

1 ALAN W. SPARER (No. 104921)
2 MARC HABER (No. 192981)
3 JAMES S. NABWANGU (No. 236601)
4 LAW OFFICES OF ALAN W. SPARER
5 100 Pine Street, 33rd Floor
6 San Francisco, California 94111-5128
7 Telephone: 415/217-7300
8 Facsimile: 415/217-7307
9 asparer@sparerlaw.com
10 mhaber@sparerlaw.com
11 jnabwangu@sparerlaw.com

12 Attorneys for Plaintiffs
13 MICHAEL B. ESHELMAN, D.D.S.; PETER
14 F. SILCHER, D.D.S.; and LORI I. SILCHER

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

13 MICHAEL B. ESHELMAN, D.D.S.; PETER
14 F. SILCHER, D.D.S.; and LORI I. SILCHER,

No. C 07 1429 JSW

Action Filed: March 12, 2007

15 Plaintiffs,

16 v.

DECLARATION OF JAMES S.
NABWANGU IN OPPOSITION TO
DEFENDANTS 3i'S AND BADAWI'S
MOTION TO DISMISS

17 ORTHOCLEAR HOLDINGS, INC. a British
18 Virgin Islands Company; ORTHOCLEAR,
19 INC., a Delaware Corporation;
20 MUHAMMAD ZIAULLAH CHISHTI, an
21 individual; HUAFENG "CHARLES" WEN,
22 an individual; PETER RIEPENHAUSEN, an
23 individual; ARTHUR T. TAYLOR, an
24 individual; SAIYED ATIQ RAZA, an
25 individual; CHRISTOPHER KAWAJA, an
26 individual; PATRICIA HUMELL SEIFERT,
27 an individual; JOSEPH BREELAND, an
28 individual; MUDASSAR RATHORE, an
individual; PAUL BADAWI, an individual;
3i Technology Partners III, LP; and DOES 1
through 25, inclusive,,

Date: January 4, 2008
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White
Trial Date: Not Set

Defendants.

1 I, James S. Nabwangu, declare as follows:

2 1. I am an attorney with the Law Offices of Alan W. Sparer. I am duly licensed to
3 practice before the courts of this State, and I am counsel for Plaintiffs Michael B. Eshelman,
4 D.D.S., Peter F. Silcher, D.D.S., and Lori I. Silcher (“Plaintiffs”) in this case. I make this
5 declaration in connection with Plaintiffs’ Opposition to Defendants 3i’s and Badawi’s Motion to
6 Dismiss. Except as otherwise indicated, the statements made herein are based on my personal
7 knowledge, and if called upon to do so, I would and could testify competently thereto.

8 2. Attached hereto as Exhibit A is a true and correct copy of an OrthoClear letter to
9 Shareholders dated March 8, 2007, emailed to Shareholders by OrthoClear’s Finance and
10 Investor Relations department.

11 3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the BVI
12 Business Companies Act of 2004, amended 2005, effective 2006.

13 I declare under penalty of perjury that the foregoing is true and correct. Executed on this
14 9th day of November 2007 in San Francisco, California.

15 _____ /s/
16 JAMES S. NABWANGU

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Main Identity

From: "Marko Varik" <marko.varik@orthoclear.com>
To: <office@woodlandsbraces.com>
Sent: Monday, October 02, 2006 5:20 PM
Attach: Preferred Shareholder FAQ Letter 2006-10-02.pdf
Subject: Re: URGENT. Important shareholder document needing you immediate attention.

Today there was a letter sent out explaining a bit what has been going on. I have attached this letter also to this mail. In case you should have some more questions after reading this letter please feel free to contact me again.

And I am really sorry that it took so long before we were able to send out an explanation to our shareholders.

Marko Varik
Finance & Investor Relations
OrthoClear
marko.varik@orthoclear.com
Office: 415.362.4800 ext. 1007

On 10/2/06 6:19 AM, "office@woodlandsbraces.com" <office@woodlandsbraces.com> wrote:

> You honestly can't expect us, who have contributed collectively 425,000
> dollars, to sign a one page document that gives us no explanation nor
> information. I would think you owe us a detailed explanation as to what we
> can reasonably expect as a result of your actions.

> ----- Original Message -----

> From: "Marko Varik" <marko.varik@orthoclear.com>

> To: "Marko Varik" <marko.varik@orthoclear.com>

> Sent: Thursday, September 28, 2006 5:28 PM

> Subject: URGENT. Important shareholder document needing you immediate
> attention.

