



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

April 1, 2024

Douglas K. Schnell  
Wilson Sonsini Goodrich & Rosati

Re: Align Technology, Inc. (the "Company")  
Incoming letter dated January 18, 2024

Dear Douglas K. Schnell:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Elizabeth C Funk Trust and co-filer (the "Proponents") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(f) because the Proponents failed to comply with Rule 14a-8(b)(1)(i). As required by Rule 14a-8(f), the Company notified the Proponents of the problem, and the Proponents failed to adequately correct it. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rules 14a-8(b)(1)(i) and 14a-8(f).

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Luke Morgan  
As You Sow

DOUGLAS K. SCHNELL  
Internet: dschnell@wsgr.com  
Direct dial: (650) 849-3275

Client File No.: 22733-053

January 18, 2024

## BY ONLINE SUBMISSION FORM

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: Shareholder Proposal of Elizabeth C Funk Trust, with Laird Norton Family Foundation as Co-Filer, Submitted to Align Technology, Inc.**

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended, we are writing on behalf of our client, Align Technology, Inc., a Delaware corporation (the “Company”), to request that the Staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) concur with the Company’s view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (together, the “Proposal”) submitted by As You Sow (the “Representative”), on behalf of Elizabeth C Funk Trust (the “Proponent”) and Laird Norton Family Foundation (the “Co-Filer”), from the proxy materials (the “2024 Proxy Materials”) to be distributed by the Company in connection with its 2024 Annual Meeting of Shareholders (the “2024 Annual Meeting”).

In accordance with Section C of Staff Legal Bulletin No. 14D (November 7, 2008) (“SLB 14D”), the Company is emailing this letter to the Staff. Simultaneously, pursuant to Rule 14a-8(j), the Company is sending a copy of this letter to the Representative as notice of the Company’s intention to exclude the Proposal from the 2024 Proxy Materials. The Company will promptly forward to the Representative any response from the Staff to this no-action request that the Staff transmits by email or fax only to the Company. Also pursuant to Rule 14a-8(j), this letter is being filed no later than 80 calendar days before the Company files the 2024 Proxy Materials.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that they elect to submit to the Staff or the Commission. Accordingly, the Company is taking this opportunity to remind the Representative that if it submits correspondence to the Staff or the Commission with respect to

the Proposal, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of the Company.

**1. The Proposal**

The text of the resolution contained in the Proposal is set forth below:

RESOLVED: Shareholders request that Align Technology, Inc. (Align) report to shareholders on the effectiveness of the Company's diversity, equity, and inclusion efforts. The report should be done at reasonable expense, exclude proprietary information, and provide transparency on outcomes, using quantitative metrics for workforce diversity, hiring, promotion, and retention of employees, including data by gender, race, and ethnicity.

A copy of the Proposal, and the related correspondence from the Proponent and the Co-Filer, is attached as Exhibit A.

**2. Bases for Exclusion**

The Company requests that the Staff concur in its view that it may exclude the Proposal from the 2024 Proxy Materials pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) because each of the Proponent and the Co-Filer failed to provide, within 14 days of receipt of the Company's request, the requisite proof of continuous stock ownership in response to the Company's proper request for such information.

**3. Background**

On December 6, 2023, the Company received the Proposal from the Representative, along with letters from the Proponent and the Co-Filer that, among other things, authorized the Representative to act on behalf of the Proponent and the Co-Filer, respectively, with respect to the Proposal. The Representative did not include with such letters any documentary evidence of record or beneficial ownership by the Proponent or the Co-Filer of the Company's stock. The Company reviewed its stock records, which did not indicate that either the Proponent or the Co-Filer was a record owner of the Company's stock.

As required by Rule 14a-8(f), on December 14, 2023, within 14 calendar days of the date that the Company received the Proposal, the Company notified the Representative by email of the procedural deficiencies associated with the submission of the Proposal (such notification, the "Deficiency Notice"). The Deficiency Notice, which is attached as Exhibit B, identified the procedural deficiencies in the submission related to the lack of verification of ownership of the required number of shares of the Company's stock. The Deficiency Notice included a copy of Rule 14a-8, Staff Legal Bulletin No. 14F (October 18, 2011) ("SLB 14F") and Staff Legal Bulletin No. 14G (October 16, 2012).

On December 28, 2023, the Representative, on behalf of the Proponent and the Co-Filer, provided the Company with the email attached as Exhibit C (the “December 28 Email”). As explained below, this email does not remedy the deficiencies identified in the Deficiency Notice.

Pursuant to Rule 14a-8(f)(1), a response correcting the deficiencies identified in the Deficiency Notice was required to be postmarked or transmitted electronically to the Company by December 28, 2023, which is 14 calendar days from the date that the Proponent received the Deficiency Notice.

On January 18, 2024—a full 21 days after the clear deadline referenced in the Deficiency Notice—the Proponent attempted to provide the Company with a purported ownership verification letter. This letter is attached as Exhibit D.

#### **4. Analysis**

The Proposal may be excluded under Rule 14a-8(b) and Rule 14a-8(f)(1) because the Proponent and Co-Filer each failed to establish ownership eligibility to submit the Proposal despite proper notice from the Company.

Rule 14a-8(b)(1) provides, in part, that to be eligible to submit a proposal for an annual meeting that is scheduled to be held on or after January 1, 2022, a shareholder proponent must have continuously held:

- At least \$2,000 in market value of the company’s securities entitled to vote on the proposal for at least three years preceding and including the submission date;
- At least \$15,000 in market value of the company’s securities entitled to vote on the proposal for at least two years preceding and including the submission date;  
or
- At least \$25,000 in market value of the company’s securities entitled to vote on the proposal for at least one year preceding and including the submission date.

Each of these ownership requirements were specifically described by the Company in the Deficiency Notice. Staff Legal Bulletin No. 14 specifies that when the shareholder is not the registered holder, the shareholder “is responsible for proving his or her eligibility to submit a proposal to the company,” which the shareholder may do by one of the two ways provided in Rule 14a-8(b)(2). Section C.1.c, Staff Legal Bulletin No. 14 (Jul. 13, 2001) (“SLB 14”). Further, the Staff has clarified that these proof of ownership letters must come from the “record” holder of the company’s stock, and that only Depository Trust Company (“DTC”) participants are viewed as record holders of securities that are deposited at DTC. *See* Section B., SLB 14F.

Rule 14a-8(f)(1) provides that a company may exclude a shareholder proposal if the proponent fails to satisfy the procedural requirements set forth in Rule 14a-8(b), including the beneficial ownership requirements of Rule 14a-8(b), so long as the company timely notifies the

proponent of the deficiency and the proponent fails to correct the deficiency within a 14-calendar day period. The Company satisfied its obligation under Rule 14a-8 by timely transmitting the Deficiency Notice to the Representative. None of the Representative, the Proponent or the Co-Filer has, as of the date of this request, provided the requisite documentation to establish ownership eligibility to submit the Proposal. Well more than 14 calendar days have passed since the Representative received the Deficiency Notice.

On December 28, 2023, the Representative, on behalf of the Proponent and the Co-Filer, provided the Company with the December 28 Email. In this email, the Representative (1) admitted that the Proponent was not able to provide the required ownership verification letter; and (2) provided a letter *from, and signed by, the Co-Filer* (who is not a DTC participant) that can only be described as an attempt by the Co-Filer to “self-certify” its ownership of the Company’s stock.<sup>1</sup> The Company respectfully submits that the admission in (1) resolves, in the Company’s favor, any question about the Proponent’s eligibility to submit the Proposal. With respect to (2), there is absolutely no basis, in either Rule 14a-8 or the Staff’s guidance, that such “self-certification” is permissible. In this regard, the Company is mindful of Rule 14a-8(b)(2)(ii)(A), which provides, in relevant part, that to verify ownership, a proponent should “submit to the company *a written statement from the ‘record’ holder*” (emphasis added). Similar guidance is found in SLB 14F, which provides that proponents should arrange “to have *their broker or bank provide* the required verification of ownership” (emphasis added). Section C, SLB 14F. Both Rule 14a-8 and SLB 14F were provided with the Deficiency Notice. As the Staff is well aware, the shareholder “is responsible for proving his or her eligibility to submit a proposal to the company.” Section C.1.c, SLB 14.

As mentioned above, on January 18, 2024—a full 21 days *after* the clear deadline referenced in the Deficiency Notice—the Proponent attempted to provide the Company with a purported ownership verification letter.

