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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

SUSAN BITTER SMITH, Chairman  
BOB STUMP  
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AZ CORP COMMISSION  
DOCKET CONTROL

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'S POST  
HEARING BRIEF

DOCKETED

OCT 19 2015

DOCKETED BY [Signature]

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its post-hearing brief as follows:

**I. PROCEDURAL HISTORY**

On November 18, 2013, the Division filed a Notice of Opportunity for Hearing ("Notice") against Kent Maerki ("Maerki") and Norma Jean Coffin aka Norma Jean Maerki, aka Norma Jean Maule ("Coffin") and Dental Support Plus Franchise, LLC ("DSPF") (collectively "Respondents"). Maerki, Coffin and DSPF filed requests for hearing on December 10, 2013. A pre-hearing conference was set for December 23, 2013. On December 19, 2013, Maerki and DSPF requested that the pre-hearing conference be continued due his unavailability. The pre-hearing conference was continued to January 16, 2014. On December 21, 2013, Respondents filed an Answer.

On January 17, 2014, the Administrative Law Judge Stern ("ALJ Stern") issued the Third Procedural Order scheduling the hearing to begin on June 2, 2014. On May 9, 2014, Maerki and DSPF filed a motion to continue the June 2, 2014, administrative hearing. A Fifth Procedural

1 Order was issued on May 27, 2014, that continued the June 2, 2014, hearing and set a status  
2 conference to be held. On July 10, 2014, a Sixth Procedural Order was issued scheduling an  
3 administrative hearing to begin on September 29, 2014.

4 On September 22, 2014, Respondents filed an emergency motion to continue the  
5 September 29, 2014, hearing. The Ninth Procedural Order was issued on September 26, 2014,  
6 continuing the administrative hearing set to begin on September 29, 2014. On December 10, 2014,  
7 the Tenth Procedural Order was issued scheduling the administrative hearing to begin on February  
8 9, 2015. On January 14, 2015, Respondents filed a motion to continue the administrative hearing.  
9 On February 10, 2015, the Twelfth Procedural Order was issued continuing the February 9, 2015,  
10 administrative hearing. The Thirteenth Procedural Order scheduled the hearing to begin on July  
11 13, 2015.

12 The administrative hearing began on July 13, 2015, and ended on July 28, 2015.

13 **II. JURISDICTION**

14 The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona  
15 Constitution and the Act.

16 **III. FACTS**

17 1. KENT MAERKI ("MAERKI") was, at all relevant times, a married man residing in  
18 Arizona.<sup>1</sup> MAERKI is married to NORMA JEAN COFFIN aka NORMA JEAN MAERKI, aka  
19 NORMA JEAN MAULE.<sup>2</sup> MAERKI is the co-founder, president, marketing director and a  
20 member of DENTAL SUPPORT PLUS FRANCHISE, LLC.<sup>3</sup> MAERKI was not registered to sell  
21 securities as a salesman or dealer at the time the DSPF program was offered.<sup>4</sup>

22 2. DENTAL SUPPORT PLUS FRANCHISE, LLC ("DSPF") was, at all relevant  
23 times, organized as a member-managed limited liability company under the laws of the state of  
24

25 <sup>1</sup> Exhibit S-7, page 7, line 7 to page 9, line 4.

26 <sup>2</sup> Exhibit S-7, page 27, line 11 to page 28, line 1.

<sup>3</sup> Exhibits S-2, S-3 and S-7, lines 13 – 17.

<sup>4</sup> Hearing Transcript Volume IV, page 518, line 20 – page 519, line 4; Exhibit S-1a.

1 Arizona on November 26, 2010.<sup>5</sup> On August 28, 2012, DSPF formed a limited liability company in  
 2 Nevada.<sup>6</sup> DSPF conducts business operations from Scottsdale, Arizona.<sup>7</sup> MAERKI and NORMA  
 3 JEAN COFFIN aka NORMA JEAN MAERKI, aka NORMA JEAN MAULE are the only two  
 4 members of DSPF.<sup>8</sup> DSPF is not registered as a broker/dealer in Arizona nor has DSPF registered  
 5 any securities with the Arizona Corporation Commission.<sup>9</sup>

6 3. NORMA JEAN COFFIN aka NORMA JEAN MAERKI, aka NORMA JEAN  
 7 MAULE (“COFFIN”) has been, at all relevant times, the spouse of MAERKI. COFFIN may be  
 8 referred to as “Respondent Spouse.” COFFIN is joined in this action under A.R.S. § 44-2031(C)  
 9 solely for purposes of determining the liability of the marital communities.<sup>10</sup>

10 4. At all relevant times, MAERKI has been acting for his own benefit and for the benefit  
 11 or in furtherance of his marital community.

12 5. MAERKI and DSPF may be referred to collectively as “Respondents.”

### 13 **DENTAL SUPPORT PLUS FRANCHISE**

14 6. Since about July 2010, MAERKI, as owner and president of DSPF, along with  
 15 others,<sup>11</sup> designed a franchise-type dental marketing program known as DSPF.<sup>12</sup> The DSPF  
 16 program was the next in a series of programs to raise money from investors after prior  
 17 patient/dentists programs failed.<sup>13</sup> DSPF was allegedly a franchise system that allowed the  
 18 investor/franchisee to provision patients for dentists.<sup>14</sup> In reality, DSPF was an entity continuing  
 19 earlier schemes from others that all sought to supply patients to dentists.<sup>15</sup> The prior entities raised  
 20 funds from investors through private placements and joint venture partnerships to provision patients

21 \_\_\_\_\_  
 22 <sup>5</sup> Hearing Transcript Volume IV, page 519, lines 17 – 25; Exhibit S-2.

<sup>6</sup> Hearing Transcript Volume IV, page 520, line 19 – page 522, line 9; Exhibit S-3.

<sup>7</sup> Exhibit S-7, page 10, line 16 to page 11, line 4.

<sup>8</sup> Exhibits S-2 and S-3.

<sup>9</sup> Hearing Transcript Volume IV, page 519, lines 5 – 12; Exhibit S-1b.

<sup>10</sup> Exhibit S-7, page 27, line 11 to page 28, line 1; and Exhibit S-8, page 15, lines 15 – 20.

<sup>11</sup> David White, Dale Murray, and Steven Vereen. Hearing Transcript Volume VII, page 1021, lines 2 – 3.

<sup>12</sup> Exhibit S-7a, page 10, lines 11 – 15; Exhibit S-10, ACC000067.

<sup>13</sup> Hearing Transcript Volume VII, page 1008, lines 11 – 13; page 1009, lines 12 – 19; page 1011, line 1 – 8; lines 18 –  
 20; page 1015, line 16 – page 1016, line 1; page 1017, line 1 – page 1018, line 8.

<sup>14</sup> Exhibit S-7a, page 33, line 24 – page 34, line 1.

<sup>15</sup> Hearing Transcript Volume VII, page 1008, lines 1 – 13; page 1010, lines 10 – 11.

1 to dentists and they all failed and investors lost money.<sup>16</sup> The DSPF marketing program was to train  
2 people to locate and introduce able-to-pay patients with dentists that were willing to share the  
3 revenue generated from those able-to-pay patients with those that purchased DSPF programs.<sup>17</sup>

4 7. DSPF included purchasing the marketing program and the option of purchasing  
5 management services to implement the program.<sup>18</sup> MAERKI and his entities would charge a fee  
6 (\$20,000 to \$30,000) for the program and then continue to receive fees (royalties) based upon what  
7 the investors received from utilizing DSPF.<sup>19</sup>

8 8. MAERKI claimed that dentists did not have sufficient able-to-pay patients and were  
9 in need of a marketing system to assist dentists in recruiting patients. DSPF programs would  
10 provide that assistance to the dentists.<sup>20</sup> Also, the DSPF program was to provide guidance on  
11 inducing dentists to participate in the program.<sup>21</sup>

12 7. DSPF utilized approved vendors to supply patients and recruit dentists. Dentists  
13 were recruited by Oracare, an affiliated company and an approved vendor, to participate in the  
14 DSPF program with the promise of a steady stream of able-to-pay patients.<sup>22</sup> Dentists would pay a  
15 percentage of the dental fees received from able-to-pay patients to the investors.<sup>23</sup> If an investor  
16 purchased the management services, the fees would be distributed through the management  
17 company to the investor.<sup>24</sup> The fees would be automatically withdrawn from the funds paid to the  
18 investors.<sup>25</sup>

19 8. MAERKI and DSPF had a team of salesmen nationwide that solicited their clients  
20 and others to invest in DSPF's "franchise-like" program. Based upon the testimony obtained,  
21

22  
23 <sup>16</sup> Hearing Transcript Volume VII, page 1009, lines 12 -19; page 1010, lines 13 - 20; page 1011, lines 15 - 20.

<sup>17</sup> Exhibit S-7a, page 33, lines 13 - 17.

<sup>18</sup> Exhibit S-7a, page 34, lines 5 - 9.

<sup>19</sup> Exhibit S-7a, page 34, lines 10 - 14.

<sup>20</sup> Exhibit S-7a, page 54, lines 15 - 22.

<sup>21</sup> Exhibit S-7a, page 34, lines 5 - 9.

<sup>22</sup> Exhibit S-7a, page 75, line 17 - page 76, line 7.

<sup>23</sup> Exhibit S-7a, page 87, line 18 - page 88, line 4.

<sup>24</sup> Exhibit S-7a, page 119, lines 19 - 25.

<sup>25</sup> Exhibit S-19.

1 MAERKI and the salesmen offered and sold the DSPF program using the same representations and  
2 offering materials designed or approved by MAERKI.

