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Suit over lost patent trial rejected

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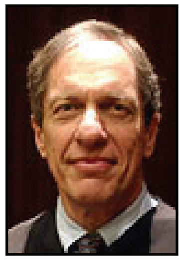
A defunct San Francisco purveyor of invisible braces didn't hoodwink investors about its chances in a bet-the-company patent case, a federal judge ruled Friday.

OrthoClear Inc. settled a patent case with Align Technology Inc. in 2006, agreeing to shut down its business in exchange for $20 million. But a cadre of angry orthodontists who'd invested in the company sued OrthoClear and its executives for misleadingly assuring them that Align's patent suit had no merit.

U.S. District Judge Jeffrey White dismissed the class action once and for all, ruling that OrthoClear, a private company, had warned its investors about the risks of the litigation with Align. White cited a disclaimer sent to investors, stating that a negative result in the Align case could "have a substantial adverse effect on the company and on any investment in the shares." He also ruled that the OrthoClear execs didn't make intentionally misleading statements about the litigation.

"It's not a violation of securities laws to be wrong about how a litigation is going to turn out," said Charles "Chip" Rice, a Shartsis Friese lawyer who represented OrthoClear along with Arthur Shartsis.



Jeffrey White

The federal judge dismissed an investor class action against OrthoClear and its executives.

Alan Sparer, of the Sparer Law Group in San Francisco, said the investing orthodontists he represents will appeal the final dismissal.

"Obviously since they're boilerplate disclosures, it's not sufficient when you've also said there's no real issue," Sparer said. "You can't do both and claim you're protected."

Even though patent cases can make or — as in this case — break a company, there are relatively few securities fraud cases filed because of negative trial outcomes. Securities litigators say that's because most everything about litigation is already out in the public, making it difficult to prove that the company is intentionally misleading investors.

"It's tough to prove scienter in this type of case," said Michael Charlson, a partner at Hogan & Hartson in Palo Alto. "You've told people the case is out there; it's all out there on the public record — people can go look at the court documents if they want."

And then there's also the fact that litigation is inherently unpredictable, Charlson said.

The patent fight began shortly after OrthoClear was founded in 2005 by top executives from Santa Clara's Align Technology. The two traded suits and countersuits, alleging everything from patent infringement to trade libel.

The investors targeted OrthoClear as well as its execs, including General Counsel Patricia Hummel Seifert, who was represented by Robie & Matthai (a number of other firms represented other executives), but without success.

Aside from this securities lawsuit, the Align-OrthoClear patent fight also spawned an insider trading investigation when an OrthoClear board member bought a bunch of Align stock ahead of the settlement announcement. Saiyed Atiq Raza paid a $3 million fine to the SEC to settle the charges last year.

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