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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

SUSAN BITTER SMITH, Chairman  
BOB STUMP  
BOB BURNS  
DOUG LITTLE  
TOM FORESE

ORIGINAL

In the matter of:	)
KENT MAERKI and NORMA JEAN COFFIN	)
aka NORMA JEAN MAERKI, aka NORMA	)
JEAN MAULE, husband and wife,	)
DENTAL SUPPORT PLUS FRANCHISE, LLC,	)
an Arizona limited liability company	)
Respondents.	)

DOCKET NO. S-20897A-13-0391  
**SECURITIES' DIVISION RESPONSE  
TO RESPONDENTS' MOTION TO  
CONTINUE HEARING**  
Arizona Corporation Commission

DOCKETED

JAN 20 2015

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The Securities Division received Respondents' Motion to Continue Hearing ("Motion to Continue") on January 12, 2015. Respondents seek a continuance of the hearing scheduled to begin on February 9, 2015, due to Respondent Maerki's health and a pre-existing scheduling conflict with local counsel. Respondents' Motion to Continue should be denied. The Securities Division objects to any further continuance for the reasons outlined below.

**A. PROCEDURAL HISTORY**

On November 18, 2013, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, and Order for Other Affirmative Action ("Notice"). The Respondents requested a hearing on December 10, 2013. A Procedural Order was issued on January 17, 2014, scheduling a hearing to begin on June 2, 2014.

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1 On May 9, 2014, Respondents Maerki and Dental Support Plus Franchise, LLC<sup>1</sup>, filed a  
2 motion requesting a continuance of part of the scheduled hearing dates due to a scheduling conflict  
3 with a business trip and unrelated court dates. The Division objected to any type of continuance. In  
4 its Fourth Procedural Order, ALJ Stern found good cause was not established and scheduled the  
5 matter for oral arguments.<sup>2</sup> On May 22, 2014, a procedural conference was held regarding the  
6 Motion to Continue filed by the Respondents Maerki and Dental Support Plus Franchise, LLC. At  
7 this time, Respondents Maerki and Dental Support Plus Franchise, LLC indicated that they had  
8 retained out-of-state counsel. Therefore, the hearing was continued, with an agreement between all  
9 parties, to schedule the hearing to begin on September 29, 2014.<sup>3&4</sup>

10 On September 22, 2014, Respondents filed Respondents' Emergency Application to  
11 Continue to Hearing and Motion for Order to Shorten Time ("Emergency Application") requesting  
12 a shortened time for response and ruling. The Securities Division objected to any further  
13 continuances. In its Ninth Procedural Order, ALJ Stern continued the hearing. At a status  
14 conference on November 13, 2014, ALJ Stern indicated that he would reschedule the hearing to the  
15 beginning of the year. On December 10, 2014, ALJ Stern issued a Tenth Procedural Order  
16 scheduling the hearing to commence on February 9, 2015, with additional dates through February  
17 26, 2015.

18 On January 5, 2015, the Securities Division received an email from Respondents' counsel  
19 requesting a continuance due to a conflict with the scheduled hearing and local counsel's schedule.  
20 Since it was clear that the conflict was known long before the hearing was rescheduled, the  
21 Securities Division denied the request.

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<sup>1</sup> Respondent Norma Jean Coffin aka Norma Jean Maerki, aka Norma Jean Maule did not request a continuance at this  
24 time.

<sup>2</sup> See Fourth Procedural Order (Schedules Procedural Conference).

<sup>3</sup> See Fifth Procedural Order (Continues Hearing and Schedules Status Conference).

25 <sup>4</sup> Contrary to the representations of Respondents' counsel, Marie Mirch, neither the Fourth Procedural Order nor the  
26 Fifth Procedural Order referenced "an issue as to whether there was a criminal investigation pending against Mr.  
Maerki." See January 9, 2015, Respondents' Motion to Continue Hearing, page 3, second paragraph last sentence and  
footnote 1.