### 3 **THE OFFERING**

4 9. MAERKI designed the offering materials to encourage investors to purchase the  
5 DSPF program in combination with the management services.<sup>26</sup> Although, MAERKI asserts  
6 investors could purchase the DSPF program without the purchase of the marketing services, in  
7 reality, only MAERKI did not purchase the combination program.<sup>27</sup>

8 10. The offering documents stated that DSPF “is involved in the business of dental  
9 patient marketing and referrals. [DSPF] provide[s] dental patients to dentists who are part of the  
10 Dental Support Plus family of dentists.”<sup>28</sup>

11 11. DSPF “offer[ed] [to investors] an absentee-owned fully-managed dental franchise  
12 with a 5-year track record producing annual profits up to 40% to 60% or more.”<sup>29</sup>

13 12. The DSPF program was marketed and sold to investors as a system. Investors were  
14 encouraged to purchase not only the DSPF program, but also the management services that were  
15 available.<sup>30</sup>

16 13. The offering materials that were provided to offerees and investors contained  
17 projections and potential returns which were based upon investors purchasing the combination of  
18 the DSPF program and the management services.<sup>31</sup> In fact, as of July 2012, DSPF sold over 400  
19 programs to investors.<sup>32</sup> All investors but one chose to utilize the services of the DSPF approved  
20 vendors to handle the management of their DSPF programs.<sup>33</sup> MAERKI was the only investor that  
21  
22

23 <sup>26</sup> Exhibit S7a, page 54, lines 8 – 14; page 64, line 22 – page 65, line 9.

24 <sup>27</sup> Exhibit S-7a, page 75, lines 7 – 13.

25 <sup>28</sup> Exhibit S-10, ACC000063.

26 <sup>29</sup> Exhibit S-10, ACC000322.

<sup>30</sup> Hearing Transcript Volume II, page 331, line 19 – page 332, line 9; Volume III, page 371, lines 1 – 18; Volume V,  
page 689, lines 10 – 21.

<sup>31</sup> Exhibits S-9, ACC000318; S-10, ACC000318, ACC000323.

<sup>32</sup> Exhibit S-7a, page 58, lines 6 – 10.

<sup>33</sup> Exhibit S-7a, page 58, lines 11 – 15; page 75 lines 7 – 13.

1 chose to not use the management services of the approved vendors.<sup>34</sup> None of the franchisees  
2 brought other possible vendors to DSPF.<sup>35</sup>

3 14. DSPF offered the investors who purchased the program an opportunity to have the  
4 day-to-day management functions handled by approved vendors. The approved vendors were  
5 responsible for locating both the Partner Dentists to participate in the program as well as the  
6 patients for the Partner Dentists. The investors had only limited responsibilities with respect to the  
7 management of the DSPF program if the approved management vendors were retained by the  
8 investor.<sup>36</sup>

9 15. If interested in purchasing the DSPF program, the investor would be required to  
10 complete a series of documents, including a franchise agreement and disclosure document.  
11 MAERKI was responsible for the preparation and production of the information contained in the  
12 franchise agreement and the disclosure documents.<sup>37</sup> MAERKI was also responsible for providing  
13 the information that was utilized in the franchise documents and creating all offering documents  
14 which were to be completed by the investors.<sup>38</sup>

15 16. Investors could retain the only DSPF approved management company, MetroMedia,  
16 to handle the day-to-day management of the “franchise” (i.e., DSPF program).<sup>39</sup> The  
17 “[m]anagement company is responsible for 100% of the day-to-day, hands-on management of the  
18 Franchise.”<sup>40</sup> The investor was only responsible for “reconciling monthly reports with accounts,  
19 oversight and taxes.”<sup>41</sup> DSPF provided investors the names of other approved vendor companies  
20 that may be retained to do the reconciliation, oversight and taxes.<sup>42</sup>

21  
22  
23 <sup>34</sup> Exhibit S-7a, page 75 lines 7 – 13.

24 <sup>35</sup> Exhibit S-7a, page 58, lines 16 – 19.

25 <sup>36</sup> Exhibit S-13; Exhibit S-24; Exhibit R-123.

26 <sup>37</sup> Exhibit S-7a, page 64, line 22 to page 65, line 9.

<sup>38</sup> Exhibit S-7a, page 54, lines 8 – 14; page 64, line 22 to page 65, line 9.

<sup>39</sup> Exhibit S-10, ACC00067; Exhibit S-61a, ACC122388.

<sup>40</sup> Exhibit S-10, ACC000322.

<sup>41</sup> Exhibit S-10, ACC000322.

<sup>42</sup> Exhibit S-20, ACC043980.

1           17.     When retained, MetroMedia was to locate prospective patients on behalf of the  
2 investors. MetroMedia was to represented that it would obtain a minimum of 15 new qualified  
3 patients quarterly.<sup>43</sup> The vendor agreement was to be executed by the Franchisee.<sup>44</sup>

4           18.     Oracare was the one approved vendor company DSPF had to recruit, qualify and  
5 contract with Partner Dentists into the DSPF network of Partner Dentists.<sup>45</sup> MetroMedia and  
6 Oracare had the same officers and directors.<sup>46</sup> The agreement between Oracare and MAERKI on  
7 behalf of DSPF was executed by MAERKI.<sup>47</sup>

8           19.     Through at least July 2012, there was only one approved management company and  
9 one approved company to locate patients and Partner Dentists.<sup>48</sup> As of at least July 2012, all but  
10 one investor utilized the services of MetroMedia and Oracare.<sup>49</sup> MAERKI was the only investor  
11 that did not utilize MetroMedia and Oracare.<sup>50</sup>

12           20.     Initially, the investors paid a fee of \$20,000.<sup>51</sup> In approximately October 2011, the  
13 fee was increased to \$25,000.<sup>52</sup> On or about November 4, 2012, potential investors were notified  
14 that the fee per unit would increase to \$30,000.<sup>53</sup> DSPF then sent a portion of the fee to  
15 MetroMedia and Oracare.<sup>54</sup>

16           21.     Once the patients assigned to the investors paid the Partner Dentists for services  
17 rendered, a MAERKI owned management company (“Dental Support Management, Inc.”)  
18 collected payments from the Partner Dentists totaling 35 percent of the patient fees paid by referred  
19 patients.<sup>55</sup> Once Dental Support Management, Inc. received the payments from the Partner Dentists,  
20

21 <sup>43</sup> Exhibit S-15; Exhibit S-31

22 <sup>44</sup> Exhibit S-15.

23 <sup>45</sup> Exhibits S-10, ACC000067; S-14.

24 <sup>46</sup> Hearing Transcript Volume II, page 251, lines 4 -7.

25 <sup>47</sup> Exhibit S-14.

26 <sup>48</sup> Exhibit S-7a, page 56, line 25 – page 57, line 4.

<sup>49</sup> Exhibit S-7a, page 58, lines 11 – 15; page 75 lines 7 – 13.

<sup>50</sup> Exhibit S-7a, page 75, lines 7 – 13.

<sup>51</sup> Exhibit S-7a, page 34, line 13; Exhibit S-9, ACC000014.

<sup>52</sup> Exhibit S-7a, page 34, lines 10 – 11; Exhibit S-20, ACC043966-67.

<sup>53</sup> Exhibit S-11, ACC044745 – 44750; Exhibit S-11, ACC044748-750.

<sup>54</sup> Exhibit S-5; Exhibit S-7a, page 155, lines 4 – 11; page 155, line 25 to page 156, line 5; Exhibit S-14

<sup>55</sup> Exhibit S-7a, page 96, lines 14 -17

1 it retained 1.8 percent.<sup>56</sup> Then Dental Support Management, Inc. sent the remaining funds to  
 2 Oracare.<sup>57</sup> Oracare then sent the funds to the investor.<sup>58</sup> Oracare then withdrew the funds to pay the  
 3 following amounts: DSPF received four percent of the remaining funds; Oracare received 19  
 4 percent of the remaining funds; and MetroMedia received 29 percent of the remaining funds.<sup>59</sup> The  
 5 investor retained the remaining funds.<sup>60</sup> DSPF and MAERK pre-funded \$5 million to Oracare and  
 6 MetroMedia.<sup>61</sup>

7 22. As part of the Vendor agreement between DSPF and Oracare, the investors were  
 8 required to sign authorization agreements with Oracare for automatic deposits of the revenue from  
 9 the Partner Dentists and withdrawals of the fees to be paid to DSPF, MetroMedia and Oracare.<sup>62</sup>

10 23. The investors were to receive a percentage of the dental fees charged by the Partner  
 11 Dentists.<sup>63</sup> According to MAERKI, the investor, DSPF, MetroMedia and Oracare shared in the  
 12 proceeds from the Partner Dentists.<sup>64</sup> Only if Oracare and MetroMedia were supplying the patients  
 13 to the Partner Dentists and the patients were making payments to the Partner Dentists, to the  
 14 investors, DSPF, MetroMedia and Oracare receive compensation.<sup>65</sup> In other words, DSPF, Dental  
 15 Support Management, Inc., MetroMedia and Oracare and the investor get paid based solely upon  
 16 the financial success of the program the investors purchased.<sup>66</sup> According to MAERKI, “we [DSPF,  
 17 Oracare and MetroMedia] don’t get paid unless you [investor/franchisee] get paid.”<sup>67</sup>

18 24. Between 2010 and June of 2013, Respondents have raised \$13,514,958 million from  
 19 at least 441 investors.<sup>68</sup>

20 ...

21 <sup>56</sup> Exhibit S-7a, page 119, lines 1 – 4; page 119, lines 19 to page 120, line 3.

22 <sup>57</sup> Exhibit S-7a, page 119, lines 3 – 4; Exhibit S-20, ACC044108.

23 <sup>58</sup> Exhibit S-7a, page 119, lines 5 – 9.

24 <sup>59</sup> Exhibit S-7a, page 119, lines 19 - 21; page 90, lines 3 – 10;

25 <sup>60</sup> Exhibit S-20, ACC044108.

26 <sup>61</sup> Exhibit S-61.

<sup>62</sup> Exhibit S-19.

<sup>63</sup> Hearing Transcript Volume II, page 261, lines 13 – 14.

<sup>64</sup> Exhibit S-7a, page 119, lines 13 – 21.

<sup>65</sup> Exhibit S-7a, page 157, lines 18 – 24.

<sup>66</sup> Exhibit S-7a, page 157, lines 18 – 24.

<sup>67</sup> Exhibit S-61a, ACC122546.

<sup>68</sup> Exhibit S-57.

