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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
DOCKETED
JUN 09 2015

DOCKETED BY

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

ORIGINAL

FIFTEENTH PROCEDURAL ORDER (Grants Motion to Withdraw and Authorizes Extension of Time)

BY THE COMMISSION:

On November 18, 2013, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing ("Notice") against Kent Maerki and Norma Jean Coffin aka Norma Jean Maerki, aka Norma Jean Maule, husband and wife, and Dental Support Plus Franchise, LLC ("Dental Support") (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of investment contracts.

Respondents were duly served with a copy of the Notice.

On December 10, 2013, Respondents filed requests for hearing in response to the Notice in this matter pursuant to A.R.S §44-1972 and A.A.C. R14-4-306.

On December 11, 2013, by Procedural Order, a pre-hearing conference was scheduled on December 23, 2013.

On December 19, 2013, Respondent, Kent Maerki, filed a Motion for a Continuance stating that he would be unavailable due to previously scheduled business travel arrangements.

The Division indicated that it did not object to a brief continuance.

On December 20, 2013, by Procedural Order, a continuance to January 16, 2014 was granted.

On January 16, 2014, at the pre-hearing conference, the Division appeared through counsel and Respondents appeared on their own behalf. Counsel for the Division requested that a hearing be scheduled and estimated that the proceeding would require approximately two weeks of hearing to complete. Respondents did not object to this request, but indicated they may retain an out of state attorney who will comply with Arizona law to appear *pro hac vice*.

On January 17, 2014, by Procedural Order, a hearing was scheduled to commence on June 2, 2014, with additional days of hearing scheduled during the following weeks.

On May 9, 2014, the Division filed a Motion to Allow Telephonic Testimony stating five of its prospective witnesses would be unduly burdened if they were required to appear in Phoenix for the proceeding. There were no objections to the Division's request.

Respondent, Kent Maerki, on May 9, 2014, filed a Motion for a Continuance due to several conflicts that had arisen for him with the presently scheduled proceeding. The conflicts in two of three instances involved court proceedings in separate venues, the United States Bankruptcy Court for the District of Arizona on June 4, 2014 and the Maricopa County Superior Court on June 12, 2014.[1] The third conflict is purportedly based on a November 2013 invoice and involves an "unmovable business trip" which was to begin on June 2, 2014, but Mr. Maerki failed to raise this issue when the Commission's proceeding was scheduled in January.

On May 12, 2014, the Division filed its response to Respondent Maerki's request for a continuance of the proceeding. With respect to the June 4, 2014, proceeding in the United States Bankruptcy Court, the Division stated that Mr. Maerki's request for a continuance did not specify how this matter conflicted with this proceeding since the Petition in the bankruptcy proceeding lists Janus Spectrum, LLC as the debtor and named an unknown third party as the president or managing director of Janus Spectrum, LLC. The Division further noted that the Superior Court proceeding on June 12, 2014 was only scheduled for a status conference limited to 30 minutes and was to begin at 9:45 a.m. so that the Commission's proceeding on that date could be scheduled to begin in the early afternoon on that date. Lastly, the Division argued that the copy of the invoice was dated May 6,

[1] According to Mr. Maerki's Motion, these proceedings were scheduled only recently during the first week in May.

2014, and did not bear any reference to a business meeting that would conflict with the Commission's proceeding that had been scheduled to commence on June 2, 2014.

On May 15, 2014, by Procedural Order, good cause for a continuance of the proceeding was not found, but Mr. Maerki was afforded an opportunity to explain the merits of his motion further at a procedural conference scheduled on May 22, 2014. The Division's request to authorize telephonic testimony was also approved.

On May 22, 2014, at the procedural conference, the Division appeared with counsel and Mr. Maerki appeared on his own behalf. Mrs. Maerki did not appear and an appearance was not entered on behalf of Dental Support. At the outset, a brief discussion took place concerning Mr. Maerki's request for a continuance followed by Mr. Maerki's revelation that he had retained counsel, the Mirch Law Firm, LLP, from San Diego, California. Mr. Maerki provided a copy of a letter that was addressed to the presiding Administrative Law Judge from Attorney Marie Mirch which confirmed the firm's retention by the Respondents. Attorney Marie Mirch's letter indicated she was in the process of applying for *pro hac vice* status in Arizona and that a motion to associate counsel *pro hac vice* would be filed in the near future by local counsel. Additionally, Attorney Mirch indicated that she was unavailable for any hearing in June at the Commission due to other previously scheduled proceedings in California. A further discussion took place concerning a continuance and it was determined that the proceeding should be continued and a status conference should be scheduled in its place on July 9, 2014.

