iTero and Invisalign an open or a closed system, Mr. Coss?

11:11 A. In my opinion, it's a closed system.

11:11 MS. FERRERA: No further questions. Thank you, Mr. Coss.

11:11 RECROSS-EXAMINATION

11:11 BY MR. DURST:

11:12 Q. Mr. Coss, there's been talk in this courtroom about an even playing field. That is a phrase that you used from time to time, isn't it?

11:12 A. Yes.

11:12 Q. You even used it in your deposition, didn't you?

11:12 A. I don't recall.

11:12 Q. You know, an even playing field, it doesn't mean that there are no winners, no losers. That's not what an even playing field means, is it?

11:12 A. Well, it depends.

11:12 Q. Well, let's take a sports analogy. In sports, those playing fields are level, aren't they?

11:12 A. It depends.

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

11:13 A. It's been a very long time, but yes.
11:13 Q. Yes. And every one of those games, there was a loser too, wasn't there, sir?
11:13 A. No.
11:13 Q. Well -- well, there were some ties. Is that what you mean?
11:13 A. That's right.
11:13 Q. Okay. Unless there was a tie, there was a loser, wasn't there?
11:13 A. That's correct.
11:13 Q. And in all those Stanley Cups, there were winners?
11:13 A. That's right.
11:13 Q. Can't have a tie in a Stanley Cup.
11:13 Now, the same's true in business, right?
11:13 A. What's the same in business?
11:13 Q. There are winners and losers on even playing fields?
11:14 A. Well, it depends.
11:14 Q. Well, in sports, you might have better players, right? That could be a reason that the Canadiens were so winning?
11:14 A. It could.
11:14 Q. Could have been better coaching, right?
11:14 A. It could.

11:14 Q. It might have been a better organization. Canadiens were a strong organization in those years, weren't they?

11:14 A. Yes. They were.

11:14 Q. Now, those things factor into business success too, don't they?

11:14 A. Yes.

11:14 Q. And sometimes -- like you told us in your deposition, sometimes in an even playing field, you look at it and it feels like it's an uneven playing field, right?

11:14 You told us -- do you remember we asked you to compare Straumann's implant business with the ClearCorrect aligner business, and you said you didn't think that was really an even playing field?

11:14 Do you recall that?

11:14 A. Those are two completely different markets.

11:14 Q. And -- but do you remember telling me you didn't think -- telling us you didn't think that was an even playing field?

11:14 MS. FERRERA: Your Honor, may we approach?

11:15 THE COURT: Yes.

11:15 (Bench conference.)

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

11:17 A. Yes.
11:17 Q. And they have -- they have a very able and effective sales force, right?
11:17 A. Yes.
11:17 Q. And that leads -- that has led Straumann to be successful?
11:17 A. Amongst other things, yes.
11:17 Q. ClearCorrect, on the other hand, is a newer business, correct?
11:17 A. Versus Straumann?
11:17 Q. Yes.
11:17 A. Yes.
11:17 Q. A smaller operation?
11:17 A. It's part of the same group.
11:18 Q. But it's a smaller business unit, isn't it? It has smaller -- it has less sales?
11:18 A. Yes. There's less sales.
11:18 Q. It has fewer people dedicated directly to it, right?
11:18 A. No.
11:18 Q. Now, Mr. Coss, your point was that Straumann is more established, and it wins more than ClearCorrect in the market, right?
11:18 A. No. It was not.
11:18 Q. That's how it was an uneven playing field,

11:18 right?
A. No.
Q. Is Straumann doing anything wrong with respect to this even playing field thing?
A. Like is Straumann doing anything wrong?
Q. Right. Is its position in the marketplace, is that evidence that it has done something wrong?
A. No. Straumann hasn't done anything wrong.
Q. Straumann has that position in the marketplace, and you believe that it's done nothing wrong at all; is that true?
A. Straumann has done nothing wrong. No.
MR. DURST: Thank you.
No further questions, Your Honor.
FURTHER REDIRECT EXAMINATION
BY MS. FERRERA:
Q. Mr. Coss, counsel was asking you just now about the implant business.
Do you recall that?
A. I do.
Q. Is this case about implants?
A. Not at all.
Q. This case is about clear aligners, right?
A. That's correct.
Q. And is the U.S. market for clear aligners a

level playing field?

A. No. It is not.

Q. Why not?

A. Why not? Because, one, Invisalign has I believe well over 80 percent of the market share, and they do not allow clinicians to send information and scans in an open form in order to be able to treat those patients, limiting the ability of all the other clear aligner providers to compete.

MS. FERRERA: Thank you, Mr. Coss.

MR. DURST: Nothing further, Your Honor.

THE COURT: You may step down, sir.

We're going to take a break in a second, but who is your next witness?

MR. MUELLER: Our next witness, Your Honor, is Brooks Buitta, and Mr. Zubler will conduct the examination.

THE COURT: And I should have that, but is that a fact witness or a --

MR. MUELLER: Fact witness, Your Honor. B-U-I-T-T-A.

THE COURT: About how long will it --

MR. MUELLER: He will be about a half hour or so on direct examination, Your Honor.

THE COURT: So ladies and gentlemen of

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

11:43 calls Brooks Buitta.

(The witness was sworn.)

DIRECT EXAMINATION

BY MR. ZUBLER:

Q. Good morning, Mr. Buitta. Could you please introduce yourself to the jury?

A. Good morning. My name is Brooks Buitta.

Q. And what company do you work for?

A. I work for ClearCorrect.

Q. ClearCorrect. And what is your current job title?

A. I am the senior director of special markets for North America.

Q. Before we get into your work at ClearCorrect, I'd like to ask you a few questions about your background.

Where do you -- where are you from, sir?

A. I'm from a town in Massachusetts called Norwell.

Q. And where do you live today?

A. I live in Norwell. I live in the same -- the same place that I grew up in, same house.

Q. And could you describe your family briefly for the jury?

A. Yeah. I live with my wife and kids. Lauren

and Stoll and Brooks, 13 and 11.

Q. When did you join ClearCorrect?

A. I joined in January of 2020.

Q. Before that, what did you do?

A. I've been in sales and marketing essentially my whole career. I started in the dental industry specifically around 2008.

Q. And why did you decide to join ClearCorrect in 2020?

A. Having been in the industry, I knew of Straumann Group and ClearCorrect. I knew about the company being very reputable, having a good relationship with customers, taking good care of their people. And specifically having to do with the clear aligner market, I knew that it was a growth market which was of interest as a salesperson.

Q. So let's go back to 2020. You joined ClearCorrect. What's your first role?

A. I joined as what we call a TM, a territory manager. So a salesperson, an outside salesperson.

Q. Can you describe for the jury what you did on a day-to-day basis?

A. Sure. My job was to manage a geography, so an area in Massachusetts and the state of Rhode Island, bringing on new customers as well as working with our

existing business, our existing customers, to help them grow.

Q. How did you go about bringing in or finding new customers?

A. A lot of hard work, a lot of shoe leather. What we call prospecting or cold calling. So knocking on doors, getting in front of potential customers, having been in the industry, networking and using relationships that I knew.

Q. For how long did you work as a territory manager going door to door for ClearCorrect?

A. Yeah. I was in that role for about three and a half years.

Q. After that position, what was your next job at ClearCorrect?

A. I was promoted to the director of sales operations for North America.

Q. What does the director for sales operations for North America do at ClearCorrect?

A. Yeah. It was a new role at the time. I worked directly with the sales team and our training team to look for ways to improve our processes, help our sales team succeed, and also work with what we call customer relationship management, helping the team do better.

11:47 Q. How long were you the director of sales operations for North America?

11:47 A. I was in that role up until February of this year.

11:47 Q. And what's your current position?

11:47 A. I am the director of special markets for North America.

11:47 Q. Now, today when ClearCorrect sells clear aligners, who are your competitors?

11:47 A. We sell against other aligner manufacturers.

11:47 Q. And in your capacity as a -- as the director of orthodontic sales operations for North America, when you would generate market share analyses, what competitors would you include in the pie chart or the bar graph of that market share analysis?

11:47 A. Yeah. It was usually a pie chart. Lot of pie charts, but it was the other manufacturers in the aligner market. By and large, Invisalign was a big part of that -- of that pie for sure.

11:48 Q. What percentage did Align have?

11:48 A. Varied at times, but usually in the 80 percent range.

11:48 Q. When you were generating these market share analyses, did you include braces as one component of the market share?

A. No. I wouldn't have done that.

Q. What about direct-to-consumer companies? That phrase has come up at times in this litigation. What is a direct-to-consumer company and does ClearCorrect compete with those companies?

A. Yeah. Direct-to-consumer treatment or direct-to-consumer companies, talking about the actual treatment to the patient, would be companies that bypass the doctor for the most part and have the patient receive treatment remotely.

At times, I've included them as aligner manufacturers in that competition. More recently in the U.S., they've left the market. It's not a successful business model. So that sort of decreased the total pie, I guess, if we're still talking about those -- those pie charts. So making Align, I would say, even a larger piece.

Q. Now, let's go back to your time as a sales representative or territory manager for ClearCorrect, when you were going door to door. Who were your customers and potential customers?

A. Yeah. My customers would be dentists, orthodontists. Anybody that would be either using clear aligners or could be using clear aligners.

Q. And when you were knocking on the doors of

11:49 these doctors, what was your sales pitch?

A. I mean, like any -- any sales, I would be talking about the features, benefits of my product. But having done this for a long time, I knew to frame it, sort of address pain points of customers.

You know, as a -- as a smaller player trying to break in, you need to really create a story around that. And I think I would talk specifically about a couple of things. Choice was really important and also I think being a good partner, being a good business partner to our customers.

Q. Okay. I want to come back to a couple points there.

First of all, you used -- you used the phrase "pain points." What's a pain point in the context of selling?

A. Yeah. Sorry. I kind of take that for granted. A pain point is just something we think of as an area that can be improved on or make a customer's experience better. So it's an area that if you have a solution for it, that can help you win in a sales role.

Q. You also mentioned "choice" as being part of your sales message. Why was doctor choice part of your sales message?

A. It's I think something, again, that was a pain

point. From being in the industry, I realized that was something that would resonate for doctors and make them interested in working with me. It also was something that really -- I felt like I had an, you know, a benefit to bring to them.

You know, we allowed them to use any scanner they wanted in their office and work with ClearCorrect, which really resonated I think with -- with a lot of doctors.

Q. So when you were going door to door making your sales pitch, how was your sales pitch generally received?

A. I'd like to think it was received well, but definitely we ran into a lot of hurdles. I, you know, got a lot of -- sort of, I guess, hypothetical or proverbial doors in the face. But I think a lot of challenges in general, even though I think the message itself was well received.

Q. What were the challenges you faced?

A. The big piece, we're talking about sort of the market that I was selling into. The vast majority of the customers I was selling to were Invisalign users, and they almost exclusively had an iTero scanner. That would oftentimes be a very big challenge and a hurdle to take on.

11:52 Q. All right. Let's talk about the iTero scanner.

MR. ZUBLER: And if we could pull up DDX-6.3.

BY MR. ZUBLER:

Q. And I want to focus first on how dental scans could get from a scanner to Invisalign to order an Invisalign aligner.

What does this figure show, sir?

A. This is showing what an open system would look like, so having all the scanners in the market submitting cases to Invisalign.

Q. Okay. And what are the characteristics then of an open system?

A. Yeah. An open system means there aren't any barriers. There's no encumbrances to having those scans or patients sent from any piece of equipment.

Q. Now, as a factual matter, based on what you've seen in the field, if a doctor wants to order Invisalign aligners, which scanners can the doctor choose to make those scans for the Invisalign aligners?

A. Yeah. From my experience, it's the iTero scanner. I think there's a handful of older units that I didn't run into often in the field that may still be available, but by and large the iTero.

11:53 MR. ZUBLER: If we could go to the next exhibit, DDX-6.4.

BY MR. ZUBLER:

11:53 Q. What does this demonstrative show, sir?

11:53 A. This is more the reality that I know and that I sold against in the field.

11:53 Q. And what is your understanding as to why scans from other scanners can't be used to order Invisalign aligners?

11:54 A. My understanding is that that's a decision on the part of Align or Invisalign.

11:54 Q. All right. Now I want to change the focus not to the issue of how scans get to Invisalign, but let's talk about how scans can go to other companies like ClearCorrect.

11:54 MR. ZUBLER: If we could pull up DDX-6.5.

BY MR. ZUBLER:

11:54 Q. What does this demonstrative show?

11:54 A. Yeah. So again, this would be an open system with all scanners sending to all of the other aligner companies in the market.

11:54 Q. Okay. Now, if a doctor wants to order ClearCorrect aligners, for example, which scanners will ClearCorrect accept scans from for ClearCorrect aligners?

11:54 A. To my knowledge, all scanners can be used for ClearCorrect.

11:54 Q. Now, at a high level, though, how many of your prospective customers had iTero scanners?

11:55 A. Would you remind repeating the question?

11:55 Q. Sure. Just as a high level or approximately, how many of your prospective customers, when you were knocking on doors, had iTero scanners?

11:55 A. Yeah. Especially of those prospects, the ones that I would focus on being, you know, using a higher volume of cases, almost all of them would have an iTero scanner.

11:55 Q. Okay. Let's consider a doctor. He's a prospective customers -- customer of yours. You knock on his door. You're talking to him or her, and this doctor has an iTero.

Could this doctor use an iTero to order ClearCorrect aligners?

11:55 A. They could. Technically, yes. They could.

11:55 Q. Okay. What do you mean, "technically, yes. They could"?

11:55 A. There are ways to send an iTero scan to ClearCorrect. I say "technically" only because my time in the field, we ran into a lot of trouble and encumbrances just trying to make that happen. But yes.

11:56 You can.

Q. Okay. Let's suppose you're dealing with a potential customer. He or she has an iTero, the doctor, dentist or orthodontist.

What would you do to try to sell your product in that situation?

A. Yeah. As a salesperson, you need to help your customer, do the best by them for prospects, try to show how they can do it, make it seem as easy as you can. I would even create, you know, my own step-by-step processes to help offices through the process.

Q. And what was the actual process that a dentist or orthodontist would have to go through in order to export a scan from an iTero to ClearCorrect?

A. Yeah. I would typically think of it as a couple of different pieces to the process. I would start by making sure to walk them through the sort of -- sort of setup, meaning that, you know, they could have their IT access to have folders created to export the files, make sure that all the people in the office had access to log in at different workstations, so sort of an initial process.

And then in terms of getting the scan to ClearCorrect on an every-time basis, it was exporting

files, saving them in a particular way, unzipping zip files, and then eventually getting them into the ClearCorrect system.

Q. So for an individual scan, how long would it typically take to export a scan from an iTero to ClearCorrect?

A. It can vary, but usually a few minutes is what I would run into.

Q. Now, based on your experience in the field, is a few minutes a significant or insignificant amount of time for whether a doctor would want to purchase ClearCorrect aligners?

A. I can say significant, but again, kind of thinking in a couple of different ways. You know, the customers I was selling to are consumers. And so I think when we think about a few minutes, when you're talking about technology, it's really impactful. We don't like to wait on our, you know, usernames and log-ins or anything that we do now with our phones or any tech.

So a few minutes would be a frustration, but then in sort of the dental setting, if you think about a dental practice, these are at least the customers I was trying to bring over. We're not doing one scan or one patient a day, but it could be 15 or 20.

So if you're talking about a few minutes, that could cumulatively be an hour of time for either the staff or the doctor, something we call "chair time," which is the time they really dedicate to treating patients, and it's also something they look at in terms of profitability.

Q. Now, if doctors had issues with exporting scans from the iTero to ClearCorrect, what would ClearCorrect do?

A. Yeah. Usually as the TM at the time, I would be the first point of contact, so getting calls and messages. But we also have a dedicated team called provider services. So all different ways to communicate to the team in our Round Rock facility to try to triage that, either supporting the customer directly or supporting the sales team.

Q. If you could turn to Tab 2 in your binder, please.

There's a document there DTX-2866. What is this document, sir?

A. This is an e-mail from Bonnie Williams on our inside sales team asking for support on an export process.

Q. Does this document relate to the provider support team that you mentioned a moment ago?

12:00 A. Yes. So this is directly going to our provider services team, again, trying to triage something going on that's already been, you know, kind of attempted in the field and with a number -- another member of our team from the clinical advisor team.

MR. ZUBLER: Your Honor, we move the admission of DTX-2866.

MR. TUBACH: No objection.

THE COURT: Admitted.

BY MR. ZUBLER:

Q. This e-mail chain is dated January 30th, 2023. And the subject line is Provider Assistance Needed for Strategic Account, Time-Sensitive.

Do you see that?

A. I do.

Q. And if we look at the second page, there's a portion where Bonnie Williams is writing.

Who is Bonnie Williams?

A. Bonnie Williams was a member of the inside sales team.

Q. And she writes: Can someone very familiar with uploading iTero scans to the ClearCorrect lab please urgently reach out to Kristy, the office manager at Epic Smiles.

What is this referring to?

12:01 A. So this is, again, Bonnie trying to get somebody from our support team to come in and add additional support for a customer in a dental practice.

Q. All right. If we could go to the next page, there's a sentence that begins "This morning."

It says: This morning I walked her through Dr. Arcaro's recommendations. See below. However, Kristy is still unable to save the scans to her desktop to upload.

Do you see that, sir?

A. Yes.

Q. What is that referring to?

A. So Dr. Arcaro was the head of our clinical advisor team, so an orthodontist on staff there to support customers. Looks like Dr. Arcaro had a set of steps to help do this, but the customer looks like they cannot get through that first process that I mentioned, which is getting the scans to her desktop.

Q. And reading further in the e-mail, what is the response of ClearCorrect to this customer?

A. I think it's -- I think this -- yep. This is the steps again of everything that needs to be done to try to get the case to ClearCorrect.

Q. Now, have you seen the process for exporting a scan from the iTero to Align for an Invisalign aligner?

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

12:04 Q. Sure. Thinking about ClearCorrect's total scans that it receives from scanners across the spectrum, approximately what percentage of those scans come from iTero scanners?

12:04 A. I don't know the exact numbers, but they're relatively low.

12:04 Q. Approximately how low, sir?

12:04 A. In the low single digits, I think.

12:04 Q. And is that a percentage, you mean, or --

12:04 A. Low single-digit percentages, yes.

12:04 Q. If we could pull up DDX-6.6, what does this show?

12:05 A. So this is showing the limitation of getting cases to all the other aligner manufacturers from the iTero.

12:05 Q. In what sense does it show that, sir?

12:05 A. Well, I think this is what -- sort of the reality that we -- that I saw, meaning from all the other scanners in the market, cases can flow. I think while there's still a technical way to get from the iTero, I think it's just extremely limited.

12:05 Q. Now, how, sir, if at all, did the time it takes to export scans from an iTero to ClearCorrect, how did that affect your sales efforts with potential customers?

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

12:07 A. Yeah. I think when we talk about the scanners being one area that really was a headache and a real challenge, I think that's coupled when we're talking about having a first impression and an opportunity. I think the loyalty program that most of the larger doctors that I was selling to were part of made it a challenge. It's something called the Advantage Program.

Q. What briefly is the Advantage Program from Align?

A. Yeah. It's a -- it's a volume discount program. Doctors are tasked to hit a certain number of case volume every six months. The volume of cases that they approved or sent to Align would then dictate their status or their tier and their pricing going forward.

Q. For a doctor in the Advantage Program, what is the magnitude of the monetary impact of being in one tier versus another?

A. Yeah. It's based on the price of the cases. The change in dropping even one step or stage can be, you know, $100 to a case.

If we think about again volume customers, the ones that I needed to win over to be successful, that's multiplied by high, high volume. So a lot of money. And that's just one -- one change in sort of tier or

12:09 status.

12:09 Q. So the price the dentist or orthodontist would pay for Align aligners in a given period was based on what, their prior purchases; is that correct?

12:09 A. Yeah. What a doctor would do for business in a set window of six months would then dictate their -- the pricing they would pay going forward on everything they would buy.

12:09 Q. And if a doctor wanted to lower the price, then, that was set from their prior purchases, what would they -- what could they do?

12:09 A. I don't -- I don't know of anything at that point. I think they were locked in until the next period.

12:09 Q. And from a sales perspective, how did this Advantage Program affect your job and your ability to win new customers?

12:09 A. Yeah. I think -- I mean, in -- in sales you need opportunities. You need sort of a certain number of at bats. So you just want the chance to have opportunities to show what you do, show what your products can do.

12:10 So I think doctors were extremely reluctant to divert cases away from what they were doing. If they know that they need to do a certain number of cases to

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

directly connected with -- with ClearCorrect, make it an easy, seamless process, unlike what they were used to, at no charge. They would commit to doing a certain number of ClearCorrect cases over two years to help pay off our upfront cost of putting the scanner in their office.

Q. Could you turn to Tab 3 in your binder, sir, which is PTX-636?

A. Yep.

Q. What is this document, sir?

A. This is an e-mail from me to Andrea Hoffman on our marketing team.

MR. ZUBLER: Your Honor, we move admission of PTX-636.

MR. TUBACH: No objection.

THE COURT: Admitted.

BY MR. ZUBLER:

Q. If we could go at the end of the first paragraph, you're writing this e-mail. And looking at the e-mail dated April 16th, if we could scroll down to further in the chain, please.

And you write at the end of the first paragraph: This offer is especially valuable for GPs doing similar case numbers currently locked into an iTero workflow and the associated costs.

Do you see that, sir?

A. Yes.

Q. And what were you trying to accomplish here, sir?

A. With Andrea being on the marketing team, I really am just explaining the importance of this program to try to break into the sort of challenge or negative cycle that I mentioned with that iTero lock-in. So that's what I'm explaining here.

Q. How did doctors who already had an iTero respond to this ClearCorrect offer of a second type of scanner in their office?

A. It was, I would say, not successful there. Primarily a lot of doctors did not want to have a second workflow, a different scanner to manage in that way.

Also, because we're trying to have them have an easier way to try us but also at the same time committing to cases over time, it was a challenge to have those higher-volume, more attractive customers for us to win, you know, make that switch sight unseen because of some of the issues I mentioned with having an opportunity to trial our cases.

Q. Was this program successful?

A. I can't say it was successful looking back on

it. No.

Q. Very briefly. This -- the jury has heard in this case testimony about ClearCorrect's high trim line in its products.

Are you familiar with that, sir?

A. I'm familiar. I'm wearing my aligners now. So I'm familiar.

Q. All right. And what is ClearCorrect's approach with respect to the trim line?

A. The high trim line, we call it the performance trim line, is something that as a salesperson in the field and we as a company kind of tout as a real benefit to our -- to our customers and their patients.

Q. And how have customers reacted to the high trim line? Do you have any real-world examples to that?

A. Yeah. I think the ability to be much more retentive, to keep the aligners in place to help move teeth has been really well received. I hear positive feedback all the time.

Just about a week and a half ago, I was at a large meeting and had a customer over lunch tell me how happy they are about using us now. The high trim line allows this doctor, who happens to be an orthodontist doing a lot of cases, they treat all of their cases

12:15 with no attachments on their first round of treatment.

12:15 Q. Now, Mr. Buitta, the jury has heard testimony and seen a document today, PTX-190, about some performance issues that ClearCorrect had with an orthodontic company called Pure Orthodontics back in 2023.

12:15 Are you familiar with those issues that ClearCorrect faced in 2023?

12:15 A. Yes. I'm familiar.

12:15 Q. And did ClearCorrect resolve those issues?