The Staff has consistently concurred with exclusion of shareholder proposals where proponents have failed to include with the proposal proof of beneficial ownership of the requisite amount of company stock for the required period and have subsequently failed, following a timely and proper request by a company, to provide evidence of eligibility under Rule 14a-8(b) and Rule 14a-8(f)(1). For example, in Home Depot, Inc. (avail. Mar. 9, 2023), the Staff concurred with the exclusion of a shareholder proposal where the proponent submitted a proposal without any accompanying proof of ownership and did not provide adequate ownership verification after receiving the company’s timely deficiency notice. *See also* Yum! Brands, Inc. (avail. Mar. 31, 2023) (concurring with the exclusion of a shareholder proposal where the proponent submitted a proposal without any accompanying proof of ownership and did not provide proof of ownership after receiving the company’s deficiency notice, notwithstanding deficiencies in the company’s deficiency notice); Getty Images Holdings, Inc. (avail. May 2, 2023) (concurring with the exclusion of a shareholder proposal where the

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<sup>1</sup> SEI Corporation, which is described in the “self-certification” letter as a DTC participant, is not actually a DTC participant according to DTC’s most recent participant list.

proponent submitted a proposal without any accompanying proof of ownership, among other deficiencies, and did not adequately address the problems after receiving the company's timely deficiency notice); Walgreens Boots Alliance, Inc. (avail. Nov. 8, 2022) (concurring with the exclusion of a shareholder proposal where the proponent supplied proof of ownership 16 days after receiving the company's timely deficiency notice); FedEx Corp. (avail. June 5, 2019) (concurring with exclusion of a shareholder proposal where proof of ownership was provided 15 days after receiving the company's timely deficiency notice); AT&T Inc. (avail. Jan. 29, 2019) (concurring with exclusion of a shareholder proposal where proof of ownership was provided 17 days after receiving the company's timely deficiency notice); Time Warner Inc. (avail. Mar. 13, 2018) (concurring with the exclusion of a shareholder proposal where proof of ownership was provided 18 days after receiving the company's timely deficiency notice); ITC Holdings Corp. (avail. Feb. 9, 2016) (concurring with the exclusion of a shareholder proposal where proof of ownership was provided 35 days after receiving the company's timely deficiency notice); Prudential Financial, Inc. (avail. Dec. 28, 2015) (concurring with the exclusion of a shareholder proposal where the proof of ownership was provided 23 days after receiving the company's timely deficiency notice); and Mondelēz International, Inc. (avail. Feb. 27, 2015) (concurring with the exclusion of a shareholder proposal where proof of ownership was provided 16 days after receiving the company's timely deficiency notice).

## **5. Conclusion**

The Company requests that the Staff concur with its view that, for the reasons stated above, it may exclude the Proposal from the 2024 Proxy Materials.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

/s/ Douglas K. Schnell

Douglas K. Schnell

Enclosures

cc: Align Technology, Inc.  
Julie Coletti  
Paul Katawicz  
Melissa Sallee

As You Sow

Andrew Behar (shareholderengagement@asyousow.org)

**WILSON  
SONSINI**

Office of Chief Counsel  
January 18, 2024  
Page 6

Whistle Stop Capital  
Meredith Benton (benton@whistlestop.capital)

Wilson Sonsini Goodrich & Rosati, Professional Corporation  
Katharine Martin  
Chris Fennell

**Exhibit A**  
**(see attached)**





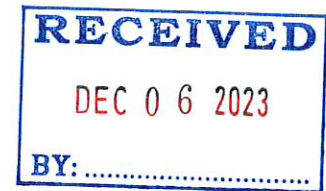
2020 Milvia St. Suite 500  
Berkeley, CA 94704

[www.asyousow.org](http://www.asyousow.org)  
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**VIA FEDEX & EMAIL**

December 5, 2023

Julie Coletti  
Executive Vice President, Chief Legal  
and Regulatory Officer  
Align Technology, Inc.  
410 N. Scottsdale Rd. Suite 1300,  
Tempe, AZ 85288  
[REDACTED]



Dear Ms. Coletti,

*As You Sow*® is filing a shareholder proposal on behalf of Elizabeth C Funk Trust (“Proponent”), a shareholder of Align Technology Inc. for inclusion in Align Technology’s 2024 proxy statement and for consideration by shareholders in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

A letter from the Proponent authorizing *As You Sow* to act on its behalf is enclosed. The Proponent is available for a meeting with the Company regarding this shareholder proposal at the following days/times: December 18, 2023 at 2:00pm Mountain Time or December 19, 2023 at 2:30pm Mountain Time.

The Proponent is designating *As You Sow* as a representative for all issues in this matter. Meredith Benton, Workplace Equity Program Manager at [REDACTED] is the contact person on behalf of *As You Sow*. **Please also send all correspondence regarding this proposal to [shareholderengagement@asyousow.org](mailto:shareholderengagement@asyousow.org).**

A representative of the Proponent will attend the stockholder meeting to move the resolution as required.

We are available to discuss this issue and are optimistic that such a discussion could result in resolution of the Proponent’s concerns.

Sincerely,



Andrew Behar  
CEO, *As You Sow*

Enclosures

- Shareholder Proposal
- Shareholder Authorization

cc: [investorinfo@aligntech.com](mailto:investorinfo@aligntech.com)

**RESOLVED:** Shareholders request that Align Technology Inc. (Align) report to shareholders on the effectiveness of the Company's diversity, equity, and inclusion efforts. The report should be done at reasonable expense, exclude proprietary information, and provide transparency on outcomes, using quantitative metrics for workforce diversity, hiring, promotion, and retention of employees, including data by gender, race, and ethnicity.

**SUPPORTING STATEMENT:** Quantitative data is sought so that investors can assess and compare the effectiveness of companies' diversity, equity, and inclusion programs.

It is advised that this content be provided through Align's existing sustainability reporting infrastructure. An independent report specific to this topic is not requested.

**WHEREAS:** More than half of the S&P 500 and over one-third of the Russell 1000 have released, or have committed to release, their consolidated EEO-1 forms, a best practice in diversity data reporting. Companies that release, or have committed to release, more inclusion data than Align include: Baxter International, Biogen, CVS Health, Gilead Sciences, Pfizer, and UnitedHealth Group.

As *You Sow* and Whistle Stop Capital released research in November 2023 that reviewed the EEO-1 reports of 1,641 companies against financial performance metrics from 2016-2021.<sup>1</sup> Within the healthcare sector, statistically significant positive correlations were found between increased manager diversity and mean free cash flow per share, income after tax, mean long-term growth, and ten-year compound annual growth rate.

As of the date of the filing of this proposal, Align had not yet released its consolidated EEO-1 form, nor had it shared sufficient hiring, retention, or promotion data to allow investors to determine the effectiveness of its diversity and inclusion programs.

As detailed below, inclusion indicators are also important in assessing Align's workplace equity efforts and if the Company will be able to successfully build, utilize, and maintain a diverse management team.

**Hiring:** Studies conducted by economists at the University of Chicago and UC Berkeley found that "discriminating companies tend to be less profitable," stating "it is costly for firms to discriminate against productive workers."<sup>2</sup>

**Promotion:** Without equitable promotional practices, companies will be unable to build the necessary employee pipelines for diverse management. Women and employees of color experience "a broken rung" in their careers; for every 100 men who are promoted, only 87 women are. Whereas women of color comprise 18 percent of the entry-level workforce and only 6 percent of executives.<sup>3</sup>

**Retention:** Retention rates indicate if employees believe a company represents their best opportunity. Morgan Stanley has found that employee retention above industry average can indicate a competitive advantage and higher levels of future profitability.<sup>4</sup>

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<sup>1</sup> <https://www.asyousow.org/report-page/2023-positive-relationships-linking-workforce-diversity-and-financial-performance>

<sup>2</sup> <https://www.nytimes.com/2021/07/29/business/economy/hiring-racial-discrimination.html>

<sup>3</sup> <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>

<sup>4</sup> [https://www.morganstanley.com/im/publication/insights/articles/article\\_culturequantframework\\_us.pdf, p. 2](https://www.morganstanley.com/im/publication/insights/articles/article_culturequantframework_us.pdf, p. 2)

11/18/2023

Andrew Behar  
CEO  
As You Sow  
2020 Milvia St, Suite #500  
Berkeley, CA 94704

**Re: Authorization to File Shareholder Resolution**

Dear Andrew Behar,

The undersigned (“Stockholder”) authorizes As You Sow to file a shareholder resolution on Stockholder’s behalf with the named Company for inclusion in the Company’s 2024 proxy statement, in accordance with Rule 14a-8 under the Securities and Exchange Act of 1934, as amended. The resolution at issue relates to the below described subject.