On May 27, 2014, by Procedural Order, the hearing scheduled to commence on June 2, 2014, was continued, and a status conference was scheduled on July 9, 2014. The Division was further granted authorization to utilize telephonic testimony during the presentation of its evidence.

On July 9, 2014, at the status conference, the Division appeared with counsel. Respondents were present with local counsel.[2] The Division requested that a hearing be scheduled and estimated that the proceeding would require approximately three weeks of hearing. After discussions with counsel, it was agreed that the matter would be scheduled to commence in late September and

[2] Attorney Mirch joined in the proceeding telephonically from California and indicated that her application to appear *pro hac vice* was pending with the State Bar of Arizona.

continue into October, 2014. It was also noted that the Division was planning to utilize approximately 13 witnesses and that the Respondents would possibly utilize six witnesses.

On July 10, 2014, by Procedural Order, a hearing was scheduled to commence on September 9, 2014.

On July 30, 2014, Respondents filed a Motion to Associate Counsel *Pro Hac Vice* pursuant to Arizona Law and the Rules of the Arizona Supreme Court.

On August 1, 2014, the Division filed a response stating that it had no objections to the Motion to Associate Counsel *Pro Hac Vice* filed by Respondents.

On August 5, 2014, by Procedural Order, Respondents' Motion to Associate Counsel *Pro Hac Vice* was granted.

On September 22, 2014, Respondents filed an Emergency Application to Continue Hearing ("Emergency Application") because Respondent, Kent Maerki, had suffered a stroke on August 27, 2014, and was hospitalized for two days. Respondent Maerki's counsel requested a continuance of at least eight weeks to permit him time to recover from his stroke. Attached to the Emergency Application as Exhibit 1 was a note from Mr. Maerki's cardiologist who recommended a delay in any legal proceedings for at least eight weeks because it was important that Mr. Maerki maintained a low stress level, after which he would be reevaluated by his physician.

On September 23, 2014, the Division filed a response to the Emergency Application and argued that it should be denied. In support of its response counsel for the Division argued that the medical evidence in support of the Emergency Application was not entirely clear and even after eight weeks whether Mr. Maerki would be able to participate in the proceeding. Additionally, the Division stated that it appeared that Respondent Maerki did not plan to attend the proceeding the week of September 29th because its investigator had learned that Respondent Maerki had a reservation at a hotel in Las Vegas, Nevada beginning on September 30, 2014, to attend the third week of a three part seminar that he had been participating in earlier in the year.

On September 24, 2014, by Procedural Order, Respondents were directed to reply to the Division's response which had been filed in this proceeding before a ruling would be made. Due to the short time available, a telephonic procedural conference was scheduled on September 26, 2014, to

address the issues raised by the Emergency Application.

On September 24th and 25th, 2014, the Division filed two supplemental responses in opposition to the Emergency Application.

On September 26, 2014, the Respondents filed an additional pleading purporting to be an affidavit in support of the Emergency Application. However, the document was not notarized.

Subsequently, on September 26, 2014, at the procedural conference, the Division and the Respondents appeared telephonically and argued the issues raised by the filing of the Emergency Application.

On September 26, 2014, by Procedural Order, it was found that good cause was established to continue the proceeding, and a procedural conference was scheduled on November 13, 2014, to determine the rescheduling of the hearing to avoid conflicts with the schedules of counsel and to allow for further medical evaluation of Respondent Maerki. Additionally, Respondent Maerki was ordered to provide the Division with the necessary medical releases so that the appropriate physicians could be contacted to discuss the Respondent's medical condition and his ability to participate in a three to four week long legal proceeding.

On November 13, 2014, at the procedural conference, the Division and Respondents appeared through counsel. A discussion of Mr. Maerki's present state of health was had and it was further discussed when his treating physician would provide an indication of whether Respondent Maerki would be able to participate in a legal proceeding lasting several weeks. At that time, it was believed that Mr. Maerki would see his cardiologist in mid-December and if a problem developed with the hearing that was to be scheduled, then the issue would be addressed upon the filing of the appropriate documentation.