1 **THE OFFEREES AND INVESTORS**

2 **EDWARD MAZNIO**

3 25. Edward Maznio<sup>69</sup> invested \$20,000 in January of 2011.<sup>70</sup> Investor Maznio was  
4 introduced to the DSPF investment through Deborah Jenkins and MAERKI.<sup>71</sup>

5 26. In January of 2011, Investor Maznio purchased a DSPF franchise. Investor Maznio  
6 testified that he made an investment when he purchased a DSPF franchise.<sup>72</sup> Further, Investor  
7 Maznio testified that he employed DSPF vendors to get the results he expected.<sup>73</sup> Investor Maznio  
8 only responsibility was for the investment and bookkeeping.<sup>74</sup>

9 27. Investor Maznio testified that his understanding of “fully-managed” was that “a  
10 hundred percent of the day-to-day, hands-on management of the franchise would be covered by  
11 someone other” than himself and not an employee of his.<sup>75</sup> Investor Maznio received a brochure  
12 that stated “MetroMedia assumes 100 percent responsibility for day-to-day management of your  
13 Dental Support Plus Franchise.”<sup>76</sup>

14 28. Investor Maznio never received 40% to 60% return on his investment.<sup>77</sup>

15 29. Investor Maznio believed only vendors were Oracare and MetroMedia until Dental  
16 Support Group replaced them.<sup>78</sup>

17 30. Although Investor Maznio knew the track record represented by DSPF was from  
18 MAERKI and other individuals, he did not know that Dazzle Dental was not successful.<sup>79</sup>

19 ...

20 ...

21 \_\_\_\_\_  
22 <sup>69</sup> Hearing Transcript, volume II, pages 192 – 248; Exhibits S-52, S-53 and S-58.

23 <sup>70</sup> Exhibit S-52, ACC004363

24 <sup>71</sup> Hearing Transcript, volume II, page 193, line 23 – page 194, line 12.

25 <sup>72</sup> Hearing Transcript Volume II, page 197, lines 9 – 14.

26 <sup>73</sup> Hearing Transcript Volume II, page 197, lines 9 – 14.

<sup>74</sup> Hearing Transcript Volume II, page 198, lines 2 – 6.

<sup>75</sup> Hearing Transcript Volume II, page 198, lines 10 – 16; Exhibit S-58, ACC045086.

<sup>76</sup> Hearing Transcript Volume II, page Hearing Transcript Volume IV, page 205, line 16 – page 206, line 16; Exhibit S-58, ACC045100.

<sup>77</sup> Hearing Transcript Volume II, page 246, lines 13 – 15.

<sup>78</sup> Hearing Transcript Volume II, page 239, lines 5 – 20.

<sup>79</sup> Hearing Transcript Volume II, page 201, line 4 to page 203, line 1; page 224, lines 8 - 17.

1 31. Investor Maznio was not told that MAERKI had a previous SEC permanent  
 2 injunction, FTC permanent injunction or disclose current litigation against himself.<sup>80</sup> Had Investor  
 3 Maznio known of the permanent injunctions against MAERKI, he would not have invested.<sup>81</sup>

4 32. Investor Maznio, even after complaining, was never instructed that it was his  
 5 responsibility to locate patients and dentists.<sup>82</sup>

6 **ALFRED EARL HOLYOAK**

7 33. On about May 17, 2011, Investor Holyoak purchased two DSPF franchises from  
 8 Tony Sellers for \$40,000.<sup>83</sup> Mr. Sellers had previously sold Investor Holyoak a variable annuity.<sup>84</sup>

9 34. On about May 17, 2011, Investor Holyoak purchased two DSPF franchises from  
 10 Tony Sellers for \$40,000.<sup>85</sup> Investor Holyoak testified that he understood the DSPF investment to  
 11 have a proven track record of five years, was absentee-owned, fully-managed, and profit return of  
 12 40 to 60 percent after a six-month start-up period.<sup>86</sup> Investor Holyoak believed he was purchasing a  
 13 “fully-managed franchise,” that DSPF would assign a territory, find the dentists and do “everything  
 14 else that went with it.”<sup>87</sup> All that Investor Holyoak would have to do is “nothing” except provide  
 15 the money.<sup>88</sup> Investor Holyoak never planned to operate the DSPF franchise himself.<sup>89</sup> Investor  
 16 Holyoak testified that he was “buying a fully-managed, sit back and let the money roll in”  
 17 program.<sup>90</sup>

18 35. Investor Holyoak believed he was purchasing a “fully-managed franchise,” that  
 19 DSPF would assign a territory, find the dentists and do “everything else that went with it.”<sup>91</sup> All  
 20

21 <sup>80</sup> Hearing Transcript Volume II, page 226, line 16 – page 227, line 1 and Exhibits S-6 and S-70a – f.

22 <sup>81</sup> Hearing Transcript Volume II, page 227, lines 2 – 8.

23 <sup>82</sup> Hearing Transcript Volume II, page 245, lines 5 – 10.

24 <sup>83</sup> Exhibit S-56a, ACC027175; ACC027192; Hearing Transcript Volume I, page 144, line 2 – page 145, line 4; page  
 25 147, lines 11 – 15; page 150, lines 3 – 9.

26 <sup>84</sup> Hearing Transcript Volume I, page 144, line 2 – page 145, line 4; page 147, lines 11 – 15.

<sup>85</sup> Exhibit S-56a, ACC027175; ACC027192; Hearing Transcript Volume I, page 150, lines 3 – 9.

<sup>86</sup> Hearing Transcript Volume I, page 146, lines 11 – 14.

<sup>87</sup> Hearing Transcript Volume I, page 146, lines 17 – 24.

<sup>88</sup> Hearing Transcript Volume I, page 147, line 1.

<sup>89</sup> Hearing Transcript Volume I, page 147, lines 6 – 10.

<sup>90</sup> Hearing Transcript Volume I, page 156, lines 2 – 3.

<sup>91</sup> Hearing Transcript Volume I, page 146, lines 17 – 24.

1 that Investor Holyoak would have to do is “nothing” except provide the money.<sup>92</sup> Investor Holyoak  
 2 never planned to operate the DSPF franchise himself.<sup>93</sup> Investor Holyoak testified that he was  
 3 “buying a fully-managed, sit back and let the money roll in” program.<sup>94</sup> Since he had no business  
 4 experience “why buy something you know absolutely nothing about?”<sup>95</sup>

5 36. Investor Holyoak testified that understood the DSPF investment to have a proven  
 6 track record of five years, was absentee-owned, fully-managed, and profit return of 40 to 60 percent  
 7 after a six-month start-up period.<sup>96</sup> Investor Holyoak believed that the five-year track record  
 8 reflected MAERKI’S experience.<sup>97</sup> Investor Holyoak testified that he believed his franchise would  
 9 be ready to start receiving patients within 180 days.<sup>98</sup>

10 37. Investor Holyoak filed a number of complaints against DSPF.<sup>99</sup> DSPF’s response  
 11 was that it was Investor Holyoaks responsibility to obtain patients and dentists.<sup>100</sup> Investor Holyoak  
 12 testified that he agreed to a fully managed system where all I provided was the income.<sup>101</sup> They  
 13 provided the patients and dentists.<sup>102</sup>

14 38. Investor Holyoak did not read the Franchise Disclosure Document instead, his  
 15 salesman told him about the document and completed the forms.<sup>103</sup> Investor Holyoak signed and  
 16 initialed the document where his salesman told him.<sup>104</sup>

17 39. Investor Holyoak testified that Mr. Sellers told him that DSPF only makes money  
 18 after the franchises do.<sup>105</sup> Further, in a letter sent to Investor Holyoak from MAERKI where  
 19 MAERKI stated that “[f]ranchises have not been profitable, and as a result, DSPF has not been  
 20

21 <sup>92</sup> Hearing Transcript Volume I, page 147, line 1.

<sup>93</sup> Hearing Transcript Volume I, page 147, lines 6 – 10.

<sup>94</sup> Hearing Transcript Volume I, page 156, lines 2 – 3.

<sup>95</sup> Hearing Transcript Volume V, page 622, line 17 to page 623, line 3.

<sup>96</sup> Hearing Transcript Volume I, page 146, lines 11 – 14.

<sup>97</sup> Hearing Transcript Volume I, page 147, lines 16 – 21.

<sup>98</sup> Hearing Transcript Volume I, page 164, lines 1 – 7; Exhibit S-56d, ACC062745.

<sup>99</sup> Hearing Transcript Volume I, page 154, line 1 – page 160, line 25; Exhibit S-56b – d.

<sup>100</sup> Hearing Transcript Volume V, page 618, lines 9 – 12.

<sup>101</sup> Hearing Transcript Volume V, page 618, lines 9 – 12.

<sup>102</sup> Hearing Transcript Volume V, page 618, lines 13 – 21.

<sup>103</sup> Hearing Transcript Volume I, page 149, lines 1 – 10.

<sup>104</sup> Hearing Transcript Volume I, page 149, lines 1 – 10.

<sup>105</sup> Hearing Transcript Volume I, page 158, lines 1 – 3; Exhibit S-56c, ACC064722.

1 profitable.”<sup>106</sup> Investor Holyoak testified that he had no control over DSPF when it was  
2 “shelved.”<sup>107</sup>

3 40. Investor Holyoak testified that he understood based upon what he was told by his  
4 salesperson that his franchise would be ready to start receiving patients within 180 days.<sup>108</sup>

5 41. Investor Holyoak was not told about MAERKI’s SEC action, FTC action or any on-  
6 going litigation against MAERKI.<sup>109</sup> According to Investor Holyoak, he would have wanted to  
7 know this information prior to making an investment since it would have indicated possible red  
8 flags.<sup>110</sup>

### 9 JAMES OROSEL

10 42. In April of 2012, James Orosel invested \$25,000 in one DSPF franchise through  
11 Bobby Jones and MAERKI.<sup>111</sup> In November of 2012, Investor Orosel invested an additional  
12 \$150,000 for six DSPF franchises through Darryl Bank.<sup>112</sup>

13 43. On or before November 15, 2011, Investor Orosel, heard a radio show that  
14 MAERKI was on discussing the DSPF opportunity.<sup>113</sup> Investor Orosel testified that he attended a  
15 show at the Phoenix Convention Center and spoke with Mr. Jones and MAERKI about the DSPF  
16 investment opportunity.<sup>114</sup> Mr. Jones then sent an email to Investor Orosel indicating that he would  
17 receive a series of emails to “educate you about **Dental Support Plus**, an absentee-owned, fully-  
18 managed dental franchise with a 5-year track record producing annual profits up to 40% to 60% or  
19 more.”<sup>115</sup> This email was sent from the address of info@dspf.co.<sup>116</sup> Investor Orosel testified that he  
20 was interested in the DSPF investment for two reasons, “[o]ne, the 40 to 60 percent sounded  
21

<sup>106</sup> Hearing Transcript Volume V, page 621, lines 2 – 5; Exhibit S-61b, ACC124155.