>

>

>> Please give the following your immediate attention.

>>

>> Marko Varik

>> Finance & Investor Relations

>> OrthoClear

>> marko.varik@orthoclear.com

>> Office: 415.362.4800 ext. 1007

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>

Marko Varik

EXHIBIT A

1/10/2007

Finance & Investor Relations
OrthoClear
marko.varik@orthoclear.com
Office: 415.362.4800 ext. 1007

OrthoClear

October 2, 2006

Dear Preferred Shareholder:

On Thursday, September 28, 2006 we transmitted a brief letter and request that you approve a settlement with Align Technology, Inc. that would transfer \$20 million to OrthoClear Holdings, Inc. if OrthoClear exits the aligner market world-wide. We have received follow-up questions and we will attempt to respond collectively to those questions.

First, what is the status of the settlement? The core settlement terms are complete, subject to shareholder approval for OrthoClear's exiting from the aligner business on a worldwide basis instead of only the United States. Align will pay \$10 million to OrthoClear under the terms of the settlement, and an additional \$10 million provided that approval is obtained and the company exits the clear aligner market world-wide. All of this money goes to the corporation, not to any individuals who are giving or obtaining releases.

Second, why should you sign this document? We believe that retaining the right to continue in the aligner business outside of the United States would not have much value in itself, because we would continue to face the potential for litigation overseas. The requested consent will allow us to obtain an additional \$10 million, which can be used to meet our obligations to creditors, employees, and shareholders.

Third, what are OrthoClear's plans for the future? The settlement terms do not require OrthoClear to cease operations or to dissolve. During the next several weeks, we have the opportunity to evaluate alternative business models, including deploying our overseas plant as a contract manufacturing site. No final decision has been made about the approach to take, but our goal is to maximize investor return. We will not delay this process and anticipate that decisions on whether to pursue a new direction or wind-up the business entirely will be made before year-end.

The timing of the settlement was influenced by a variety of factors, including the rapid approach of two trials in 2006 and the increasing litigation costs associated with the trials and the four other pending cases with Align. In addition, on the eve of court-ordered settlement discussions, International Trade Commission staff attorneys suggested an interpretation of one patent that increased the risk of an exclusion order prohibiting us from importing aligners into the U.S. Although it is possible that we may have been able to have an order like this overturned eventually, in the meantime we faced a risk of disruption to our business and to our customer deliveries.

We determined it was not feasible to pursue alternatives in a commercially reasonable time period with the resources we had available or were likely to be able to obtain. We also did not want our existing customers to have to pay for alternate aligner treatment. Finally, even if we were ultimately successful in the ITC proceeding we would have faced continuing material litigation with Align in other courts.

A key point of the settlement is that Align must complete pending OrthoClear cases at no charge to the doctor or patient. The \$20 million payment from Align will provide us cash to orderly shut down those parts of the business worldwide that cannot be readily redeployed, curtail further Align litigation expense, and maximize the opportunity to provide return to shareholders.

The exact amount of money that may be returned to shareholders in each class has not yet been determined and cannot be determined unless and until there is an actual liquidation.

VIRGIN ISLANDS

THE BVI BUSINESS COMPANIES ACT, 2004

No. 16 of 2004

**Amended by
26/2005**

Subsidiary Legislation

Segregated Portfolio Companies Regulations, 2005 (S.I. 2005 No. 96)

**Revised under the Statute Revision Act, 2005 (No. 25 of 2005)
as of 1st January, 2006**

EXHIBIT B

59. (1) Subject to section 57, a company may purchase, redeem or otherwise acquire its own shares in accordance with either Company may purchase, redeem or otherwise acquire its own shares.

(a) sections 60, 61 and 62; or

(b) such other provisions for the purchase, redemption or acquisition of its own shares as may be specified in its memorandum or articles. 26/2005

(2) Sections 60, 61 and 62 do not apply to a company to the extent that they are negated, modified or inconsistent with provisions for the purchase, redemption or acquisition of its own shares specified in the company's memorandum or articles. 26/2005

(3) Where a company may purchase, redeem or otherwise acquire its own shares otherwise than in accordance with sections 60,61 and 62, it may not purchase, redeem or otherwise acquire the shares without the consent of the member whose shares are to be purchased, redeemed or otherwise acquired, unless the company is permitted by the memorandum or articles to purchase, redeem or otherwise acquire the shares without that consent.