On December 10, 2014, by Procedural Order, the hearing was scheduled to commence on February 9, 2015.

On January 14, 2015, Respondents filed a Motion to Continue Hearing for two reasons. First, Respondents included a copy of an affidavit from Respondent Kent Maerki's cardiologist, Dr. Jack Wolfson, who examined Mr. Maerki on January 7, 2015, and cited numerous heart related problems which in his opinion "can lead to life-threatening consequences." Dr. Wolfson further stated that Mr.

Maerki's "participation or appearance in any legal matter could have a very serious negative impact on his health." Additionally, he stated that he had advised Mr. Maerki not to participate in any "stressful events, in particular any legal proceedings." However, Dr. Wolfson failed to state, in his opinion, when Mr. Maerki would be physically able to appear at the Commission to address the allegations against him contained in the Notice. Second, Respondents stated that local counsel, Mark Chester, would not be available "on the dates set for hearing" due to a trial scheduled in the United States District Court for the Southern District of California. This trial was scheduled by a Scheduling Order dated September 22, 2014, that was also filed as an exhibit. However, no mention was made of this matter by an attorney from Mr. Chester's office who was present at the procedural conference on November 13, 2014, in order to avoid any possible conflicts with the scheduling of this hearing.

On January 20, 2015, the Division filed its response to the Motion to Continue Hearing filed by Respondents. The Division stated that it objected to any further continuances of the hearing in this matter. The Division pointed out that Mr. Maerki's medical records reflect a lengthy history of medical problems, but they had not prevented him from being involved in multiple businesses. Additionally, the Division related that a medical report of a neuropsychologist who examined Mr. Maerki on October 9, 2014, stated that Respondent functioned well under self-induced stress when starting a new business, but was stressed by his legal problems. Another report from Scottsdale Healthcare Outpatient Therapy stated that Mr. Maerki worked 70 hours per week running his businesses. The Division, based on these reports, concluded that Mr. Maerki "should be able to assist in his defense." However, the Division failed to address Dr. Wolfson's opinion made in his affidavit.

The Division, with respect to Respondents' local counsel's conflict with his earlier scheduled hearing in the United States District Court, stated that when scheduling this hearing no mention was made of the federal court hearing. The Division cited the Arizona Rules of the Supreme Court Rule 38(a)(2) and argued that there was no specific requirement for Mr. Chester to personally appear with Ms. Mirch who is appearing for the Respondents *Pro Hac Vice* in the proceeding and who, from all appearances, is acting as lead counsel.

On January 22, 2015, in the Eleventh Procedural Order, it was determined that before a ruling would be made on Respondents' Motion to Continue that supplemental filings would have to be

made by the Respondents and the Division. The Respondents would have to file a clarification from Dr. Wolfson of when, in his opinion, Mr. Maerki would be able to physically appear at the hearing on this matter if he chose to do so. The continuance requested by Mr. Chester due to his scheduling conflict would be addressed concurrently with the request due to Mr. Maerki's medical problem. The Eleventh Procedural Order ordered that Respondent's Motion for Continuance of Hearing was taken under advisement, and that Respondents were ordered to file by January 29, 2015, additional documentation from Dr. Jack Wolfson as to his opinion on a date certain that Respondent Maerki would be physically able to appear at the hearing if he wished to do so.

It was further ordered that the Division should file its response to the initial filing which contained Dr. Wolfson's opinion on January 14, 2015, and to any supplemental filing which contained clarification by Dr. Wolfson by February 5, 2015.

On January 29, 2015, Respondents filed a supplement to their Motion to Continue Hearing stating that Dr. Wolfson's affidavit would be forthcoming, but had not yet been received by Respondents' counsel. Additional reasons were also stated in support of the need of local counsel's presence at the hearing. Lastly, Ms. Mirch who is appearing *Pro Hac Vice* further stated that she had another reason for continuing the hearing due to the fact that her elderly mother who lives in Dallas, Texas has "become very ill" and that she would be flying to Dallas to be with her for as long as necessary.