Stockholder: Elizabeth C Funk Trust (S)  
Company: Align Technology Inc  
Subject: Disclosure of key diversity and inclusion metrics

The Stockholder has continuously owned an amount of Company stock, with voting rights, for the requisite duration of time that enables the Stockholder to file a shareholder resolution for inclusion in the Company’s proxy statement. The Stockholder intends to hold the required amount of stock through the date of the Company’s annual meeting in 2024.

The Stockholder gives As You Sow the authority to address, on the Stockholder’s behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing the Stockholder in engagements with the Company, entering into any agreement with the Company, designating another entity as lead filer and representative of the shareholder resolution, presenting the proposal at the Company’s annual general meeting, and all other forms of representation necessary in moving the resolution. The Stockholder understands that the Stockholder’s name and contact information will be disclosed in the proposal. The Stockholder acknowledges that their name may appear on the company’s proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder’s name in relation to the resolution. The Stockholder supports this proposal.

The Stockholder is available to meet with the Company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal within the regular business hours of Company’s principal executive offices. The Stockholder authorizes its representative, As You Sow, to provide specific dates and times of availability.

The Stockholder can be contacted at the following email address to schedule a dialogue:

████████████████████

**Any correspondence regarding meeting dates must also be sent to the Stockholder's representative: [shareholderengagement@asyousow.org](mailto:shareholderengagement@asyousow.org)**

**The Stockholder also authorizes As You Sow to send a letter of support of the resolution on Stockholder's behalf.**

Sincerely,

DocuSigned by:  
**Elizabeth Funk**  
1FD7AD6FFC2D49E...

Name: Elizabeth Funk

Title: Member



AS YOU SOW

2020 Milvia St. Suite 500  
Berkeley, CA 94704

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BY: .....

VIA FEDEX & EMAIL

December 5, 2023

Julie Coletti  
Executive Vice President, Chief Legal  
and Regulatory Officer  
Align Technology, Inc.  
410 N. Scottsdale Rd. Suite 1300,  
Tempe, AZ 85288  
[REDACTED]

Dear Ms. Coletti,

As You Sow® is co-filing a shareholder proposal on behalf of the following Align Technology Inc shareholder for action at the next annual meeting of Align Technology:

- Laird Norton Family Foundation

Shareholder is a co-filer of the enclosed proposal with Elizabeth C Funk Trust, who is the Proponent of the proposal. As You Sow has submitted the enclosed shareholder proposal on behalf of Proponent for inclusion in the 2024 proxy statement in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934. Co-filer will either: (a) be available on the dates and times offered by the Proponent for an initial meeting, or (b) authorize As You Sow to engage with the Company on their behalf, within the meaning of Rule 14a-8(b)(iii)(B).

As You Sow is authorized to act on Laird Norton Family Foundation's behalf with regard to withdrawal of the proposal. A representative of the lead filer will attend the stockholders' meeting to move the resolution as required.

A letter authorizing As You Sow to act on co-filer's behalf is enclosed.

We are hopeful that the issue raised in this proposal can be resolved. To schedule a dialogue, please contact Meredith Benton, Workplace Equity Program Manager at [REDACTED]. Please send all correspondence with a copy to [shareholderengagement@asyousow.org](mailto:shareholderengagement@asyousow.org).

Sincerely,

Andrew Behar  
CEO, As You Sow

Enclosures

- Shareholder Proposal
- Shareholder Authorization

cc: [investorinfo@aligntech.com](mailto:investorinfo@aligntech.com)

**RESOLVED:** Shareholders request that Align Technology Inc. (Align) report to shareholders on the effectiveness of the Company's diversity, equity, and inclusion efforts. The report should be done at reasonable expense, exclude proprietary information, and provide transparency on outcomes, using quantitative metrics for workforce diversity, hiring, promotion, and retention of employees, including data by gender, race, and ethnicity.

**SUPPORTING STATEMENT:** Quantitative data is sought so that investors can assess and compare the effectiveness of companies' diversity, equity, and inclusion programs.

It is advised that this content be provided through Align's existing sustainability reporting infrastructure. An independent report specific to this topic is not requested.

**WHEREAS:** More than half of the S&P 500 and over one-third of the Russell 1000 have released, or have committed to release, their consolidated EEO-1 forms, a best practice in diversity data reporting. Companies that release, or have committed to release, more inclusion data than Align include: Baxter International, Biogen, CVS Health, Gilead Sciences, Pfizer, and UnitedHealth Group.

As *You Sow* and Whistle Stop Capital released research in November 2023 that reviewed the EEO-1 reports of 1,641 companies against financial performance metrics from 2016-2021.<sup>1</sup> Within the healthcare sector, statistically significant positive correlations were found between increased manager diversity and mean free cash flow per share, income after tax, mean long-term growth, and ten-year compound annual growth rate.

As of the date of the filing of this proposal, Align had not yet released its consolidated EEO-1 form, nor had it shared sufficient hiring, retention, or promotion data to allow investors to determine the effectiveness of its diversity and inclusion programs.

As detailed below, inclusion indicators are also important in assessing Align's workplace equity efforts and if the Company will be able to successfully build, utilize, and maintain a diverse management team.

**Hiring:** Studies conducted by economists at the University of Chicago and UC Berkeley found that "discriminating companies tend to be less profitable," stating "it is costly for firms to discriminate against productive workers."<sup>2</sup>

**Promotion:** Without equitable promotional practices, companies will be unable to build the necessary employee pipelines for diverse management. Women and employees of color experience "a broken rung" in their careers; for every 100 men who are promoted, only 87 women are. Whereas women of color comprise 18 percent of the entry-level workforce and only 6 percent of executives.<sup>3</sup>

**Retention:** Retention rates indicate if employees believe a company represents their best opportunity. Morgan Stanley has found that employee retention above industry average can indicate a competitive advantage and higher levels of future profitability.<sup>4</sup>

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<sup>1</sup> <https://www.asyousow.org/report-page/2023-positive-relationships-linking-workforce-diversity-and-financial-performance>

<sup>2</sup> <https://www.nytimes.com/2021/07/29/business/economy/hiring-racial-discrimination.html>

<sup>3</sup> <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>

<sup>4</sup> [https://www.morganstanley.com/im/publication/insights/articles/article\\_culturequantframework\\_us.pdf, p. 2](https://www.morganstanley.com/im/publication/insights/articles/article_culturequantframework_us.pdf, p. 2)

November 28, 2023

Andrew Behar  
CEO  
2020 Milvia St, Suite #500  
Berkeley, CA 94704

**Re: Authorization to File Shareholder Resolution**

Dear Andrew Behar,

The undersigned ("Stockholder") authorizes As You Sow to co-file a shareholder resolution on the Stockholder's behalf with the named Company for inclusion in the Company's 2024 proxy statement, in accordance with Rule 14a-8 under the Securities and Exchange Act of 1934, as amended. The resolution at issue relates to the below described subject.

**Stockholder:** Laird Norton Family Foundation

**Company:** Align Technology Inc


**Subject:** Disclosure of key diversity and inclusion metrics.

The Stockholder has continuously owned an amount of Company stock, with voting rights, for the requisite duration of time that enables the Stockholder to file a shareholder resolution for inclusion in the Company's proxy statement. The Stockholder intends to hold the required amount of stock through the date of the Company's annual meeting in 2024.

The Stockholder gives As You Sow the authority to address, on the Stockholder's behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing the Stockholder in engagements with the Company, entering into any agreement with the Company, designating another entity as lead filer and representative of the shareholder resolution, presenting the proposal at the Company's annual general meeting, and all other forms of representation necessary in moving the resolution. The Stockholder understands that the Stockholder's name and contact information will be disclosed in the proposal. The Stockholder acknowledges that their name may appear on the company's proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder's name in relation to the resolution. The Stockholder supports this proposal.

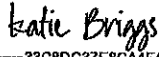
The Stockholder is available to meet with the Company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal, within the regular business hours of Company's principal executive offices. The Stockholder authorizes its representative, As You Sow, to provide specific dates and times of availability.

The Stockholder can be contacted at the following email address to schedule a dialogue:

 Any correspondence regarding meeting dates must also be sent to the Stockholder's representative: [shareholderengagement@asyousow.org](mailto:shareholderengagement@asyousow.org).

The Stockholder also authorizes As You Sow to send a letter of support of the resolution on the Stockholder's behalf.

Sincerely,

DocuSigned by:  
  
33C8DC37E8CA4EA

Name: Katie Briggs  
Title: Managing Director



**Exhibit B**  
**(see attached)**

---

**From:** Harleigh Jones [REDACTED]  
**Sent:** Thursday, December 14, 2023 9:24 AM  
**To:** shareholderengagement@asyousow.org  
**Cc:** Julie Coletti; Paul Katawicz; Melissa Sallee  
**Subject:** Shareholder Proposal to Align Technology, Inc.  
**Attachments:** As you SOW Rule 14a-8 14-day Ltr.pdf

Dear Mr. Behar:

Please see attached correspondence from Julie Coletti in response to your communication dated December 5, 2023.