12:15 A. Yeah. That's -- that's actually the customer that I'm talking about, was a CEO of Pure.

12:16 Q. I'm sorry, the customer you were talking about a moment ago?

12:16 A. Yes.

12:16 Q. So what is the status of the relationship between ClearCorrect and Pure Orthodontics today?

12:16 A. They're -- they're one of our largest, most successful customers.

12:16 MR. ZUBLER: Your Honor, I pass the witness.

12:16 THE COURT: Ladies and gentlemen of the jury, would you like to finish this witness?

12:16 Okay. Cross?

12:16 CROSS-EXAMINATION

12:16 BY MR. TUBACH:

12:17 Q. Good afternoon, Mr. Buitta.

12:17 A. Close enough.

12:17 Q. Buitta?

12:17 A. Buitta.

12:17 Q. Buitta. All right. I'm going to get that right.

12:17 My name's Michael Tubach. I represent Align. I'm going to have some questions for you. Okay?

12:17 A. Sure.

12:17 Q. Now, when you -- in February of 2026, you say you moved to be director of special markets?

12:17 A. Yes.

12:17 Q. Is that another way that means you handled DSO accounts?

12:17 A. That's part of my team, works with DSOs, yes.

12:17 Q. And we also talked -- you mentioned that at times you had included direct-to-consumer aligners in your market assessments internally; isn't that correct?

12:17 A. I would.

12:17 Q. Yeah. And that's because it's part of the same market that you're in, right?

12:17 A. The aligner market, yes.

12:17 Q. Right. You would include direct to consumer, right?

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

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

earlier, right?

A. Technically, yes.

Q. Well, technically. You said it usually takes, in your words, a few minutes, correct?

A. That's my experience. Yes.

Q. And you would agree with me, sir, that it is -- every company wants to create a seamless workflow between its scanner and order its own aligners. You would agree with me?

A. I'm not sure I would agree with saying my own that way.

Q. So you think that Straumann -- Straumann has its own scanners, right?

A. Yes.

Q. Okay. And is it your testimony that Straumann isn't trying to create a seamless workflow between the Straumann scanner and ordering ClearCorrect aligners?

Is that your testimony?

A. And others, yes.

Q. Not others, sir. Listen to my question carefully.

Is it your testimony here that Straumann is not trying to create a seamless workflow between the Straumann scanner and their ClearCorrect aligners?

A. I want to make sure I'm answering correctly

because there's a couple of negatives in there.

Q. You agree that's what they want to do, right?

A. Yes.

Q. Okay. Thank you.

Now, we talked about that loyalty program. You mentioned that -- the Align loyalty program, right?

A. Uh-huh.

Q. And the way the program is structured is that whatever a doctor buys in one six-month window determines their discount in the next six-month window, right?

A. That's my understanding, yes.

Q. Okay. And you used the word "tasked," that the doctors are tasked with hitting certain targets.

No one gives them a task, right?

A. I probably used that term because --

Q. No one uses the word "task" to tell them what to do; isn't that right, sir?

A. I used the word "task."

Q. But no one's telling -- a task is something you give to someone that they have to do, right? You task -- you have kids?

A. I do.

Q. You give them a task?

A. Yes.

12:21 Q. That's not a -- that's not a "do it if you feel like it." That's take the garbage out, right? All right? That's a task.

Does anybody give a task to the doctors to determine how much Invisalign to buy?

A. Sometimes, in my opinion.

Q. So who tells them how much they have to buy?

A. From my experience, their local sales team can say that to them.

Q. Can say they have to order Invisalign? Are you telling us that we're forcing doctors to order Invisalign? You're not saying that, right?

A. I wouldn't say it that way.

Q. Okay. Because the task that you've identified is however many they buy, that is going to determine what the discount is, right?

A. Do you mind repeating that?

Q. Sure. However many Invisalign they order in one six-month period is going to determine how much of a discount they get in the next six-month period, right?

A. That's right.

Q. Okay. And that means they're paying a lower price for Invisalign, right?

A. If they hit their tier, yes.

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

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

12:24 Q. Well, they could do one of two things if they didn't meet their required ClearCorrect targets. They could either buy vouchers to get ClearCorrect in the future, or they could pay 70 percent of what they owed, right? That's the way the program was structured?

A. In addition to a third option.

Q. And the third option was?

A. To purchase a scanner at a low price.

Q. The low price was $33,000, wasn't it, sir?

A. I think it depended on the time.

Q. About $33,000, right?

A. It was called the floor price.

Q. About $33,000, right?

A. I can't tell you the exact number, but --

Q. Okay. That's in the ballpark?

A. Could be.

Q. Plus Straumann took a $2,000 fee for the financing if they wanted to do that, right? Right? You remember that, sir, don't you?

A. Yes. I don't know that I would agree with a fee in that way, but yes.

Q. Okay. They would take $2,000 from the doctor, right?

A. Yes.

Q. You can call it whatever you want.

12:25 Now, you said Straumann's proud of its high trim line, right, on the -- in their aligners, right?

A. Yeah.

Q. And you're wearing them right now?

A. I am.

Q. Okay. Straumann's basically the only company that offers a high trim line, right? There aren't really other big aligner companies out there that do a high trim line, right?

A. I believe there are.

Q. Most of the large companies -- Align, Dentsply, Sirona, Ormco -- they offer what's called a scalloped trim line; isn't that right?

A. Yes. That's true.

Q. Okay. And Straumann had never -- was -- basically had not offered a scalloped trim line ever, right?

A. No.

Q. Now, you know that just recently, on April 29th of this year, your CEO announced that you're going to start offering scalloped trim lines, didn't he?

A. I believe so.

Q. Now, another thing about the market, you testified earlier that the market wouldn't have

12:26 included braces, right? You say that?
12:27 A. That's right.
12:27 MR. TUBACH: All right. Let's turn to
12:27 PTX-1591, if we could.
12:27 A. Is there a tab to turn to?
12:27 BY MR. TUBACH:
12:27 Q. Sorry. Tab 1 for you, sir.
12:27 A. Thank you.
12:27 Q. 1591 is an internal e-mail titled Competitive
12:27 Knowledge Help, right?
12:27 A. Yes.
12:27 MR. TUBACH: Move to admit Exhibit 1591.
12:27 MR. ZUBLER: No objection.
12:27 THE COURT: Admitted.
12:27 BY MR. TUBACH:
12:27 Q. Now, 1591 is an internal document from --
12:27 MR. TUBACH: And publish to the jury, if
12:27 we could. Thank you.
BY MR. TUBACH:
12:27 Q. 1591 is titled Competitive Knowledge Help,
12:27 right?
12:27 A. Yes.
12:27 Q. And there at the -- the first large e-mail
12:27 there at the bottom, Ms. DiMattia, who works at
12:27 Straumann, right --

12:27 A. Yes.

12:27 Q. -- she wrote: I would like to get all of your input and expertise with creating some slides on our competition. A lot of you have great industry knowledge and experience. So I'm calling upon you all to help create two slides per competitor that I will compile into a comprehensive competitive slide deck review. This slide deck will be built into the new higher training so they have a full understanding of the industry landscape/competition.

That's what she wrote, right?

A. Yes.

Q. Now, she also said, down in the next paragraph: Feel free to let me know if something here should not be included.

Right?

A. I see that.

Q. Yeah. Okay.

MR. TUBACH: So now let's put up the list of the competitors that she put on the list. And that's going to be the first and second page together.

BY MR. TUBACH:

Q. So the bottom of the first page there says Align, right?

A. Yes. I see that.

12:28 Q. And there's some other clear aligners there, right? What's the last one there? Could you read that to us?

12:28 A. It says: Brackets/wires.

12:28 Q. And that's another way of saying braces, right?

12:28 A. Yes.

12:28 Q. Now, when you -- you got this e-mail, right?

12:29 A. Yes. I did.

12:29 Q. You got it along with all of the other regional sales directors for ClearCorrect, right?

12:29 A. Yes. I was on the e-mail.

12:29 Q. With all the other regional sales directors of ClearCorrect, right?

12:29 A. That's right.

12:29 Q. Okay. Now, you didn't write back to her and say, "Wait, wait, wait, we don't want to train our people on wires and brackets because they're not even in our market."

12:29 You didn't write that back to her like that, did you?

12:29 A. No. I didn't.

12:29 Q. Nobody wrote back to her like that, did they?

12:29 A. Not that I know of.

12:29 Q. In fact, the only person who wrote back was

12:29 the regional sales director for the northeast region,
12:29 who wrote, "I will take brackets and wires," right?
12:29 A. Yes.
12:29 Q. And put that document aside, sir.
12:29 Now, you testified earlier that there was a --
12:29 you did what you called -- you shoe leathered, right?
12:29 You were out there hustling to sell ClearCorrect,
12:29 right?
12:29 A. That's right.
12:29 Q. That's what sales is. It's all about
12:29 hustling, right?
12:30 A. A lot of it. Yes.
12:30 Q. Now, there could be lots of reasons why a
12:30 customer, a doctor, might not want to buy ClearCorrect
12:30 aligners, right?
12:30 A. That's right.
12:30 Q. They might be a loyal Invisalign customer,
12:30 right?
12:30 A. That's right.
12:30 Q. They could be a Spark customer or an Angel
12:30 customer, right?
12:30 A. Yes.
12:30 Q. They might also just be too busy to take a
12:30 sales call, right? You've certainly experienced that,
12:30 I'm sure?

12:30 A. Absolutely.

12:30 Q. Now, one other reason why a doctor might not want to order ClearCorrect is because of the problems with ClearCorrect products and services.

12:30 Would you agree with that?

12:30 A. That's a possibility.

12:30 Q. Sure. Take a look at Tab 2, PTX-618.

12:30 Oh, you're in Tab 2.

12:30 A. Thank you.

12:30 MR. TUBACH: This is an internal e-mail entitled DSO and VIP Issues.

12:31 I move to admit PTX-618.

12:31 MR. ZUBLER: No objection.

12:31 THE COURT: Admitted.

12:31 BY MR. TUBACH:

12:31 Q. Now, this e-mail, sir, is an e-mail that you're on, right? The bottom one there from Annette Collins to a number of people including yourself, right?

12:31 A. Yes.

12:31 Q. And she's recounting problems that you all have had with DSO and VIP accounts, right?

12:31 A. What was the second thing you mentioned, DSO and?

12:31 Q. VIP. It's in the title of the e-mail.

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

having here is that they were being promised a eight-day TAT. That's turnaround time, right?

A. That's right.

Q. But they were getting their aligners three to four weeks later, right?

A. It looks like in this instance. Yes.

Q. Yeah. And this was the -- some of the top accounts, right?

That's what it says there, "top accounts," in the very top of the first e-mail there.

Do you see that?

A. Yes.

Q. I've been in contact with Cassiti's top accounts?

A. Yes.

Q. Okay. And what was happening as a result of this, if you go down a little bit: Patient acceptances have dropped. Frustrated patients asking for refunds or to use the other competitor.

And at the bottom: So the confusion with not knowing when their cases will actually arrive has had some of the associates using Align in the last few weeks.

Do you see that?

A. I do.

12:33 Q. And those two that are mentioned there, Amara Dental and Jantinder Singh Rooprai, they're no longer buying ClearCorrect, are they?

12:33 A. I'm not sure that's true.

12:33 Q. They're -- they're diamond Invisalign sellers, right?

12:33 A. I believe so.

12:33 Q. Okay. At the bottom of the e-mail, it says: These are just a few of the case complaints and time frames.

Do you see that?

12:33 A. I do.

12:33 Q. Now, at the very bottom there, it says: Along with that KOL, Dr. Mark Lowe has grown frustrated with his treatment setups. I've attached screenshots of his gripes.

KOL stands for key opinion leader, right?

12:33 A. Yes.

12:33 Q. A key opinion leader is a doctor whose job it is to go out there and try to convince other doctors to start using your product, right?

12:34 A. Often. Yes.

12:34 Q. That's why you have key opinion leaders, right?

12:34 A. I agree with that.

12:34 Q. Okay. And let's look at his gripes. Why don't we go to Tab 3?

MR. TUBACH: PTX-193.

BY MR. TUBACH:

12:34 Q. This is an internal e-mail regarding the Mark Lowe that we just talked about, the Dr. Lowe.

MR. TUBACH: Move to admit PTX Align 0193. Move to admit PTX-0193.

MR. ZUBLER: No objection.

THE COURT: Admitted.

MR. TUBACH: Okay. And publish to the jury.

BY MR. TUBACH:

12:34 Q. Let's start with the second page. This is a screenshot someone has taken of a computer, right?

Probably easier for you to look on the screen, although you're welcome to look in your binder if you want.

This is an e-mail from Dr. Lowe, correct?

12:35 And it says: We have a serious issue.

And he talks about two patients: The technician just free-lanced the case and added round trips galore; changed IPR when not asked to do so; added an engager for God knows what course they took. They are wasting my time and my patience. They are

killing your numbers. This is not a one-off problem. This is a major issue. How will I convince any orthodontist or anyone using Invisalign to use ClearCorrect/Straumann if I don't have a team focused on VTP or at least just following my preferences and/or my instructions?

You see that?

A. I do see it.

Q. VTP is virtual treatment planning, right?

A. I believe so.

Q. Okay. And if you go to the first page of this e-mail, Kent Braud of Straumann says, the last sentence: The frustrating thing here is that Dr. Lowe is a major advocate who wants to recommend our brand. He doesn't feel the confidence to recommend ClearCorrect to other orthodontists.

You see that, right?

A. I see that.

Q. And did you -- have you ever met Dr. Lowe?

A. I have.

MR. TUBACH: Can we pull up his -- do we have his website available? And while you get that ready, Mr. Smith, I'll go on to the next document.

BY MR. TUBACH:

Q. Why don't we take a look at PTX-583. That's

12:36 Tab 4 in your binder, sir.

12:36 This is an internal ClearCorrect document relating to DSOs that we've just been talking about.

12:36 MR. TUBACH: I move the admission of PTX-583. I move the admission of PTX-583.

12:36 MR. ZUBLER: Your Honor, we have no objection to the admission, but we're not sure -- we think he needs to lay a foundation to use it with the witness.

12:37 THE COURT: It'll be admitted.

12:37 BY MR. TUBACH:

12:37 Q. Mr. Buitta, you're currently working with DSO accounts, right?

12:37 A. I am. That's right.

12:37 Q. And the person before you who did that was Bettina Cantrell, wasn't it?

12:37 A. Yes.

12:37 Q. And you worked with her?

12:37 A. I did work with her.

12:37 Q. There were several e-mails that we've seen where both you and she are on those, right?

12:37 A. Sure.

12:37 Q. And she prepared this document that you have before you, right?

12:37 A. I'm not familiar with this document.

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

12:38 Q. Okay. Let's look at the next one, Simply Beautiful Smiles, the next page.

You're familiar with them?

Sorry, it's the very top. If you look on the screen, it might be easier. Sorry.

Do you know that -- do you know that account, sir?

A. I am -- I am not familiar with Simply Beautiful Smiles.

Q. Okay. You are familiar, though, with the fact that at some point ClearCorrect started charging doctors' personal credit cards without their authorization, right?

A. I don't know anything about that.

Q. You don't know anything about that?

A. No.

MR. TUBACH: All right. Let's turn to PTX-61 -- PTX-3002. This is an internal document from ClearCorrect. Move its admission.

MR. ZUBLER: Excuse me. What tab would that be?

MR. TUBACH: Oh. For you, it's Tab 6.

MR. ZUBLER: Your Honor, we do not see Mr. Buitta on this --

THE COURT: I can't hear you.

MR. ZUBLER: We do not see Mr. Buitta as being on this document. We don't object to its admission, but there would need to be a foundation laid.

THE COURT: Okay. I'll admit it, but it won't be shown to the jury until you establish whether or not he's seen this.

BY MR. TUBACH:

Q. Well, let's look at the second page of the document, sir.

At the bottom, whose name appears at the very bottom as the sender of the e-mail?

A. I see my name.

Q. That's you, isn't it?

A. Yes.

Q. And you say: According to the doctor's office manager, additional incorrect charges hit his credit card.

Right?

A. That's what it says.

MR. TUBACH: Your Honor, we'd like to publish this document to the jury.

THE COURT: I'll allow you to publish it.

BY MR. TUBACH:

Q. Now, going up the chain, you forwarded that to

someone else, and it said: Another set of unexplainable charges being flagged by the doctor's AmEx.

Right? Sorry. We're on --

A. You've lost me a little bit. I apologize. Where are we?

Q. This is, I think, the wrong -- 3002. We're on Page 2 of 3002. There we go. Right in the middle there.

You sent an e-mail to Ms. Modlin that says: Another set of unexplainable charges being flagged by the doctor's AmEx?

Do you see that?

A. I see that.

Q. Now, farther up in the chain, Ms. Modlin says: My entire team is dealing with ghost charges on credit cards the last week. I spoke to some Straumann regional sales directors and it appears to be across the organization.

Do you see that?

A. I see that here.

Q. Now, farther up in the first page, Andrew Pelleymounter says -- and he's with ClearCorrect America, right, North America? He says: We seem to have a huge uptick in incorrect charges.

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

12:42 Q. And if we look at the third page of this, there's an e-mail at the top that says: We have to stop being so difficult to log into. Just in general overall, our doctors, with exceptions, are intelligent adaptable people. Yet every single day, multiple times, I'm fielding complaints and support requests about not being able to log into the doctor portal.

You see that?

A. Yeah. I'm just trying to follow in -- in --

Q. It's probably easier on the screen, but you're welcome to do whatever you want.

A. Okay.

Q. And if you look at the one page, farther back on the second page, Mr. Braud writes in the middle there: This is the kind of nagging ankle-biter-type thing that we just can't seem to work through.

You see that?

A. I don't. Sorry. I'm just -- because I'm making sure I understand who's sending the e-mail and who's receiving it.

Q. It's in the middle of the second page, sir.

A. Yes.

Q. And it's highlighted there on the screen for you: This is the kind of nagging ankle-biter-type 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 Q. Okay. In fact, ClearCorrect had their business, most of them, right?

12:44 A. I'm not sure I know the specifics on each of these.

12:44 Q. But at least in these instances, it just couldn't execute on basic tasks like getting the product there on time and not charging doctors' credit cards with ghost charges, right? In these instances, right?

12:44 A. In these instances, yes.

12:44 Q. Now, you said earlier that there was a -- there was a -- you bundled the scanner, right, with a -- with aligners, right? We talked about that earlier. This is not talking about that document now, right?

12:45 And you described it. That bundle is not successful, right?

12:45 A. Correct. Yes.

12:45 Q. Now, there's been testimony in here that Straumann didn't have any penalties it would impose on doctors if they didn't meet the requirements, right? You didn't hear that. I'm just telling you that.

12:45 Do you agree with that?

12:45 A. Would you mind repeating the question?

12:45 Q. Sure. That there were no penalties imposed on

12:45 doctors who didn't meet the requirements that they had to meet with that bundle deal?

A. I would agree with that.

MR. TUBACH: Okay. Let's take a look at PTX-0627.

If I could approach, Your Honor. 0627.

BY MR. TUBACH:

Q. This is an internal e-mail from you dated March 5, 2024.

MR. TUBACH: I move its admission.

MR. ZUBLER: No objection.

THE COURT: Admitted.

BY MR. TUBACH:

Q. Mr. Buitta, this is the results of that bundle program, right?

A. This is -- this is a list of customers in the program. Yes.

Q. Well, and the list of customers says that 70 -- that they had to pay -- either team, they had to buy either vouchers or pay a 70 percent penalty, right?

A. That is what the Excel says, yes.

Q. Okay. And in fact, a number of the 70 percent penalties were past due, weren't they?

A. Yes. That's right.

MR. TUBACH: Do we have that website we

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

12:48 A. It looks like it, yes.
12:48 Q. And the next one to the right, he's offering OrthoFX.
12:48 That's another clear aligner company, right?
12:48 A. Yes. It is.
12:48 Q. And the next one on the right is ClearCorrect, right?
12:48 A. Yes.
12:48 Q. And the next one on the right is Child Orthodontics. And then the bottom one on the left side is Traditional Braces.
12:48 Do you see that?
12:48 A. I see that.
12:48 Q. The next one is Clear Braces, right?
12:48 A. I see that.
12:48 Q. And the next one is LightForce Braces.
12:48 Do you know what those are?
12:49 A. I do.
12:49 Q. Yeah. We'll talk about that in a minute.
12:49 The last one is Adult Orthodontics, right?
12:49 A. Yes.
12:49 Q. And so LightForce braces, they're 3D custom-printed braces, right?
12:49 A. Yes. They are.
12:49 Q. And Dr. Lowe is offering all of these options

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

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

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

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

12:54 strike that.

12:54 Is it common or uncommon for clear aligner companies to get customer complaints?

12:54 A. It's really common, from my experience. I mean, we're making custom devices so we're making things that are specific to every single patient. They're being delivered at very specific times for the case treatment.

12:55 So there's a -- there's a lot of complexity involved. So it's not uncommon to get, you know, concerns.

12:55 Q. What is ClearCorrect's philosophy for addressing customer complaints?

12:55 A. Yeah. As I -- as I mentioned, I think ClearCorrect, Straumann Group as a whole, is really focused on something we call player/learner. It's really focused around extreme ownership, really controlling the controllable.

12:55 So anytime that there's something that we can do better, it's taking ownership, making sure that there's a lot of communication. We have a pretty flat organization, so some of the communication you see here is from, you know, an individual salesperson. And I can speak from experience when you are in your territory and you get one complaint about one thing, it

can feel like a -- like a really big issue.

And so to see that going to, you know, somebody that's maybe two or three sort of points away in the group, it's really common. And that tends to be the culture that I've experienced.

Q. On a level playing field in an open system, is ClearCorrect able to compete?

A. On a level playing field with an open system, absolutely.

Q. Today, is there an open system and a level playing field in the clear aligner industry?

A. I can't say there is.

Q. And have Align's business practices blocked ClearCorrect from competing for a substantial portion of the clear aligner market?

MR. TUBACH: Objection. It's a legal conclusion he's asking for.

THE COURT: Leading?

MR. TUBACH: A legal.

THE COURT: Overruled.

MR. ZUBLER: I'll repeat the question.

BY MR. ZUBLER:

Q. Have Align's business practices blocked ClearCorrect from competing for a substantial portion of the clear aligner market?

12:56 THE COURT: I will -- I will sustain the objection to that question.

BY MR. ZUBLER:

Q. Okay. Sir, how would you describe the impact of Align's business practices on the ability of ClearCorrect to compete in the clear aligner market?

A. I would say it's locked in potential customers and blocked -- blocked ClearCorrect.

MR. ZUBLER: Pass the witness.

MR. TUBACH: No further questions. Thank you, Your Honor.

THE COURT: You may step down, sir.

Ladies and gentlemen of the jury, do you think you could be back by 2:00? It's 1:00.

You don't count because you just have to walk two blocks.

You count. We all count. Can we get back by 2:00?

Okay. We'll stand in recess until a little bit before 2:00. We'll start back up then.

THE BAILIFF: All rise.

(Jury exited the courtroom.)

THE COURT: Thank you. You may be seated.

Is there anything we need to take up?

12:58 MR. MUELLER: Not from the defendants, Your Honor. Thank you.

12:58 MR. DURST: Nor from plaintiffs.

12:58 THE COURT: Okay.

12:58 (Recess taken.)

02:03 THE BAILIFF: All rise.

02:03 THE COURT: Please remain standing for the jury.

02:03 (Jury entered the courtroom.)

02:03 THE COURT: Thank you. You may be seated.