1 On January 12, 2015, the Securities Division received a copy of Respondents' Motion to  
2 Continue Hearing dated January 9, 2015 ("Motion to Continue"). The Securities Division objects to  
3 any further continuances of this matter.

4 **B. RESPONDENT MAERKI'S HEALTH CONDITION SHOULD NOT BE A GRANT**  
5 **OF IMMUNITY**

6 The Securities Division is sympathetic to Respondent Maerki's health issues. However,  
7 Respondent Maerki's health issues should not be used to protect him from taking responsibility for  
8 his business practices. Respondent Maerki's health issues have existed and have been treated for  
9 years. Throughout the creation of DSPF and the raising of over \$12 million, Respondent Maerki  
10 has had the same health issues.

11 As stated by Respondent Maerki's counsel, he is driving and going to work.<sup>5</sup> According to  
12 the medical records attached to the Emergency Application, Respondent Maerki has had medical  
13 issues for an extended period prior to the stroke in August of 2014. Respondent Maerki's medical  
14 history reveals that he has had long term medical issues including Afib, hypertension, questionable  
15 walking issues, nine concussions, four cerebral hemorrhages, and sleep apnea.<sup>6</sup> Those long term  
16 medical issues have not caused Respondent Maerki issues in creating businesses, driving, traveling  
17 and raising millions of dollars from investors in multiple businesses. In a report from Barrow  
18 Neurovascular, Respondent Maerki's past medical history includes many of the same issues  
19 discussed in Dr. Wolfson's affidavit attached to the current Motion to Continue.<sup>7</sup>

20 According to Respondent Maerki's neurologist, a neuropsychologist should make the  
21 determination related to his competency to endure a hearing.<sup>8</sup> Respondent Maerki was seen by a  
22 neuropsychologist on October 9, 2014.<sup>9</sup> The report indicates that Respondent Maerki is beginning a  
23 new startup company and that he functions well under self-induced stress such as creating a new

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25 <sup>5</sup> See Transcript of September 26, 2014, page 16, lines 12 – 22.

26 <sup>6</sup> See Exhibit 5 of the Emergency Application.

<sup>7</sup> See Exhibits 6.1, 7, 7.15, 7.17 of the Emergency Application.

<sup>8</sup> See Exhibit 2 of Clapper Affidavit attached as Exhibit A.

<sup>9</sup> See Exhibit 1 of Clapper Affidavit Bates No. ACC127095 –ACC127099.

1 company.<sup>10</sup> However, the report continued, Respondent Maerki does feel stressed about the  
2 pending lawsuits.<sup>11</sup> According to the report issued by Scottsdale Healthcare Outpatient Therapy  
3 Services, dated October 14, 2014, Respondent Maerki works 70 hours per week in his businesses  
4 which is a decrease from the 120 hours prior to the stroke.<sup>12</sup> Further, the report says Respondent  
5 Maerki travels 2 - 3 days a month for business.<sup>13</sup> The Assessment indicates that Respondent Maerki  
6 continues to run his businesses.<sup>14</sup>

7 There is no doubt that Respondent Maerki has some health issues. However, if Respondent  
8 Maerki is able to drive, travel, operate his businesses and start new businesses, he should be able to  
9 assist in his defense of the allegations in the Notice.

### 10 C. CONFLICT WAS KNOWN WHEN HEARING SCHEDULED

11 This is the second time Respondents have requested a continuance based upon an  
12 undisclosed pre-existing conflict. The first hearing was scheduled to begin on June 2, 2014.  
13 Respondents filed a Motion to Continue the June 2, 2014, hearing date citing an “unmovable  
14 business trip.”<sup>15</sup> According to the invoice attached to the Respondents’ May 9, 2014, Motion to  
15 Continue, payment for the “unmovable business trip” was made on November 12, 2013. The  
16 Procedural Conference to schedule the hearing was on January 16, 2014. Four months after the  
17 Third Procedural Order was issued scheduling the hearing to begin June 2, 2014, the Respondents’  
18 requested a continuance for an “unmovable business trip” that was scheduled two months before  
19 the Third Procedural Order was issued.