Thank you,

# align

**Harleigh Jones**

Executive Assistant to Julie Coletti,  
EVP, Chief Legal & Regulatory Officer

Align Technology, Inc.  
410 N Scottsdale Rd Suite 1300  
Tempe, AZ 85288  
[REDACTED]

Invisalign | iTero | exocad

December 14, 2023

**BY EMAIL** ([shareholderengagement@asyousow.org](mailto:shareholderengagement@asyousow.org))

As You Sow  
2020 Milvia St., Suite 500  
Berkeley, CA 94704

**Re: Shareholder Proposal**

Dear Mr. Behar:

I am writing concerning the shareholder proposal (the "Proposal") submitted to Align Technology, Inc. ("Align") by you (the "Proponent"). The Proposal was submitted pursuant to Rule 14a-8 of the Securities Exchange Act of 1934, as amended, for inclusion in Align's proxy materials for its 2024 Annual Meeting of Shareholders (the "2024 Annual Meeting"). Align received the Proposal on December 6, 2023 (the "Submission Date").

As set forth below, the Proposal contains certain deficiencies that, pursuant to the rules and regulations of the Securities and Exchange Commission (the "SEC"), Align is required to bring to the Proponent's attention.

**1. Ownership of Align Shares**

Rule 14a-8(b) provides that, as of *and including* the Submission Date, a proponent must have continuously held:

- At least \$2,000 in market value of Align's securities entitled to vote on the proposal for at least three years;
- At least \$15,000 in market value of Align's securities entitled to vote on the proposal for at least two years; or
- At least \$25,000 in market value of Align's securities entitled to vote on the proposal for at least one year.

Rule 14a-8(b) requires a proponent to prove its eligibility by submitting either:

- A written statement from the "record" holder of the proponent's shares (usually a broker or a bank) verifying that, *as of the Submission Date*, the proponent continuously held at least \$2,000, \$15,000, or \$25,000 in market value of Align's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively. As addressed by the SEC staff in Staff Legal Bulletin 14G, if the proponent's shares are held by a bank, broker or other securities intermediary that is a Depository Trust Company ("DTC") participant or an affiliate thereof, then proof of ownership from either that DTC participant or its affiliate will satisfy this requirement. Alternatively, if the proponent's shares are held by a bank, broker or

other securities intermediary that is not a DTC participant or an affiliate of a DTC participant, then proof of ownership must be provided by both (1) the bank, broker or other securities intermediary; and (2) the DTC participant (or an affiliate thereof) that can verify the holdings of the bank, broker or other securities intermediary. The proponent can confirm whether a particular bank, broker or other securities intermediary is a DTC participant by checking DTC's participant list, which is available at <https://www.dtcc.com/client-center/dtc-directories>. The proponent should be able to determine who the DTC participant is by asking the proponent's bank, broker or other securities intermediary.

- If the proponent has filed with the SEC a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, demonstrating that it continuously held at least \$2,000, \$15,000, or \$25,000 in market value of Align's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively, a copy of the schedule or form, and any subsequent amendments reporting a change in the ownership level and a written statement that the proponent continuously held the requisite number of Align shares for the requisite period.

Align did not receive any proof of ownership in connection with the Proposal as of the Submission Date. To remedy this defect, the Proponent would have to submit sufficient proof of ownership of the requisite number of Align shares during the applicable period preceding *and including* the Submission Date.

## **2. No Aggregation with Other Shareholders**

Rule 14a-8(b) does not permit a proponent to aggregate the proponent's holdings with those of another shareholder or group of shareholders to meet the requisite amount of securities necessary to be eligible to submit a proposal. To remedy this defect, the Proponent must confirm that it is not aggregating its holdings with those of another shareholder or group.

\* \* \*

For reference, copies of Rule 14a-8, Staff Legal Bulletin No. 14F and Staff Legal Bulletin No. 14G are enclosed.

For the Proposal to be eligible for inclusion in Align's proxy materials for the 2024 Annual Meeting, the SEC's rules require that the Proponent's response to this letter, correcting all procedural deficiencies identified in this letter, be postmarked or transmitted electronically no later than 14 calendar days from the date that the Proponent receives this letter. Please address any response to me at the address set forth on the first page of this letter. The Proponent is responsible for confirming Align's receipt of any correspondence that the Proponent submits in response to this letter.

Align reserves the right to submit a no-action request to exclude the Proposal on other grounds even if the Proponent remedies all procedural defects in the submission of the Proposal.

As regards your offer to meet, thank you. Allow us additional time to consider your offer and request and we will be in touch.

If you have any questions with respect to the foregoing, please contact me.

Very truly yours

*/s/ Julie Coletti*

Julie Coletti  
EVP, Chief Legal & Regulatory Officer  
Align Technology, Inc.

Enclosures as stated

**Exhibit C**  
**(see attached)**

---

**From:** Shareholder Engagement <shareholderengagement@asyousow.org>  
**Sent:** Thursday, December 28, 2023 3:55 PM  
**To:** Harleigh Jones  
**Cc:** Julie Coletti; Paul Katawicz; Melissa Sallee  
**Subject:** Re: Shareholder Proposal to Align Technology, Inc.  
**Attachments:** 24.ALGN.1 Align Technology - Proof of Ownership\_Laird Norton Family Foundation.pdf

Some people who received this message don't often get email from shareholderengagement@asyousow.org. [Learn why this is important](#)

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Harleigh,

Confirming receipt of this deficiency letter. Please see attached the following proof of ownership:  
Co-Filer Laird Norton Family Foundation 20 shares

The proof of ownership for the Lead Filer, Elizabeth C Funk Trust (S), was requested on December 8, 2023, however, the shareholder's custodian has ignored the request, and despite multiple attempts they continue to not comply. Please allow us a grace period as we continue to follow-up with the custodian regarding this proof of ownership.

It would be much appreciated if you could confirm receipt of this email and its attachment.

Thank you and wishing you a happy new year,  
Rachel

**Rachel Lowy** (she/her/hers)  
**Shareholder Relations Sr. Coordinator**  
**As You Sow**<sup>®</sup>  
Main Post Office, P.O. Box 751 | Berkeley, CA 94701  
[REDACTED]

---

**From:** Harleigh Jones [REDACTED]  
**Sent:** Thursday, December 14, 2023 9:24 AM  
**To:** Shareholder Engagement <shareholderengagement@asyousow.org>  
**Cc:** Julie Coletti [REDACTED]; Paul Katawicz [REDACTED]; Melissa Sallee  
[REDACTED]  
**Subject:** Shareholder Proposal to Align Technology, Inc.

You don't often get email from hjones@aligntech.com. [Learn why this is important](#)

Dear Mr. Behar:

Please see attached correspondence from Julie Coletti in response to your communication dated December 5, 2023.

Thank you,



**Harleigh Jones**

Executive Assistant to Julie Coletti,  
EVP, Chief Legal & Regulatory Officer

Align Technology, Inc.  
410 N Scottsdale Rd Suite 1300  
Tempe, AZ 85288



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lairdnorton  
WEALTH MANAGEMENT

December 7, 2023

Laird Norton Family Foundation

**SEI Corporation**, a DTC participant, acts as the custodian for Laird Norton Family Foundation. As of the date of this letter, Laird Norton Family Foundation held, and has held continuously for at least **37** months, **20** shares of Align Technology Inc (ALGN), with a value of over **\$2,000**.

Best Regards,

*Sarah Myhre*

Sarah Myhre (Dec 7, 2023 08:14 PST)

---

**Sarah Myhre**  
**Manager, Operations**  
**Laird Norton Wealth Management**

**Exhibit D**  
**(see attached)**

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**From:** Shareholder Engagement <shareholderengagement@asyousow.org>  
**Sent:** Thursday, January 18, 2024 10:34 AM  
**To:** Harleigh Jones  
**Cc:** Julie Coletti; Paul Katawicz; Melissa Sallee  
**Subject:** Re: Shareholder Proposal to Align Technology, Inc.  
**Attachments:** 24.ALGN.1 Align Technology - Proof of Ownership\_Elizabeth C Funk Trust.pdf

You don't often get email from shareholderengagement@asyousow.org. [Learn why this is important](#)

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello Harleigh,

Thank you for your patience as we continue to work through the custodial issues for proofs of ownership.

Please see attached the following proof of ownership:

Lead Filer      Elizabeth C Funk Trust (S)      20 shares

It would be greatly appreciated if you could confirm receipt of this and my pervious email, and that all deficiencies have been satisfied.