02:04 MR. MUELLER: Your Honor, at this point, we will play by deposition testimony from Ms. Lisa Barry, senior director of global iTero services for Align Technology.

02:04 And, Your Honor, the exhibits referred to in the video are the following: DTX-12, DTX-13, DTX-14, and DTX-15.

02:04 THE COURT: Are there objections?

02:04 MR. DURST: There are no objections, Your Honor.

02:04 THE COURT: They'll be admitted.

02:04 (Video deposition of Lisa Barry played as follows:

02:04 Q. Can you please state your full legal name for the record?

A. My full legal name is Lisa Splitt Barry.
Q. And are you currently employed?
A. Yes.
Q. Where are you employed?
A. At Align Technology.
Q. And what is your current role?
A. My current role is senior director of global iTero services.
Q. So I've handed you what's been marked as Barry Exhibit 7. It consists of an e-mail with an attachment. The Bates stamp on the e-mail is ALGNAT-PURCH000760125.

And the e-mail is from Misty Clark to you on December 31st, 2018.

Do you see that?
A. Yes.
Q. Who is Misty Clark?
A. Misty Clark was the director of North America Invisalign marketing.
Q. Is Misty still with Align Technologies?
A. No.
Q. Do you recognize the document?
A. Yes.
Q. Misty writes: Lisa, here is a stab at our main stage.

Do you see that?

A. Yes.

Q. What is a "main stage" in this context?

A. We have an annual sales meeting, and we have a general session, and there's a big main stage where all attendees go to for different presentations.

Q. And you and Misty were presenting at the main stage?

A. Yes.

Q. And do you see that throughout the document, the paragraphs begin Misty, Lisa, Misty, Lisa?

A. Yes.

Q. Is that to indicate who's speaking?

A. Yes.

Q. And so it begins: Misty, and for every practice that buys a competing scanner, means that we leave an opening for a competitive aligner to come in.

Do you see that?

A. Yes.

Q. Do you understand what she meant by that?

A. What I'll say with this -- I remember this. This is -- I was quite annoyed because we were supposed to put our script together, develop it together, and she did this on her own. And it's not -- it's not the final, and it changed quite a bit.

So some of these types of things that she's saying here were not final and not exactly everything I agree with. So I just wanted to let you know that this is not the final document.

Q. The next sentence begins: Lisa.

That's you, correct?

A. Yes.

Q. That's right. We are your competitive moat.

Do you see that?

A. Yes.

Q. What does "competitive moat" mean?

A. That was Misty's marketing speak. Apparently she read some book that had that word and she -- she was using it. It was the first time I heard it. She was putting that in there just for some visual perhaps. I don't know. But I do believe we took it out of the final presentation.

Q. It's listed here as something you would say, correct?

A. Correct.

Q. Did you want to understand what it meant before you said it?

A. Well, again, I was quite annoyed that she did this on her own without me being involved with it. So I was supposed to be a coauthor of this. So I

didn't ask her because I said we need to do a total rewrite.

Q. Did you provide edits in the response to this?

A. I did. We were editing up until the night before -- of the presentation.

Q. So I've handed you what's been marked as Barry Exhibit 8. It is a three-page document beginning with the Bates number ALGNAT-PURCH00616283. I'll just point you to the very last page of the packet I handed you. That is not a Bates-stamped document. That is a printout of metadata associated with this file when it was produced to us by your counsel.

Do you recognize this document?

A. Still referring to the last one, or the whole document?

Q. The whole document. I wouldn't expect you to recognize the metadata.

A. Okay. I was going to say because my name's spelled wrong. I don't recognize this. No.

Q. Let's look briefly at that last page, the metadata.

Do you see there are items in bold at the top of the page?

A. Yes.

Q. The fourth of which says "File Name"?

A. Uh-huh.

Q. Underneath it, it says: Main Stage_Lisa+Misty Script-LBedits.docx.

Do you see that?

A. Yes.

Q. Your initials are LB, correct?

A. Correct.

Q. If you look at the document itself, do you see that it appears to be a redline of the main stage script?

A. Yes.

Q. Would you agree that based on the title of the document, these are your edits to Misty's script?

A. My edits at that time, yes. There were more.

Q. Do you see the next paragraph after your name, you've edited what used to say "We are your competitive moat" to "iTero is Invisalign's competitive moat"?

Do you see that?

A. Yes.

Q. Did you make that change?

A. I assume so.

Q. So you didn't remove the phrase "competitive moat."

Do you see that?

A. Not at this time, I didn't. This was not the

final draft, and all final drafts had to go through legal review, and I do believe that was removed.

Q. Do you believe that -- I'm sorry. I didn't mean to interrupt you.

A. I believe it was removed from the final presentation. I don't know who removed it. I was not -- I was not -- I don't like the whole moat thing. It's just not how I talk, and I didn't want to say it. It was something new again, marketing fluff that Misty put in. So --

Q. Your edit to that sentence, you removed the text "we are your" and replaced it with "iTero is Invisalign's."

Do you see that?

A. Yes.

Q. What does the sentence "iTero is Invisalign's competitive moat" mean?

A. Using her terminology of competitive moat, it was just that we are working together with Invisalign. We sell -- we're a two -- actually, more than two now. We're a four-product company, but back at this time, we were Invisalign and iTero.

So we -- when we sell iTeros, we would like for people also to do Invisalign. When we sell Invisalign, we'd also like for people to do our -- to

buy our other product. So together as a company, you know, we are separate -- you can buy them separately. You can buy them together.

It's always -- marketing 101, you know, easiest to sell to your current customers than to go out and find new ones. So that's what we're saying here in this, that we can help each other out.

Q. What is your understanding of what a moat is?

A. I believe a moat is that little river around a castle.

Q. And what do you understand the purpose of a moat to be?

A. In any sense? I mean, well, not in any sense, but in my castle sense, it's a barrier.

Q. Is that the goal?

A. What I will say is this was Misty's wording, and Misty's no longer here with our company. And then we did -- as far as I know, we changed this wording. So again, this was what she authored.

It was -- so I would say that this is what she wanted us to say, but it's not really indicative of what our company looks at for competitors. We do not -- we sell our products based on a value prop and not really go tit for tat on -- about the competition.

We know what's out there in the market, as any

good marketing and sales company would know, but we do not go and try to -- I think your word -- to prevent or to -- the barrier, that's not what we do as a company.

Q. And you said these words are Misty's words, correct?

A. Yes.

Q. This document reflects your edits to Misty's document, right?

A. Yes.

Q. And it doesn't delete the words "competitive moat," correct?

A. At this time, no. In this version, no.

Q. I've handed you what's been marked as Barry Exhibit 9. It consists of a cover e-mail and attachment, the cover e-mail beginning with the Bates number ALIGNAT-PURCH00377107.

It's an e-mail from William Donnelly to you and others on January 3rd, 2019, with the subject Formatting Review - KO19 Pre-Learn Deck.

Do you see that?

A. Yes.

Q. What is KO19?

A. Kickoff 2019. It was our annual sales meeting.

Q. Is this the same conference at which you and

Misty were exchanging scripts for a main stage?

A. Yes.

Q. So if you turn your attention to Slide 7, which ends in the Bates number 7114. You see the title of the slide is Build the Moat Around Your Business?

A. Yes.

Q. And do you see underneath there's an image?

A. Yes.

Q. What is the image of?

A. A castle.

Q. What is around the castle?

A. Water.

Q. And is that water a moat?

A. Yes.

Q. Did you draft this slide?

A. No.

Q. Do you know who did?

A. Not 100 percent sure, but I would bet it was Misty.

Q. And just turning your attention briefly back to Mr. Donnelly's e-mail, the cover e-mail, he said that he had reviewed this document with you and Misty, right?

A. Yes.

Q. Did you understand what "Build the Moat Around

Your Business" meant?

A. Again, same as before with Misty's marketing buzzword, yes.

Q. And what did it mean?

A. She's -- again, if you look at the script, when we say that we want to make sure that some of the competitors that have a scanner don't bring in, you know, their own aligners, we need to make sure that we sell both of our products.

Q. And you didn't ask anyone to remove this picture of the castle and the moat, did you?

A. I don't have the veto power on Invisalign marketing. And this is Invisalign marketing content, not mine. So yeah.

Q. What makes you say this is Invisalign marketing content?

A. Because my team in iTero didn't write this document. And it says: You Go Beyond. That is Invisalign Go. And if you look through the presentation, it's talking -- for instance, Slide 8, Competition is Here. These are all clear aligner competition. And then it's all about how to use Invisalign Go with prerestorative dental treatments. So this is -- and Will Donnelly is an Invisalign sales manager. So --

Q. I've handed you what's been marked as Exhibit 10. It is an e-mail with an attachment. The e-mail begins with Bates number ALIGNAT-PURCH00377261. And it's an e-mail from William Donnelly to you and others on January 4th, 2019, with the subject Final GP Pre-Learn Deck.

Do you see that?

A. Yes.

Q. I'm just going to turn your attention to Slide 7 again, ends in the Bates number 7268.

Do you see that?

A. Yes.

Q. The text on this slide is still Build the Moat Around Your Business; is that right?

A. Yes.

Q. A different picture, though, right?

A. Yes.

Q. Still a castle?

A. Yes.

Q. Still with water around it?

A. Yes. I will say, though, that this -- don't know if this had gone through legal or not, because he doesn't talk about the legal review. So, again, I can't verify that that is final or not.

Q. You would agree we've reviewed multiple

documents that contain the word "moat"?

A. Yes.

Q. For each of those documents, you told me it was Misty's term, correct?

A. Correct.

Q. Have you ever heard anyone else at Align Technologies use the term "moat" or "competitive moat"?

A. Not that I recall.

Q. Do you know if you used the term "moat" or "competitive moat" during the main stage?

A. I do not believe I did.

(End of video deposition.)

MR. MUELLER: Your Honor, we call as our next witness Matthew Miller from Align Technology.

(The witness was sworn.)

DIRECT EXAMINATION

BY MR. MUELLER:

Q. Good afternoon, sir. My name is Joe Mueller. Nice to meet you.

A. Nice to meet you too.

Q. Could you please state your name for the record?

A. Matthew Miller.

Q. And, Mr. Miller, you are currently employed at Align Technology, correct?

02:19 A. Yes.
02:19 Q. You are the vice president of the Americas for commercial operations, right?
02:19 A. Correct.
02:19 Q. And you're responsible for overseeing sales operations for Canada and the United States, true?
02:19 A. Correct.
02:19 Q. And that includes both sales of the Invisalign clear aligners as well as the iTero scanners, correct?
02:19 A. Correct.
02:19 Q. Now, sir, you are one of the top executives at Align, correct?
02:19 A. A vice president.
02:20 Q. And you deal with the chief executive officer, Joe Hogan, on occasion, right?
02:20 A. Correct.
02:20 Q. Now, Mr. Hogan speaks on behalf of the company on occasion, right?
02:20 A. Yes.
02:20 Q. Earnings, calls with investors, for example?
02:20 A. Yes.
02:20 Q. He appears on programs like CNBC financial programs as another example?
02:20 A. Yes.
02:20 Q. Okay. Now, sir, I'm going to play a video of

Mr. Hogan.

MR. MUELLER: And, Your Honor, this is DTX-2868, and the parties have resolved any remaining objections on this video.

So I'd offer, Your Honor, DTX-2868, and then I'm going to play it.

MR. DURST: Your Honor, we object on foundation grounds.

MR. MUELLER: I just asked one moment ago. It's the CNBC of Joe Hogan. I'm happy to show a screenshot of it to the witness.

THE COURT: Okay. Show a screenshot.

MR. MUELLER: Sure.

BY MR. MUELLER:

Q. If we could just show a screenshot, and if you can confirm this is -- and this still shot is actually Tab 2 in your binder. I think we had one for you.

Sir, if you turn to your binder right in front of you, if you'd turn to Tab 2. This is indeed Mr. Hogan; am I right, sir?

A. Yes.

MR. MUELLER: Okay. Your Honor, we offer it.

MR. DURST: Your Honor, I object on foundation grounds. Yes, he can identify a picture of

the CEO. That doesn't mean he can say anything at all about this video.

MR. MUELLER: Well, Your Honor --

THE COURT: What makes you think he knows what this gentleman's about to say?

MR. MUELLER: Your Honor, these are positions that Mr. Hogan took on behalf of the company. And my intent was to ask him questions about those positions that the CEO took.

THE COURT: Have we -- have we heard those positions in court?

MR. MUELLER: Not yet, but we have disclosed a video and resolved any remaining objections that Align had to it.

THE COURT: But I'm saying have we heard evidence of what he's about to say other than through this?

MR. MUELLER: Not yet. Your Honor.

THE COURT: Okay. Well, then I'll sustain the objection.

BY MR. MUELLER:

Q. All right. Sir, if we could, if you could turn to Tab 49 in your binder. And let me know when you're there.

A. I'm here.

Q. Sir, this is an e-mail between you and two other folks, Mu Li, M-U, L-I, and Daniel Stubbs, right?

A. Yes.

MR. MUELLER: This is DTX-2882, Your Honor. I offer it.

MR. DURST: No objection, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And if we could put this up. This is forwarding to you an e-mail chain that includes e-mails from Mr. Hogan, the chief executive officer, right?

A. Yes.

Q. Now, the title of the e-mail is LightForce, correct?

A. Yes.

Q. LightForce is a manufacturer of customized brackets, true?

A. Yes.

Q. And I'd like to direct your attention, if I could, sir, to Page 1, a little bit further down the page where it says, "What is LightForce."

And before we get there, who is Mu Li?

A. Mu Li is our vice president of global business development.

Q. I'm sorry, sir?

A. Vice president of global business development.

Q. Thank you.

And who is Raj Pudipeddi?

A. Raj Pudipeddi at the time was a chief marketing officer.

Q. And now, do you see below there it says, "Who is LightForce," and right below that it says, "Uses 3D printing to manufacture customized brackets," right?

A. Correct.

Q. Now, if we go up a little further in the e-mail chain, do you see Mr. Pudipeddi said: Excellent summary, Mu. Thanks for pulling it together. No add from my end.

Do you see that, sir?

A. Yes.

Q. And then it goes on to say: Joe, my belief is that this whole digital braces area will have a slow death as they are focused on better feed for horses as we expand our cars.

Do you see that, sir?

A. Yes.

Q. And this is analogizing braces to horses and clear aligners to cars. That was the analogy offered by Mr. Pudipeddi, true?

A. I can't speak to his analogy. I can read the

words and say they're there.

Q. Fair enough.

But you do see the words here are: The digital braces area will have a slow death as they are focused on better feed for horses as we expand our cars.

Do you see that, sir?

A. I see that. Yes.

Q. And then above that, Mr. Hogan said: I agree, Raj. Thanks for the thoughts.

Do you see that, sir?

A. Yes.

Q. Do you agree?

A. I do not.

Q. Okay. So you don't agree with the CEO, and you don't agree with the director of marketing. Do I have that right, sir?

A. In this particular instance, I think digital brackets were an innovative solution to the market. So I don't agree.

Q. Now, if we could go to Tab 4 in your binder.

And before we do, who's Daniel Diederich?

A. Daniel -- sorry, Daniel Diederich reports to Mu Li, business development.

Q. Now, let's go to Tab 4 of your binder. This

is DTX-136.

Do you see the correspondence between Mr. Diederich and Mr. Li?

A. Yes.

MR. MUELLER: Your Honor, I offer it.

THE WITNESS: I have not seen this before.

THE COURT: I think --

MR. DURST: I object on foundation, Your Honor.

MR. MUELLER: Well, Your Honor, the first point is just to get this in. And, Your Honor, I would offer it as the stipulated business record pursuant to the parties' stipulation.

I'll then ask some questions, and if he doesn't have any foundation to answer questions, I'll move on.

THE COURT: The same way I did -- I'll admit it, but you have to lay a foundation for him to be asked questions about the content.

MR. MUELLER: Understood.

THE COURT: And it won't be shown to the jury until --

MR. MUELLER: Fair enough.

BY MR. MUELLER:

Q. Sir, I'd like you to turn, if you could -- and I'm not going to show it to the jury. But I'd like you to turn, if you could, to Page 1 of this, and do you see the e-mail from Mr. Diederich to Mu Li?

A. Yes.

Q. And do you see his description of the doctor-directed aligner market? Are you familiar with that back-and-forth between Mr. Diederich and Mu Li with regard to a doctor-directed aligner market?

A. This is the first time I'm seeing this. I wasn't part of this.

Q. Have you ever used or heard used the term "doctor-directed aligner market" at Align?

A. We use "doctor-directed." That's a meaning like doctors treat the patient.

Q. So, sir, if I could, have you ever seen or heard the term "doctor-directed aligner market" in your time at Align?

A. Yes.

Q. Let's go to DTX-1369, if you could, please, sir. This is Tab 10. And let me know when you're there.

A. I'm here.

Q. This is an executive management quality system review presentation from April 8th, 2020. I'm going to

offer it and then ask you some questions about it.

MR. MUELLER: Your Honor, I offer this. This is DTX-1369.

MR. DURST: Your Honor, no objection to admission, but we have foundation objections to this testimony.

THE COURT: It'll be admitted.

BY MR. MUELLER:

Q. Now, sir, on this one I'd like you to turn, if you could -- first of all, have you heard of the Boston Consulting Group?

A. Yes.

Q. And that's a consulting group that does consulting work for various companies in various industries, true?

A. Yes.

Q. And they did some consulting work to evaluate the quality management systems of Align, right?

A. I'm unaware and wouldn't be privy to this type of stuff at Align.

Q. I'm sorry, sir?

A. I wouldn't be like on these type of work streams or on top of it. So I can't answer that.

Q. So you've never heard of the Boston Consulting Group studying the quality management systems of Align?

A. Correct.

Q. All right. Let me just ask you one more question, and then we'll move on.

If you go to Slide 9 -- I'm not going to publish it. But if you go to Slide 9, do you see the section titled Primary Areas of Concern Highlighted by Align Employees?

Do you see that, sir?

A. The slide, yes, I see it.

Q. And are you familiar with the areas of concern described here including lack of quality, inefficient processes, and few accountability measures?

A. No.

Q. All right. Let's go, if we could -- let me take you, sir, to Tab 44 in your binder which is DTX-308.

Now, this is a global intelligence -- global competitive intelligence update generated by Align's global intelligence team in March of 2020.

Do you see that, sir?

A. Yes. I see it.

MR. MUELLER: Your Honor, I offer it. This is DTX-308.

MR. DURST: No objection, Your Honor, to admission, but Mr. Miller has no knowledge about this.

So I object on grounds of foundation, or at least not that's been established.

THE COURT: It'll be admitted.

BY MR. MUELLER:

Q. All right. Sir, this document, I'm going to take you to Page 28, and let me know when you're there. We're not going to publish it, but let me know when you're there on Page 28.

A. Just to clarify, there's the Slide No. 28, or do you mean Exhibit -- Page 28 of 37?

Q. It's 28. And if it helps, sir, there's a -- the -- there's a table that has CC strengths in the left-hand side.

A. Yes.

Q. Okay. Now, just to be clear, "CC" stands for ClearCorrect, right?

A. I would presume, but to say that, this is the first time I'm seeing this document.

Q. All right. So I'm just going to ask you a couple of questions to see if you can tell me more about this. It lists various CC strengths, including attractive pricing and made in the USA.

And right below that it says: In addition to the strengths above, many felt an advantage of ClearCorrect was that it was not Align.

Do you see that, sir?

A. Can you redirect me? I'm sorry.

Q. Sure. Take your time.

In the table it lists various strengths of CC, ClearCorrect, including attractive pricing, made in the USA.

And then below that there's a note that says: In addition to the strengths above, many felt an advantage of ClearCorrect was that it was not Align.

Do you see that, sir?

A. I'm sorry. I was on the wrong page. Now I'm seeing it.

Q. And are you familiar with any discussion within Align that you were part of in which ClearCorrect's strengths were identified as including attractive pricing, made in the USA, and not being Align?

A. No. This is -- this would be a global report that I wasn't part of.

Q. And my last question on this is there's a sentence -- the very next sentence that talks about: Doctors feeling Align had become greedy, overly aggressive, and didn't care about the doctor providers.

Are you familiar with any such discussion in your time at Align?

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

02:33 A. Yes. I am.

02:33 Q. Now, let me ask you about this. You see where it says --

02:33 MR. DURST: Your Honor, I object to Mr. Mueller just reading in a document for which there is no foundation for this. He's just reading things off the page, Your Honor, and we have objected on the grounds of foundation.

02:33 THE COURT: I couldn't hear you at the end, but I think I know what you said.

02:33 Mr. Mueller, if you'll make sure -- if you'll just point to the part of the page and if the witness is clear on what you're asking about, and just make sure he understands what it is that you're discussing.

MR. MUELLER: Understood.

02:33 THE COURT: And then you're free -- if he is, you're free to read from that page.

02:33 MR. MUELLER: Understood. Understood.

BY MR. MUELLER:

02:33 Q. Do you see the title of this? I won't read any more than the title.

02:33 Do you see where it says: User data. ClearCorrect patient scores came back eerily similar to Invisalign?

02:34

02:34 Are you familiar with this table of data in the Align presentation?

A. I'm not familiar with this. It's the first time I'd be seeing this.

Q. Okay. All right. You can put that aside, sir.

Now, you understand that in 2018, a company called Bay Materials released a material known as Zendura FLX to the marketplace for clear aligners, right?

A. Yes.

Q. And do you know, sir, that Align conducted certain testing of that material after it was released?

A. I did not know that.

Q. Did you know one way or the other whether Align conducted what is known as reverse engineering of that material?

A. No.

Q. Did you know one way or the other -- and I'm going to show you DTX-2867. This is an admitted exhibit.

Did you know one way or the other, if you go to Page 2 --

A. What tab number? Sorry.

02:35 Q. Tab 8. I apologize. I didn't give it to you.

Tab 8.

A. Okay. I'm here.

Q. Did you know one way or the other what Align concluded with respect to Bay Materials' hard-soft-hard structure at that time?

A. No. And this is another document that I wouldn't be privy to, is the EMC meetings, and I'm not part of those.

Q. Haven't seen that one either?

A. Correct.

Q. Okay. Let's go to DTX-1388, which is in evidence. It's Tab 11 in your binder. And I'd like you to turn to Page 46. And actually, first, if you go to Slide 7 first.

A. Okay. I'm here.

Q. Do you see the picture of the moat?

A. Yes.

Q. And you have seen pictures like that in your time at Align, true?

A. Yes.

MR. MUELLER: Can we put that up, Your Honor? May we publish that, Your Honor? He confirmed he's seen pictures of moats before. This is an admitted exhibit, and I want to --

THE COURT: Yes. You can proceed.

BY MR. MUELLER:

Q. So we have here the Build the Moat Around Your Business. And I'd like to take you, if I could, sir, to Page 46. Actually, before I do -- before I do, if we go back to the cover page for a moment. DTX-1388. This is KO19 in the center of the page.

Do you see that?

A. Yes.

Q. What does KO19 stand for?

A. The sales kickoff meetings we have each year. This would be the 2019 version of that, and it'd be a pre -- prelearn where you send the prereads to the sales force of what they need to --

Q. I'm sorry. I didn't catch the last thing you said, Mr. Miller.

A. Sorry. The sales force would typically receive these ahead of the meeting. So their job is to preread it, come prepared, understanding the document in its entirety for the meeting.

Q. Fair enough.

So just to make sure the record is clear here, for the sales force at Align, there's a kickoff meeting each year, right?