20 With Respondents’ latest Motion to Continue dated January 9, 2015, local counsel  
21 apparently has a conflict with the recently scheduled hearing date. Local counsel appeared at the  
22 November 13, 2014, status conference. A discussion was held regarding the rescheduling of the  
23 hearing. ALJ Stern indicated that the “earliest I would foresee a hearing would probably be in the

24 <sup>10</sup> See Exhibit 1 to Clapper Affidavit, Bates No. ACC127096.

25 <sup>11</sup> Id.

26 <sup>12</sup> See Exhibit 1 to Clapper Affidavit, Bates No. ACC127115.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> See Respondent’s Motion for Continuance docketed on May 9, 2014.

1 beginning of next year. Now, the question is, is it going to be before February, after February or  
 2 somewhere in between? I don't quite know."<sup>16</sup> ALJ Stern also stated that the hearing "may fall in  
 3 January. It could fall in February . . ."<sup>17</sup> Local counsel requested that the hearing be scheduled  
 4 "sometime after February," not due to a schedule conflict but due Respondent's health.<sup>18</sup> At no  
 5 time did local counsel disclose that they would be unavailable for the month of February.

6 The failure of Respondents' local counsel to disclose a known conflict should not be  
 7 grounds to continue the hearing. Local counsel is not required to participate in the hearing.

#### 8 **D. LOCAL COUNSEL NOT REQUIRED TO ATTEND HEARING**

9 Pursuant to the Arizona Rules of the Supreme Court Rule 38(a)(2):

10 *Association of Local Counsel.* No nonresident attorney may appear pro hac vice  
 11 before any court, board or administrative agency of this state unless the  
 12 nonresident attorney has associated in that cause an attorney who is a member in  
 13 good standing of the State Bar of Arizona (hereinafter called local counsel). The  
 14 name of local counsel shall appear on all notices, orders, pleadings, and other  
 15 documents filed in the cause. Local counsel **may be required** to personally  
 16 appear and participate in pretrial conferences, hearings, trials, or other  
 17 proceedings conducted before the court, board, or administrative agency when the  
 18 court, board, or administrative agency deems such appearance and participation  
 19 appropriate. Local counsel associating with a nonresident attorney in a particular  
 20 cause shall accept joint responsibility with the nonresident attorney to the client,  
 21 to opposing parties and counsel, and to court, board, or administrative agency in  
 22 that particular cause. Emphasis added.

23 In Mr. Chester's Motion to Associate Counsel *Pro Hac Vice*, he agreed to serve as local  
 24 counsel in this matter and accepted the responsibilities detailed in Rule 38(a)(2), *Ariz.R.Sup.Ct.* In  
 25 the Seventh Procedural Order, ALJ Stern granted the Motion to Associate Counsel. There is no  
 26 specific requirement that Mr. Chester was "required to personally appear and participate in pretrial  
 27 conferences, hearings, trials, or other proceedings conducted before the . . . administrative agency."

28 *Id.*

29 Since Mr. Chester's conflict with scheduled hearing dates was known during the status  
 30 conference and it was not disclosed to the ALJ or the Securities Division, the assumption is that

16 See Transcript dated November 13, 2014, page 10, lines 6 – 9.

17 See Transcript dated November 13, 2014, page 13, lines 12 – 13.

18 See Transcript dated November 13, 2014, page 8, line 20.

1 there was not going to be a conflict. Otherwise the conflict would have certainly been raised to  
2 avoid having to file a motion to continue the hearing yet again.