Thank you and warm regards,  
Rachel

**Rachel Lowy** (she/her/hers)  
**Shareholder Relations Sr. Coordinator**  
**As You Sow**<sup>®</sup>  
Main Post Office, P.O. Box 751 | Berkeley, CA 94701

[rlowy@asyousow.org](mailto:rlowy@asyousow.org) | [www.asyousow.org](http://www.asyousow.org)



~Empowering Shareholders to Change Corporations for Good~

---

**From:** Shareholder Engagement <shareholderengagement@asyousow.org>  
**Sent:** Thursday, December 28, 2023 3:55 PM  
**To:** Harleigh Jones [REDACTED]  
**Cc:** Julie Coletti [REDACTED]; Paul Katawicz [REDACTED]; Melissa Sallee  
**Subject:** Re: Shareholder Proposal to Align Technology, Inc.

Dear Harleigh,

Confirming receipt of this deficiency letter. Please see attached the following proof of ownership:

Co-Filer      Laird Norton Family Foundation      20 shares

The proof of ownership for the Lead Filer, Elizabeth C Funk Trust (S), was requested on December 8, 2023, however, the shareholder's custodian has ignored the request, and despite multiple attempts they continue to not comply. Please allow us a grace period as we continue to follow-up with the custodian regarding this proof of ownership.

It would be much appreciated if you could confirm receipt of this email and its attachment.

Thank you and wishing you a happy new year,  
Rachel

**Rachel Lowy** (she/her/hers)  
**Shareholder Relations Sr. Coordinator**  
**As You Sow®**  
Main Post Office, P.O. Box 751 | Berkeley, CA 94701  
[REDACTED]

---

**From:** Harleigh Jones [REDACTED]  
**Sent:** Thursday, December 14, 2023 9:24 AM  
**To:** Shareholder Engagement <shareholderengagement@asyousow.org>  
**Cc:** Julie Coletti [REDACTED]; Paul Katawicz [REDACTED]; Melissa Sallee [REDACTED]  
**Subject:** Shareholder Proposal to Align Technology, Inc.

You don't often get email from hjones@aligntech.com. [Learn why this is important](#)

Dear Mr. Behar:

Please see attached correspondence from Julie Coletti in response to your communication dated December 5, 2023.

Thank you,

# align

**Harleigh Jones**  
Executive Assistant to Julie Coletti,  
EVP, Chief Legal & Regulatory Officer

Align Technology, Inc.  
410 N Scottsdale Rd Suite 1300  
Tempe, AZ 85288  
[REDACTED]

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This message and any attachments may contain information that is confidential, proprietary, and private and may be legally protected from disclosure. The information is intended to be for the use of the individual or entity designated above. If you are not the intended recipient of this message, please notify the sender immediately, and delete this message and any attachments. Any disclosure, reproduction, distribution or other use of this message or any attachments by an individual or entity other than the intended recipient is prohibited.



January 09, 2024

Account ending in: [REDACTED]

Reference #: [REDACTED]

Questions: Please call your advisor directly  
or contact Schwab Alliance™ at  
1-800-515-2157

Elizabeth C Funk Trust  
[REDACTED]

## As requested, we're confirming a stock holding in your account.

To Whom It May Concern,

As requested, we're writing to confirm that the above account holds in trust 20 shares of ALGN ALIGN TECHNOLOGY INC common stock. These shares have been held in the account continuously for at least one year since March 20, 2020.

These shares are held at Depository Trust Company under Charles Schwab & Co., Inc., which serves as custodian for the account.

**Thank you for choosing Schwab.** If you have questions, please contact your advisor or Schwab Alliance at 1-800-515-2157. We appreciate your business and look forward to serving you in the future.

Independent investment advisors are not owned by, affiliated with, or supervised by Charles Schwab & Co., Inc. ("Schwab").

February 26, 2024

**VIA ONLINE SUBMISSION**

Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Email: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

**Re: Shareholder Proposal to Align Technology, Inc. Regarding DEI Data Disclosures on Behalf of Elizabeth C Funk Trust, with Laird Norton Family Foundation as Co-Filer**

Ladies and Gentlemen:

Elizabeth C Funk Trust (the “Proponent”), with Laird Norton Family Foundation as co-filer (the “Co-filer”), beneficial owners of common stock of Align Technology, Inc. (the “Company” or “Align”), has submitted a shareholder proposal (the “Proposal”) seeking disclosure of data concerning the effectiveness of the Company’s diversity, equity, and inclusion programs. The Proponent and Co-Filer have designated *As You Sow* to act as their representative with respect to the Proposal, including responding to the Company’s January 18, 2024 “No Action” letter (the “Company Letter”).

The Company Letter contends that the Proposal may be excluded from the Company’s 2024 proxy statement because the Proponent and Co-filer did not timely provide proof of ownership of Company stock. Proponent’s response demonstrates that the Company has no basis under Rule 14a-8 for exclusion of the Proposal. As such, the Proponent respectfully requests that the Staff inform the Company that it cannot concur with the Company’s request.

A copy of this letter is being emailed concurrently to the Company.

**ANALYSIS**

As the Staff has been made aware, shareholder proponents — despite timely requests and follow up — are increasingly facing difficulty in obtaining proof-of-ownership letters from their brokers. That is the case here — proof of ownership was requested from the Proponent’s broker several days *before* the Company sent its deficiency notice and followed up with the custodian multiple times during the deficiency period, to no avail. The broker failed to respond timely with a proof of ownership that would meet the standards of Rule 14a-8, despite receiving a clear request from Proponent with all information necessary to meet the standard. This situation is untenable, and the Commission should consider rule changes to address the issue where, through no fault of their own, proponents are unable to timely obtain the needed documentation.<sup>1</sup>

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<sup>1</sup> In particular, in circumstances in which: (a) the Proponent is *in fact eligible* to submit a proposal and (b) has made *good-faith efforts* to obtain proof-of-ownership within the deficiency period, the Staff should

However, in this case, the Co-filer provided proof of ownership within the deficiency period. The Company did not timely notify the Co-filer of the Company's belief that its proof was deficient. The Staff has been clear that such notifications are necessary. Therefore, the Company may not exclude the Proposal.

The Company evidently declined to file a second deficiency letter because of its belief that it received "a letter *from, and signed by, the Co-Filer . . . that . . . can only be described as an attempt by the Co-Filer to 'self-certify' its ownership of the Company's stock.*" Company Letter at 4 (emphasis in original). This is inaccurate. The Co-filer is the "Laird Norton Family Foundation." The proof-of-ownership letter came from the Co-filer's asset manager, Laird Norton Wealth Management. See Company Letter, Exhibit C, at p.3. Despite the similar names and shared genealogy, these are legally distinct entities — the former is a philanthropical 501(c)3 organization and the latter a for-profit wealth management company.<sup>2</sup>

As the Co-filer's proof acknowledges, the Co-filer's shares are held through SEI Corporation, a DTC participant.<sup>3</sup> While it may be the case that the Staff could conclude that Co-filer's proof is insufficient because it did not come from the DTC participant itself, the Staff has made clear that issuers in receipt of such proofs are required to *send a deficiency letter* identifying this new deficiency. See Staff Legal Bulletin No. 14F (Oct. 18, 2011) (noting that companies may exclude proposals because proofs came from non-DTC participants only after notifying shareholders of that deficiency and giving an opportunity to cure); Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("[C]ompanies should identify any specific defects in the proof of ownership letter, even if the company previously sent a deficiency notice prior to receiving the . . . proof of ownership if such deficiency notice did not identify the specific defect(s).").

Accordingly, because the Company did not notify the Co-filer of any deficiency with its proof of ownership letter or provide the Co-filer with an opportunity to cure any such deficiency, the no-action request must be denied. See, e.g., *CoStar Group, Inc.* (Apr. 5, 2022) (rejecting no action request where "the Company failed to notify the Proponent of any deficiencies within 14 days of receiving the Proposal as required by Rule 14a-8(f)(1)"). See also *LNB Bancorp, Inc.* (Dec. 28, 2007) (rejecting no action request where company failed to adequately inform proponent of necessary cure to alleged deficiency); *AT&T Inc.* (Feb. 16, 2007) (rejecting no action request where Company addressed deficiency notice to incorrect address); *Marathon Oil Corp.* (Mar. 3, 2009) (rejecting no-action request while acknowledging that proponent "exceeded the one-

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decline to concur in granting no-action relief based on failure to provide proof of ownership in the form of a broker letter *within* the deficiency period.

<sup>2</sup> See Laird Norton Family Foundation Form 990 at p. 7, <https://projects.propublica.org/nonprofits/organizations/916339917/202303079349100530/full> (listing Laird Norton Wealth Management as independent contractor paid for investment services).