A. Correct.

Q. And the sales folks who are on the sales force

receive these materials before the meeting as what you called a preread?

A. Correct.

Q. And then there would be discussion of these materials at the kickoff meeting itself as well?

A. Correct.

Q. Okay. And you've been part of such meetings; am I -- is that fair to say?

A. Yes.

Q. Okay. Let's take a look, if we could, sir, at Page 46. And we can put this up, and I want to ask you about some talking points here.

MR. DURST: Your Honor, this should not be on the screen. There is a foundation objection of this document. The picture of the moat was up because Mr. Miller said that he had seen the picture of a moat before. And that was the only foundation that was laid for that. There's no foundation for this substance, Your Honor.

MR. MUELLER: Well, Your Honor, I just asked him --

THE COURT: I heard.

The objection's overruled.

MR. MUELLER: Page 46, please. If you could put it up here, there's some speaker notes.

BY MR. MUELLER:

Q. Here we go. I want to direct your attention, if I could, sir. Do you see there's the text "Competition is here..." in the middle, right?

A. Yes.

Q. And that's referring to a slide that referred to other clear aligner suppliers, right?

A. What slide number? I'm not following how to follow the speaker notes. Sorry.

Q. Sure. We can take you back just to make sure we're here. It's Slide 8. In the same deck, Slide 8. "Competition is here..."

Do you see that?

A. Yes. I'm on that slide.

Q. And one of the competitors listed here is ClearCorrect, true?

A. Yes.

Q. All right. Let's go back to Page 46. And the speaker notes say: Competition is here... Remember - getting general dentists to adopt and utilize the iTero digital scanner builds a moat.

Do you see that, sir?

A. Yes.

Q. So part of this kickoff presentation to the sales force of Align included the speaker note that

getting general dentists to adopt and utilize the iTero digital scanner builds a moat. Correct?

A. I can see that there. What was said at the presentation, I don't recall or, you know, I can say -- I'm happy to explain kind of how these things work, if you want me to.

Q. Mr. Miller, you're not here to deny that the 2019 kickoff meeting of the Align sales force, they were shown this presentation, and the speaker notes for what was said to the sales force included this, correct?

A. Correct.

Q. Okay. So getting general dentists to adopt and utilize the iTero digital scanner builds a moat.

The next sentence says: We know the competition is out there and will only increase.

Do you see that, sir?

A. Yes.

Q. And then the final sentence of these speaker notes to the sales force of Align, the 2019 kickoff meeting, states: The iTero scanner will block competition from gaining business in your accounts and help your doctors keep and grow treatment with Invisalign clear aligners rather than seeking out another option.

Have I read that correctly, sir?

A. Yes. And it's an inaccurate statement.

Q. Sir, these are the speaker notes. This is a true and authentic copy of the speaker notes for the kickoff presentation for the 2019 kickoff meeting of the Align sales force, correct?

A. Correct.

Q. Okay. Now, 2019 is the year after Zendura FLX was announced to the market, right?

A. I don't have a timeline in front of me, but I trust that you're connecting --

Q. Did you know that in 2020, ClearCorrect began incorporating that Zendura FLX hard-soft-hard material into the ClearCorrect clear aligners?

A. No. That's not -- nothing I'd be aware of.

Q. Now, scanners are incredibly important for a clear aligner business, true?

A. Yes, and in all of digital dentistry.

Q. And, in fact, sir, it's a fact that Align itself gets about 10 times as many of its prescriptions from digital scanners as it does from the putty that can be used inside a patient's mouth, the PVS putty, right?

A. I don't know the exact statistic, but we receive -- the majority of our business comes off a

digital scanner.

Q. Well, let me show you the exact statistic. If you could go to Tab 22 in your binder. This is DTX-2783.

A. I'm sorry. So you said Tab 22?

Q. Tab 22, sir, please.

A. Yes. I'm here.

Q. This is DTX-2783, titled Summary of Quarterly Number of New Invisalign Case Submissions Since 2014 by Source.

MR. MUELLER: Your Honor, we offer it.

MR. DURST: No objection to admission, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And, sir, you know, you know as part of your work at Align, the general ratio between PVS submissions to Align versus intraoral scanner submissions, right?

A. Yes.

MR. MUELLER: Okay. Your Honor, may I publish this? This is --

THE COURT: No objection?

MR. DURST: Yes, Your Honor. Object to foundation.

02:43 THE COURT: Overruled.

BY MR. MUELLER:

Q. All right. Let's take a look here. Sir, if you look at this, and do you see in the center we have scan type.

Do you see that, sir?

A. Yes.

Q. Now, PVS is the putty, right?

A. That is correct.

Q. So if we look down here, do you see that the numbers for PVS are less than for iTero, right, in the years -- I'm sorry. PVS was greater than iTero back in 2014.

Do you see that?

A. Yes.

Q. Now, let's fast-forward to 2017 Q4. Do you see at that point the iTero submissions eclipsed or went out ahead of the PVS ones?

A. Yes. I can see that here.

Q. And that trend continued as the years continued, right, sir?

A. Sorry. This is the first time I'm seeing this. I'm just trying to --

Q. Well, let me ask you to focus. For example, if we go all the way down to the bottom, this is 2024

Q2.

Do you see that, sir?

A. Yes.

Q. The iTero scans, there was 282,676 in 2024 Q2, right?

A. Yes.

Q. The PVS scans in that same time period, 17,444, right?

A. Yes.

Q. That's actually a lot less than 1/10 of the iTero scans, true?

A. Mathematically I think, yeah, trying to do quick mental math. Sorry.

Q. Fair enough.

And, Mr. Miller, it is consistent with your own experience that the number of Invisalign submissions that come from the iTero is far, far greater today than for the putty that you can put in someone's mouth, true?

A. Yes.

Q. Okay. Now, the iTero, the iTero is something that you also supervise the sales of, correct?

A. The -- just to clarify, the sales operations.

Q. The sales operations; am I right, sir?

A. Yes.

02:45 Q. And it's also correct that Align provides support for its iTero scanners with dentists and orthodontists, true?

02:45 A. Yes.

02:45 Q. And you have what's called an end-of-support policy for those folks?

02:45 A. Can you clarify that?

02:45 Q. Sure. ELS. You've heard the term "ELS"?

02:45 A. Sure. Yes.

02:45 Q. And what is the ELS policy?

02:45 A. The best way to explain it is when technology becomes outdated and is no longer supported with updates, it's hard to continue to support it without upgrades.

02:45 Q. And for -- for Align, the ELS is five years from the date of purchase of an iTero, correct?

02:45 A. I believe that's as stated in the contract, but they've lasted much longer than that.

02:45 Q. It could be longer?

02:45 A. Yes.

02:45 Q. ITero receives support from Align for at least five years; is that fair?

02:46 A. Yes.

02:46 Q. And it could be longer?

02:46 A. Yes.

Q. Okay. Take a look, if you could, sir, at DTX-2877. This is in evidence as Tab 20 in your binder.

Let me know when you're there, sir.

A. I'm on Tab 20.

Q. And do you see that this is an e-mail, the title of which is iTero Support After Five Years.

Do you see that?

A. I see that.

Q. This is the same policy that we were just discussing; is that right?

A. I wouldn't -- if you don't mind, I have to read through it. I wasn't part of this.

Q. Sure. Take your time. It's --

(Simultaneous conversation.)

BY MR. MUELLER:

Q. There's a bold statement about a five-year support.

A. That's what that subject line looks like.

Q. Okay.

MR. MUELLER: And, actually, Your Honor --

BY MR. MUELLER:

Q. You're at Tab 20; is that right, sir?

A. Yes.

02:47 MR. MUELLER: Okay. Your Honor, I offer DTX-2877.

02:47 MR. DURST: No objection to admission.

02:47 THE COURT: Admitted.

02:47 BY MR. MUELLER:

02:47 Q. Now, you also are familiar, of course, with Invisalign at times receiving certain complaints from doctors of -- who prescribe Invisalign for their patients, right?

02:47 A. Yes.

02:47 Q. And over the years, Align has had a complaint rate of around 2 percent; is that fair?

02:47 A. That, I don't know.

02:47 Q. Okay. But you would agree with me that Align receives complaints, correct?

02:47 A. Yes.

02:47 Q. And Align has sold millions of Invisalign units, true?

02:47 A. Yes.

02:47 Q. And over the years, Align has received thousands of complaints, which is only a fraction of the millions sold, but they've received thousands of complaints from doctors, true?

02:47 A. Again, I don't know the number. We have a -- we have a dedicated customer support line that receives

calls every day.

So to answer your question, yes. We receive calls and complaints and try to resolve them.

Q. And I can show you some data in just a moment, sir, but you are -- you know that in this industry, in the clear aligner industry, it's not uncommon to receive complaints, correct?

A. Correct.

Q. And in fact, if we had the time, I could show you document after document after document after document in which someone over the years has expressed a complaint about Invisalign, true?

A. I would -- I don't know.

Q. And, sir, the truth is, if I were to take all of the complaints that Align has received over the years about Invisalign, it would probably touch the ceiling. I could probably make several stacks of such complaints that would touch the ceiling; isn't that true?

A. Never tried to do it that way, but with 23, 24 million successfully completed cases with doctors and patients, you'd have calls coming in.

Q. Well, that's precisely my point, sir. If you sold that many units, you're going to get some complaints over the years, correct?

A. Yes.

Q. And in fact, you're not here to dispute, okay, you're not here to dispute that Align has received thousands and thousands of complaints over the years of selling Invisalign, correct?

A. Correct.

Q. And the fact that Align has received thousands and thousands of complaints about Invisalign, does that make Invisalign a bad product?

A. No.

Q. And in fact, if I were to show you thousands of complaints for Invisalign, would that change your opinion as to whether Invisalign is a good product?

A. No.

Q. And in fact, if I were to do that, show you thousands of complaints about Invisalign, would you consider that fair or not fair on the question of whether Invisalign is a good product?

A. I consider it fair because that's how we've developed our product over the years with customers helping us improve it.

Q. So you get complaints. You spot issues, and you try to improve it, right?

A. Correct.

Q. And that's the way it should be done?

A. That's the way we've operated. Yes.

Q. And the fact that another company might receive a complaint and work on improving it, is that consistent or inconsistent with how the industry operates, in your own experience?

A. I don't have any experience outside of Align within our industry.

Q. Okay. But at Align, it's sold millions of units of Invisalign, correct?

A. Yes.

Q. Received thousands of complaints also, correct?

A. Yes.

Q. And the same is true for iTero. Align has received complaints over the years about iTero, true?

A. Yes.

Q. And has sold many iTero units to various dentists and orthodontists across the country, correct?

A. Yes.

Q. And some of them complained about it, right?

A. Yes.

Q. In fact, there's been many complaints over the years about iTero, true?

A. I don't know how you define "many."

Q. Fair enough.

02:50 On a volume basis, if we were just to count
02:51 the number of complaints, there would be a high
02:51 absolute number of complaints, true?
02:51 A. I think it's pretty normal with any medical
02:51 device the complaint volume that comes through.
02:51 Q. It's normal, and you still consider iTero a
02:51 good product, correct?
02:51 A. Yes.
02:51 Q. Now, on occasion you've also had some billing
02:51 issues with certain doctors, true?
02:51 A. Yes.
02:51 Q. And some doctors have complained to you about
02:51 certain Align bills, true?
02:51 A. Yes.
02:51 Q. Over the years that's probably happened
02:51 thousands of times as well, right?
02:51 A. Yes.
02:51 Q. And again, does that mean that Align has bad
02:51 billing practices?
02:51 A. No.
02:51 Q. The fact that you receive thousands of billing
02:51 complaints, does that mean Align has bad billing
02:51 practices?
02:51 A. No.
02:51 Q. Let me ask you to turn to DTX-47. It's in

your binder at Tab 23.

A. I'm here.

Q. And this is an e-mail chain between Simon Beard and Abhishek Ganguly. I'm not sure I'm pronouncing that correctly, but do you know those folks?

A. I do know them. Yes.

Q. They are the senior vice president and managing director of Europe, the Middle East, and Africa in the case of Mr. Beard, right?

A. Yes.

MR. MUELLER: Your Honor, I offer the document. This is DTX-47.

MR. DURST: No objection to admission, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And have you seen this particular e-mail chain before, sir?

A. Not before the litigation.

Q. Okay.

A. I'm not in the chain or I would have received this.

Q. Now, let's talk a little bit about the iTero. If I'm using the iTero, I'm a dentist or a doctor -- a

dentist or orthodontist, I can use the intraoral scanner to scan a patient's mouth, right?

A. Yes.

Q. And there's a wand that actually performs the scanning, correct?

A. Correct.

Q. And that's connected to a console, right?

A. Yes.

Q. Now, the console has a drop-down menu on it, true?

A. Yes.

Q. So after I perform a scan with the iTero scanner, I can use that drop-down menu, right?

A. Yes.

Q. And one option I can use that drop-down menu for is I can send the scan to Align, correct?

A. Yes.

Q. So on the drop-down menu, one of the options is Align, true?

A. It's called Invisalign Scan.

Q. Fair enough.

It says Invisalign is one of the options, right?

A. Yes.

Q. That will take the scan of the patient's mouth

and send it for Invisalign prescription, true?

A. Yes.

Q. Now, there's some other options that are available on this drop-down menu, correct?

A. Yes.

Q. For example, restorative laboratories can be listed on that menu?

A. Yes.

Q. And restorative laboratories do restoration of certain teeth, correct?

A. Yes.

Q. Okay. But, sir, you would agree with me one thing we wouldn't find on that drop-down menu are other clear aligner companies, correct?

A. No.

Q. So is that correct or incorrect?

A. It's incorrect.

Q. ClearCorrect is not on that drop-down menu, correct?

A. Straumann is.

Q. Sir, ClearCorrect -- ClearCorrect clear aligners are not on that menu, correct?

A. Correct.

Q. And for ClearCorrect, what needs to happen is the scan data needs to be sent to a separate computer,

true?

A. That, I don't know. I'm not sure what Straumann does to it.

Q. You don't know one way or the other?

A. Correct.

Q. All right. Let me ask you to turn to DTX-1393. It's at Tab 25 in your binder. Take your time and let me know when you're there.

A. I'm here.

Q. This is an e-mail chain that includes you, right, sir?

A. Yes.

MR. MUELLER: DTX-1393, we offer it, Your Honor.

MR. DURST: No objection, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. So up here we have you as one of the recipients of this e-mail, correct?

A. Yes.

Q. And let's go to Page 2. I want to go to an earlier e-mail from Ms. Kerri Kling.

Who is she?

A. Kerri Kling worked on the iTero side of the business.

02:55 Q. All right. Do you see below there's a section titled Lab Account Naming Criteria?

02:55 A. Yes.

02:56 Q. And Ms. Kling was asking about follow-up with the legal team. And before I get into this, I just want to be very, very clear about one thing. I'm not going to ask you for any communication you or one of your colleagues had with lawyers or what they told you. So please know that I'm not asking for that at all, okay, sir?

02:56 A. Okay.

02:56 Q. All right. So here, we see Ms. Kling asking about the follow-up with the legal team on the implementation of the lab account naming criteria.

Do you see that?

02:56 A. Yes.

02:56 Q. And if we go up to the next one, the next e-mail, this is an e-mail from you, right, sir?

02:56 A. Correct.

02:56 Q. And you said: Sid from AMS side is currently leading that work stream and is in the process of submitting for legal review.

Do you see that?

02:56 A. Yes.

02:56 Q. Now, let's go to the next e-mail up.

This is the gentleman you referred to as Sid?

A. Correct.

Q. And he said: Do you know what the Angel Lab name is for iTero scan submissions? They do not have an account. Any doctor using them would STL export from the doctor's MIDC account and send on their own.

Do you see that?

A. I do.

Q. Angel is another clear aligner company, correct?

A. That is correct.

Q. And in the next paragraph, Mr. Mishra said: Additionally, are there any other major labs apart from Ormco_Spark that are worth flagging? Nathan and I are working on a framework proposal for legal, and it would be good to proactively identify labs of material threat.

Do you see that, sir?

A. I do.

Q. And it goes on to say: ClearCorrect, SureSmile.

Right?

A. Yes. I see that.

Q. And packaging these insights within legal's boundaries.

So here, Mr. Mishra is identifying as a material threat ClearCorrect, right?

A. He is. And he's just an analytics and data scientist. So he would be qualified for that statement.

Q. Whatever his position, what he said was material threat, ClearCorrect, right?

A. He did say that, yes.

Q. And in fact, ClearCorrect, as we just discussed, is not on that drop-down menu for iTero, true?

A. That is correct.

Q. Let's take a look at DTX-1421. This is Tab 26 in your binder. This is an e-mail chain between Raphael Pascaud -- if I'm pronouncing that correctly -- and Joe Hogan.

Are you there, sir?

A. Yes.

MR. MUELLER: Your Honor, we offer DTX-1421.

MR. DURST: No objection.

A. Sorry. This is a document I wouldn't have been privy to or part of either.

BY MR. MUELLER:

Q. You've not seen it before?

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

foundation objections to this document, and it's on the screen. So we request -- we have foundation objections.

THE COURT: He hasn't asked a question yet on that.

MR. DURST: He has it on the screen, Your Honor.

THE COURT: You have a question --

MR. MUELLER: You can take that page down. I did ask him about the page he was on. There's an e-mail that he's listed on, Mr. Miller.

THE COURT: Okay.

BY MR. MUELLER:

Q. Have you read any other e-mails in this chain aside from the ones that you were listed on?

A. No. And I was removed after that. I wouldn't have seen that ever again.

Q. All right. We'll put that aside.

Let's take a look at DTX-208. This is Tab 28 in your binder.

Are you there, sir?

A. Yes. Sorry.

Q. This is another e-mail between Mr. Pudipeddi and Mu Li; is that right, sir?

A. Correct.

03:00 MR. MUELLER: Your Honor, I offer it, DTX-208.

03:00 MR. DURST: No objection to admission, Your Honor. None.

BY MR. MUELLER:

Q. Have you seen this before, sir?

A. No. I have not.

Q. All right. Let's go to DTX-329, Tab 29 in your binder.

This is between Michael Smith and Michael Flanagan.

Who are those folks?

A. Michael Smith was the -- I think VP of global ortho at the time of this, and Michael Flanagan was -- I might get this wrong, but if I recall correctly, he was in the treatment planning side of the business operationally.

MR. MUELLER: Your Honor, we offer DTX-329.

MR. DURST: No objection to admission, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And have you seen this e-mail before, sir, or the data reflected in it before?

A. The first time I saw this was in my depositions.

Q. Okay. And you have no personal knowledge of it?

A. Correct.

Q. All right. Now, you know, sir, that the -- if a doctor wants to use iTero for output, exporting scan information to a third party that's not on the drop-down menu, that data needs to go through another computer first, right?

A. Correct.

Q. Whereas for Invisalign, the Invisalign data can go directly from the iTero scanner to Align, correct?

A. Correct.

Q. Okay. Just so we're crystal clear with this jury, that iTero scanner can send data directly to Invisalign, the scanner itself, correct?

A. Yes.

Q. And for other clear aligner companies not listed on the drop-down menu, the data needs to go through a separate computer, correct?

A. I believe so, if I'm following you correctly.

Q. Rather than from the iTero directly, correct?

A. Yes. They'd go to the myitero.com, download

the file, and then move it.

Q. And myitero.com is a website that needs to be accessed by the separate computer, true?

A. Yes.

Q. All right. Those files are sometimes called STL files, correct?

A. Correct.

Q. And the truth is, sir, that Align monitors the usage of doctors when they export those STL files through myitero.com, correct?

A. That's incorrect.

Q. Align tracks the data; isn't that true?

A. Align might have the data. But at least from my understanding on the commercial side, we don't have tracking mechanisms in place to monitor.

Q. You've never seen any reference to Align tracking the data sent by doctors through those external STL exports?

A. Nothing to act on in a consistent or, you know, basic manner.

Q. Well, sir, that wasn't my question.

Have you ever seen anything about Align tracking data from doctors' exports of STLs to clear aligner companies other than Align?

A. It's not possible to track it once you

download the STL file to where it goes.

Q. It's a yes or no. Are you aware of Align tracking the exports of STL files to non-Invisalign prescriptions?

A. The only one I'm aware of is when you do the drop-down. That's what I'm trying to clarify.

The answer is yes if you're taking the drop-down, the company would know that. But if it's the third computer you were describing, then it's not possible.

Q. All right. Let's go to Tab 33, DTX-35.

A. I'm there.

Q. Again, Angel Aligner is a competitor aligner, before I get into this, right?

A. Yes.

Q. All right. This is DTX-35. It's an e-mail exchange that includes you. In fact, it's from you, right, sir?

A. I'm sorry. You say Tab 35?

Q. I said Tab 33, DTX-35.

A. Okay. Thank you.

Q. I misspoke. I apologize.

A. Okay. I'm here.

Q. Okay. So DTX-35 is an e-mail from you to Mr. Beard and Mr. Taylor, correct?

A. Yes.

MR. MUELLER: Your Honor, we offer it.

MR. DURST: No objection, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. The first e-mail in the chain is from a territory manager named Alex Sakai, right?

A. From John Ramko to Alex Sakai, am I on the right page?

Q. If we go all the way down -- oh, yes, you're right. It's from John Ramko to Alex Sakai.

A. Yes.

Q. And if we go down, do you see there's a section that is reporting on a doctor, Dr. Richard Ting.

Do you see that?

A. Yes.

Q. Who had been asked to consider switching to Angel, right?

A. Yes.

Q. Now, let's look at what Mr. Beard said about this situation where a doctor was considering switching to Angel.

Mr. Beard -- if we scroll a little bit further up, Mr. Beard said to you and Mr. Taylor: Bottom line

here is that we cannot allow Angel to get a foothold in the market. Raj was clear with me that if we allow them to build a foundation, it will be difficult to stop them.

Right?

A. Yes.

Q. And let's go a little further up. You wrote in response: We are actively trying to identify their, quote, lab naming convention so we can pull immediate red flags to our sales team the moment one single scan gets exported from an iTero. Once we have that, these accounts will be addressed same day by the sales rep.

Do you see that, sir?

A. I do. Yes.

Q. So here's an example of you suggesting the iTero could be used to track doctors' usage of the scanner and what they were using it for, true?

A. Yes. That's how I could have answered your question that it's not possible.

Q. Okay. Well, you say right here: We're actively trying, actively trying to identify their lab naming convention so we can pull immediate red flags to our sales team the moment one single scan gets exported from an iTero.

Right?

A. Yes. That was -- that was the hope, and we failed.

Q. Right. And the genesis of this e-mail from you was Mr. Pudipeddi saying, "We can't let Angel get a foothold," correct?

A. Yeah. I was trying to understand do they have a --

THE COURT: Just answer his question, please.

THE WITNESS: Sorry.

THE COURT: Thank you.

A. Yes.

BY MR. MUELLER:

Q. What Mr. Beard said is: Raj was clear with me that if we allow them to build a foundation, it will be difficult to stop them.

Correct?

A. Yes.

Q. Let's go to DTX-209. This is Tab 34 in your binder.

A. I'm sorry. Did you say 44?

Q. Tab 34.

A. 34. Thank you.

Q. This is from Mr. Hogan to Mr. Chris Puco. Who's Mr. Chris Puco?

A. Chris -- Chris Puco was the -- I believe the EVP of the Americas at this time.

MR. MUELLER: Your Honor, I offer DTX-209.

MR. DURST: No objection, Your Honor, to admission.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And have you seen any of the content of this correspondence between the chief executive officer and Mr. Puco before today?