On January 30, 2015, the second affidavit by Dr. Wolfson was filed wherein he stated that "Mr. Maerki should not participate in this hearing." Further, Dr. Wolfson opined "that Mr. Maerki's participation or appearance in any legal matter could have a very serious negative impact on his health. Therefore, I have advised Mr. Maerki that he is not to participate in any stressful events, in particular any legal proceedings."

On February 3, 2015, the Division responded that "Respondent Maerki should not be granted immunity due to his health issues." The Division argued that Mr. Maerki had freely selected his own counsel who "is able to adequately protect" the rights of Mr. Maerki at a hearing, and that Respondent Maerki's rights would be protected.

With respect to Mr. Maerki's *Pro Hac Vice* attorney's argument for the presence of local

counsel during the hearing on this matter, the Division represented that there is no specific requirement under the Arizona Rules of the Supreme Court for local counsel to personally appear and participate in the hearing, and that local counsel's scheduling conflict had not been disclosed earlier. In light of the illness of Ms. Mirch's mother, the Division objected to the lack of information provided by Ms. Mirch as to the nature of her mother's illness or how much of a delay would be required.

On February 5, 2015, Respondents' counsel, Ms. Mirch, filed an affidavit to further supplement and support the Motion to Continue filed on January 14, 2015, setting forth more fully the facts surrounding her 89 years old mother's medical condition and the fact that she would have to be in Dallas for at least the first week or more of the hearing.

The Division filed, on February 5, 2015, its Second Motion for Telephonic Testimony which named two additional witnesses that the Division wished to call as witnesses telephonically because they reside outside of Arizona and that it would be unduly burdensome for them to appear in Phoenix for the hearing.

On February 6, 2015, a teleconference took place with Ms. Mirch for the Respondents, and counsel for the Division present. The issues raised by the Motion to Continue and the Division's objection to the Motion to Continue were argued by counsel. When the arguments were concluded, the presiding Administrative Law Judge ("ALJ") advised counsel for the parties that the proceeding would be continued and a procedural conference scheduled to reschedule the hearing.

On February 10, 2015, by Procedural Order, the Respondents' Motion to Continue and the Division's Second Motion to Allow Telephonic Testimony were granted. It was further ordered that a procedural conference be held on February 26, 2015.

On February 26, 2015, at the procedural conference, the Division and Respondents appeared through counsel. Counsel discussed the number of witnesses for the parties and the expected length of the hearing. Additionally, the Division and the Respondents were advised that they should exchange copies of their complete Witness and Exhibit Lists by June 1, 2015, if not previously exchanged, with courtesy copies provided to the presiding ALJ. Respondents' counsel, Ms. Mirch , agreed that if she were to request to withdraw from the proceeding due to a fee dispute she would do

so no later than June 1, 2015. Lastly, the parties agreed that the hearing should commence on July 13, 2015, and believed that the evidentiary portion of the hearing would be concluded by the end of the month.

On March 17, 2015, by Procedural Order, the hearing was scheduled to commence on July 13, 2015.

On May 15, 2015, Respondents' counsel, Attorney Marie Mirch, who had been granted *Pro Hac Vice* status to appear on behalf of the Respondents, filed a Motion to Withdraw as Counsel ("Motion to Withdraw"). Attorney Mirch cited E.R. 1.16(b) of the Rules of Professional Conduct in support of her Motion to Withdraw. Ms. Mirch represented that the Respondents had been notified of her intent to withdraw as counsel of record and had been notified in writing of the status of the proceeding together with all upcoming deadlines. She also provided the Commission with all last known mailing addresses of the Respondents and the email address of Respondent Kent Maerki.

Neither the Respondents nor Respondents' local counsel, who it is presumed is aware of Ms. Mirch's action herein, responded to Attorney Mirch's Motion to Withdraw.

On May 15, 2015, the Division filed a response to Attorney Mirch's Motion to Withdraw and stated that it did not object to the Motion to Withdraw so long as the hearing schedule was not affected. Counsel for the Division further stated that Respondents' local counsel had thus far taken no action on Attorney Mirch's Motion to Withdraw.

On May 27, 2015, by Procedural Order, Attorney Mirch's Motion to Withdraw was granted, and local counsel was ordered to make a filing to inform the presiding Administrative Law Judge of his intentions with respect to whether he will continue in his representation of the Respondents, and whether he will be counsel of record at the hearing.