<sup>3</sup> The Company letter asserts that SEI Corporation is not a DTC participant. SEI Corporation's DTC registration is under the "SEI Private Trust Company," see DTC #2039. See Schedule 14A, SEI Institutional Managed Trust (2015), at p. A-36, [https://www.sec.gov/Archives/edgar/data/701817/000110465915073180/a15-21225\\_1def14a.htm](https://www.sec.gov/Archives/edgar/data/701817/000110465915073180/a15-21225_1def14a.htm) (noting address of SEI Private Trust Company as "C/O SEI Corporation").

proposal limitation” because the company “did not request that the proponent reduce the proposals to cure the deficiency”).<sup>4</sup>

Because the Company has not demonstrated the Co-filer’s ineligibility to submit the Proposal, the Proposal may not be excluded, regardless of the failure of the Proponent’s broker to provide proof of ownership.

### CONCLUSION

Based on the foregoing, we believe that the Company has provided no basis for the conclusion that the Proposal is excludable from the 2024 proxy statement pursuant to Rule 14a-8. We urge the Staff to deny the no action request.

Sincerely,



Luke Morgan  
Staff Attorney, *As You Sow*

cc:

Douglas K. Schnell, Wilson Sonsini Goodrich & Rosati  
Julie Coletti, Align Technology, Inc.  
Paul Katawicz, Align Technology, Inc.  
Melissa Sallee, Align Technology, Inc.

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<sup>4</sup> The Company’s decision not to send a second deficiency notice may have been based on its mistaken belief about the author of the proof-of-ownership letter and on the understandable concern that if proponents could initiate a second deficiency period by attempted “self-certifications,” this could introduce perverse incentives. But that is not what happened here.



DOUGLAS K. SCHNELL  
Internet: dschnell@wsgr.com  
Direct dial: (650) 849-3275

Client File No.: 22733.052

February 28, 2024

## BY ONLINE SUBMISSION FORM

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: Shareholder Proposal of Elizabeth C Funk Trust, with Laird Norton Family Foundation as Co-Filer, Submitted to Align Technology, Inc.**

Ladies and Gentlemen:

We are writing in reference to the no-action request submitted on January 18, 2024 (the “No-Action Request”) by Align Technology, Inc. (the “Company”), a Delaware corporation, in respect of the shareholder proposal and supporting statement (the “Proposal”) submitted by As You Sow (the “Representative”), on behalf of Elizabeth C Funk Trust (the “Funk Trust”), with Laird Norton Family Foundation (the “Co-Filer”) as a co-filer. The No-Action Request detailed the Company’s request that the staff (the “Staff”) of the Securities and Exchange Commission (the “Commission”) concur with the Company’s view that it may exclude the Proposal from the proxy materials to be distributed by the Company in connection with its 2024 Annual Meeting of Stockholders (the “2024 Proxy Materials”).

This letter is in response to the letter, dated February 26, 2024, submitted by the Representative (the “February 26 Letter”). A copy of this letter is being sent to the Representative, and we remind the Representative of the obligations pursuant to Rule 14a-8(k) and related Staff guidance. We respectfully request that any correspondence that the Representative submits to the Staff or the Commission with respect to this letter or the No-Action Request be concurrently furnished to the undersigned on behalf of the Company.

### **1. Timely Proof of Ownership Was Not Provided**

At the outset, we note that the February 26 Letter ignores one simple fact: the documentation accompanying the Proposal clearly and unambiguously states—in multiple places—that the *Funk Trust is the proponent of the Proposal*. Equally clearly and

unambiguously, Rule 14a-8(b) enumerates the various requirements that a *proponent* must satisfy in order to be eligible to submit a shareholder proposal. The Funk Trust did not, within the time periods outlined in the No-Action Request, timely submit proper proof of ownership of the requisite amount of the Company's stock. The February 26 Letter admits this deficiency in several places. Accordingly, the Proposal was not validly submitted and should be excluded.

## **2. The Company Provided All Required Notice of the Deficiency**

Included with the No-Action Request was a copy of the deficiency notice that the Company timely provided, which notice outlined the procedural deficiencies associated with the submission of the Proposal (such notice, the "Deficiency Notice"). The Deficiency Notice clearly and unambiguously details the procedural requirements that must be satisfied in order for a proponent to be eligible to submit a shareholder proposal. Included in the Deficiency Notice was a discussion of the need for a proponent holding shares through a Depository Trust Company ("DTC") participant to submit proof of ownership *from the appropriate DTC participant*. As stated above, the Funk Trust did not submit the required proof of ownership in a timely manner. The Company submits that this settles the matter, and the Proposal should be excluded.

## **3. The Representative Makes Numerous Unfounded Arguments**

In the February 26 Letter, the Representative argues that even though the Funk Trust did not provide proof of ownership by the deadline (a fact that is incontrovertible and not in any way disputed), the Proposal should somehow not be excluded because the Company did not provide the Co-Filer (who, as stated above, is not the proponent of the Proposal) with notice that its purported proof of ownership was deficient. This argument is both without merit and mystifying in its approach. The Company timely sent the Deficiency Notice to the Representative. The Representative then submitted a purported proof of ownership for the Co-Filer. Notwithstanding the decision to submit such proof of ownership for the Co-Filer (which is puzzling given that the proponent is the Funk Trust), such proof of ownership is deficient in multiple respects because it was not from a DTC participant and did not identify a DTC participant that is the record holder of the Co-Filer's shares. In this regard, the Company notes the highly prescriptive nature of Rule 14a-8. The Deficiency Notice was clear as to the requirements for proving ownership, and Rule 14a-8 does not obligate the Company to send a deficiency notice each time that Rule 14a-8 is not complied with. To find otherwise would impose on companies an obligation to engage in a limitless repeat loop of deficiency letters.

The Company respectfully requests that the Staff grant no-action relief and submits that the Staff should not provide any additional time period for the Co-Filer to provide proof of ownership for the reasons provided above and in the No-Action Request. In addition, the Company urges the Staff to consider the following:

- The February 26 Letter engages in a hyper-technical "gotcha" argument related to an illusory obligation on the Company to send a second deficiency notice following receipt of the letter from Laird Norton Wealth Management (who is neither the Funk Trust (the proponent of the Proposal) nor the Co-Filer)

responding to the Deficiency Notice (such letter, the “Co-Filer’s Deficient Response”). In truth, there is no such obligation. The Representative chose to prepare and submit the Proposal, and has substantial experience over many years with shareholder proposals.<sup>1</sup> The Representative is well aware of the requirements of Rule 14a-8 and had ample opportunity prior to and after submission of the Proposal to obtain appropriate documentation from a DTC participant, but failed to do so. The idea that the Representative somehow needed more time and a second deficiency notice to understand that it must provide proof of ownership from a DTC participant is a ridiculously tortured attempt to bend the Staff’s guidance to fit this situation. In addition, the requirement that proof of ownership come from a DTC participant—the very information that the Representative now claims should have been provided in a second deficiency notice—was clearly and unambiguously stated in the Deficiency Notice. The Representative had ample notice, both as a matter of historical experience and through the Deficiency Notice, of how to appropriately prove ownership for purposes of Rule 14a-8. Such proof was not provided with respect to the Funk Trust or the Co-Filer. The Company encourages the Staff not to allow for “heads I win, tails you lose” gaming of the Rule 14a-8 process in the manner desired by the Representative. *See The Boeing Company* (avail. Jan. 19, 2012) (concurring with the exclusion of a shareholder proposal, and rejecting the argument that a second deficiency notice was required, where the proponent, among other things, failed to identify the source of security ownership as a DTC participant). *See also PDL BioPharma, Inc.* (avail. Mar. 1, 2019) (concurring with the exclusion of a shareholder proposal, and rejecting any requirement that a second deficiency notice was required, where the proponent’s broker letter failed to establish that the proponent owned the requisite minimum number of shares); *American Airlines Group, Inc.* (avail. Feb. 20, 2015) (concurring with the exclusion of a shareholder proposal where the proponent submitted a deficient broker letter seven days following receipt of the company’s deficiency notice and the company did not send a second deficiency notice); *Coca-Cola Co.* (avail. Dec. 16, 2014) (concurring with the exclusion of a shareholder proposal where the proponent submitted a deficient broker letter nine days following receipt of the company’s deficiency notice and the company did not send a second deficiency notice); *Union Pacific Corp.* (avail. Jan. 29, 2010) (concurring with the exclusion of a shareholder proposal where the proponent submitted a deficient broker letter three days following receipt of the company’s deficiency notice and the company did not send a second deficiency notice).