A. No. This looks like the executive management team on the thread here, and I wouldn't have seen these.

Q. Mr. Miller, in the clear aligner industry or clear aligner market, do you believe in open systems or closed systems, you personally?

A. Are you referring to the iTero or the Invisalign?

Q. Just generally. In the clear aligner system, what do you think is -- let me withdraw the question.

In the clear aligner market in the United States -- are you with me?

A. Yes.

Q. In the clear aligner market in the United

States, do you believe, you personally, that the best thing for that market is that companies use open systems or closed systems, in your view?

A. Yeah. I believe in expanding access to care for patients, which means the more iTeros that are out there, the more people can receive clear aligner therapy.

Q. Open or closed?

A. It's an open system.

Q. So you say it's open?

A. The iTero is open.

Q. Let's take a look at DTX-1059.

And you're certainly privy to global business strategy in your role at Align, correct?

A. It depends.

Q. Let's take a look at Tab 35, DTX-1059. This is already in evidence.

And do you see at the bottom of the first page there's a reference to open and closed systems?

A. I do. And this would be the first time I'd be seeing this.

Q. You haven't seen that before?

A. Correct.

Q. All right. Now, you understand that Align enters into contracts with various practitioners as

well as what are called dental service organizations, true?

A. Yes.

Q. Let's take a look at DTX-144 -- 1444. Three 4s. This is Tab 37 in your binder.

A. I'm there.

Q. And DTX-1444 is an agreement between Align Technologies and Heartland Dental, right?

A. Yes.

MR. MUELLER: Your Honor, we offer DTX-1444.

MR. DURST: No objection, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And of course, sir, you've seen many of these agreements over the years, correct?

A. Yes.

Q. So let's take a look at a couple provisions.

These agreements offer certain terms to organizations or doctors if they remain in what's called good standing according to the agreements, true?

A. This particular contract is between Align and the dental service organization, not the doctors.

Q. And let's take a look at Paragraph 14 which is Page 8.

And in Paragraph 14, it says: Align provides the Find a Doctor functionality on Invisalign.com.

Right?

A. Yes.

Q. It goes on to say: In order for Invisalign providers to be listed within the Find a Doctor tool, Invisalign providers must maintain good standing as solely determined by Align.

Right?

A. Yes.

Q. Not maintaining good standing may include without limitation.

And it lists certain things, right?

A. Yes.

Q. One of them, diversion of prospective patients into non-Invisalign treatment, correct?

A. Yes.

Q. And so one of the criteria by which Align judges whether or not an organization and its doctors are in good standing is whether those folks are diverting prospective patients into non-Invisalign treatment, true?

A. Yes. From a layman's term, we refer to that as a bait and switch.

Q. Sir, I'm asking about what it says on paper

right here. "Diversion of prospective patients into a non-Invisalign treatment."

Right?

A. Yes.

Q. And let me ask you, sir, you used the term "bait and switch." If a dentist or an orthodontist chooses to offer another clear aligner to their patients, they're allowed to do that even if they're also offering Invisalign, correct?

A. Yes.

Q. And once -- once a doctor decides to take on Invisalign and offer Invisalign as a service, you're not here to say that the doctor should be forbidden from ever prescribing something else, are you?

A. Not at all.

Q. Yet this contract says right here that diversion of prospective patients into non-Invisalign treatment would be criteria to be found not in good standing, true?

A. No.

Q. Sir, does this say "bait and switch" in this provision?

A. That's what it means.

Q. Does it -- I'm not asking you what it means.

Does it say "bait and switch," sir?

A. No. The words are not written there.
Q. Does it say a doctor shall not falsely provide a patient with the impression that they're receiving Invisalign when they're not? Does it say that?
A. It's not written there.
Q. Doesn't say anything about false advertising right here?
A. No.
Q. What it says is: Diversion of prospective patients into non-Invisalign is one of the grounds under which the organization can be found not in good standing. Correct?
A. That's what it says.
Q. Now, these agreements have terms, right?
A. Yes.
Q. And the terms are five years, right?
A. Depends on the agreement. Yes. Two to five years.
Q. Two to five years. There are agreements like this with a five-year period, correct?
A. Yes.
Q. Now, sir, there's not just this one agreement. In fact, sir, isn't it true, isn't it true that there are thousands of agreements that Align has entered with good standing provisions like the one that we're

looking at right here?

A. I've never counted them, but that wouldn't surprise me.

Q. Well, I'll represent to you, I have one box right here.

Do you see that, sir?

A. Yes.

Q. And I've got another box right here.

And is it surprising to you that there are that volume or more of contracts with these types of provisions?

A. I've never -- it surprises me to see them in the boxes like that, yes.

Q. But you don't dispute that Align has entered into thousands of agreements with provisions like the one that we see right here, true?

A. I trust that if you say they're in that box, then they're in the box.

Q. Let's take a look at DTX-210. This is at Tab 38 in your binder.

And this is an e-mail chain between Mr. Hogan, the chief executive officer, and Brad Jergenson.

Who's Mr. Jergenson?

A. At the time, he was the vice president and general manager for the U.S. business.

MR. MUELLER: Your Honor, I offer it.

MR. DURST: No objection to admission, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And, sir, I'd like you to focus your attention, before I show this, to Page 2, and if you just take a look at it, there's a section on a report of a doctor wanting to try an alternative to Invisalign.

My question to you is: Have you seen that before or the correspondence about it?

A. No. I was not involved in this communication or -- or thread.

Q. Let's go to Tab 39 in your binder. This is DTX-2019.

Do you see this global white paper from Align?

A. Yes.

MR. MUELLER: Your Honor, I offer it.

MR. DURST: No objection to admission, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. Have you seen this before, sir?

A. No.

Q. Let's go to Tab 43. DTX-309. And let me know when you're there, sir.

A. I'm here.

Q. This is e-mail correspondence among various Align executives with an attachment titled Align Competitive Qual Analysis March of 2021.

Do you see that, sir?

A. I do.

MR. MUELLER: Your Honor, I offer it.

MR. DURST: No objection to admission, Your Honor.

THE COURT: Admitted.

BY MR. MUELLER:

Q. And are you familiar with this document or the attachment?

A. No.

Q. Mr. Miller, Align does some advertising to the general public, correct?

A. Yes.

Q. Has Align in -- well, Align uses, for example, sports figures, Patrick Mahomes, other folks to speak on its behalf in certain paid advertising, correct?

A. Yes.

Q. Has Align ever told the public in any form or fashion that the iTero scanner is needed -- is needed

to receive an Invisalign prescription?

A. In a commercial or?

Q. In the general marketing it does to the general market -- you with me?

A. Yes.

Q. Okay. So in that market -- withdraw the question.

In the general public advertising that Align conducts -- are you with me, sir?

A. Yes.

Q. Does Align ever tell the general public that their doctors are going to have to have an iTero scanner if they're going to be able to prescribe Invisalign?

A. So I can't speak on all the consumer advertising because I see just kind of what I see as a consumer from the consumer team, but if they say that, it wouldn't be accurate because you can receive it from a PVS impression.

Q. Okay. Does Align tell the consumers in this general advertising that the only ways to get Invisalign are putty in your mouth or Align's own iTero scanner? Does that appear in the sports advertising or anything else?

A. Not that I've seen.

MR. MUELLER: Thank you, sir.

I pass the witness, Your Honor.

Your Honor, I'm sorry. Before we start, I just was handed a note. I read one exhibit number incorrectly. I moved in DTX-2783, and the exhibit number I was showing the witness in the binder was 2873. So I want to make that clarification.

THE COURT: Thank you.

MR. DURST: Your Honor, we will, of course, move at the Court's and the jury's preference. This is our direct examination of Mr. Miller, and so we're going to be at it for a little while. Happy to start.

We're going to be at this for a little while. This is our direct examination of him. Just inquiring about the break, whether you would let us go ahead.

THE COURT: Please.

CROSS-EXAMINATION

BY MR. DURST:

Q. Good afternoon, sir.

A. Good afternoon.

Q. Okay. So let's go back to the beginning a little bit of talking about yourself for just a couple minutes, and then we'll get into some other topics.

So, Mr. Miller, where do you live and work?

A. I work for Align Technology and live in Raleigh, North Carolina.

Q. And before you were in Raleigh, where were you?

A. I was in Houston.

Q. And what were you doing in Houston?

A. I was the sales manager for Align for South Texas.

Q. Now, before being sales manager for Align in South Texas, what were you doing for a living?

A. I worked for -- same geography, but I worked for a company called Abbott.

Q. Is that a pharmaceutical company?

(Simultaneous conversation.)

A. -- medical device side. Covering the Texas, you know, health center down in, you know, Houston and then Louisiana.

BY MR. DURST:

Q. Okay. I'll do my part of this, and we'll have to ask you to. I won't talk until you're finished. And so give me a chance to finish, okay?

A. Sorry.

Q. No worries at all. We just don't want Ms. Davis to ring that bell on us.

So you were at Abbott. You moved to Align.

How did that happen and why?

A. So that's kind of a random story. I had received a LinkedIn message from the sales director of Align saying, hey, I'm in town. We have an opening in Houston. Would you like to have dinner with me?

But I never responded to anybody. I was actually doing quite well at Abbott, enjoyed it, but I was -- I'd seen people popping the Invisalign aligners out of their mouths, you know, at lunch, and colleagues. So I was kind of curious about the technology.

So I decided, you know, what do I have to lose? Worst case, I ask this person a lot of questions about the product and learn something about the medical technology that they invented.

Really liked the conversation, liked where the company was heading, and really what his vision for the future was and then why he thought I'd be a good fit there. So one thing led to another, and I decided to make a lateral move over, you know, out of the traditional medical device space into the, you know, orthodontic and general dentistry space.

Q. What enthused you about going to work for Align?

A. It was a personal thing. Growing up, I had braces as a kid, never wore my retainer, knew I needed teeth straightened a little bit to get back to where I needed to. You know, I had -- was born with three teeth missing. From an adult side. So -- sorry. Personal. So I lacked confidence. So Align gives people confidence.

Q. You have water there if you need it, sir, if you need a drink.

A. Thank you.

Q. Now, Mr. Miller, you have had responsibilities for some marketing responsibilities --

A. Yes.

Q. -- in your time at Align.

Why is marketing important to Align?

A. Well, it's a downstream business model, and what that means is you need to have marketing awareness for patients, prospective patients to know I can get my teeth straightened, and I need to go find a doctor and where can I find my doctor.

So you can't just deploy a bunch of field sales personnel at doctors' practices if patients aren't coming and asking for the product.

So you have to have consumer marketing efforts creating awareness for the category so that demand

is -- you know, they're essentially going to the stores, which is orthodontic practices and dentist offices asking for the product.

Q. And back in the early days of Align, what were the marketing challenges and the company challenges?

A. Yeah. So I joined in 2015, so I wasn't there for the early days. But from what I had heard and understood is Align spent more money on marketing than they had revenue coming in.

So times were tight. There was many times the company might not have survived or made it. So, you know, the company had to build consumer awareness to drive demand into the practices so doctors would both want to learn how to use the product and treat the patients.

Q. So in the early days of Align when they were working to expand their -- their sales, they spent more money on marketing than they did on -- than they received in revenue?

A. Yes.

Q. And in those early days of the company, what were the -- what was the head-to-head competition like?

A. It was fighting for legitimacy that a clear piece of plastic can move teeth like braces can. So 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

today that you otherwise maybe couldn't have a decade ago.

Q. And in that group, Mr. Miller, the folks that are out in the field talking to -- talking to doctors, how many people does Align employ in that role in the United States?

A. In the -- in the U.S. and Canada, it's 812 people.

Q. Now, in terms of tools of connecting with patients, let's start with the patients first.

And Mr. Mueller mentioned to you the NFL. Are you involved in Align's relationship with the National Football League?

A. Yes.

Q. Can you tell us about the origins of that relationship?

A. Yes. So I started the program with the National Football League. It started with, you know, the iTero they were using for scanning with mouthguards. They were trying to do --

Q. Pardon me, they were scanning -- the NFL was using the iTero for what?

A. Yeah. Sorry. The iTero -- it's a digital impression for players to receive their mouthguard study. So the player health and safety division was

basically putting microchips in the mouthguard so when there was impacts, they could measure what is the impact like to try to avoid concussions.

And so we started conducting the scanning for them. And throughout that process, we found out a lot of players actually were in treatment or inquiring about treatment. And the conversation, you know, with the player health and safety evolved into, you know, figuring out how can Align and Invisalign become a sponsor. And that quickly evolved into we were, at one point, one of six on-field approved products as an official partner of the NFL.

Q. And do you -- Mr. Mueller mentioned Patrick Mahomes. Did the company -- were you involved or was the company involved in introducing Mr. Mahomes to Invisalign?

A. No. That's -- I think that's the funny thing about the players with the National Football League, is before we started working with them, Patrick Mahomes was already in Invisalign treatment.

So if anyone watches the Kansas City Chiefs, he's chewing on what looks like a mouthguard. That's -- that's actually, over the last six or seven years, actually Invisalign. He's very comfortable with it. He prefers it over a traditional mouthguard.

So he was already in treatment before we did the deal with the National Football League.

Q. Have you brought to court today, Mr. Miller, or helped us bring to court today a demonstration of the type of promotion that Align uses with NFL players?

A. Yes. This is a -- would be a 30-second commercial that we ran during kind of the Super Bowl weeks and throughout the season of last year.

MR. DURST: Mr. Smith, let's play PDX-33.

(Video played.)

BY MR. DURST:

Q. Mr. Miller, what is that "it starts with a click" saying that Patrick Mahomes said at the end?

A. It's really nothing too creative. It's just when you pop the Invisalign in, it's typically left with a click. And if you're taking it out, you feel a click, which -- which is a sign it's a good fit.

Q. Now, Mr. Mahomes, was he wearing his Invisaligns when he was the Super Bowl MVP for the Kansas City Chiefs?

A. Yes.

Q. Now, I'd like to talk to you just a little bit about what distinguishes Invisalign, what gives -- what gives it the competitive edge in the marketplace?

A. Yeah. Trust, you know, brand trust and

recognition. So the National Football League is a good example. The player health and safety division would not allow a product unless it had a proven track record and they trusted it to be helpful to their players instead of harmful and had a proven track record of successful completion with the doctors that provide the treatment.

So, you know, brand integrity and trust is the most important currency we have.

Q. Mr. Miller, does Align have an estimate of the percentage of cases that it can treat, that Invisalign can -- Invisalign can treat, that overlaps with braces or competes with braces?

A. Yes.

Q. What is that?

A. I'm told from our scientists it's upwards of 98 to 100 percent now.

Q. 98 to 100 percent of cases that can be treated with braces can also be treated with -- with Invisalign?

A. Correct.

Q. Now, there's been some discussion including you mentioned a moment ago the iTero. Why does Align provide the iTero out to doctors in the teeth-straightening industry?

A. The high-resolution image file helps us provide a very high-quality Invisalign aligner. And that's -- that's the most important part of the process, is having a high-quality image, much like you'd have like, you know, a CT scan for brain surgery. It starts with the image. If you can trust the image, you can manufacture and get a good treatment plan.

Q. And do doctors use the iTero scanner for uses other than clear aligners?

A. Yes.

Q. Can you describe some of those, please?

A. Yeah. It's evolved to now it can detect cavities without an x-ray. You know, doctors can order simple things like nightguards, retainers. If they're getting implants, you can get a really good scan which gives a really good crown and a really good fit for the patient.

So it's just anytime -- anything that was physically taken with an impression with the putty historically can now get a high-quality image, you know, for the laboratory to use in a digital format.

Q. Now, Mr. Miller, why does Align limit the inputs that the scanners -- that can be used in making the Invisalign aligners?

A. It goes back to the quality. So the

Invisalign product is the output of a high-quality scan. So our brand is entirely dependent on having a successful prescription from the doctor. If we have a substandard scan and it goes through, we still manufacture. The unfortunate part is you might not know that there was a scan problem until the end of treatment when the treatment never actually closed out and reached its ideal state.

Q. Now, Mr. Miller, is the situation with accepting scans from other scanners, is that the same in the United States as it is in other countries around the world?

A. No.

Q. And why not?

A. That, I don't know. I don't -- something -- there's different laws in different countries, different requirements, different governing bodies. In the U.S. we have the FDA, you know. You know, I don't know what's -- what's out there in the other European or Asia-Pacific parts of the world.

Q. Now, what would happen -- and let's focus back on what this lawsuit is about, which is the United States.

What would happen if Align accepted scans from subquality scanners? What would happen to Align, and

what would happen to the patients?

A. Yeah. The worst -- the worst fear is the patients don't receive a proper treatment. They would ultimately suffer. They could be in treatment for years, not successfully get the proper bite, which is the most important thing. It's not just aesthetics. With -- with Invisalign, it's actually having the teeth bite together to prevent damage.

So if we don't have the proper scan, then we don't have the quality control. It could lead to a bad product as the output.

Q. And the product's going where, patient's mouth?

A. Patient's mouth.

Q. Now, Mr. Miller, you heard some -- you got some questions earlier about a picture of a moat.

Do you remember that?

A. Yes.

Q. Okay. And I think I heard you say you would like to explain what that means to you. Would you do so now to the jury, please?

A. Yes. The -- so the moat picture, it was in a document. What that document was is a training deck, and it was talking how we're going to partner with businesses and how we're going to work with the iTero

and help dentists make the digital comprehensive dentistry switch. And it's teaching reps how to actually message and talk to doctors of how they can leverage this technology.

It's not about I view a moat as like you're trapped into someplace. That's not at all what that document was. I think it's a very poor choice of words and a poor image by one of our employees.

I personally subscribe like to a shiny castle, if -- people want to be there because they like to be there. We want customer service. We want a high-quality product that they trust and believe, and we earn their business every day.

At Align, we don't have recurring business. It's once the patient receives their prescription, we hope we did a good job so the doctor trusts us for the next one.

So there's -- there's nothing that traps people in with our sales force. We don't train them to do that. I oversee sales training. I know for a fact we don't train our people that way.

Q. Is the outcome simulator one of the features that is made available to doctors on the iTero scanner?

A. Yes.

Q. And do you have a demonstrative exhibit, a

video, PDX-35?

MR. DURST: Mr. Smith, don't start it, please, but have it ready.

BY MR. DURST:

Q. Do you have a demonstration of how the outcome simulator on the iTero works?

A. Yes.

Q. We're going to show a film that you have identified. If you need to stop it so you can explain it to the jury, just ask Mr. Smith to pause. Okay?

A. Okay.

MR. DURST: All right. Mr. Smith, can you start to play, please?

(Video played.)

A. So what you're seeing is the Invisalign outcome simulator. So it's after the scan's completed with a patient, the doctor will have a discussion. And it will do a simulation before and after.

So on the left, you see here's your current state of the teeth. On the right is the after. And it's a simulated outcome of after treatment with the Invisalign product. Here's where you're going to get to.

So we're on a simulation in stages, and a stage can be one aligner set to the next. So you

typically change those out every week.

The doctor can actually change the tooth if they want to have a conversation with the patient aesthetically, bite, function. They can walk through a consult one-on-one with that doctor and that patient at the chair side.

The reason this video's important is before that -- this was invented, doctors would typically use shadow puppets with their hands, trying to describe what's wrong with your teeth, how they're hitting each other. They might show some pictures or a mirror at that point.

So the iTero helps doctors educate the patients in a more meaningful way, and they can see why they need their teeth straightened and what's the -- you know, potential solution would look like with Invisalign.

BY MR. DURST:

Q. So this is called a simulation. It's a computer model?

A. Yes.

Q. And is the assumption in the computer model that the patient, the teeth -- the mouth that's being demonstrated, is the assumption in the model that an Invisalign treatment is being given to that patient?

A. That's correct. It's called the Invisalign outcome simulator, and it's based off the Invisalign sequencing and technology behind it.

Q. And if there were other treatments that might be given to a patient, would that simulator be an accurate representation of what would happen?

A. It would not be.

Q. Now, Align has some programs to support doctors who want to buy iTeros, right?

A. Yes.

Q. iTeros may be -- the company may provide financing for doctors; is that accurate?

A. Yes.

Q. And if a doctor or a practice buys an iTero, they get the benefits of the scanning and the simulator.

Are there other advantages that doctors get as well?

A. I'm sorry. Could you repeat the question?

Q. Yes.

What advantages do doctors get by buying the iTero?

A. Yeah. It updates their practice technology in many regards. So instead of -- from a patient experience, instead of PVS impressions, right, you can

actually -- you're using digital technology.

You know, it improves their workflows. I think there are a lot of benefits with it.

Q. And, Mr. Miller, the jury's heard some about -- we don't need to go into great detail for them to hear it all again, but they've heard some about the Advantage Program.

What is the Align Advantage Program in a sentence or two?

A. To simplify it, it's nothing more than a loyalty program you'd find with, you know, pretty much out in our daily lives. Starbucks have them. Airlines have them. Hotels have them.

So the more you buy, the more points you get, and the points, you know, essentially reduce your fixed costs as a doctor.

Q. Is it effectively a discount program?

A. It is.

Q. And does it amount to a bulk discount program?

A. Yeah. So if I can elaborate on --

Q. Please do.

A. -- on that statement. The bulk, when we are competing against bracket and wire, they sell it in bulk, meaning you can physically buy parts. And the more you buy, the cheaper your price. They can

warehouse that.

So in order for us to compete effectively, we only do one prescription at a time, one patient at a time. So in order to do that, the best solution for us was to give them a bulk discounting program. It was kind of retroactive, meaning here's your -- how much volume you buy over a six-month period, here's your net effective discount price based on that volume.

So it allows us to compete against braces in a more effective way, which is what the industry was used to.

Q. And does Align have other discount programs that they offer in addition to Advantage from time to time?

A. We'll try things. Yes.

Q. And the jury has heard a little bit about something called DSOs. I'm not sure anyone's taken the time to explain what is a dental service organization.

Can you tell the jury just in general terms what is a DSO?

A. Yeah. So the way I relate to it, because I worked in health systems, you know, like in Houston Memorial Herman or Methodist were health systems, and they owned, you know, 15, 20 locations.

The same thing in dental is starting to catch

on, where it's not as proliferated as you find in health, but it's dental service organizations I would view as more like your health system, and they have satellite clinics around, you know, the geographies that they own and operate.

Q. Now, Mr. Mueller showed you a contract by a group called Heartland.

Is that a DSO?

A. It is. Yes.

Q. And he focused you on the good standing provision.

Do you recall that?

A. Yes.

Q. And that provision has in it a clause that said that Heartland would not divert prospective patients.

Do you remember seeing that?

A. Yes.

Q. You call that a bait and switch clause, I believe. Did I hear you right?

A. Yes.

Q. What do you mean by "bait and switch"?

A. So bait and switch from what we mean is if someone comes in and wants to buy Invisalign, they sign a contract for Invisalign, and they show up to receive

the delivery of the Invisalign. The assumption is, in the patient's mind, they have Invisalign in their mouth, and that's what they're being treated with.

Bait and switch is they do not actually have Invisalign in their mouth. It could be something else. That's what we want to prevent.

Q. Now, Mr. Miller, has Align encountered problems with -- I guess you might call them a bad egg dentist or a bad egg doctor doing a bait and switch as it relates to that simulator that you demonstrated for the -- for the jury?

A. Yes.

Q. And some of those complaints that Mr. Mueller was talking about that pile up, does Align receive complaints from patients that have been baited and switched?

A. Yes.

Q. Are there some -- what resources have you had to deploy to deal with this problem?

A. Yeah. We've had to staff a hotline for patients. So we have employees that sit on phones and take inbound phone calls for patient complaints.