<sup>107</sup> Hearing Transcript Volume V, page 621, line 25 to page 622, line 5.

<sup>108</sup> Hearing Transcript Volume I, page 164, lines 1 – 7; Exhibit S-56d, ACC062745.

<sup>109</sup> Hearing Transcript Volume V, page 624, line 14 to page 625, line 12.

<sup>110</sup> Hearing Transcript Volume V, page 625, line 13 to page 626, line 3.

<sup>111</sup> Hearing Transcript Volume I, page 36, line 2 – 6.

<sup>112</sup> Hearing Transcript Volume I, page 61, line 2 to page 68, line 13; page 70, line 6 to page 72, line 13; Exhibits S-59b, S-59c, S-59d, S-60a, S-60b, and S-60c.

<sup>113</sup> Hearing Transcript Volume I, page 32, lines 3 – 8; page 35, lines 12 – 22.

<sup>114</sup> Hearing Transcript Volume I, page 35, line 25 to page 36, line 17.

<sup>115</sup> Exhibit S-61a, ACC122309.

<sup>116</sup> Exhibit S-61a, ACC122309.

1 awfully good. And the other was that it was absentee-owned, owner.”<sup>117</sup> Investor Orosel believed  
 2 the “5-year track record” mentioned in the email belonged to Dental Support Plus.<sup>118</sup>

3 44. Investor Orosel understood the “absentee-owned, fully-managed dental franchise”  
 4 to mean that all he would be required to do is invest in it and receive checks, monthly.<sup>119</sup> Investor  
 5 Orosel further testified that DSPF was going to (or a business contracted with them) locate dentists  
 6 and patients and the funds paid to the dentists would come back to the investors.<sup>120</sup> Investor Orosel  
 7 testified that he had a discussion with MAERKI as whether DSPF was an investment or a  
 8 business.<sup>121</sup> According to Investor Orosel, MAERKI stated that a lot of people were putting in  
 9 their IRA accounts.<sup>122</sup> It was Investor Orosel’s understanding that an IRA cannot be used to run a  
 10 business so he was comfortable making the investment.<sup>123</sup> Investor Orosel stated that he believed  
 11 that the franchise was an investment, “like a piece of stock in the company.”<sup>124</sup> Investor Orosel  
 12 testified under cross-examination that he “thought it was quite clear to me that I was not going to  
 13 run this business. It was a manager run business, and I was not responsible for doing any of  
 14 that.”<sup>125</sup> Further, Investor Orosel stated that “[i]n my mind, it was strictly an investment, and it  
 15 didn’t work out.”<sup>126</sup> Investor Orosel believed, based upon the promotional materials he received,  
 16 that he was to be a passive investor.<sup>127</sup>

17 45. At the time Investor Orosel decided to invest, he disclosed to Mr. Jones and  
 18 MAERKI that he had no plans to operate the business himself.<sup>128</sup> All Investor Orosel believed he  
 19  
 20  
 21

22 <sup>117</sup> Hearing Transcript Volume I, page 37, lines 5 – 9.

<sup>118</sup> Exhibit S-61a, ACC122309; Hearing Transcript Volume I, page 37, lines 10 – 15.

<sup>119</sup> Hearing Transcript Volume I, page 41, lines 1 – 7.

<sup>120</sup> Hearing Transcript Volume I, page 47, line 20 – page 48, line 10.

<sup>121</sup> Hearing Transcript Volume I, page 98, line 22 – page 99, line 11.

<sup>122</sup> Hearing Transcript Volume I, page 98, line 22 – page 99, line 20.

<sup>123</sup> Hearing Transcript Volume I, page 98, line 22 – page 99, line 20.

<sup>124</sup> Hearing Transcript Volume I, page 106, lines 12 – 20.

<sup>125</sup> Hearing Transcript Volume I, page 119, lines 1 – 9.

<sup>126</sup> Hearing Transcript Volume I, page 121, lines 7 – 11.

<sup>127</sup> Hearing Transcript Volume I, page 141, lines 3 – 8.

<sup>128</sup> Hearing Transcript Volume I, page 140, lines 20 – 23.

1 needed to do was pay for the franchise.<sup>129</sup> Investor Orosel testified that “made [him] very  
2 comfortable knowing that it was set up as an investment and not as a business.”<sup>130</sup>

3 46. Investor Orosel testified that he was interested in the DSPF investment for two  
4 reasons, “[o]ne, the 40 to 60 percent sounded awfully good. And the other was that it was absentee-  
5 owned, owner.”<sup>131</sup>

6 47. Investor Orosel was not told that he needed to obtain patients and dentists for his  
7 franchise.<sup>132</sup>

8 48. Investor Orosel signed up for the fully-managed program since he had no experience  
9 in the dental business, marketing or locating patients.<sup>133</sup> One of the documents provided to Investor  
10 Orosel through the email series was titled *Frequently Asked Questions* (“FAQ”).<sup>134</sup> The FAQ’s  
11 stated that the franchise becomes fully-managed under professional management.<sup>135</sup> The franchisee  
12 is responsible for reconciling accounts, oversight and paying taxes.<sup>136</sup> Although, Investor Orosel  
13 testified that collection of the fees from the dentists and distributions to Oracare and MetroMedia  
14 were done through automatic deposits and withdrawals.<sup>137</sup> The FAQs mentioned that [t]he  
15 franchise model has been built on a results-proven platform with more the[n] 5-years of research,  
16 development and actual performance.<sup>138</sup>

17 49. The FAQs mentioned that [t]he franchise model has been built on a results-proven  
18 platform with more the[n] 5-years of research, development and actual performance.<sup>139</sup> Investor  
19 Orosel testified that he believed the five year track record was from DSPF.<sup>140</sup> He was influenced to  
20 invest by the track record.<sup>141</sup>

21 <sup>129</sup> Hearing Transcript Volume I, page 99, lines 10 – 11.

22 <sup>130</sup> Hearing Transcript Volume I, page 99, lines 4 – 11.

23 <sup>131</sup> Hearing Transcript Volume I, page 37, lines 5 – 9.

24 <sup>132</sup> Hearing Transcript Volume I, page 95, line 13 – page 96, line 7.

25 <sup>133</sup> Hearing Transcript Volume I, page 41, lines 8 – 17.

26 <sup>134</sup> Exhibit 61a, ACC122312; Hearing Transcript Volume I, page 39, lines 5 - 8.

<sup>135</sup> Exhibit 61a, ACC122313; Hearing Transcript Volume I, page 42, lines 19 – 22.

<sup>136</sup> Exhibit 61a, ACC122313; Hearing Transcript Volume I, page 42, lines 19 – 22.

<sup>137</sup> Hearing Transcript Volume I, page 75, lines 1 – 23.

<sup>138</sup> Exhibit 61a, ACC122313.

<sup>139</sup> Exhibit 61a, ACC122313.

<sup>140</sup> Hearing Transcript Volume I, page 43, lines 3 – 14.

<sup>141</sup> Hearing Transcript Volume I, page 56, lines 16 – 17.

1           50.     Investor Orosel testified that he believed his franchise would be fully operational in  
2 180 days.<sup>142</sup> Investor Orosel testified that he believed he would start receiving checks within 180  
3 days.<sup>143</sup> Having a fully operational franchise in 180 days influenced Investor Orosel's decision to  
4 invest.<sup>144</sup> According to the materials Investor Orosel received, investing in a franchise was less  
5 risky than other types of investments.<sup>145</sup> It was Investor Orosel's testimony that he would receive a  
6 return on his investment through receiving a portion of the fees paid by patients to specific  
7 dentists.<sup>146</sup>

8           51.     In April of 2012, Investor Orosel invested \$25,000 in one DSPF franchise.<sup>147</sup> In  
9 November of 2012, Investor Orosel was interested in investing in more franchises and could not get  
10 a hold of Mr. Jones .<sup>148</sup> DSPF told Investor Orosel to connect Darryl Bank, another salesman for  
11 DSPF.<sup>149</sup> Investor Orosel invested an additional \$150,000 for six DSPF franchises through Darryl  
12 Bank.<sup>150</sup>

13           52.     In about November of 2012, Investor Orosel testified that he received offering  
14 documents related to Dominion Private Client Group owned by Darryl Bank.<sup>151</sup> According to the  
15 offering document, investors could invest in the DSPF franchises in two different ways: 1) by  
16 purchasing DSPF franchises at \$30,000 or multiples thereof; 2) by investing in a pool of DSPF  
17 franchises at \$5,000 and \$1,000 multiples thereafter.<sup>152</sup> Dominion Private Client Group sent  
18 another document to Investor Orosel titled *Investment Offering* for DSPF Group, LLC dated  
19 October 2012<sup>153</sup>. The *Investment Offering* stated that “[f]or the last five years Dental support Plus  
20 has been increasing the patient flow to dental offices and increasing cash flows dramatically with

21 <sup>142</sup> Hearing Transcript Volume I, page 43, lines 17 – 19; Exhibit S-61a, ACC122313.

22 <sup>143</sup> Hearing Transcript Volume I, page 50, lines 11 – 25; Exhibit S-61a, ACC122326.

23 <sup>144</sup> Hearing Transcript Volume I, page 56, lines 18 – 19.

24 <sup>145</sup> Hearing Transcript Volume I, page 44, lines 11 – 13; Exhibit S-61a, ACC122315.

25 <sup>146</sup> Hearing Transcript Volume I, page 47, line 11 to page 48, line 10.

26 <sup>147</sup> Hearing Transcript Volume I, page 59, line 4 to page 60, line 22; Exhibit S-59a, ACC120880.

<sup>148</sup> Hearing Transcript Volume I, page 68, lines 4 -10.