On June 1, 2015, Respondent, Kent Maerki, filed a request for an extension of time for the exchange of Respondents' copies of their Witness List and Exhibits and a filing on the franchise issue in the proceeding. Respondent Maerki stated that he is involved in other litigation and this litigation is slowing his response time since he now represents himself pro per.

On June 2, 2015, Attorney Mark D. Chester, who has acted as local counsel for the Respondents, filed a Motion to Withdraw as Counsel of Record pursuant to E.R. 1.16(b) after

Attorney Mirch's Motion to Withdraw was granted by Procedural Order on May 27, 2015.

On June 4, 2015, the Division filed separate responses to each of the aforementioned filings by Respondent Maerki and by Attorney Chester. With respect to Respondent Maerki's request, the Division noted that the Arizona Supreme Court Rules prohibit Respondent Maerki from representing his spouse who had been named as a Respondent in the proceeding solely for the purpose of determining the liability of the marital community pursuant to A.R.S. § 44-2031(C). The Division further argued it was illogical to believe that Respondent Maerki was not aware of the filing deadlines in light of Ms. Mirch's representations in her Motion to Withdraw. Further, the Division stated that on April 14, 2014, and January 5, 2015, copies of Witness Lists and Exhibits were provided to the Division by Respondent Maerki and Attorney Mirch, respectively. Lastly, with respect to an extension for the filing of a memorandum on the franchise issue, the Division stated that the Thirteenth Procedural Order dated March 17, 2015, established the filing date for this memorandum and that ample time had been allowed for the filing of this document.

With respect to Attorney Chester's Motion to Withdraw as Counsel of Record, the Division argued that Mr. Chester's motion should be denied because Respondents have not complied with their obligations to produce complete copies of Witness Lists and Exhibits and have failed to file a memorandum on the franchise issue. Further, the Division argued that the withdrawal of Respondents' remaining attorney could have a material adverse effect on the Respondents' interests.

Under the circumstances, after a review of the request by Respondent Maerki and Mr. Chester's motion and the Division's arguments against them, the request by Respondent Maerki is not unduly burdensome and an extension of time should be granted. Since two sets of these lists have previously been provided to the Division, if any additional witnesses or exhibits are added, the Division will be provided with additional time to address them if necessary during the hearing. As far as Mr. Chester's Motion to Withdraw as Counsel of Record, it should be granted. Further, Respondents may address the franchise issue in a closing memorandum if they choose to do so.

IT IS THEREFORE ORDERED that the **Respondents shall provide copies of their complete Witness List and Exhibits by July 1, 2015, to the Division** with courtesy copies to the presiding Administrative Law Judge, as previously ordered.

IT IS FURTHER ORDERED that the Respondents shall file a memorandum on the franchise issue by **July 1, 2015,** or if they choose to do so, include it as part of their closing brief.

IT IS FURTHER ORDERED that the Motion to Withdraw as Counsel of Record by Attorney Mark D. Chester is hereby granted.

IT IS FURTHER ORDERED that the **hearing** shall be held on **July 13, 2015, at 10:00 a.m.,** in Hearing Room No. 2 at the offices of the Commission, 1200 West Washington Street, Phoenix, Arizona, as previously ordered.

IT IS FURTHER ORDERED that the parties shall reserve **July 14, 15, 16, 20, 21, 22, 23, 27, 28, 29, and 30, 2015** for additional days of hearing, if necessary.

IT IS FURTHER ORDERED that all telephonic testimony shall be conducted over landlines.

IT IS FURTHER ORDERED **that if the parties reach a resolution of the issues raised in the Notice prior to the hearing, the Division shall file a Motion to Vacate the proceeding.**

IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized Communications) is in effect and shall remain in effect until the Commission's Decision in this matter is final and non-appealable.

IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission *pro hac vice.*

IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the Rules of the Arizona Supreme Court). Representation before the Commission includes appearances at all hearings and procedural conferences, as well as all Open Meetings for which the matter is scheduled for discussion, unless counsel has previously been granted permission to withdraw by the Administrative Law Judge or the Commission.

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IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 9TH day of June, 2015.

MARC E. STERN
ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered
and e-mailed this 9TH day of June, 2015 to:

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