(4) Unless the shares are held as treasury shares in accordance with section 64, any shares acquired by a company are deemed to be cancelled immediately on purchase, redemption or other acquisition. 26/2005

60. (1) The directors of a company may make an offer to purchase, redeem or otherwise acquire shares issued by the company, if the offer is Process for purchase, redemption or other acquisition of own shares.

(a) an offer to all shareholders to purchase, redeem or otherwise acquire shares issued by the company that 26/2005

(i) would, if accepted, leave the relative voting and distribution rights of the shareholders unaffected; and

(ii) affords each shareholder a reasonable opportunity to accept the offer; or

(b) an offer to one or more shareholders to purchase, redeem or otherwise acquire shares

(i) to which all shareholders have consented in writing; or

(ii) that is permitted by the memorandum or articles and is made in accordance with section 61.

(2) Where an offer is made in accordance with subsection (1)(a), 26/2005

- (a) the offer may also permit the company to purchase, redeem or otherwise acquire additional shares from a shareholder to the extent that another shareholder does not accept the offer or accepts the offer only in part; and
- (b) if the number of additional shares exceeds the number of shares that the company is entitled to purchase, redeem or otherwise acquire, the number of additional shares shall be reduced rateably.

Offer to one or
more shareholders.
26/2005

61. (1) The directors of a company shall not make an offer to one or more shareholders under section 60(1)(b) unless they have passed a resolution stating that, in their opinion,

- (a) the purchase, redemption or other acquisition is to the benefit of the remaining shareholders; and
- (b) the terms of the offer and the consideration offered for the shares are fair and reasonable to the company and to the remaining shareholders.

(2) A resolution passed under subsection (1) shall set out the reasons for the directors' opinion.

(3) The directors shall not make an offer to one or more shareholders under section 60(1)(b) if, after the passing of a resolution under subsection (1) and before the making of the offer, they cease to hold the opinions specified in subsection (1).

26/2005

(4) A shareholder may apply to the Court for an order restraining the proposed purchase, redemption or other acquisition of shares under section 60(1)(b) on the grounds that

- (a) the purchase, redemption or other acquisition is not in the best interests of the remaining shareholders; or
- (b) the terms of the offer and the consideration offered for the shares are not fair and reasonable to the company or the remaining shareholders.

Shares redeemed
otherwise than at
option of company.

62. (1) If a share is redeemable at the option of the shareholder and the shareholder gives the company proper notice of his intention to redeem the share

- (a) the company shall redeem the share on the date specified in the notice, or if no date is specified, on the date of the receipt of the notice;

- (b) unless the share is held as a treasury share under section 64, the share is deemed to be cancelled; and
- (c) from the date of redemption, the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.

(2) If a share is redeemable on a specified date

- (a) the company shall redeem the share on that date;
- (b) unless the share is held as a treasury share under section 64, the share is deemed to be cancelled; and
- (c) from the date of redemption, the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.

(3) Where a company redeems a share under subsections (1) and (2), sections 60 and 61 do not apply.

63. The purchase, redemption or other acquisition by a company of one or more of its own shares is deemed not to be a distribution where

Purchases,
redemptions or
other acquisitions
deemed not to be a
distribution.

- (a) the company redeems the share or shares under and in accordance with section 62;
- (b) the company redeems the share or shares pursuant to a right of a shareholder to have his shares redeemed or to have his shares exchanged for money or other property of the company; or
- (c) the company purchases, redeems or otherwise acquires the share or shares by virtue of the provisions of section 179.

26/2005

64. (1) A company may hold shares that have been purchased, redeemed or otherwise acquired under section 59 as treasury shares if

Treasury shares.

26/2005

- (a) the memorandum or articles of the company do not prohibit it from holding treasury shares;
- (b) the directors resolve that shares to be purchased, redeemed or otherwise acquired shall be held as treasury shares; and
- (c) the number of shares purchased, redeemed or otherwise acquired, when aggregated with shares of the same class already held by the company as treasury shares, does not exceed fifty per cent of the

- (b) as to the costs of the proceedings; and
- (c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the members represented.

Prejudiced
members.

184I. (1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders

- (a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;
- (b) requiring the company or any other person to pay compensation to the member;
- (c) regulating the future conduct of the company's affairs;
- (d) amending the memorandum or articles of the company;
- (e) appointing a receiver of the company;
- (f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;
- (g) directing the rectification of the records of the company;
- (h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.

(3) No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings in which the application is made.