<sup>149</sup> Hearing Transcript Volume I, page 68, lines 4 -10.

<sup>150</sup> Hearing Transcript Volume I, page 60, line 23 to page 65, line 12; page 68, lines 11 – 13; page 70, line 6 to page 72, line 13; Exhibits S-59b, S-59c, S-59d, S-60a, S-60b, and S-60c.

<sup>151</sup> Hearing Transcript Volume I, page 81, lines 1 – 3; Exhibit S-61a, ACC122446.

<sup>152</sup> Exhibit S-61a, ACC122446.

<sup>153</sup> Exhibit S-61a, ACC122447.

1 minimal increase in overhead to the dental practice. . . . It is a proven system with documented,  
 2 record-breaking results and a five year track record.”<sup>154</sup> The *Investment Offering* document further  
 3 stated “[t]hese investors have shared in the growth over the last five years and even added to their  
 4 portfolio by taking additional franchise options.”<sup>155</sup> DSPF had only been in business since 2010 not  
 5 five years.<sup>156</sup> Nowhere is it disclosed that investors had not received the promised 40 to 60 percent  
 6 return nor that most franchises were not fully operational at 180 days as represented. The  
 7 *Investment Offering* explained that DSPF model allowed the franchisee to either participate or not  
 8 in their investment.<sup>157</sup> According to the *Investment Offering*, the benefits of a franchise purchase  
 9 are as follows:<sup>158</sup>

- 10 a) Day to day operations and management may be conducted by the franchise  
 11 owner or an approved management company if elected;
- 12 b) Franchise model built on a results-proven platform over an 8-year time  
 13 period which included 5-years of research and development and 3-years of  
 14 successful performance;
- 15 c) New franchise is targeted to fully operational in approximately 180 days; and
- 16 d) Annual profits up to 30% or more after one to two years in operation.

17 53. The *Investment Offering* explained the pooling option as investing in a number of  
 18 DSPF franchises under the management of approved management companies.<sup>159</sup> This removes the  
 19 burden of day-to-day operational management from the investors.<sup>160</sup> The total offering comprises  
 20 12,000 to 15,000 shares making a total offering of \$15 million.<sup>161</sup> MAERKI is listed in the  
 21 *Investment Offering*.<sup>162</sup>

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23 <sup>154</sup> Exhibit S-61a, ACC122449.

24 <sup>155</sup> Exhibit S-61a, ACC122449.

24 <sup>156</sup> Exhibits S-2 and S-3.

25 <sup>157</sup> Exhibit S-61a, ACC122450.

25 <sup>158</sup> Exhibit S-61a, ACC122451.

26 <sup>159</sup> Exhibit S-61a, ACC122452.

<sup>160</sup> Exhibit S-61a, ACC122452.

<sup>161</sup> Exhibit S-61a, ACC122453.

<sup>162</sup> Exhibit S-61a, ACC122454.

1 54. Investor Orosel testified that at no time did MAERKI, Mr. Jones, Mr. Bank or any  
2 of the DSPF staff notify him that he was responsible for the success of his investment.<sup>163</sup>

3 55. Investor Orosel testified that he would not have invested if he had known that the  
4 180-day for a fully-operational franchise had not been met by prior franchisees.<sup>164</sup> Further, he  
5 would not have invested had he been told that investors were not making any money with the  
6 franchises.<sup>165</sup>

7 56. Investor Orosel testified that he reviewed MAERKI's bio listed in the Franchise  
8 Disclosure Document.<sup>166</sup> At no time was Investor Orosel aware of a SEC action against MAERKI  
9 or a FTC action against MAERKI.<sup>167</sup>

10 57. Investor Orosel testified that he would have wanted to know the above information  
11 prior to making an investment in DSPF.<sup>168</sup>

## 12 **HAROLD KNOWLTON, II**

13 58. On or about April 20, 2011, Hal Knowlton invested \$40,000 in DSPF.<sup>169</sup> Investor  
14 Knowlton dealt with Paul Smith<sup>170</sup> and MAERKI.<sup>171</sup> Investor Knowlton testified that he understood  
15 that the franchises were to be activated within 180 days of purchasing the franchises.<sup>172</sup>

16 59. Investor Knowlton testified that he believed the return on investment would be 30%  
17 or higher.<sup>173</sup> Investor Knowlton testified that MetroMedia and Oracare were the only approved  
18 vendors; they were not allowed to use any other vendors.<sup>174</sup>

19  
20  
21  
22 <sup>163</sup> Hearing Transcript Volume I, page 95, line 13 to page 96, line 9.

<sup>164</sup> Hearing Transcript Volume I, page 74, lines 5 – 10.

<sup>165</sup> Hearing Transcript Volume I, page 74, lines 11 – 14.

<sup>166</sup> Hearing Transcript Volume I, page 97, lines 16 – 20. Exhibit S-10, ACC000069.

<sup>167</sup> Hearing Transcript Volume I, page 99, lines 21 – 24.

<sup>168</sup> Hearing Transcript Volume I, page 98, lines 6 – 8.

<sup>169</sup> Hearing Transcript Volume IV, page 437, lines 5 – 11.

<sup>170</sup> Hearing Transcript Volume IV, page 433, lines 22 – 25.

<sup>171</sup> Hearing Transcript Volume IV, page 441, lines 17 – 19.

<sup>172</sup> Hearing Transcript Volume IV, page 447, lines 6 – 11.

<sup>173</sup> Hearing Transcript Volume IV, page 449, lines 1 – 2; page 490, lines 8 - 11.

<sup>174</sup> Hearing Transcript Volume IV, page 442, lines 19 – 24.

1           60.     Investor Knowlton believed that the track record came from test franchises that were  
2 being operated by DSPF.<sup>175</sup> According to Investor Knowlton he did not have to pay DSPF, Oracare  
3 or MetroMedia if he did not get paid.<sup>176</sup>

4           61.     Investor Knowlton testified that even though some of the documents stated that the  
5 franchisees had to obtain patients and dentists he did not want to operate the franchise himself and  
6 that is why the he retained Oracare and MetroMedia.<sup>177</sup> Investor Knowlton stated that he purchased  
7 an investment not a business.<sup>178</sup>

8           62.     Based upon DSPF continuing to raise the price of the franchise, Investor Knowlton  
9 believed that this meant the franchise was doing well.<sup>179</sup>

10          63.     Investor Knowlton received and sent numerous emails to DSPF and MAERKI  
11 regarding the investment he purchased.<sup>180</sup> In an email sent by Investor Knowlton to MAERKI,  
12 Investor Knowlton stated that the DSPF investment appeared to have all the characteristics of a  
13 scam.<sup>181</sup> It appears that MAERKI forwarded the email to Lynne Shelton, Steven Vereen, Dale  
14 Murray and others.<sup>182</sup> MAERKI stated “damage control for the salespersons has been difficult.”<sup>183</sup>  
15 This shows that in March of 2012, MAERKI knew there were problems with the program yet he  
16 continued to offer and sell the program without clearly disclosing the problems to new investors.

17          64.     In August of 2012, Investor Knowlton sent another email to MAERKI complaining  
18 that he had invested and has not received a “single dollar” from his franchise businesses.<sup>184</sup> Investor  
19 Knowlton stated in the email that they are not sure what they invested in since none of the  
20 “expectations set out in the Marketing Materials/Presentations and Franchise Agreements” have  
21

22 <sup>175</sup> Hearing Transcript Volume IV, page 462, lines 7 – 20; page 468, line 7 – page 469, line 5.

23 <sup>176</sup> Hearing Transcript Volume IV, page 458, lines 17 – 20; page 466, line 21 – page 467, line 2.

24 <sup>177</sup> Hearing Transcript Volume IV, page 491, line 16 – page 492, line 19.

25 <sup>178</sup> Hearing Transcript Volume IV, page 448, lines 5 – 7; page 463, line 11 – page 464, line 1; page 504, line 13 – page  
26 505, line 25; page 508, line 20 – page 509, line 17.

<sup>179</sup> Hearing Transcript Volume IV, page 454, lines 17 – 23; Exhibit S-20, ACC043966.

<sup>180</sup> Exhibits S-19, S-20 and S-21.

<sup>181</sup> Hearing Transcript Volume IV, page 480, line 21 – page 481, line 5; Exhibit S-20, ACC044097- 100.

<sup>182</sup> S-20, ACC044097.

<sup>183</sup> Exhibit S-20, ACC044097.

<sup>184</sup> Hearing Transcript Volume IV, page 488, line 20 – page 490, line 16; Exhibit S-20, ACC044235.

1 been met.<sup>185</sup> The email further states that the DSPF program was a critical component of Investor  
2 Knowlton's retirement cash flow plans.<sup>186</sup>

3 65. Investor Knowlton stated in an email that "[w]e bought into [MAERKI's]  
4 knowledge, experience and a business model we were led to believe is proven to deliver the 30-  
5 60% ROI marketed to us."<sup>187</sup> Yet, during the hearing, MAERKI solicited testimony from Lynne  
6 Shelton, Dale Murray and Aghee Smith that the only information investors were to rely upon was  
7 in the FDD. The FDD did not disclose MAERKI's regulatory problems.<sup>188</sup> Further, Investor  
8 Knowlton testified that he would have wanted to know about MAERKI's background.<sup>189</sup>

9 66. According to the testimony of Investor Knowlton, the disclosure documents and the  
10 franchise documents mentioned a training class and manual that were available to investors  
11 however they were never provided.<sup>190</sup> Ms. Shelton testified that the franchisees took a training class  
12 and received numerous manuals.<sup>191</sup>

13 67. Investor Knowlton complained a number of times to DSPF and MAERKI that his  
14 investment was not performing as represented.<sup>192</sup> After complaining about the lack of progress with  
15 his investment at no time was Investor Knowlton informed that it was his responsibility to locate  
16 dentists and patients.<sup>193</sup>

### 17 **INVESTIGATOR BARAN**

18 68. On about January 13, 2012, Investigator Baran, in an undercover capacity, contacted  
19 DSPF for information related to the investment opportunity in DSPF.<sup>194</sup> Investigator Baran  
20 received a series of emails from DSPF that contained investment documents that a majority of other  
21 investors received.<sup>195</sup>

22 <sup>185</sup> Exhibit S-20, ACC044235.