And on there, that's where we typically find that someone's calling in for a complaint about the product. We try to identify and locate them. We don't

have any record of that patient, and then they'll typically find that it's not an Invisalign product.

Q. Now, Mr. Miller, you called this a bait and switch clause or a bait and switch language.

By that, are you saying that the contract is intended to prevent doctors and DSOs from baiting and switching?

A. It is. Yes. If they want to use another product, that's fine. That's completely normal. We just want them being honest and truthful with the patient of what product they're receiving.

Q. Now, Mr. Miller, do you have any personal experience with this bait and switch problem?

A. I do. Yeah.

Q. Can you tell us about the personal experience you had with the bait and switch problem?

A. Yeah. It started when I first started here at Align in 2015. My mother-in-law lives in Ohio. She called me and --

Q. Where were you at the time? She was in Ohio, mother-in-law's in Ohio.

Where are you?

A. Houston.

Q. Okay.

A. Yep. So she calls and says, hey, I started

Invisalign. Can you help me? I'm having problems with it.

Q. How long had she been your mother-in-law at that point?

A. Nine -- nine years.

Q. Okay. You need to know that answer.

A. Yeah.

So she -- she's like, can you help me?

And I was like, okay. Sure. I know how to find -- let me find you. So I go into the patient database and try to find her by name. Couldn't locate her. So I'm asking for the doctor's name. Couldn't locate the doctor.

And so I reached out to the doctor. I go, what's the website? So I went to the doctor's website. It showed Invisalign. So I was like, okay. I must be doing something wrong because I'm in my first year.

So I asked her just to -- if she could take out her aligner, because on there it identifies the patient ID on there. There's unique numbers on each aligner.

And that way I could find her. I could hand it over to our clinical team, and they could -- they could let us know like, oh. We found her case. We know how to solve the problem. And the pain she's

experiencing, we can address.

When she took it out, it turns out it was not Invisalign at all at that point in time, which explains why I couldn't find her.

Q. What -- had your mother-in-law been baited and switched?

A. She had. She signed an Invisalign contract. Her contract said "Invisalign" on it. She was shocked, as I was, coming out of major medical hospital environments with NICUs, that it was even something that could happen.

Q. And, Mr. Miller, what aligner did your mother-in-law, was she baited and switched into?

A. She was baited and switched into ClearCorrect.

MR. DURST: Pass the witness, Your Honor.

MR. MUELLER: Nothing further for Mr. Miller, Your Honor.

THE COURT: May he be excused?

MR. MUELLER: He may be.

THE COURT: Ladies and gentlemen of the jury, let's take our afternoon recess. If we would break for 10 or 15 minutes. Please remember my instructions not to discuss the case with each other.

THE BAILIFF: All rise.

(Jury exited the courtroom.)

THE COURT: Thank you. You may be seated.

You may step down, sir, and you're free to stay in the court or leave, whichever you care to.

THE WITNESS: Thank you, Your Honor.

THE COURT: You're welcome.

Who -- who's next?

MR. MUELLER: Yes, Your Honor. So the --

THE COURT: Bryan Taylor.

MR. MUELLER: I'm sorry?

THE COURT: Is it Bryan Taylor?

MR. MUELLER: It is, Your Honor.

Before we do, I would like to address the two videos that we were going to play with Mr. Miller and request Your Honor's permission to play those in a standalone basis. These are DTX --

THE COURT: No. You can do that.

MR. MUELLER: I can? Okay. So we'll do that first and then call Dr. Taylor.

And then the final thing, Your Honor, there were two exhibits --

MR. DURST: Your Honor, we object to that on a standalone basis. I'm not sure what that means.

Those -- those videos have not been played at this point because there is no foundation for

them.

MR. MUELLER: Well, that's just not true. So these are --

THE COURT: Well, okay.

MR. MUELLER: I can explain what they are, Your Honor.

THE COURT: Explain what they are and then why you think they're coming in, and then I can hear from Mr. Durst.

MR. MUELLER: Sure. So two things, Your Honor. These are exhibits that we've been discussing with Align's counsel the last few days. There's no further objection we'd understood before today. They're statements of a party opponent. It's the CEO of the plaintiff. They've been authenticated.

At his deposition, we confirmed with the CEO at his deposition that those were in fact statements he made. So the foundation is they're genuine.

THE COURT: Mr. Durst, if they at their deposition got him to admit that these were his statements, what -- what is your objection?

MR. DURST: My objection, Your Honor, is that they have in a crafty manner not designated his deposition.

THE COURT: Well --

MR. DURST: And it's too late for them to designate that deposition under our procedures, Your Honor.

So they chose not to designate the deposition which might have provided the authentication for this. But they chose not to do that. So they're avoiding --

THE COURT: Well, here's the problem, and I have no way of resolving this.

Mr. Mueller, I'm going to speak for you for a second. But Mr. Mueller seems to think that there was -- they had done everything they needed to do to get these admitted without having to go through the steps of playing the dep.

Mr. Mueller, I assume your team thought that they would be admissible without you going through the steps of actually showing the deposition with him admitting that.

MR. MUELLER: Correct. And in fact, Your Honor, I'll give you one example what we did to make sure there was no issue here.

We removed the questions so it's just statements by Mr. Hogan. We discussed with the plaintiff's team whether they had any further objection

to the exhibits which have been on our exhibit list for months containing --

THE COURT: So you disclosed these as exhibits?

MR. MUELLER: We did.

THE COURT: You disclosed this as an exhibit?

MR. MUELLER: We did.

THE COURT: So what -- Mr. Durst, what do you lose by them not going through the step of showing the deposition of him putting them into evidence when they were on their exhibit list?

I'm not finding any surprise on -- I was going to say, if you didn't know they might be played, but if they're on his exhibit list, what -- how are you prejudiced? How is this unfair?

MR. DURST: Yeah. We have -- one of the problems we have, Your Honor, is that last night I think, it might have been the night before, they changed the videos. So they did have videos on their exhibit list.

THE COURT: So these videos are not the same. Are they less? Are they -- are they less?

MR. MUELLER: I got to correct the record on that. What we changed -- I'll give you an example.

There was a question that said: Mr. Hogan, you've had a 20-year monopoly in this industry.

THE COURT: And you took that out?

MR. MUELLER: We took it out.

THE COURT: Mr. Durst, do you want to put that back in?

MR. DURST: I don't like that one coming in, Your Honor.

(Laughter.)

THE COURT: Mr. Durst, I'm overruling your objections. I'm going to let the videos be played.

MR. MUELLER: So we'll play those, Your Honor, and then we'll have Dr. Taylor.

The only final thing I had, Your Honor, was there were two exhibits that there was no objection. I got a note from the folks here there was no objection when I offered them, but I think there may not be a formal recognition of admission.

Those are DTX-208 and DTX-1421 from the examination we just completed, 208 and 1421.

THE COURT: Those will be admitted.

Anything else we need to take up before the next witness?

MR. MUELLER: Nothing further, Your

Honor. Thank you.

THE COURT: And Mr. Durst?

MR. DURST: Nothing here, Your Honor.

THE COURT: And who is Dr. Taylor?

MR. MUELLER: I'm sorry, Your Honor?

THE COURT: Who is Dr. Taylor? Is he a fact witness?

MR. MUELLER: He is an expert witness. Orthodontist.

THE COURT: Okay. So I have -- this doesn't need to be on the record.

(Off-the-record discussion.)

THE COURT: Tomorrow when Dr. Perryman finishes, hopefully I'll remember, but failing that, if you will remind me, we will break before we start with Dr. Reitman. And we will do the Rule 50 motion. As always, you're welcome to make a Rule 50 motion orally and submit something in writing, either simultaneously or after that. And we'll take it up.

And then after your case-in-chief, again, if you, Mr. Mueller, if you will remind me, I'll give you the opportunity -- I'll give you both the opportunities to do Rule 50 motions since it's bilateral.

Also, again, I'll put on the record, I

don't know what it is, I had some glitch. As you know, we do the jury charge off the record. And when we're all done, but before I do my closing, you do -- before I read the charge, remind me, and I will give you all the opportunity to make your objections on the record to the jury charge which -- and there may be some this time given that I'll have to make some decisions probably on the antitrust stuff.

But I'm not purposely trying to prevent you from doing it, but I have a glitch. So if you all -- I've taken up your time. If y'all will get back as quickly as possible, we'll resume -- unless there's something else, we'll resume.

MR. MUELLER: Nothing from us, Your Honor.

MR. DURST: Nothing further from us.

THE BAILIFF: All rise.

(Recess taken.)

THE BAILIFF: All rise.

THE COURT: Please remain standing for the jury.

(Jury entered the courtroom.)

THE COURT: Thank you. You may be seated.

MR. MUELLER: Your Honor, at this point,

as we discussed with Your Honor, we'll offer DTX-2868, an excerpt of an interview with Joe Hogan, the chief executive officer of Align.

(Video played.)

MR. MUELLER: Next, Your Honor, we offer DTX-2869, another excerpt of an interview with Mr. Hogan.

(Video played.)

MR. MUELLER: Your Honor, at this point, we call Dr. Bryan Taylor, and Mr. Underwood will conduct the examination.

(The witness was sworn.)

DIRECT EXAMINATION

BY MR. UNDERWOOD:

Q. Good afternoon, Dr. Taylor. How are you doing?

A. Doing great.

Q. Could you please introduce yourself to the ladies and gentlemen of the jury?

A. You bet. I'm Dr. Bryan Taylor. I'm an orthodontist. Been practicing -- or recently retired but practiced here in Waco for over 35 years and live here and grew up and was raised here.

Q. And do you have a family?

A. I do. I have a wife of -- celebrating

40 years of wedding, of our marriage this summer in just a few weeks. And I have two daughters, beautiful daughters.

Q. And did you prepare a set of PowerPoint slides to assist your testimony this afternoon?

A. I did.

MR. UNDERWOOD: All right. Let's get those up.

BY MR. UNDERWOOD:

Q. And let's turn first, if we could, to your background, Dr. Taylor, beginning -- you alluded to this, but where did you grow up?

A. So raised here in Waco. Spent elementary school through high school here in the Waco area, first at Midway and then at Bruceville-Eddy.

Q. Did you graduate from Bruceville-Eddy High School?

A. I did.

Q. What'd you do after high school?

A. After high school I started at McLennan County Community College, then transferred over to Baylor University, where I did my predental undergraduate work.

Q. And what after that?

A. After that I went to the University of Texas

Health Science Center in San Antonio, where I went to my four-year dental school in which I received a doctorate of dental surgery.

Q. And after you got your doctorate of dental surgery or DDS degree, what'd you do after that?

A. Well, if you want to call yourself an orthodontist or hold yourself out as an orthodontic specialist, you need to do additional training. And so I went to Columbia University for my orthodontic training in New York City.

Q. What was that like having grown up in Waco and Bruceville-Eddy, then moving up to New York City?

A. You can imagine it was a pretty big transition for me and for them as well. I moved there in a pickup truck and a cattle trailer.

Q. Did you get any questions about that in New York?

A. Yes. I had a big Charolais sticker on the side of the truck, and if I had one person ask me, I had ten ask me. You got horses in there?

Q. What'd you do after your time at Columbia University in New York?

A. After Columbia, I came back to Waco. That had always been the plan, since junior high, to go back into practice with my father, who was an orthodontist

here in Waco. He'd been here for 40 years.

And in fact, I was a third generation dentist. My grandfather, while not an orthodontist, was a dentist up in the Dallas area.

Q. And how long did you practice with your father?

A. We practiced about two years together before I opted to move out and become a friendly competitor.

Q. And what -- did you start your own practice?

A. I did.

Q. And what was that practice like at the very beginning?

A. Well, that practice, at that point, I went by my name, Bryan E. Taylor, DDS. And it was a very small practice, small office, a couple of -- just two staff members. I had three treatment chairs, and those weren't full all the time for sure.

Q. And were you able to grow the practice over time?

A. Oh, yes. And I have to call out my wife here. She was a big driving factor in helping me do this. But yes. We grew the practice. It became much larger than what the building would accommodate. So I built a new office and continued to grow.

Q. And that practice was Brazos Braces?

A. It was.

Q. How many locations did you end up having of Brazos Braces?

A. By the time we finished, I had three. I started off -- the day I came to Waco, when I was still practicing with my father, I had an office in Gatesville, Texas. And so I'd been going there for my entire career.

And then had the Waco -- the new Waco office. And then after a few years, I thought, you know, this China Spring area sure seems to be growing. Lot of houses, kids out there. So I opened a China Spring location.

Q. You mentioned earlier that you're retired?

A. I am.

Q. When did you retire from practice?

A. I retired the summer of 2024.

Q. And about how many folks were working at Brazos Braces when you retired?

A. At the time I quit, we had 15 employees. A couple of those were part time.

MR. UNDERWOOD: And let's go to the next slide, please.

BY MR. UNDERWOOD:

Q. During your career, did you hold any

leadership roles in any orthodontic or dental societies or organizations?

A. I did. I was -- the Central Texas Dental Society is the local organization of Waco and Temple dentists, and I was president of that. I was chairman of a couple of committees that dealt with ethics.

Q. And I see here the Texas Association of Orthodontists.

What was your role with that organization?

A. Well, I was on the board and then eventually became president, and that is, of course, obviously the Texas orthodontists. And that's about 550 to 600 members.

Q. And then what's the bottom organization here on the screen?

A. Well, the Southwest Society of Orthodontists, I was also a board member there for a number of years, and that is the regional five-state area of those kind of state organizations.

Q. So, Dr. Taylor, what issues are you here to address today?

A. I'm here to address Align's conduct and policies as they relate to working orthodontists.

Q. And do you have experience with Align, including Invisalign?

A. I do.

Q. What is that experience?

A. Well, as we've heard, Align came to market with their Invisalign product in 1999, and I was a very early adopter. I started in around the year 2000, and at one point early on, I was told that I was one of the top 100 Invisalign orthodontists in America.

Q. And are you also familiar with what the jury's heard about called the Advantage Program?

A. I am.

Q. And when you were practicing, were you in the Advantage Program?

A. I was.

Q. The jury's also heard about this iTero scanner. Do you see that here?

A. I do.

Q. And do you have experience and does your practice have experience with that scanner?

A. Yes. I do. I purchased one of those in 2015.

MR. UNDERWOOD: Your Honor, we offer Dr. Bryan Taylor as an expert in the field of orthodontics and orthodontic practice management, including on doctor choice.

MR. DURST: No objection, Your Honor.

THE COURT: He'll be admitted as such.

BY MR. UNDERWOOD:

Q. Now, Dr. Taylor, are you being compensated for your time spent working on this case?

A. I am.

Q. And are you paid regardless of who wins or who loses this case?

A. Yes. I am.

Q. No financial stake in the outcome of this case?

A. Not at all.

Q. What type of work did you do to analyze the issues in this case?

A. Well, primarily, I rely on my 35 years of experience as a private practicing orthodontist. I also -- if I really want to add in, I've got about another 15 years where I worked with my dad before I got my license.

I reviewed a lot of documents regarding information about this case, depositions, and did some review and exploration on my own.

Q. Have you ever testified as an expert witness in a lawsuit before?

A. Never have.

Q. Have you ever given any testimony of any sort in a lawsuit before?

A. Never have.

Q. This is the first time?

A. This is my first time.

Q. All right, Dr. Taylor, at a high level, can you tell the ladies and gentlemen of this jury what your opinions are in this case, beginning with the first one?

A. You bet. So No. 1 is that clear aligners -- Invisalign is what we've been talking about here a lot, but clear aligners in a larger sense, and wires and brackets, traditional braces as I refer to them, are not interchangeable. They're not the same thing. They don't do the same things, and they're really not close substitutes.

Q. What's your second opinion?

A. That Align's iTero-only policy in which you're forced to use an iTero if you want to order Invisalign products is -- forces doctors to purchase an iTero.

Q. And your third opinion?

A. That iTeros' process called the STL export process, where you take the information and send it to whatever companies you want, is time consuming and complicated. And in the end, that deters doctors from even trying other kinds of aligners.

Q. And your fourth opinion?

A. My fourth opinion is workflow and efficiency are critical to an orthodontic practice. It's profitability.

Q. And finally, what is your fifth opinion?

A. That Align's loyalty program, the Advantage Program you mentioned, creates a risk of financial penalties to doctors. And that, again, discourages them from trying competing aligners.

Q. All right. Thank you, Dr. Taylor. Let's turn to your first opinion in this case.

And again, what is that opinion?

A. Basically, that clear aligners and braces are not the same.

Q. Based on your experience, Dr. Taylor, what are the major differences between clear aligners and traditional wire and bracket braces?

A. Well, probably the first and most obvious is that brackets and wires, traditional braces, are very visible. And clear aligners are invisible, discreet. They don't show up, and that's a big difference.

Q. What else?

A. Secondly, I would say the fact that they're removable. So that definitely is a benefit for clear aligners. You can pop those out for important events, weddings, presentations, things like that. And of

course traditional braces, those are not coming off.

Q. And does the fact that clear aligners are removable have any impact on oral hygiene?

A. They do. They do. That's one of the big benefits of clear aligner treatment. You've got braces and wires, and you can imagine it's difficult -- not impossible but difficult to keep those really good and adequately clean.

I had a lot of problems with that, with my patients either not putting in the effort or just not physically being able to do it well. The fact that you can pop that aligner out gives people the ability to brush and clean those teeth just as well as if they weren't going through orthodontic treatment, and floss, if I can talk them into doing that.

Q. And finally, I see here: Fewer in-office visits.

What does that mean?

A. The way that we normally treat orthodontic patients is that we see people kind of each section. So we'll say a traditional orthodontic patient in my office with braces and wires would be seen on a six- to seven-week rotation. Every -- we schedule them every six to seven weeks.

With clear aligners, we look at that case, and

we make a lot of the decisions before treatment so that we don't have to have that period where we are adjusting and making -- deciding what our plan for the next appointment is. That's already predetermined by our work beforehand.

So that means that we can move patients out to a longer time. Invisalign or clear aligner cases could be seen every 12, 15 weeks, as opposed to 6 or 7.

Q. And in your clinical experience, Dr. Taylor, did your patients care about these differences?

A. Oh, absolutely. Those were all factors in the decision process.

Q. In your experience, would patients who wanted clear aligners accept wire and bracket braces instead?

A. Not normally. The vast majority of my patients that desired clear aligners, which were a lot of adults, they were unwilling to accept clear -- I mean to accept wires and brackets as an alternative treatment.

Q. Were there ever situations in your practice where a patient came in asking about clear aligners and you did not give clear aligners to the patient?

A. Yes. Yes. It happened fairly often.

Q. Why is that?

A. Well, there are -- like everything, there are

really great benefits to each one of those treatment modalities. And although clear aligner treatment is very good, it does not address all of the problems that traditional wires and braces do.

So a certain set of patients that would be interested in clear aligner treatment, I would have to tell them, I'm sorry. I don't believe you're a good candidate for that.

Maybe it was that they just felt like they weren't going to be compliant themselves. And so at that point, I would present the alternative options. But most of them walked out the door.

Q. You mentioned compliance, which I'll come back to in a minute, but are there any other examples in your experience why a patient may not be a good candidate for a clear aligner?

A. There are several problems. One thing that we talk about with clear aligner treatment is the problems that would be considered unpredictable.

So yes. It's a problem that might work with clear aligners but not necessarily. It was unpredictable. And I never felt comfortable with unpredictable when somebody was paying me to straighten their teeth.

One of the specifics would be vertical

movements, movements up and down. You can imagine you've got a tooth. You need to move it down, what we call extrusion. It needs to come down.

Well, the plastic fits up over it, and then do-do-do-do-do, you know, over the course of the plan, the plastic comes down. But even with little bumps glued on the teeth, it didn't work as well at catch and hold and moving -- physically moving that tooth down.

Q. And then coming back to patient compliance, can you explain what that is and why that's relevant?

A. You bet. With clear aligner treatment, a critical -- I couldn't -- I can't stress it enough now and I couldn't stress it enough to my patients -- is patient compliance with that clear aligner is critical. We need to have that in for 22-plus hours a day. And if you don't wear it as directed, then things are not going to work well. They may not work at all.

Q. After clear aligners were released, did you notice any changes in adult patients?

A. I did. There was a substantial, you know, opening of adult patients that began to call and request examinations. That's the appointment where I would evaluate the patient. So that -- the number of adults that were coming in seeking an opinion about treatment really, really grew with clear aligner once

clear aligners were on the market.

MR. UNDERWOOD: And let's go to the next slide.

BY MR. UNDERWOOD:

Q. We've heard briefly in this case about ceramic braces and briefly about lingual braces.

Are either of those substitutes for clear aligners?

A. Not in my opinion.

Q. Why not?

A. Well, as we talk about the ceramic braces, is that more aesthetic than traditional braces? Sure. It does look better.

My standard line for people that came in when we were discussing ceramic brackets was, "You're not going to fool anybody." You still see the wires. The little -- there's a little rubber ring that holds the wire into the brace, and we change those each time. But depending on habits like smoking, coffee drinking, wine drinking, those little rubber rings discolor.

So over the course of that six-week period, they may look beautiful day one. But by the end of the five or six weeks, they're very visible.

So ceramic brackets, while better, are not a substitute.

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

Mr. Lee?

BY MR. UNDERWOOD:

Q. Is that your younger face on the left-hand side of the screen?

A. It is.

Q. And is this a screenshot from your website?

A. It is.

Q. And is there a page on your website called "Types of braces"?

A. There is.

Q. I just want to ask you point-blank, Dr. Taylor, are clear aligners a type of braces?

A. Not in my opinion.

Q. Then why do you have a website, a web page that says "Types of braces" that list clear aligners?

A. That's a -- that's a very good question. There's a couple of reasons for that.

One is I didn't actually write and produce this page. It was a third party that we hire to develop our web page. They do a lot of orthodontists. And -- and that was something that came to us. I didn't really look to think that that needed editing.

But -- but in a practical sense, it also -- it works well for my -- for the laypeople that are looking at what -- what are their options.

So it is something that -- it kind of gives them what might potentially be a -- be a choice for them.

MR. UNDERWOOD: Can we go to the next slide, Mr. Lee?

BY MR. UNDERWOOD:

Q. Did you hear during Mr. Mueller's opening statement when he talked about a car dealership offering trucks and vans and cars and all sorts of types of vehicles?

A. I did.

Q. And is that at all like your website situation?

A. I think it can be, yeah, related to that.

Q. Can you explain?

A. Well, you go into, quote, a car dealership, but they don't just have cars. They also have trucks. And so while it says car dealership, it really -- there are variations of that that are available.

Q. What type of vehicle do you drive, Dr. Taylor?

A. A truck.

Q. Why do you drive a truck?

A. Well, couple of reasons. One is I need to haul lawnmowers. I need to pull a boat. But also that's really what I want.

Q. Is that a common sentiment among truck drivers, you think?

A. Absolutely.

Q. And so if we can just bring that back to the situation in this case. How is that like the clear aligners versus wires and bracket braces situation?

A. Well, when you -- when you go in, you want to have a choice about what things fit your needs. What you want is certainly important. You want to have the option to choose what you want but within reason. You have to know what the needs are as well.

Q. Thank you, Dr. Taylor.

Let's go to your second opinion. What is that opinion?

A. That's that Align forces doctors to use an iTero.

Q. And can you explain what you mean by that?

A. Certainly. So if we're going in an orthodontic practice, especially in today's world, there's a strong desire from the market for some form of clear aligner treatment. You want to have that in your bag of tricks to offer people.