- The Co-Filer’s Deficient Response was so grossly deficient as to be indecipherable for the reasons stated in the No-Action Request. Further, it was not from a DTC participant (a fact that the Representative admits in the February 26 Letter). And

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<sup>1</sup> The Representative’s website shows that it has been associated with at least 759 shareholder proposals dating back to 2010. *See* <https://www.asyousow.org/resolutions-tracker>.

the purported DTC participant identified in the Co-Filer's Deficient Response does not even exist. The Representative seemingly would have the Company engage in a spelunking exercise to guess that "SEI Corporation" is affiliated with "SEI Private Trust Company." And, in the Representative's upside-down view of the shareholder proposal process, the Company should have intuited this information from the Co-Filer's Deficient Response, which was not provided or signed by "SEI Corporation" or "SEI Private Trust Company."<sup>2</sup> Rather, it was provided and signed by Laird Norton Wealth Management, an entity that is unrelated to any "SEI" entity and has no obvious connection to any DTC participant, much less any company associated with an "SEI" entity.<sup>3</sup> The Co-Filer's Deficient Response does not even explain how Laird North Wealth Management relates to the Co-Filer. The inferential leaps that the Representative would have the Company engage in are well beyond those required by the text or spirit of Rule 14a-8, and would tilt the balance of the Rule 14a-8 playing field entirely in the direction of proponents.

To the extent that the Staff disagrees that the Proposal should be excluded due to the Funk Trust's failure to provide proof of ownership in a timely manner without regard to the Co-Filer's subsequent actions concerning its proof of ownership, the Company respectfully requests that the Staff concur in the Company's view that the Proposal may be excluded under Rule 14a-8(b) and Rule 14a-8(f)(1) because: (1) the Funk Trust failed to provide adequate proof of ownership within the required timeframe after receiving the Deficiency Notice; and (2) the Co-Filer failed to provide adequate proof of ownership from a DTC participant as required, including after receiving the Deficiency Notice.

- 
- <sup>2</sup> When describing its analysis of proof of ownership letters, Staff Legal Bulletin No. 14L (Nov. 3, 2021) states, "We took a plain meaning approach to interpreting the text of the proof of ownership letter, and we expect companies to apply a similar approach in their review of such letters." The Company submits that the Staff should take the same approach in the reverse. A plain meaning approach to the Co-Filer's insufficient response to the Deficiency Notice is that "SEI Corporation" is the applicable DTC participant for the shares held by the Co-Filer. This is not true; "SEI Corporation" is not a DTC participant and, accordingly, the purported proof of ownership submitted by the Co-Filer is not adequate for purposes of Rule 14a-8. (The No-Action Request describes additional deficiencies with the Co-Filer's Deficient Response.) The Company is entitled to rely on the plain meaning of the words chosen by the Representative.
- <sup>3</sup> It would only be speculation on the Company's part as to why the Representative submitted a document that is not in any respect what it purports to be, that is not sufficient under Rule 14a-8 and that contains at least one material misstatement, and now wishes to claim that it is the Company that did not satisfy its obligations under Rule 14a-8.

Office of Chief Counsel  
February 28, 2024  
Page 5

**4. Conclusion**

The Company requests that the Staff concur with its view that, for the reasons stated above, it may exclude the Proposal from the 2024 Proxy Materials.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

/s/ Douglas K. Schnell

Douglas K. Schnell

cc: Align Technology, Inc.  
Julie Coletti  
Paul Katawicz  
Melissa Sallee

As You Sow  
Andrew Behar ([shareholderengagement@asyousow.org](mailto:shareholderengagement@asyousow.org))

Whistle Stop Capital  
Meredith Benton ([benton@whistlestop.capital](mailto:benton@whistlestop.capital))

Wilson Sonsini Goodrich & Rosati, Professional Corporation  
Katharine Martin  
Chris Fennell

March 1, 2024

**VIA ONLINE SUBMISSION**

Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549  
Email: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

**Re: Shareholder Proposal to Align Technology, Inc. Regarding DEI Data Disclosures on Behalf of Elizabeth C Funk Trust, with Laird Norton Family Foundation as Co-Filer**

Ladies and Gentlemen:

*As You Sow* writes in brief sur-reply to the Company's supplemental no-action letter (the "Supplemental Letter") of February 28, 2024. The Supplemental Letter does not provide a basis to exclude the Proposal, and its misconceptions about the process of attaining proof-of-ownership letters speak to the concerns raised in *As You Sow*'s initial response. A copy of this letter is being emailed concurrently to the Company and its counsel.

**ANALYSIS**

**I. The Company Has a Validly Submitted Shareholder Proposal**

The Supplemental Letter begins with the assertion that it may exclude the Proposal because it has not received adequate proof-of-ownership from *the Proponent*. See Supplemental Letter at 1. The suggestion is that, where a proposal is co-filed by more than one proponent, it may be excluded if the "lead filer" does not provide proof of ownership, even if the "co-filer" has. There is no basis in Rule 14a-8 or Staff precedent for such a rule.

Rule 14a-8 does not create separate rules for "proponents" and "co-filers," which are largely a designation of convenience. The only exception is in Rule 14a-8(b)(iii), which states that "[i]f you elect to co-file a proposal, all co-filers must either: (A) Agree to the same dates and times of availability [to offer to meet with the company], or (B) Identify a single lead filer who will provide dates and times of the lead filer's availability to engage on behalf of all co-filers." The Co-filer satisfied this requirement.

There is nothing in the Rule to indicate that if a previously designated lead filer is unable to go forward with a proposal, the proposal fails. The Company received a submission of a proposal from two of its shareholders, one of which called itself the "proponent" and one of which called itself the "co-filer." Elimination of the self-identified proponent does not invalidate the submission of a co-filer who otherwise satisfies all requirements of the Rule. Companies routinely make no-action arguments about co-filers' eligibility or proofs of ownership (as the Company did here) – a step which would be wholly unnecessary if "co-filers" proposals were not eligible to be included in a proxy statement. See, e.g., *Johnson & Johnson* (Feb. 8, 2019) (concurring in exclusion only of what the Staff tellingly referred to as the "co-proponent").

Moreover, in the circumstances here, the authorization letter signed by both the Proponent and the Co-filer authorized *As You Sow* to “address . . . any and all aspects of the shareholder resolution, including . . . designating another entity as lead filer and representative of the shareholder resolution.”

Accordingly, the initial Proponent’s ineligibility does not constitute a basis to exclude the Proposal in the absence of a basis to also exclude the Co-filer. As discussed below, the Company has provided no such basis.

## **II. The Company Did Not Notify the Co-filer of the Specific Deficiencies Now Forming the Basis of Its No-Action Request**

The bulk of the Supplemental Letter is addressed to attempting to refute the idea that the Company was required to send the Co-filer a notice concerning what the Company considers to be deficiencies in the Co-filer’s proof-of-ownership letter. The Supplemental Letter describes this well-settled requirement as “mystifying.” But it is straightforward:

- 1. Companies are required to identify “specific deficiencies” in proof-of-ownership letters.** *See* Staff Legal Bulletin No. 14G (Oct. 16, 2012); *see also* Staff Legal Bulletin No. 14L (Nov. 3, 2021) (stating that deficiency notices should “identify any *specific defects*” in proof of ownership letters).
- 2. The Company’s initial deficiency notice did not identify “specific deficiencies” in the Co-filer’s Proof of Ownership, nor could it – the Company had not yet received the proof.** The Company’s deficiency letter provided notice that the proof of ownership had not been received. *See generally* Company Letter. As noted below in Section III, this is routinely the case as custodians are unwilling to provide a letter stating ownership through a prospective filing date. Rather they will not act to produce a letter until the filing date has passed.
- 3. The Company then received the Co-filer’s Proof of Ownership during the initial deficiency period.**
- 4. The Company did not send a deficiency notice regarding the DTC issue after receiving the Co-filer’s proof of ownership.**
- 5. Therefore, the Company did not send a deficiency notice identifying “specific deficiencies” in the Co-filer’s Proof of Ownership, as required by the Rules.**

In short: “failure to provide a proof of ownership letter” is one deficiency; “inadequacies in a provided proof of ownership letter” is a *different* deficiency, which had not yet occurred when the Company sent its initial deficiency letter.