23 <sup>186</sup> Exhibit S-20, ACC044235.

24 <sup>187</sup> Exhibit S-20, ACC044235.

25 <sup>188</sup> Exhibit S-10

26 <sup>189</sup> Hearing Transcript Volume IV, page 499, line 11 – page 500, line 3.

<sup>190</sup> Hearing Transcript Volume IV, page 491, lines 7 – 15; page 509, line 20 - 5.

<sup>191</sup> Hearing Transcript Volume VI, page 778, line 20 – 779, line 11.

<sup>192</sup> Hearing Transcript Volume IV, page 491, line 16 – page 492, line 19; Exhibit S-20.

<sup>193</sup> Hearing Transcript Volume IV, page 491, line 20 – 19.

<sup>194</sup> Hearing Transcript Volume IV, page 541, line 17 – page 546, line 16.

<sup>195</sup> Exhibit S-9.



1           73.     The email also stated “Absentee owned, fully-managed dental franchise  
2 with a 5-year track record producing annual profits up to 40% to 60%, or more.”<sup>206</sup>

3           74.     Another email sent to offerees stated:<sup>207</sup>

4                     **Validation – Management Accomplishments**  
5                     **Two Patients per Day per Dentist**

6                     The design of the Dental Support Plus Platform to deliver a minimum  
7 of 2-patients per day to a Partner Dentist with each patient generating a  
8 minimum of \$1,000 of dental services within the first year.

9                     This document titled “*Management Team Accomplishments*” reviews  
10 the actual results achieved during the last 8-years: [CLICK HERE](#)<sup>208</sup>

11           75.     Investigator Baran continued receiving emails and attachments from DSPF. They  
12 included “Dental Support Plus FAQ.”<sup>209</sup> The FAQs continues the offer of an absentee-owned, fully  
13 managed dental franchise with a 5 year track record producing annual profits up to 40% to 60% or  
14 more.<sup>210</sup> Also included was a video, a tri-fold brochure<sup>211</sup>, a business brief, a franchise application,  
15 feasibility model, a flyer for MetroMedia, an agreement for MetroMedia and Management Team  
16 Accomplishments<sup>212 213</sup>.

17                     **INVESTIGATOR CLAPPER**

18           76.     On about May 14, 2012, Chief Investigator Clapper, in an undercover capacity,  
19 received an email from [info@dspf.co](mailto:info@dspf.co) that stated he was enrolled in a series of emails from  
20 DENTAL SUPPORT identical to those that Investigator Baran received.<sup>214</sup> The email disclosed  
21 that DSPF was an absentee-owned, fully-managed dental franchise with a 5-year track record  
22 producing annual profits up to 40% to 60% or more.<sup>215</sup> Those emails provided information related  
23 to the investment offered by DENTAL SUPPORT.<sup>216</sup>

24 <sup>206</sup> Exhibit S-9, ACC000015.

25 <sup>207</sup> Exhibit S-9, ACC000017-18.

26 <sup>208</sup> Exhibit S-9, ACC000052; Exhibit S-30.

<sup>209</sup> Exhibit S-9, ACC000021.

<sup>210</sup> Exhibit S-9, ACC000021

<sup>211</sup> Exhibits S-13; S-24 and R-123.

<sup>212</sup> Exhibit S-9, ACC000052; Exhibit S-30.

<sup>213</sup> Exhibit S-9, ACC000050.

<sup>214</sup> Hearing Transcript Volume IV, page 531, line 8 – page 537, line 12; Exhibit S-11, ACC044692.

<sup>215</sup> Exhibit S-11, ACC044692.

<sup>216</sup> Exhibit S-11.

1           77.     Investigator Clapper continued to receive various emails over a period of time.<sup>217</sup>  
 2 One such email, disclosed that DSPF sold over 400 units since launching sales in March of 2011.<sup>218</sup>  
 3 The email explained that there was very little effort needed by the franchisee by using the  
 4 professional management services of MetroMedia and Oracare.<sup>219</sup> Further, the email states “own a  
 5 unique, carefree, turn-key business, not a job! Use investment funds for monthly income or IRA  
 6 funds to grow your nest egg!”<sup>220</sup>

7           78.     Investigator Clapper continued to receive DSPF emails through 2014.<sup>221</sup> In an email  
 8 dated November 27, 2012, Catrina Davis states that DSPF has sold over 500 franchises and the  
 9 very first franchisee realized a double digit return in his first 12 months.<sup>222</sup> Mr. Maznio was the first  
 10 franchisee and he testified that he did not receive 40% - 60% return as represented in the offering  
 11 materials.<sup>223</sup>

## 12 **THE SALEPEOPLE**

13           103.    MAERKI had a team of salesmen nationwide that solicited their clients to invest in a  
 14 “franchise-like” program. Based upon the testimony obtained, MAERKI and the salesmen offered  
 15 and sold the DSPF program in a consistent manner.

## 16 **LOUIS BACA**

17           104.    Louis Baca testified that he became involved with MAERKI in about July of  
 18 2010.<sup>224</sup> Mr. Baca invested in Hassle Free Dental.<sup>225</sup> Hassle Free Dental was to support the  
 19 development of the DSPF’s franchise program.<sup>226</sup> Mr. Baca testified that although he purchased the  
 20 Hassle Free Dental investment through another individual, Mr. Baca understood that MAERKI had  
 21

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22 <sup>217</sup> Exhibits S-11 and S-12

23 <sup>218</sup> Exhibit S-11, ACC044700.

24 <sup>219</sup> Exhibit S-11, ACC044700.

25 <sup>220</sup> Exhibit S-11, ACC044700.

26 <sup>221</sup> Exhibit S-12.

<sup>222</sup> Exhibit S-12, ACC062816.

<sup>223</sup> Hearing Transcript Volume II, page 246, lines 13 – 15.

<sup>224</sup> Hearing Transcript Volume II, page 316, lines 8 – 10.

<sup>225</sup> Hearing Transcript Volume II, page 317, lines 13 – 14.

<sup>226</sup> Hearing Transcript Volume II, page 317, lines 4 – 12.

1 a significant role with Hassle Free Dental.<sup>227</sup> According to the testimony by Mr. Baca, Hassle Free  
2 Dental was to be more lucrative than the DSPF franchise investment program.

3 105. In September of 2010, Mr. Baca began training as a salesperson for DSPF.<sup>228</sup>  
4 MAERKI and others trained Mr. Baca to sell the DSPF program.<sup>229</sup> Mr. Baca identified the others  
5 were Dale Murray, David White and Steven Vereen.<sup>230</sup> According to Mr. Baca's testimony, there  
6 were Monday morning training meetings for the salespeople.<sup>231</sup> At these meetings, the trainers  
7 stated that the DSPF program was an investment.<sup>232</sup> In fact, according to Mr. Baca's testimony,  
8 MAERKI stated that it was ok to use the "I" word (investment) to describe the DSPF program.<sup>233</sup>

9 106. Mr. Baca testified that the salespeople were encouraged to direct potential investors  
10 to the managed option of DSPF.<sup>234</sup>

### 11 **PAUL MONTGRAIN**

12 107. Paul Montgrain was a DSPF salesperson.<sup>235</sup> In the latter part of 2011, Mr. Montgrain  
13 was introduced to MAERKI and DSPF as having a business opportunity to earn money on a  
14 passive basis as a result of putting money into a franchise and expected double digit returns as a  
15 passive owner of the franchise.<sup>236</sup>

16 108. Mr. Montgrain testified that DSPF was promoted as a passive opportunity.<sup>237</sup> This  
17 was just an investor putting up the capital necessary for the purchase of the franchise then the  
18 marketing companies would take over.<sup>238</sup> According to Mr. Montgrain's testimony, everything that  
19 was sold to them as salespeople, which they used as sales tools with their clients, were not coming  
20 true.<sup>239</sup> Mr. Montgrain testified that his clients were to be passive.<sup>240</sup> Further, Mr. Montgrain

21 <sup>227</sup> Hearing Transcript Volume II, page 318, lines 1 – 8.

22 <sup>228</sup> Hearing Transcript Volume II, page 324, lines 16 – 22.

23 <sup>229</sup> Hearing Transcript Volume II, page 324, lines 16 – 22.

24 <sup>230</sup> Hearing Transcript Volume II, page 325, lines 2 – 25.

25 <sup>231</sup> Hearing Transcript Volume II, page 326, lines 4 – 5.

26 <sup>232</sup> Hearing Transcript Volume II, page 326, line 8 - page 327, line 10.

<sup>233</sup> Hearing Transcript Volume II, page 335, lines 10 – 12.

<sup>234</sup> Hearing Transcript Volume II, page 331, line 19 – page 332, line 9.

<sup>235</sup> Hearing Transcript Volume III, page 359, line 20 – page 360 line 2.

<sup>236</sup> Hearing Transcript Volume III, page 359, line 20 – page 360, line 2.

<sup>237</sup> Hearing Transcript Volume III, page 368, lines 2 – 19.

<sup>238</sup> Hearing Transcript Volume III, page 368, lines 2 – 19.

<sup>239</sup> Hearing Transcript Volume III, page 369, line 12 – page 370, line 2.

1 testified that although investors could do the marketing themselves, it was looked upon as being the  
 2 wrong way to do things.<sup>241</sup> According to Mr. Montgrain, his clients purchased the DSPF program  
 3 based on it being promoted as a passive income opportunity.<sup>242</sup>

4 109. Based upon the training that the salespeople received it was encouraged to allow the  
 5 marketing companies and media companies to locate the dentists and the patients, not the  
 6 franchisee.<sup>243</sup> Mr. Montgrain's clients never expected to do anything but invest their money since it  
 7 was promoted as a passive investment.<sup>244</sup> Mr. Montgrain testified that all his clients took the  
 8 managed program and never intended to operate the DSPF program on a day-to-day basis.<sup>245</sup>

9 110. Mr. Montgrain testified that the annual return on the DSPF investment would be  
 10 40% – 60%.<sup>246</sup> At no time does Mr. Montgrain recall ever being told to stop selling the DSPF  
 11 program even though it was not meeting the representations made.<sup>247</sup> Based upon Mr. Montgrain's  
 12 experience, it would have been appropriate to stop selling the DSPF program until the problems  
 13 were fixed.<sup>248</sup>

14 111. Mr. Montgrain testified that there was another way to invest in the DSPF program  
 15 by buying shares in a pool of franchises.<sup>249</sup> Under questioning by MAERKI, Mr. Montgrain  
 16 testified that he became aware of the pooling in a sales meeting conducted by MAERKI.<sup>250</sup>

17 112. Mr. Montgrain had received some information related to MAERKI's prior  
 18 successes.<sup>251</sup> He was not told that MAERKI had prior orders against him from the SEC or the  
 19 FTC.<sup>252</sup> Nor was Mr. Montgrain told about any ongoing litigation with MAERKI.<sup>253</sup> Mr.