Invisalign is the biggest in -- in decision there with the most marketing, so people recognize 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

here have had impressions done and, you know, it doesn't taste great. You have to put it in there, hold it for several minutes.

Some people have a strong gag reflex. I certainly have had more than my share of patients that have actually thrown up while I'm trying to get this impression. So it's really -- it's not desirable from a patient standpoint, a patient experience standpoint.

And then secondly, from the doctor's standpoint, while it seems simple to just put that goop in there and get a mold, it's actually difficult to get all of the teeth all perfectly captured in that material. It has a tendency to run a little bit or you get a saliva bubble or an air bubble. That impression's no good.

So then you have to do it again. I routinely had to do multiple sets, sometimes as many as five or six impressions, for a single arch to try to get that.

So that is expensive, time consuming for the doctor, and again, it's a terrible patient experience.

Q. Now, if we can turn back to Align's iTero-only policy. Based on your review of the evidence in this case that the jury's seen, what has Align had to say about this policy?

A. Well, their -- Daniel Stubbs, their director

of business development, said, quote, "If you want to do Invisalign, you're forced to buy iTero and live with it."

MR. UNDERWOOD: And that's DTX-141, already in evidence.

BY MR. UNDERWOOD:

Q. Do you agree with that statement based on your experience?

A. I do.

Q. Thank you, Dr. Taylor.

Let's turn to your third opinion. What opinion is that?

A. That the iTero STL export process -- and we've heard about that -- that's taking the raw data from your iTero scan and being able to send that to another company. It deters the use of competing aligners, of even trying competing companies.

Q. Now, I want to first ask you about the process of using an iTero to place an order with Invisalign. Okay?

A. Okay.

Q. What is that process like?

A. You seat the patient, put in a little bit of patient information, do your scan, review it. Okay. Everything looks great, submit.

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

04:35 A. Well, you need to enter the patient name, type in the name again, and then it navigates, and then navigate to that correct patient.

Q. And what do you do next?

A. Next, then you need to move over and click the ID number, and that'll take you to the order information page.

Q. And then what?

A. Then you're there. You see a little button that says "export." You click on export.

Q. All right. Now, this process is called the STL export process. You just said we click on export.

Does that mean we're done?

A. I wish we were, but we're not.

Q. All right. What do you do next?

A. Well, we've got to go in. A pop-up window pops up, and you need to start selecting drop-down choices. The first one is Export Type: Open Shell.

Q. What do you do next?

A. Well, then you have another one, so another drop-down file, and you choose Arches Oriented in Occlusion.

Q. And then what?

A. Then you need to select what type file it is. You have several options, and you choose STL.

04:36 Q. Now, I see here there's actually two options that say STL. One is STL (No Color), and one is STL+PLY.

Do you see that?

A. I do see that.

Q. And you have to know which one to click?

A. Yes. You do.

Q. All right. And after clicking that top one, then what do you do?

A. Now you're back to hitting the export button again.

Q. Okay. So now that we've clicked export again, are we done?

A. I wish we were, but we're still not quite there.

Q. Okay. What's the next step?

A. After that, a zip folder comes up. You're probably familiar with zip files. You need to unzip it, and then I think, you know, ten or so files appear, and you need to start working through those.

Q. Okay. What do you do after that?

A. Well, you need to figure out which ones are the files that you need, and that's really only two to three of the ten to ten-plus that popped up. And then you'll need to save that file, the relevant files to

your computer.

Q. All right. And then what after that?

A. Well, now -- now you're ready to send that information to a new company and begin their process of getting the information.

MR. UNDERWOOD: Okay. Can we get the next slide, Mr. Lee?

BY MR. UNDERWOOD:

Q. All in, how many steps are there in this process?

A. I count that to be 14 steps.

Q. And about how long does that take start to finish?

A. At a minimum, a couple of minutes and probably more.

MR. UNDERWOOD: And if we can go to the next slide.

BY MR. UNDERWOOD:

Q. Again, how long does it take to do the iTero order with Invisalign instead of a competing aligner?

A. As we said, perform the scan and click submit. What's that, a few seconds?

MR. UNDERWOOD: Can we go back one slide?

BY MR. UNDERWOOD:

Q. Does Align provide any instructions in the

instruction manual on how to do this process displayed here on the screen?

A. They do not.

MR. UNDERWOOD: And can we advance two slides now, Mr. Lee?

BY MR. UNDERWOOD:

Q. Has anyone at Align acknowledged what the effect of this STL export process would be?

A. They have. Their vice president of product and design said, quote: It is highly manual and time consuming and thus will never be widely adopted.

Q. And this is DTX-402.

Do you agree with this sentiment?

A. I do.

MR. UNDERWOOD: If we go to the next slide.

BY MR. UNDERWOOD:

Q. Dr. Taylor, do you have any personal experience trying to use an iTero to order a clear aligner from a competing company?

A. I do.

Q. What -- can you explain what that process was like?

A. Well, I was a big 3M user. That's who I bought all my brackets, wires, things from. So I was a

very good customer. So when they introduced their Clarity clear aligner solution, they came to me and said, hey, Dr. Taylor. We'd love for you to try these. Why don't you do ten cases? No charge. Ten free cases.

And so I started that process. I did a couple of cases. I think it was two cases that I went through that upload procedure, and I decided it was just too time consuming and annoying and painful and stopped and didn't even utilize the other eight free cases.

Q. So you got ten free cases?

A. I did.

Q. Used two of them?

A. Yes.

Q. And gave up?

A. I gave up. I liked free. And I still gave up.

Q. And why did you give up?

A. It was just annoying and time consuming, and it impacted the flow of -- the flow of my practice. So it just wasn't something that -- just didn't end up being worth it.

Q. Well, let's -- you mentioned the flow of your practice. So that's a perfect segue. Let's turn to your fourth opinion, which is what, Dr. Taylor?

A. That the business of orthodontics -- in the business of orthodontics, really workflow and efficiency are critical.

Q. And can you explain what you mean by that?

A. Yes. Workflow would be, in a simple description, kind of the time from when a patient comes through the front door, they see the front desk, you get them back, put them into the chair, work on them, send them back to the front, they make their next appointment, and out the door. And we're always looking for ways to improve the efficiency of that process.

Q. I heard Mr. Buitta earlier today use the term "chair time." Is that a term you're familiar with?

A. Yes. It is.

Q. Can you explain that term to the jury, please?

A. You bet. So within that time, you know, the workflow, chair time is really the critical factor that we look at, try to measure, make sure that we're paying attention to. And that is how long that specific patient is in a specific chair.

I have six treatment chairs. I can only have one patient in that chair at a time. So that is -- the chair time is the time that patient is in that chair.

Q. All right. Now, earlier you said that the STL

export process took at least a couple minutes?

A. It did.

Q. On a busy day, how many scans might your office have conducted?

A. Probably 15 to 20.

Q. All right. Can we do a little math?

A. Let's do.

Q. Okay. Let's assume a busy week.

A. Uh-huh.

Q. 15 scans a day.

A. Uh-huh.

Q. Two extra minute per scan.

A. Okay.

Q. All right. How many extra minutes a day is that for your office to devote to this scanning process?

A. I think that comes out to 30 minutes.

Q. All right. And then over the course of a week, how might -- how much additional time might that be that your office is having to devote just to this STL export scanning process?

A. If you spread that or kind of multiply that over the days of a workweek, you're going to come out with at least a couple hours, two-plus hours.

Q. And if you had a few extra hours each week,

how might you spend that time if you weren't having to devote it to this STL export process?

A. Oh, you could do a lot of things. You could spend time off. You could market your practice to dentists. So there's a lot of things you could do with a couple of hours.

Q. What about in terms of meeting with your patients?

A. So each of those STL uploads is only a couple of minutes. And you say, oh, what's a couple of minutes? But a couple of minutes is really -- in an orthodontic practice, or at least in my practice, that was kind of where the good stuff happened.

That was the time that I had to sit down, say, hey, Bobby. Heard y'all played Midway last week. Man, that's a big school. You beat them. Yeah, how's the change to third base going for you?

And that's when they really make -- you make a connection and they realize they're more than just a set of teeth.

Q. So, Dr. Taylor, just to sum up this fourth opinion, how does the importance of workflow and chair time affect doctor choice?

A. So doctors are always looking for the best treatment for the patient. Of course that's the first

and critical thing. Whatever is best for the patient is going to always drive the decision.

But assuming that I have a couple of options or three options that give me that same result, I'm going to look and choose the one that is the most efficient and cost effective for me to help my profitability as a small business.

MR. UNDERWOOD: And can we go to Slide 37, Mr. Lee?

BY MR. UNDERWOOD:

Q. All right, Dr. Taylor. What is your fifth and final opinion?

A. That Align's Advantage Program deters doctors from even trying other aligners.

Q. And can you explain what the Advantage Program is?

A. I think we've heard a little bit about that, but that is the program within Invisalign in which you are sorted into tiers based on how much work you've done during a six-month period.

MR. UNDERWOOD: Can you go to the next slide, Mr. Lee?

BY MR. UNDERWOOD:

Q. And how does the process work?

A. So Invisalign looks at the number of case

submissions you've done for six months and assigns you then one of these different categories, and that is your, quote, status.

Q. So what happens if a doctor wants to try a competing clear aligner's company while they're involved -- or a member, rather, of this program?

A. Well, the important thing to kind of get in mind for the doctor is that you have a cutoff number. You've got to hit that cutoff number to maintain your same status or else you'll be down into a lower status.

You know, you'd love to be able to do enough to get up into a higher status, but there's a certain number that you know you're going to have to meet, and that's over a fairly long period of time, over six months.

So in Month 1 or 2, you don't really know what's going to happen in the future. So you're very hesitant to take a patient away. That could be an Invisalign case or, say, ClearCorrect case. You're hesitant to take that away because you don't know what's going to happen in the next six months.

And as you get closer to the end, you may start looking at, well, is this patient's not going to be ready to start until after, you know, that's going to be one in the next six-month period.

04:45 So that and the fact that what occurs with your status is that it sets the price that you're going to pay for all Invisalign products for the future six months.

MR. UNDERWOOD: Can we go to PDX-1.74, Mr. Lee?

BY MR. UNDERWOOD:

Q. All right. Do you recall seeing this slide in Align's opening statement?

A. I do.

Q. How is the Align Advantage Program different than these other programs, like let's take the Starbucks one, for example.

A. You bet. The Starbucks one is that sort of system that we're all familiar with. It's kind of the little punch card-type concept where you do nine free -- not -- you pay for nine cups of coffee, you get the tenth one free.

With the awards program with Invisalign, it doesn't work that way. So you don't get a free one for a certain number that you do. You have to make sure you meet that number, and then that's going to move forward for the whole six months.

So if, heaven forbid, you miss that by one or two, you've significantly increased your cost of all

the Invisalign cases for the next six months. So your overhead goes up, and that's a disadvantage that we're trying to keep from happening.

MR. UNDERWOOD: And you can pull that down, Mr. Lee.

BY MR. UNDERWOOD:

Q. Does this have an impact on doctor choice?

A. It does. It does. Again, as I talked about, when the time comes and you're looking at your cases, there's never a good time to pull away from Invisalign and try something else. You wanted to try ten cases, say, to really get a feel for it. Wow. That would really be putting it at risk for the -- for meeting your tier level.

Q. And, Dr. Taylor, what's the importance of choice for doctors and patients in your industry?

A. Well, again, I hate to keep harping on it, but always the first thing is what's best for the patient. So once we get that cut out of the way, then having more choice is good for the patient.

If they can get equal treatment with a couple of different ways, great for them to have the choice of -- after learning about the pros and cons about which one they want.

And choice is really great for doctors as well

because if I can provide the good service in a way that's more advantageous for me as a businessman, that's great. That's the choice I'm going to make.

MR. UNDERWOOD: Thank you, Dr. Taylor.

Your Honor, I pass the witness.

MR. DURST: Your Honor, may we hand Dr. Taylor a notebook?

THE COURT: Of course.

CROSS-EXAMINATION

BY MR. DURST:

Q. Afternoon, Dr. Taylor.

A. Good afternoon.

Q. My name is Tim Durst. The only time we have spoken is out in the hallway when we were talking about you and Travis Underwood knowing each other; isn't that right?

A. We did. It's nice to meet you.

Q. Good to see you.

Your practice, Brazos Braces, uses an iTero scanner?

A. It does.

Q. And, Dr. Taylor, your practice, Brazos Braces, offers both braces and aligners, correct?

A. That is correct.

Q. Patients come into your office after

consulting with you or your partner. A decision is made at some point along the way, either by the patient or with respect to the advice you've given, the choice between braces or aligners, correct?

A. 100 percent.

Q. Both are treated in that same new office building that you talked about building, right?

A. They're both done in that same spot.

Q. All right. Now, your personal experience as a dentist is that you know that it is possible to order aligners other than Invisalign by using this iTero scanner, right? You know that's true?

A. Yes.

Q. And you have limited experience doing scans yourself, right?

A. I think that's fair.

Q. Is "limited" a fair word?

A. I think that's fair.

Q. It's about five in all of your years of practice, right?

A. Of me physically doing the scan, correct.

Q. And the last time you did it -- pardon me.

And you also have used an iTero scanner -- I think you talked about this with Mr. Underwood. You've used the iTero scanner to export STL files, right?

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

a hammer, everything looks like a nail?

A. I have heard that.

Q. Now, you know this market. You've been around here a long time. Grew up. You know folks. And you know the other dentists in the area, don't you?

A. I do.

Q. And you know the folks over at Central Texas Dental Care?

A. I do.

Q. They're down there -- I guess they're in Hewitt is where they are, right?

A. Yes. They are.

Q. And I'd like to show you a PDX-31F. This is the Central Texas Dental Care website.

Do you see that?

A. I do see that.

Q. And if we go to the -- this page right here on the website of this local dentist or the dentist down in Hewitt, we see that they're offering two different types of clear aligners, aren't they?

MR. UNDERWOOD: Your Honor, I'm going to object to this as hearsay. This isn't his website. I'm not sure whose website this is.

MR. DURST: He knows who it is, Judge. He said -- we did lay that foundation, and he talked

about his experience in the local market.

THE COURT: Overruled.

A. Could you repeat the question?

BY MR. DURST:

Q. Yeah. These folks at Central Texas, they're offering two different types of clear aligners, aren't they?

A. That's what it says on their website.

Q. Invisalign and SureSmile. SureSmile you know to be another clear aligner?

A. Yes.

Q. If we are to believe their website, they're not locked into Invisalign, are they?

A. I see that they offer two options.

Q. And you know the people also over at Fusion Dental and Braces, right?

A. I -- it's hard to keep track of those dentists because it's a DSO that has a lot of turnover.

Q. But you know of that practice, don't you, sir?

A. I know of that practice.

Q. And you know the name of it, right? Even in the name of it, it says "braces," right? Like your practice, it says "braces" right in the name?

A. It does.

Q. And they have an iTero scanner. Did you know

that?

A. I did not.

Q. Well, let's check out their website, 31D, and see if you recognize this to be the Fusion Dental and Braces practice. It also looks like they have an office in Hewitt but also in Waco and Harker Heights and Killeen.

See that?

A. I do.

Q. And if we go over to the technology page of this website, we find ourselves -- you have to kind of page through, looking at all their pictures.

MR. DURST: Keep going, Mr. Smith. We are going to -- keep going I think one more. And one more. It is -- it's the technology page of this website.

And here we go. There we go.

BY MR. DURST:

Q. This -- the folks at Fusion Dental and Braces, they say they have an iTero scanner.

You see that?

A. I see they say that.

Q. And then if we go over to their aligners that they offer, let's do that. It's 31E.

You see here -- which aligner is this local

dentist that has the Align scanner, which aligner are they advertising on their website?

A. It appears they're advertising Angel Aligner.

Q. And they have -- if we believe their website, they've got an iTero scanner and they're offering Angel, right?

A. They may have an iTero scanner, but they didn't say that's the only scanner they have.

Q. That's correct. But they are offering on their website Angel?

A. Yes.

Q. So this local dentist practice with an iTero scanner, they don't seem to be locked in either, do they?

A. Depending -- yes. Depending.

Q. Now, are you familiar with an outfit called Bear Braces?

A. I am.

Q. I see them when I drive back home to Dallas. They've got that big billboard on 35.

Have you seen that?

A. Big. Yes.

Q. And if we look on their Facebook page, we can go to PDX-23B, you see that Bear Braces says that they offer braces or Invisalign, another local practice

offering aligners and braces, right?

A. Correct.

Q. And if Bear Braces' advertising is to be believed, they sell them for nearly the same price or as low as the same price, don't they, sir?

A. Yes.

Q. Dr. Taylor, you have testified that the process --

MR. DURST: We can drop that slide down.

BY MR. DURST:

Q. The process of uploading an STL scanner, an STL scan from the iTero, was "time consuming," I think was the word you used?

A. It was.

Q. Dr. Taylor, how fast would be fast enough?

A. That's a good question. I don't have an answer for that.

Q. So you don't know whether it's four minutes or three minutes?

A. I would not venture a guess at what fast means.

Q. You don't have an opinion on that?

A. In that context.

Q. Right.

Now, if we go to your website, the Brazos

Braces website, we see on PTX Trial Exhibit 1933, there's that picture of the younger Dr. Taylor again.

Do you see him?

A. I do see him.

MR. DURST: Your Honor, I move to admit PTX-1933.

MR. UNDERWOOD: No objection.

THE COURT: Admitted.

MR. DURST: And then if we go to PTX-1937 and Page 2.

BY MR. DURST:

Q. This is the slide that Mr. Underwood showed you about types of braces, right?

A. It is.

Q. And this has -- this particular page, types of braces, listing clear aligners along with ceramic braces and metal braces, that particular part of your website's been up there for quite some time, hasn't it?

A. It has.

Q. And my colleague, he asked you about this in his deposition, didn't he?

A. He did.

Q. Yeah. And you got some questions about that then. That was last year, right?

A. Earlier this year.

Q. Yeah. A few months ago at least?
A. Yes. Yes.
Q. And this website is still up there today?
A. I believe so. It's my --
Q. It still calls clear aligners "a type of braces"?
A. It's no longer my website. I'm retired.
Q. Now, if we go into what is on the Brazos Braces website and look under "Clear Aligners," I'd like you to read that sentence that says: Aligners -- the first sentence, let's just read it together. Clear aligners are a series of invisible, removable, comfortable acrylic trays that straighten your teeth like braces.

Right?

A. I see that.
Q. And the aligners are comfortable, and it gives some advantages there, right?
A. I believe so. Yes.
Q. Now, let's keep going a little bit more on your website, Doctor. And there is a -- there's a provision you have -- a page you have on your website that talks about -- it's PTX-3009.

MR. DURST: Can we put that up, please?

BY MR. DURST:

Q. Your website declares Invisalign aligners to be the most advanced clear aligner in the world.

Do you see that?

A. I do.

Q. And you personally, sir, you don't know of any clear aligner that is more advanced than Invisalign, true?

A. True.

Q. You sold Invisalign when you were in practice, and you achieved some very high status, it sounded like, from the number of Invisalign aligners that you sold?

A. I did.

Q. You did that by choice?

A. I did.

Q. And you received discounts and were enrolled in that Advantage Program, right?

A. I was.

Q. You decided on your own to join it --

A. Yeah.

Q. -- correct?

A. Yes.

Q. And you decided on your own to leave it, correct?

A. I don't know that I ever left it.

Q. Well, you left it when you retired, I guess, then?

A. Yes. Yes. Good point.

Q. And that Advantage Program didn't contractually bind you to maintain any particular advantage tier, did it, sir?

A. No. It did not.

Q. And by this program, you were able to lower the prices that you paid for the aligners that you gave to your patients, right?

A. Yes. They were lower prices depending on the status.

Q. Now, when you got lower prices, did you pass those along to your patients?

A. No.

Q. You kept that. You increased the margin in your practice?

A. I did.

Q. Now, did you ever prescribe Invisalign instead of braces to maintain your Advantage Program status, sir?

A. I did not.

Q. Now, Mr. Taylor -- Dr. Taylor, pardon me, you have never used or prescribed ClearCorrect aligners; is that accurate?

A. That is accurate.

Q. You never, in all your years of practice, had a patient come in and ask you for clear aligners, did you -- or pardon me -- ClearCorrect aligners, did you?

A. I do not remember that happening.

Q. Dr. Taylor, you've never had a patient come in and say, I want ClearCorrect aligners, right?

A. I don't believe so. Yes. I believe you're correct.

Q. Now, you mentioned a pickup truck and showed the Ford dealership there.

Do you drive a Ford?

A. I do.

Q. Did you buy it from that --

A. First time ever. But yes.

Q. Did you buy it from that dealership?

A. I'm not sure which one it showed. It's a Waco dealership. I shop local.

Q. And you've had a pickup for a long time?

A. Yes. I have.

Q. Probably bought a number of those over the years?

A. Yeah.

Q. You know this case is not about pickups?

A. I do.

Q. This case is about a serious medical device, isn't it, Dr. Taylor?

A. It is.

Q. It's about a device that goes in patients' bodies, in their mouth?

A. It does.

Q. It's about a device that parents sometimes make the decision to put in the mouths of their children, correct?

A. Absolutely.

Q. That's a serious matter, isn't it, Dr. Taylor?

A. It is.

Q. And, Dr. Taylor, doctors like you have an obligation to do what's best for their patients, don't they?

A. Without a doubt.

Q. You reckon the Ford salesman that sold you the pickup, you think he had that same professional obligation, sir?

A. To a lesser degree, I'm sure.

MR. DURST: Thank you, Dr. Taylor.

REDIRECT EXAMINATION

BY MR. UNDERWOOD:

Q. Just a few more questions, if that's okay, Dr. Taylor.

A. You bet.

Q. All right. Mr. Durst asked you about your experience personally operating the iTero scanner.

Do you remember that?

A. I do.

Q. I think you said you'd done about five scans?

A. That's fair.

Q. About how many scans has your office done?

A. Thousands.

Q. Mr. Durst showed you a couple examples of other dental practices in the area?

A. He did.

Q. I think there were two he showed?

A. He did.

Q. How many dentists and orthodontists are there nationwide?

A. Oh, gosh. Hundred thousands. I don't know.

Q. Couple more than you saw?

A. Definitely.

Q. Now, if Align made it just as easy to use an iTero scanner to get ClearCorrect as it is to get Invisalign, do you think there might be more of those doctors using ClearCorrect?

A. Absolutely.

MR. UNDERWOOD: Can we go to the Brazos

Braces website, Mr. Lee? And Wearing Braces, at the top, About Orthodontics, if you go down to Appliances.

BY MR. UNDERWOOD:

Q. Now, Mr. Durst didn't show you this section of the website, did he?

A. He did not.

Q. Can you please read what it says there?

A. About where the cursor is?

Q. Yes, sir, where it says "Appliances."

A. Appliances. Depending on your needs, your orthodontist may recommend traditional braces, clear aligners, or other specialized appliances.

Q. What does that first part mean, "depending on your needs"?

A. That I am definitely not committed to anything -- any choice of treatment until after I've evaluated that patient, seen what their problems are, and know from my experience what are the options and what would be the pros and cons to each so that I can discuss them with the patient.

Q. Is that because different choices of treatment might be better for different patients?

A. Exactly.

Q. Some would work for others but not others?

MR. DURST: Your Honor,

Mr. Underwood's -- this is his witness. He's leading him. I'd like to hear from the doctor.

THE COURT: Sustained.