3 **E. RESPONDENTS DUE PROCESS RIGHTS ARE PROTECTED**

4 According to the January 9, 2015, Motion for Continuance, Respondents' counsel states that  
5 "[d]ue process affords Mr. Maerki the right to meaningfully participate in the hearing."<sup>19</sup>  
6 Respondent Maerki is being afforded all his due process rights. He retained counsel to represent  
7 him in this matter. Respondent Maerki's counsel will assure that his rights will not be violated.  
8 Those rights will not be violated if Respondent Maerki is not present. The Securities Division did  
9 not issue a subpoena requiring his presence at the hearing. It is Respondent Maerki's choice to  
10 appear or have his legal counsel protect his rights.

11 Pursuant to A.R.S. §41-1062(A)(1), every person who is a party to such proceedings shall  
12 have the right to be represented by counsel. Pursuant to A.A.C. R14-3-104(A), the party shall be  
13 entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make  
14 arguments, and generally participate in the conduct of the proceeding. Respondent Maerki has  
15 those rights. Respondent Maerki retained counsel to represent him. Respondent Maerki's counsel  
16 has entered an appearance, and will have the right to introduce evidence, examine and cross-  
17 examine witnesses, make arguments, and generally participate in the conduct of the proceeding.  
18 Respondent Maerki's rights will be protected by his counsel. It is his choice whether to be present  
19 at the hearing or not.

20 **F. THE SECURITIES DIVISION IS PREJUDICED BY THE CONTINUED DELAYS**

21 On December 10, 2013, the Respondents requested a hearing. There have been three  
22 hearing dates set during the past year. The Securities Division was and is prepared to go forward  
23 with this matter. The Respondents represent they have "voluntarily and permanently ceased  
24 operations in July, 2014."<sup>20</sup> The Respondents have not addressed the other issues raised in the  
25

26 <sup>19</sup> Id at page 6, paragraph C1.

<sup>20</sup> See January 9, 2015, Respondents' Motion to Continue Hearing, page 7, paragraph D.

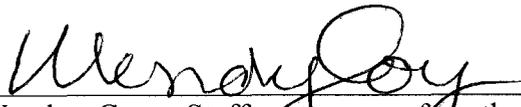
1 Notice of Opportunity for Hearing such as a cease and desist order against the Respondents,  
2 restitution and penalties. Ceasing operations does not erase any past violations.

3 The Securities Division has a duty to protect the public from fraudulent or deceptive  
4 practices in the offer or sale of securities and the prosecution of persons engaged in fraudulent or  
5 deceptive practices in the offer or sale of securities.<sup>21</sup> In order to fulfill its mandates, the Securities  
6 Division must be able to proceed in an efficient manner for the protection of the public.

7 **G. CONCLUSION**

8 The Respondents have had multiple continuances. This matter should move forward. This  
9 the second time the Respondents failed to disclose a known conflict and the third request for a  
10 continuance. Respondents requested a hearing. Respondent Maerki's rights are protected by  
11 counsel. There is no reason not to go forward with the hearing. The Respondents' Motion to  
12 Continue should be denied.

13 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of January, 2015.

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16 Wendy Coy, Staff Attorney for the Securities  
17 Division

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<sup>21</sup> Laws 1951, Ch. 18, §20.

1 SERVICE LIST FOR: KENT MAERKI and NORMA JEAN COFFIN aka NORMA JEAN  
2 MAERKI, aka NORMA JEAN MAULE, husband and wife, DENTAL SUPPORT PLUS  
3 FRANCHISE, LLC

4 ORIGINAL and 8 copies of the foregoing  
5 filed this 20<sup>th</sup> day of January, 2015, with:

6 Docket Control  
7 Arizona Corporation Commission  
8 1200 W. Washington St.  
9 Phoenix, AZ 85007

10 COPY of the foregoing hand-delivered  
11 this 20<sup>th</sup> day of January, 2015, to:

12 The Honorable Marc E. Stern  
13 Administrative Law Judge  
14 Arizona Corporation Commission  
15 1200 W. Washington St.  
16 Phoenix, AZ 85007

17 COPY of the foregoing mailed  
18 this 20<sup>th</sup> day of January, 2015, to:

19 Mark D. Chester  
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