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20  
 21 <sup>240</sup> Hearing Transcript Volume III, page 376, line 11 – page 377, line 1.

<sup>241</sup> Hearing Transcript Volume III, page 371, lines 1 – 18.

<sup>242</sup> Hearing Transcript Volume III, page 387, lines 14 – 22.

<sup>243</sup> Hearing Transcript Volume III, page 377, lines 2 – 10.

<sup>244</sup> Hearing Transcript Volume III, page 402, lines 21 – 25.

<sup>245</sup> Hearing Transcript Volume III, page 420, lines 2 – 9.

<sup>246</sup> Hearing Transcript Volume III, page 390, lines 6 – 20.

<sup>247</sup> Hearing Transcript Volume III, page 393, line 19 – page 394, line 13.

<sup>248</sup> Hearing Transcript Volume III, page 400, lines 2 – 24.

<sup>249</sup> Hearing Transcript Volume III, page 387, lines 1 – 13.

<sup>250</sup> Hearing Transcript Volume III, page 408, lines 6 – 20.

<sup>251</sup> Hearing Transcript Volume III, page 394, lines 14 – 25.

<sup>252</sup> Hearing Transcript Volume III, page 395, lines 1 – 6.

<sup>253</sup> Hearing Transcript Volume III, page 395, lines 10 – 12.

1 Montgrain testified that he would have wanted to know that information prior to putting his clients  
2 into the DSPF program.<sup>254</sup>

3 113. In the end, Mr. Montgrain made the recommendations to his clients based upon the  
4 rate of return and the passive nature of the income.<sup>255</sup>

5 **JEFF ESCHRICH**

6 114. In October of 2010, Jeff Eschrich became familiar with DSPF through representing  
7 a private placement memorandum to sell to high-net-worth investors.<sup>256</sup> Mr. Eschrich met with  
8 Steven Vereen, David White, Kent Maerki and Dale [Smith] Murray.<sup>257</sup> Subsequently, Mr.  
9 Eschrich was told about DSPF.<sup>258</sup> Mr. Eschrich became a salesperson for the DSPF program.<sup>259</sup>

10 115. On April 13, 2011, Mr. Eschrich and a client, met with Steven Vereen and Dale  
11 Murray to discuss the DSPF program.<sup>260</sup> Mr. Eschrich testified that the DSPF program was an  
12 absentee-owned business with the vendors in place.<sup>261</sup> The investor would only have to reconcile  
13 the books and reviewing accounts receivable.<sup>262</sup> In January of 2011, Investors could expect a return  
14 of 40% to 60% profits.<sup>263</sup> The franchise would be fully operational in six-months.<sup>264</sup>

15 116. Mr. Eschrich sold DSPF to two clients.<sup>265</sup> Both clients chose to use the vendors  
16 based upon the recommendation of MAERKI.<sup>266</sup> Mr. Eschrich testified that he was instructed tell  
17 prospective investors that it was better to use the established vendors than to venture out by  
18 themselves.<sup>267</sup> Further, there was information available if investors wanted to go forward without  
19 retaining the vendors however, the information as very limited.<sup>268</sup> Mr. Eschrich stated that it was

20 <sup>254</sup> Hearing Transcript Volume III, page 395, lines 13 – 25.

21 <sup>255</sup> Hearing Transcript Volume III, page 396, lines 5 – 19.

22 <sup>256</sup> Hearing Transcript Volume V, page 640, lines 18 – 24.

23 <sup>257</sup> Hearing Transcript Volume V, page 645, line 16 – page 647, line 3.

24 <sup>258</sup> Hearing Transcript Volume V, page 649, lines 19 – 24.

25 <sup>259</sup> Hearing Transcript Volume V, page 657, lines 3 – 8.

26 <sup>260</sup> Hearing Transcript Volume V, page 651, lines 4 – 12.

<sup>261</sup> Hearing Transcript Volume V, page 652, lines 6 – 16.

<sup>262</sup> Hearing Transcript Volume V, page 652, lines 6 – 16.

<sup>263</sup> Hearing Transcript Volume V, page 653, lines 2 – 3.

<sup>264</sup> Hearing Transcript Volume V, page 653, lines 18 – 23.

<sup>265</sup> Hearing Transcript Volume V, page 655, lines 3 – 12.

<sup>266</sup> Hearing Transcript Volume V, page 658, lines 1 – 5.

<sup>267</sup> Hearing Transcript Volume V, page 689, lines 10 – 21.

<sup>268</sup> Hearing Transcript Volume V, page 689, lines 10 – 21.

1 assumed that the investor would go forward with the vendors.<sup>269</sup> According to Mr. Eschrich's  
 2 testimony, his clients who purchased DSPF had a full-time job and no time to do any managerial,  
 3 significant work that is normally required when owning a true franchise.<sup>270</sup>

4 117. Mr. Eschrich testified that his clients were to receive a fully-operational franchise  
 5 within a 180 days.<sup>271</sup> In the Monday morning salesmen meetings, Mr. Eschrich was never told that  
 6 DSPF was not meeting the 180 day representation.<sup>272</sup> Further, at no time were salespeople told to  
 7 stop selling or to disclose that it would be substantially longer than the 180 days for a fully-  
 8 operational franchise.<sup>273</sup>

9 118. Mr. Eschrich testified that he received offering materials other than the franchise  
 10 disclosure document from MAERKI and DSPF.<sup>274</sup> According to Mr. Eschrich, he received emails  
 11 from MAERKI that contained marketing pieces to sell the franchise.<sup>275</sup> Mr. Eschrich testified that  
 12 the marketing materials he received from MAERKI were about 90 percent of the presentation.<sup>276</sup>

### 13 THE VENDORS

#### 14 METROMEDIA/ORACARE

#### 15 DAVID WHITE

16 119. David White was the president of both MetroMedia and Oracare.<sup>277</sup> MetroMedia  
 17 marketed for dentists and acquired patients.<sup>278</sup> Oracare "put together relationships with dentists  
 18 who needed patients."<sup>279</sup> MetroMedia and Oracare were formed in June of 2010.<sup>280</sup> MetroMedia  
 19 and DSPF had an executed agreement before the first franchise was sold.<sup>281</sup> The investor/franchisee  
 20 was to "pay MetroMedia 29 percent of franchisee gross revenue generated from patients provided

21 <sup>269</sup> Hearing Transcript Volume V, page 689, lines 10 – 21.

22 <sup>270</sup> Hearing Transcript Volume V, page 690, lines 5 – 10.

23 <sup>271</sup> Hearing Transcript Volume V, page 706, lines 6 – 9.

24 <sup>272</sup> Hearing Transcript Volume V, page 707, lines 1 – 4.

25 <sup>273</sup> Hearing Transcript Volume V, page 707, lines 5 – 11.

26 <sup>274</sup> Hearing Transcript Volume V, page 711, lines 10 – 15.

<sup>275</sup> Hearing Transcript Volume V, page 711, lines 18 – 23.

<sup>276</sup> Hearing Transcript Volume V, page 712, lines 6 – 11.

<sup>277</sup> Hearing Transcript Volume II, page 251, lines 4 – 7.

<sup>278</sup> Hearing Transcript Volume II, page 251, lines 18 – 20.

<sup>279</sup> Hearing Transcript Volume II, page 252, lines 14 - 16.

<sup>280</sup> Hearing Transcript Volume II, page 269, line 23 – page 1.

<sup>281</sup> Hearing Transcript Volume II page 257, lines 5 – 8; Exhibit S-15 (unexecuted document).

1 by vendor by electronic transfer of funds the same day that the franchisee receives payment from  
 2 their dental system.”<sup>282</sup> Oracare had an executed vender agreement with DSPF dated February 19,  
 3 2011.<sup>283</sup> To Mr. White’s knowledge, MetroMedia and Oracare were the only approved vendors in  
 4 February of 2011.<sup>284</sup> Oracare was to receive payment through ACH withdrawal of 19 percent of  
 5 patient receivables.<sup>285</sup> The franchisee kept 52 percent of the 35 percent the dentists paid.<sup>286</sup>

6 120. On or about April 26, 2012, DSPF sent MetroMedia and Oracare default letters.<sup>287</sup>  
 7 MetroMedia and Oracare were not able to keep up with the capacity that was required for both  
 8 dentists and patients.<sup>288</sup> MAERKI was aware that MetroMedia and Oracare were not able to  
 9 provide the dentists and patients as represented to investors.<sup>289</sup>

10 121. Dazzle Dental was an entity formed and operated by Mr. White, Dale Murray, Gil  
 11 Morlock and Steven Vereen.<sup>290</sup> The DSPF offering materials referenced a track record that Mr.  
 12 White stated was for the management team of Dazzle Dental.<sup>291</sup> MAERKI was aware that the track  
 13 record was based upon Dazzle Dental.<sup>292</sup> Dazzle Dental had raised about \$40 million from  
 14 investors.<sup>293</sup> Mr. White testified that the investors in Dazzle Dental did not receive any of the  
 15 patient fees collected from the referral of patients.<sup>294</sup> MAERKI was well aware that Dazzle Dental  
 16 was out of business in 2010.<sup>295</sup>

17 122. Mr. White testified that MetroMedia and Oracare received about \$5 million in  
 18 prepaid funds from DSPF.<sup>296</sup>

20 <sup>282</sup> Hearing Transcript Volume II page 258, lines 9 – 13; Exhibit S-15.

21 <sup>283</sup> Hearing Transcript Volume II page 258, lines 20 – 24; Exhibit S-14.