MR. UNDERWOOD: Thank you.

BY MR. UNDERWOOD:

Q. Can you explain how different patients might have different needs as it relates to the choice of clear aligners versus braces?

A. Sure. A multiple of factors would go into that decision-making. I would look at first what are the specific problems. As we had talked about a little bit, there are many, many things that clear aligners are not recommended for, but one would be vertical movement.

So if I saw a patient that had large vertical movements that were going to be needed, I'm going to -- I'm going to explain to -- well, I would actually probably still explain clear aligners with the caveat that I do not believe this is a good answer for you for these reasons.

Q. Now, Dr. Taylor, last set of questions. You got some questions about your time prescribing Invisalign?

A. Yes.

Q. Did you ever experience any complaints or

quality issues with Invisalign?

A. I did.

Q. And did that mean that Invisalign wasn't a good option for certain patients?

A. No. It's still a good product. There were just occasions when something went wrong. I had one situation where we got boxes of aligners. They come in packages of three. We got 9, 10, and 11, but 12, 13, and 14 were missing, things like that.

MR. UNDERWOOD: Thank you, Dr. Taylor.

I pass the witness.

RECROSS-EXAMINATION

BY MR. DURST:

Q. Dr. Taylor, you -- your practice stuck with iTero and Align, didn't it?

A. It did.

Q. It bought one scanner, correct?

A. It did.

Q. And it bought another?

A. It did.

Q. You looked at a lot of documents when you were preparing your work in this case, you said.

Did I hear that right?

A. A lot.

Q. Okay. One of them was DTX-141, which you put

on one of your slides.

MR. DURST: I'm going to ask Mr. Smith to pull it up.

BY MR. DURST:

Q. Now, in the middle of this, there is the -- or it's sort of in the bottom third, it says: If you want to do Invisalign, you're forced to buy iTero and live with it.

You put that on one of your slides, didn't you?

A. I did.

Q. Did you read the whole document, sir?

A. I don't recall.

Q. Well, let's look at the next e-mail in time.

Dr. Taylor, read that -- read that first sentence in the next e-mail after the one you displayed to the jury. Read that first sentence. Read it out loud, please.

A. I think Dan meant the iTero integration with Invisalign is so compelling that customers by default choose iTero.

Q. Were you in the courtroom when Mr. Miller talked about the shiny castle?

A. I was.

Q. People are -- Align hopes dentists are

incentivized to go to the shiny castle, right?

A. I believe they are.

Q. You understood that analogy?

A. I thought that's what he was attempting to convey.

Q. And this sentence that's right here on this page, that's consistent with that, isn't it, Dr. Taylor?

Sir?

A. I said I think that's what they're hoping.

Q. Now, you have this document if you want in front of you. Mr. Underwood handed it to you. I'd like to go to the attachment. The first page of the attachment --

A. This would be in --

Q. It's in that white notebook.

A. -- in yours or in his?

Q. It should be in yours.

A. Okay.

Q. And it's DTX-141.

MR. DURST: And, Mr. Smith, let's go to the first page of the attachment, not this page. So it would be 26 pages earlier, Mr. Smith, right after the -- there we go.

One more. Right there.

BY MR. DURST:

Q. Is that -- you see that page? You can look at it on the --

A. Okay.

Q. It's a market update and review that was attached to that e-mail.

Do you see that?

A. Okay.

Q. Okay. Well, this is some of the material you reviewed in getting ready for your testimony, right, sir?

A. It could have been.

Q. In this market review, it talks about and reviews Align and the iTero, doesn't it?

A. It does.

Q. Okay. And if we go to Page 12 of this attachment --

MR. DURST: Mr. Smith, can you move to Page 12 of the attachment? Gone a little too far, I think.

There we go, Page 12.

BY MR. DURST:

Q. Now, do you see that headline?

MR. DURST: And let's blow that up so everybody can see it, Mr. Smith.

BY MR. DURST:

Q. Open or closed system.

Now, in this document that talks about Align and other scanners in the marketplace, what does that first full sentence there -- actually, the second full sentence -- that's bolded, what does that say, Dr. Taylor?

A. What you've just highlighted for me to read?

Q. Yes, sir.

A. All scanners are now open, allowing the export of at least one of the following files: STL, OBJ and/or PLY.

Q. And that description describes iTero, doesn't it?

Sir, based on your experience?

A. Globally, yes, it's open.

Q. It's open.

MR. DURST: Thank you, Your Honor. No further questions.

FURTHER REDIRECT EXAMINATION

BY MR. UNDERWOOD:

Q. All right, Dr. Taylor. So I'm showing you -- this is that e-mail chain that's DTX-141 that you just got questions about.

Do you see that?

A. I do.

Q. This is between Align employees?

A. It is.

Q. And if we go down here, can you please read what I have underlined in blue?

A. Buy iTero only if you're an Invisalign-focused practice (because no one else works with Invisalign).

Q. So as a practical matter, is this an open or a closed system?

A. Practically, it's a closed system.

MR. UNDERWOOD: Thank you, Dr. Taylor.

MR. DURST: Your Honor, I referenced one exhibit, PTX-1937, that I failed to move into evidence. I move to admit.

MR. UNDERWOOD: No objection.

THE COURT: It's admitted.

Are we through with the doctor?

You may step down, Doctor. Thanks for being here.

THE WITNESS: Thank you.

MR. UNDERWOOD: Thank you, Your Honor.

THE COURT: Do you have another witness?

MR. MUELLER: We do, Your Honor. We call Dr. Ray Perryman, and Mr. Hirsch will conduct the examination.

(The witness was sworn.)

DIRECT EXAMINATION

BY MR. HIRSCH:

Q. Afternoon, sir.

A. Good afternoon.

Q. Can you please introduce yourself and tell us a little bit about yourself?

A. Yes, sir. My name is Ray Perryman. I'm an economist. I've worked in Waco for almost 50 years. For the last 35 years, although I've still worked in Waco, I've lived in Odessa. And the reason is 35 years ago or so, I married the mayor of Odessa. And when you marry the mayor, you move. But I have five kids and five wonderful grandkids.

Q. All right. Now, sir, did you help prepare some slides for your testimony?

A. Yes, sir. I did.

MR. HIRSCH: Let's pull those up.

BY MR. HIRSCH:

Q. And to start, can you tell us about your educational background, please?

A. Yes, sir. I graduated -- I grew up in a small town in East Texas and then was fortunate enough to get to attend Baylor as an undergrad and received a degree in mathematics. And then I went to Rice University

down in Houston and received a Ph.D. in economics.

Q. Now, Dr. Perryman, where do you currently work?

A. I work at a company called The Perryman Group. We're located out on Valley Mills in what used to be called Triangle Tower. It has a bunch of different names.

Q. And did you start The Perryman Group?

A. I did. Yes, sir.

Q. What type of work does The Perryman Group do?

A. We do all types of economic consulting. We do the kind of stuff we're about here today. We do regulatory work for businesses. We do work for like cities and chambers of commerce, government agencies, impact studies, policy studies, forecasts, economic development work. A variety of things.

Q. And what types of companies have you done those -- that type of work for?

A. Well, we've had over 3,000 clients over a long period of time. That's included most of the Fortune 100, so a lot of larger companies.

We also work with a lot of small businesses. We work with local governments, state governments, federal government, chambers of commerce, economic development organizations, trade groups. So a wide

variety.

Q. In total, sir, how long have you been an economic consultant?

A. In one form or another, almost 50 years. I've had the company a little over 40 years.

Q. In the course of your career, have you done any teaching?

A. Yes, sir. I have. When I first left graduate school at Rice, for the first 17 years I was a professor over at Baylor and was a full professor with a research chair. And then I also was a professor for a few years at SMU, and consulting took over my life. So I can't be anywhere every Monday, Wednesday, Friday at 9 o'clock now or something like that.

So I -- but I do guest lecture and have some honorary titles at a few places including Baylor.

Q. Dr. Perryman, have you done any writing? Have you authored any articles or publications regarding economic issues?

A. Yes, sir. I have. Quite a few, in fact. As you can tell, I've been around a few days. Written 5 books, about 400 academic papers. Those are papers you might write for other economists or mathematicians or statisticians or whatever. I've written about 3,000 trade articles which is the kind of thing that might

appear in a magazine or even a newspaper or for a trade group, something like that.

I have a monthly newsletter. I have a weekly -- excuse me, weekly newspaper column and a daily, very brief one-minute radio commentary as well.

Q. Can you tell us about the experience you have analyzing economics in the healthcare industry specifically?

A. Yes, sir. Quite a bit. Over the course of my life, I've analyzed a number of healthcare products and services and that type of thing. I've helped with a number of healthcare laws that have been passed at the federal and state level doing economic analysis for those.

I have done impact analysis and similar work for just about every major hospital or medical school in Texas and many other places as well including several for Baylor Scott & White, which is active here locally, including one that's ongoing right now, in fact.

Q. Now, Dr. Perryman, I don't want to ask you to brag on yourself, but have you received any awards or accolades for your work as an economist over the course of your career?

A. I have been very fortunate in that regard.

Some -- some folks at least have been very kind.

A few years ago I was privileged to be named Texan of the Year by the Texas Legislative Conference. That was primarily because of the -- helping write the State's economic development plans and programs and that sort of thing that we now use in the state. That award's been around about 60 years. It's been won by presidents and senators and athletes and singers and a variety of folks who have made some contribution. I think Robert Earle King won this year.

And then Baylor has given me just about every award they have. A few years ago I was given the Distinguished Service Medal. And to be honest, you can't tell it by looking at me, but that one was about football. I helped -- I helped them put together all the structure to allow the stadium to be built. Waco had never done anything like that before. And then I also helped with some of the studies and some of the work to kind of keep the Big 12 together back when that was a problem.

There have been a number of them throughout my career. I've been very lucky. Lately I won a couple of Lifetime Achievement Awards, and I have to say those bother me a little bit. I'm afraid they're trying to tell me something.

05:19 Q. Dr. Perryman, you've been at trial for the course of the last few days?

05:19 A. Yes, sir. I have.

05:19 Q. You've seen the trial since the beginning, have you not?

05:20 A. I have. Yes, sir.

05:20 Q. And there's been a lot of discussion about patents, true?

05:20 A. Yes, sir.

05:20 Q. What experience, if any, sir, do you have valuing patents?

05:20 A. Oh, over the course of my career, probably at least the last 35 years or so, I've been working in that area, valued thousands of patents, some inside litigation like we're talking about here, some -- out in the real world, at times I've helped to negotiate licenses or sale of patents as well. So quite a bit.

05:20 Q. And how about antitrust issues, what experience do you have analyzing antitrust issues?

05:20 A. Well, there again, as I say, I've been around a while. I've done a lot of that over the last 30, 35 years or so as well, looking at a number of industries. Several in the health field, health resources of various types, medical equipment and medical devices, that type of thing.

But I've also studied cellular phone towers and beverages and newspapers and any -- a number of other things.

Q. What experience, Dr. Perryman, do you have analyzing the relevant market for purposes of an antitrust analysis?

A. Well, relevant markets have a -- kind of a special meaning when you get into antitrust analysis, and just about every time you do antitrust analysis, you have to start with defining a market. So I have -- I've done that on a number of occasions.

Q. And relatedly, what experience do you have analyzing whether companies have engaged in anticompetitive behavior to maintain monopoly power?

A. Well, again, normally when you're involved in an antitrust issue, that's one of the things you look at. So I've done that in just about every opportunity I've been involved in over the years.

Q. All right. Finally, sir, what experience do you have analyzing damages that result from antitrust violations?

A. Well, again, virtually every time you do this type of analysis, that's one of the questions that comes up. And so consequently, I've had about 35 years' experience doing that on a number of

occasions as well.

MR. HIRSCH: All right. At this time, we would offer Dr. Perryman as an expert in patent valuation as well as analysis of market definition, monopoly power, and antitrust damages.

MR. TUBACH: No objection, Your Honor.

THE COURT: He'll be admitted as such.

MR. HIRSCH: Thank you, Your Honor.

Your Honor, given the time and the issues I'm about to transition to, I'd suggest that we break for the day, if Your Honor's inclined.

THE COURT: Since we got a late start, you guys good with going maybe another 20 minutes or so? Okay.

MR. HIRSCH: Sure.

BY MR. HIRSCH:

Q. Dr. Perryman, who retained you in this case?

A. I was retained by ClearCorrect.

Q. Before this case, had you been retained by ClearCorrect on any other matters?

A. No, sir. I had not.

Q. All right. And how are you being compensated for the time that you've spent working on the case?

A. Well, my company just bills for the time that I spend and the staff spends on the case.

Q. And what's your hourly rate, sir?

A. My personal rate the company bills me for is $900 an hour. The staff members are progressively less.

Q. And does your rate or your payment depend in any way on the outcome of the case?

A. Oh, no, sir. Just the amount of time that we spend.

Q. All right. Dr. Perryman, I want to start briefly with patent damages, and then we'll turn to antitrust. Does that sound okay?

A. Yes, sir.

Q. All right. Now, to start, can you remind us, sir, what's the correct patent damages amount if the ladies and gentlemen of the jury find that ClearCorrect does not satisfy the elongation at break requirement of the asserted claims and does not infringe?

A. Well, if you folks find that the patents are not infringed, then the damages are zero.

Q. Now, Align's patent damages expert was Mr. Lasinski, correct?

A. Yes, sir. That's correct.

Q. And you heard his testimony?

A. I did. Yes, sir.

Q. And you heard his testimony about damages in a

hypothetical world where there is infringement being more than $73 million?

A. Yes, sir. I recall that.

Q. Now, I want to ask you a few questions about that, Dr. Perryman.

A. Yes, sir.

Q. First, you heard Mr. Lasinski is seeking a royalty on the Zendura FLX material, correct?

A. Yes, sir. I did.

Q. And did you also hear that Mr. Lasinski calculated damages on clear aligners that use the Zendura FLX material?

A. Yes, sir. I did.

Q. And what is your reaction to that -- to that claim by Mr. Lasinski, seeking royalties on both of those items?

A. Well, in that case, in some of his calculations he was double counting, because you pay for the -- to use the material, to use the material to make the clear aligner, and you pay again for the aligners. So you're being -- you're paying for the same technology twice in some of his calculations.

Q. All right. Now, I want to focus for a moment on Mr. Lasinski's calculation of just the Zendura FLX material.

Do you have that in mind?

A. Yes, sir. I do.

Q. Remind us, sir, what profitability data did Mr. Lasinski use for that calculation?

A. Well, he used the average profit rate in NAICS, which stands for North American Industry Classification System, a particular code which the -- which was the one for the plastics industry as a whole. And 30 years ago almost, I was involved in helping put those codes together at the beginning. And that's a code that includes a lot of things besides just the material you would use for clear aligners.

Q. And what happens to Mr. Lasinski's number if companies in that industry spend more on costs like cars?

A. Well, that was -- really one of the unusual things about his calculation. If those companies spent money on anything, whether it was directly related to their products, much less anything that had to do with the products that are accused, just because they bought a car or whatever, the damage number would change and go up.

Q. And what's your reaction to that model, sir?

A. Well, he -- he's totally separated his calculation from what he was about. He was supposed to

be determining the value of these patents, and yet it would change in his calculation if some other company that makes something else bought a car.

Q. Now, you also heard Mr. Lasinski's testimony regarding his calculation of damages on clear aligners, correct, sir?

A. Yes, sir.

Q. And for this one, can you remind us of the operating expenses that Mr. Lasinski used?

A. Yes, sir. In this case he used the operating expenses for another one of these NAICS codes. In this case it was one for dental equipment, which again includes chairs and cement and a lot of things that are -- that are not related to these aligners that we're talking about here.

Q. Now, using ClearCorrect's actual operating expenses, not industry operating expenses but ClearCorrect's operating expenses, were ClearCorrect's profits positive or negative?

A. Their overall profits were negative.

Q. And we're going to get into why, but can you give us a preview -- a quick preview, sir, as to why ClearCorrect's profits were negative?

A. Yes, sir. A major part of it is -- as we'll talk about is the fact that they've been foreclosed

from a big piece of the market and not able to compete effectively and gain the scale it takes to make investments and be profitable in this industry.

Q. And what -- what would happen to Mr. Lasinski's damages number if he had used ClearCorrect's actual operating expenses rather than industry data?

A. Well, if he -- if he would have used the actual operating expenses, they would have actually been negative.

Q. So what is your conclusion as to the reliability of this damages model from Mr. Lasinski?

A. Well, again, he just hasn't tied it to the facts and the products at issue, and so these numbers are unreliable.

Q. And, sir, you said you were compensated for your work on this case; is that right?

A. Yes, sir.

Q. And were you compensated for the work that you did analyzing Mr. Lasinski's damages claim for the materials-related patents?

A. Yes, sir. I was.

Q. And you know that ClearCorrect had other experts like Dr. Spiegelberg, who we heard from last week, also working on the analysis of the

materials-related patents, true?

A. Yes, sir. That's correct.

Q. And for example, you heard Dr. Spiegelberg's testimony concluding that Align made false statements to the Patent Office in connection with the materials patents, true?

A. Yes, sir. I heard that.

Q. You understand that Dr. Spiegelberg was compensated for that work, right, sir?

A. Yes, sir.

Q. Fair to say ClearCorrect has incurred costs responding to Align's claims regarding the materials patents, right?

A. Yes, sir. Absolutely.

Q. All right. Last thing on patent damages, Dr. Perryman. Remind us once more. If there's no infringement, if the ladies and gentlemen of the jury find no infringement, what's the correct patent damages number?

A. Well, if you folks find there's no infringement, then the correct number is zero.

Q. All right. I want to transition to your antitrust analysis, okay?

A. Yes, sir.

Q. And can you walk through with us at a high

level the analysis that you performed relating to the antitrust issues? And then we'll dive into each one.

A. Yes, sir. There's basically five buckets here. The first question we have to ask ourselves is what is the relevant market? And again, that has a special meaning. We all use the word "market" all the time, but when you get to antitrust, it does have a special meaning.

So the first thing we have to do is define what is the appropriate market to be talking about.

Once we have that defined, the next question is: Does Align possess monopoly power in that market? And again, that has some specific meanings when we get into antitrust.

If you answer that question that they do, then the next question would be: Did Align engage in anticompetitive conduct? And that gets into some specific things as well.

And then Item 4 is if they engaged in anticompetitive conduct, did it harm ClearCorrect?

And then the final question would be: If so, how much did it harm ClearCorrect? What would an appropriate level of damages be?

Q. All right. And we'll go through each one.

A. Yes, sir.

05:31 Q. But before we do, when you refer to a monopoly, what does that mean?

05:31 A. Well, again, it has sort of a special meaning here, but a monopolist and a monopoly is a company that has enough power in the market that they can raise prices and still make a profit or they can keep other people from entering the market or keep those that are in the market from reaching any reasonable scale.

05:31 Q. And as an economic matter, what is the problem with monopolies?

05:32 A. Well, the biggest problem is if we have competition, which is kind of what we're -- our whole system is based on, if we have competition, you tend to have more companies coming in. They invest, they try to create things, they try to do things better, they try to price better.

05:32 And you have this constant thing going on, all of which benefits consumers. And so -- and when you have a monopolist, you don't tend to have that. You don't tend to have all those other companies pushing one another, so to speak.

05:32 And so -- and so basically you have a situation where it's not beneficial to consumers.

05:32 Q. So I want to start, Dr. Perryman, by talking a little bit more about that market that you described

where there is competition.

Do you have that in mind?

A. Yes.

Q. When there is competition and there's no monopolist, tell us what that market looks like.

A. Yes, sir. I have a diagram I put together here of just basically four lines representing four different companies in a market. And what you see is some of them go up, and then they go back down a little bit. Some of them enter later. At least one of them enters later and comes in, and its revenue starts growing.

And so you have a situation where every company's trying to do what they can to make us, as customers, buy their product. And so consequently, they'll bring out a new product and they'll have more sales, or they'll lower price and they'll have more sales, or they'll figure out a better way to do something or a better way to market it and have more sales.

Other companies see the opportunity, and they come into the market and push the others. So you have this constant churn of activity that's seeking to improve, ultimately improve things for consumers.

Q. So now let's compare that competitive market

to what you found in this case. All right?

A. Yes, sir.

Q. What are we -- what are you showing here, sir?

A. Well, what we're seeing here is that -- obviously the top line is Invisalign, and obviously it's had significant growth in revenues over a long period of time and has a very large percentage of the market.

And then down below that, I've got the revenues of the other companies that have come in, many of the other companies that have come in, you've heard about some of them, ClearCorrect and others, that have come into the market and tried to compete. And they're sort of down there at the bottom fighting over the scraps at this point.

Q. Dr. Perryman, have you heard of market share?

A. Yes, sir. I have.

Q. What does "market share" mean?

A. Well, market share is just the percentage of the market that one company has. And that is, of all the revenues in the market, how much of it does it -- do individual companies have.

Q. How do you calculate market share, sir?

A. Well, you can look at the revenues of a single 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

your work on the case?

A. Yes, sir. I have.

Q. And did you rely --

MR. TUBACH: I'm sorry. Could we just have someone identify what exact file he's looking at? There are lots of files that appear to be on there, and there's nothing being displayed on the screen.

MR. HIRSCH: Yeah. I'll -- I can read the JTX.

MR. TUBACH: That would be great.

BY MR. HIRSCH:

Q. And, Dr. Perryman, if you can just confirm for me that the folder that's open on that laptop includes JTX-21, JTX-25 through 51, JTX-54 through 56, JTX-59, JTX-61, JTX-64, JTX-65, JTX-67, JTX-68, JTX-71, JTX-76, JTX-80, JTX-81, and DTX-1078.

You see each of those?

A. It does. Did you mention JTX-50? I'm sorry, JTX-60? It's on there as well. I just want to make sure.

Q. Great. Thank you. Yeah, I should have. Thank you, sir.

All right. And you've reviewed those files in the course of your work, sir?

A. Yes, sir. I have.

Q. And relied on them to reach your conclusions?

A. Yes, sir.

Q. All right.

MR. HIRSCH: At this time, we would move to admit each of those documents, JTX-21, 25 through 51, 54 through 56, 59, 60, 61, 64, 65, 66, 68, 71, 76, 80, 81, and DTX-1078.

MR. TUBACH: I believe there's -- some numbers were missed, but we can make that -- we don't have to do this in front of the jury.

THE COURT: They're admitted.

MR. HIRSCH: All right. Thank you, sir.

Your Honor, I'm about to move to a section that's going to take a bit of time.

THE COURT: I'm going to cry uncle.

(Laughter.)

THE COURT: Ladies and gentlemen of the jury, thank you very much. If you'd be back here tomorrow by 8:45, we'll start at 9:00.

THE BAILIFF: All rise.

(Jury exited the courtroom.)

THE COURT: You may be seated.

MR. DURST: Your Honor, may I raise one housekeeping item?

THE COURT: Of course.

05:38 MR. DURST: I missed an exhibit in my admissions. Move to admit PTX-3009 that was used in Dr. Taylor's examination.

05:39 MR. MUELLER: We'll have to double-check which one that is. I'm sure we'll have no objection, if we could --

05:39 THE COURT: It'll be admitted.

05:39 MR. DURST: Thank you.

05:39 THE COURT: Anything else to take up for plaintiff?

05:39 MR. DURST: No, Your Honor. Thank you.

05:39 MR. MUELLER: Nothing from defendants, Your Honor.

05:39 (Off-the-record discussion.)

05:40 (Hearing adjourned.)

UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 12th day of July 2026.

/s/ Kristie M. Davis
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05:40