The Company argues that it can short-circuit the deficiency process entirely simply by sending proponents a description of what the Rule requires in proof-of-ownership letters prior to receiving a proof-of-ownership letter. *See* Supplemental Letter at 3. This assertion is wholly at odds with the Staff’s description of the Rule 14a-8 process. In particular, the Supplemental Letter does not address Staff Legal Bulletin No. 14L, which **explicitly addresses this situation:**

Finally, we believe that companies should identify any specific defects in the proof of ownership letter, even if the company previously sent a deficiency notice prior

to receiving the proponent's proof of ownership if such deficiency notice did not identify the specific defect(s).<sup>1</sup>

The initial deficiency letter could not have identified the specific defect, i.e., receipt of a proof of ownership letter from the co-filer's asset manager, not its DTC custodian. The letter could not have specifically identified this deficiency because the problem had not yet occurred.

Tellingly, the Staff precedent cited in the Supplemental Letter all predate this explicit staff guidance. *See* Supplemental Letter at 3. Now, companies routinely follow the guidance in the above-quoted language by sending a second deficiency notice in response to alleged deficiencies in proof of ownership letters. *See, e.g., Salesforce, Inc.* (Feb. 26, 2024 Company Letter at 2-3) (company sent initial deficiency notice in response to absence of proof of ownership and a second deficiency notice in response to alleged deficiencies in proof after receipt thereof); *Walmart Inc.* (Feb. 4 2024 Company Letter at 3-5) (same, noting specifically that second deficiency notice was sent "in accordance with SLB 14L"); *Amazon.com, Inc.* (Feb. 1, 2024) (Company Letter at 6 n.2) (describing, from issuer's perspective, same understanding of SLB 14L put forth here and in *As You Sow's* initial response); *Chevron Corp.* (Jan. 19, 2024 Company Letter at 2-4) (company sent initial deficiency notice in response to absence of proof of ownership and second deficiency notice in response to alleged deficiencies in proof after receipt thereof); *American Express Co.* (Mar. 9, 2023) (same); *Pfizer Inc.* (Dec. 18, 2023 Company Letter at 3) (same); *Visa, Inc.* (Nov. 8, 2023) (same, Company specifically noted second deficiency notice was sent "in accordance with SLB 14L"); *Coca-Cola Co.* (Feb. 21, 2023 Company Letter at 6) (acknowledging that SLB 14L requires submission of second deficiency letter in circumstances where first deficiency letter was sent prior to receipt of proof-of-ownership).

The remainder of the Supplemental Letter describes what the Company perceives as deficiencies in the Co-filer's Proof of Ownership. *As You Sow's* initial response provided information about the Co-filer's asset manager and DTC participant as a convenience and to correct the Company's apparent mistake about the authorship of the Co-Filer's Proof of Ownership.<sup>2</sup> The objections the Company raises to this information and its alleged deficiencies belonged in a deficiency notice so that the Co-filer would have an opportunity to cure them. Having failed to send a deficiency notice, as required by Staff Legal Bulletin No. 14L and demonstrated by the standard practice of other issuers, the Company has no basis on which to exclude the Proposal.

### **III. The Supplemental Letter Reinforces the Need for Commission Action Concerning Broker Letters**

Like the Company, *As You Sow* is frustrated with brokers' continued inability or unwillingness to timely respond to requests from investors for proof-of-ownership letters. Because the Staff has

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<sup>1</sup> *See also* Staff Legal Bulletin No. 14G (requiring companies to "identify[] in the notice of defect the specific date on which the proposal was submitted" when in receipt of a proof-of-ownership failing to demonstrate one-year of continuous ownership up to and including the submission date, which is incompatible with the Company's argument that it can pre-notify proof-of-ownership deficiencies).

<sup>2</sup> Notably, the alleged "DTC Participant" deficiency, on which the Supplemental Letter now focuses exclusively, was a footnoted throw-in in the Company's original no-action request, which relied on the Company's mistaken "self-certification" argument.



held that broker letters must demonstrate proof of ownership *up to and including the date of submission*, and because brokers will reasonably not attest to share ownership for a future date, proponents cannot provide proof of ownership letters to issuers in advance of the filing date or even shortly thereafter. Brokers generally will not begin acting on such a request until the day the filing date has passed. This creates a more-or-less *automatic* proof-of-ownership deficiency for *every proposal* submitted by a retail investor.<sup>3</sup> Once a deficiency notice is given, proof of ownership becomes due within 14 days, even though companies won't send their proxies to the printers (or receive Staff answers to no-action requests) for months. Shareholders are therefore placed into an *immediate and artificial* race against the clock – with no control over the racer. Moreover, because of the timing of most company meetings for which proposals are submitted, the 14-day deficiency period – as it did here – usually includes the winter holidays, during which many brokers simply become unresponsive. The Staff does not permit any allowances for this fact. *See Exxon Mobil Corp.* (Mar. 6, 2020) (concurring with exclusion due to late response to deficiency even where 14-day response period included Christmas Eve, Christmas Day, New Year's Eve, and New Year's Day).

The circumstances here are an excellent example of the timing problem built into Rule 14a-8 proof of ownership requirement: *As You Sow* initiated the process of requesting a proof of ownership letter for the Proponent on December 8<sup>th</sup> – *six days* before the Company sent its deficiency notice. It followed up with Proponent's asset manager *three times* during the deficiency period. The broker provided the letter, and the asset manager forwarded it to *As You Sow*, on January 9<sup>th</sup> – a full month after the initial request. That letter contained significant errors, including language that the Staff has held is inadequate to prove ownership – a fact of which the broker should know. *See The Coca-Cola Co.* (Feb. 12, 2021) (Jan. 14, 2021 letter from Sanford Lewis). After failing to receive a correction for *nine more days*, including at least one follow-up, *As You Sow* sent the Company the broker letter on January 18, the same day that the Company filed its no-action request. Such letter provided the Company with information stating valid ownership for the required time period. In the face of proponents' multiple and timely attempts to gather ownership information from the broker, some flexibility for circumstances beyond their control should be extended. The Staff often provide such a courtesy to issuers that miss stated deadlines. *See, e.g.*, Rule 14a-8(j) (permitting late no-action requests upon a showing of "good cause").

Further, the Company Letter argues that *As You Sow*, because it has represented many investors over the years, should know or do something different. But *As You Sow* does not – because it cannot – request proofs of ownership on behalf of the shareholders it represents. ***Brokers will not provide such letters to a third-party representative.*** While *As You Sow* routinely attempts to forward along a template that satisfies the Commission's guidance concerning proof of ownership letters, brokers ignore or outright refuse to use the template. Accordingly, *As You Sow* has no control over whether the proof of ownership it receives from proponents (or their asset managers from their brokers) complies with the Rule. When it is possible, *As You Sow* makes every effort to correct errors in proof-of-ownership letters. But brokers frequently ignore or refuse such requests. Accordingly, references to *As You Sow's* knowledge of the shareholder

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<sup>3</sup> A cursory review of no-action letters submitted to the Commission demonstrates that virtually every such letter, regardless of the asserted basis of exclusion, includes such a deficiency in its procedural history. *See, e.g.*, Staff precedent cited *supra*.

process, or the requirements of proof-of-ownership letters, are simply irrelevant. *See* Supplemental Letter at 3. *As You Sow* – unfortunately – plays an extraordinarily limited role in acquiring proof-of-ownership letters for proponents it represents.<sup>4</sup>

*As You Sow* does not dispute that the Company did not timely receive a proof-of-ownership letter for the Proponent. But the reality is that: (a) the Proponent is, in fact, eligible to submit the Proposal; (b) the Proponent made every reasonable effort to obtain proof-of-ownership *before* the Company even initiated the deficiency process, with multiple follow-up attempts during the deficiency period, and was unable to do so through no fault of the Proponent or its representative; and (c) the Company is not in any meaningful way prejudiced by receiving proof of ownership on January 18 instead of December 28.

This easily avoidable confluence of events amounts to a significant interference in the ability of shareholders to exercise their rights under Rule 14a-8. Proponents are increasingly being denied their right to present proposals due to brokers' inability or intransigence, thereby undermining a critical component of shareholder democracy. The situation is untenable and adjustments are needed.

### CONCLUSION

Based on the foregoing, we believe that the Company has provided no basis for the conclusion that the Proposal is excludable from the 2024 proxy statement pursuant to Rule 14a-8. We urge the Staff to deny the no action request.

Sincerely,



Luke Morgan  
Staff Attorney, *As You Sow*

cc:

Douglas K. Schnell, Wilson Sonsini Goodrich & Rosati  
Julie Coletti, Align Technology, Inc.  
Paul Katawicz, Align Technology, Inc.  
Melissa Sallee, Align Technology, Inc.

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<sup>4</sup> For this and many other reasons, to include basic due process and equal protection, the Staff should reject the Company's argument that the Staff should invent an *As You Sow*-specific rule that, based on *As You Sow*'s "historical experience" with shareholder proposals, its clients are no longer entitled to the deficiency process outlined in Rule 14a-8. *See* Supplemental Letter at 3.