22 <sup>284</sup> Hearing Transcript Volume II page 259, lines 2 – 6.

23 <sup>285</sup> Hearing Transcript Volume II page 259, lines 9 – 19; Exhibit S-14.

24 <sup>286</sup> Hearing Transcript Volume II page 261, lines 13 – 14.

25 <sup>287</sup> Hearing Transcript Volume II, page 263, lines 1 – 15; Exhibit S-16.

26 <sup>288</sup> Hearing Transcript Volume II page 263, line 25 – page 264, line 4.

<sup>289</sup> Hearing Transcript Volume II page 264, lines 1 – 20.

<sup>290</sup> Hearing Transcript Volume II page 269, lines 14 – 19.

<sup>291</sup> Hearing Transcript Volume II page 269, lines 4 – 13. Exhibit S-13.

<sup>292</sup> Hearing Transcript Volume II page 269, lines 7 – 13.

<sup>293</sup> Hearing Transcript Volume II page 266, lines 4 – 19.

<sup>294</sup> Hearing Transcript Volume II page 275, lines 10 – 20.

<sup>295</sup> Hearing Transcript Volume II page 264, lines 21 – 24.

<sup>296</sup> Hearing Transcript Volume II page 272, lines 8 – 21.

1           123. Mr. White testified that a brochure was provided to DSPF salespeople titled  
2 “Management Team Accomplishments.”<sup>297</sup> According to Mr. White’s testimony, the brochure was  
3 provided to the DSPF salespeople to provide information about MetroMedia and Oracare.<sup>298</sup>  
4 Contrary to Mr. White’s testimony, the “Management Team Accomplishments” was provided to  
5 investors as part of the email series investors received when they initially requested information  
6 about the DSPF program.<sup>299</sup>

7           124. From April, 2012 – August of 2012, MetroMedia made “appreciation payments” to  
8 investors whose franchises were past six months start-up timeframe.<sup>300</sup> MAERKI was in on the  
9 decision to have MetroMedia start making appreciation payments to investors.<sup>301</sup> The funds came  
10 from part of the \$5 million paid to MetroMedia by DSPF.<sup>302</sup> MAERKI actually sent out the  
11 appreciation payments on behalf of MetroMedia.<sup>303</sup> MetroMedia and Oracare did not receive fees  
12 from investors unless dentists were paid from referred patients.<sup>304</sup> MetroMedia began falling behind  
13 at the end of 2011<sup>305</sup>. MAERKI was fully aware that MetroMedia was falling behind at the end of  
14 2011 yet continued selling the DSPF program without disclosing the delays in providing patients.<sup>306</sup>  
15 To Mr. White’s knowledge, there were no franchisee that did not choose the management program  
16 utilizing MetroMedia and Oracare.<sup>307</sup>

17           125. At some point MAERKI was president of Oracare.<sup>308</sup> The purpose of Hassle Free  
18 and Practice Management private offerings were to bring dentists and patients together.<sup>309</sup>

19 \_\_\_\_\_  
20 <sup>297</sup> Hearing Transcript Volume II page 273, line 19 – page 274, line 17; Exhibit S-30.

<sup>298</sup> Hearing Transcript Volume II page 274, lines 12 – 21.

<sup>299</sup> Hearing Transcript Volume II page 274, lines 22 – 25; Exhibits S-9, ACC000052 - 61; S-10, ACC000365 – 374;

\*\*\*add other investors.

<sup>300</sup> Hearing Transcript Volume II page 276, line 15 – 13; page 279, lines 19 – 21; Exhibit S-33, ACC051995;  
22 ACC051997; ACC051999; ACC052006.

<sup>301</sup> Hearing Transcript Volume II page 277, lines 3 – 7.

<sup>302</sup> Hearing Transcript Volume II page 277, line 14 – page 278, line 2.

<sup>303</sup> Hearing Transcript Volume II page 305, lines 22 – 24.

<sup>304</sup> Hearing Transcript Volume II page 281, lines 5 – 18.

<sup>305</sup> Hearing Transcript Volume II page 306, lines 12 – 14; lines 23 – 25.

<sup>306</sup> Hearing Transcript Volume II page 307, lines 1 – 21.

<sup>307</sup> Hearing Transcript Volume II page 308, lines 7 – 16.

<sup>308</sup> Hearing Transcript Volume II, page 254, lines 8 – 10; page 297, line 23 – page 298, line 7; Exhibits S-49 and S-23;  
26 Exhibit 73.

<sup>309</sup> Hearing Transcript Volume II, page 298, lines 10 – 14.

1           **DALE MURRAY**

2           126. Respondents called Dale Murray as a witness.<sup>310</sup> Mr. Murray was part of the  
3 management team of Dazzle Dental.<sup>311</sup> Dazzle Dental was capitalized through investors.<sup>312</sup>

4           127. MetroMedia and Oracare were formed, after meeting with MAERKI, in 2010.<sup>313</sup> Mr.  
5 Murray testified that MetroMedia and Oracare were approved vendors for DSPF.<sup>314</sup> DSPF paid  
6 most of the franchise fees to MetroMedia and Oracare.<sup>315</sup> Most, if not all investors, contracted with  
7 MetroMedia and Oracare.<sup>316</sup> According to Mr. Murray, in the early days, as the sale of franchises  
8 picked up, MetroMedia and Oracare fell severely behind.<sup>317</sup>

9           128. The DSPF website contained information related to MetroMedia and Oracare in the  
10 “About Us” section.<sup>318</sup> Mr. Murray testified that he was aware of the DSPF website and had  
11 reviewed the content.<sup>319</sup> According to his testimony, Mr. Murray provided some of the materials for  
12 the DSPF website.<sup>320</sup> The company name throughout the website is DSPF.<sup>321</sup> Nowhere are the  
13 names MetroMedia or Oracare disclosed on the DSPF website.<sup>322</sup> Even Mr. Murray would believe  
14 the website is referring to DSPF.<sup>323</sup> When asked if this would be misleading, Mr. Murray stated  
15 “[i]t would cause me to think that it was Dental Support Plus.”<sup>324</sup>

16           129. Mr. Murray helped create the document titled “Management Team  
17 Accomplishments.”<sup>325</sup> Mr. Murray testified that the document titled “Management Team  
18 Accomplishments” was for MetroMedia and Oracare.<sup>326</sup> This document was distributed to the

19 \_\_\_\_\_  
<sup>310</sup> Hearing Transcript Volume VII, page 968 – 1034.

20 <sup>311</sup> Hearing Transcript Volume VII, page 969, lines 16 – 25.

21 <sup>312</sup> Hearing Transcript Volume VII, page 977, lines 7 – 21.

22 <sup>313</sup> Hearing Transcript Volume VII, page 979, lines 14 – 23.

23 <sup>314</sup> Hearing Transcript Volume VII, page 981, lines 1- 3.

24 <sup>315</sup> Hearing Transcript Volume VII, page 982, lines 9 – 15.

25 <sup>316</sup> Hearing Transcript Volume VII, page 985, lines 5 – 10.

26 <sup>317</sup> Hearing Transcript Volume VII, page 986, lines 8 – 10.

<sup>318</sup> Hearing Transcript Volume VII, page 991, line 6 – page 992, line 7; Exhibit S-18a, ACC 063150.

<sup>319</sup> Hearing Transcript Volume VII, page 1000, lines 10 – 20; page 1001, lines 14 – 16; Exhibit S-18a.

<sup>320</sup> Hearing Transcript Volume VII, page 1001, lines 14 – 21; Exhibit S-18a.

<sup>321</sup> Hearing Transcript Volume VII, page 1000, line 21 – page 1001, line 7; Exhibit S-18a.

<sup>322</sup> Hearing Transcript Volume VII, page 1002, lines 1 – 5; Exhibit S-18a.

<sup>323</sup> Hearing Transcript Volume VII, page 1002, line 25; page 1003, lines 6 – 9; Exhibit S-18a..

<sup>324</sup> Hearing Transcript Volume VII, page 1003, lines 10 – 15; Exhibit S-18a.

<sup>325</sup> Hearing Transcript Volume VII, page 993, line 9; Exhibit S-30.

<sup>326</sup> Hearing Transcript Volume VII, page 993, line 10 – 11.

1 franchisees to show the support they could receive.<sup>327</sup> Mr. Murray testified that DSPF hired  
 2 MetroMedia and Oracare for two reasons; one for MetroMedia to attract patients and two for  
 3 Oracare to attract dentist based upon their track record.<sup>328</sup>

4 130. The document titled "Management Team Accomplishments" contains statistics for  
 5 Dazzle Dental not MetroMedia and Oracare.<sup>329</sup> Nowhere is it disclosed that the statistics are Dazzle  
 6 Dental not DSPF, MetroMedia or Oracare.<sup>330</sup> Mr. Murray testified that investors would know that  
 7 "Management Team Accomplishments" was for Dazzle Dental because of conversations with the  
 8 investors not by reading the document.<sup>331</sup> Mr. Murray admits that he did not speak with every  
 9 single investor and he would not know if all investors were told that the "Management Team  
 10 Accomplishments" was for Dazzle Dental.<sup>332</sup> Nor, does the document relate to the statistics of  
 11 MetroMedia and Oracare's ability to obtain dentists and patients.<sup>333</sup>

12 131. Mr. Murray recognized DSPF's tri-fold brochure.<sup>334</sup> Nowhere on this document does  
 13 it disclose any name but DSPF.<sup>335</sup> Mr. Murray testified that if he saw the track record listed on the  
 14 DSPF tri-fold brochure he would think the track record belonged to DSPF.<sup>336</sup>

15 132. Mr. Murray testified that he was not on every sales call nor did he know what every  
 16 salesperson was representing to potential investors.<sup>337</sup>

17 133. Mr. Murray testified that Dazzle Dental raised about \$42 million from investors  
 18 through 27 different offerings.<sup>338</sup> The funds were to be used to establish dental centers and operate  
 19 them for a profit for the investors and the other owners.<sup>339</sup> In addition, some funds were raised to  
 20

21 <sup>327</sup> Hearing Transcript Volume VII, page 993, lines 12 – 15; Exhibit S-30.

22 <sup>328</sup> Hearing Transcript Volume VII, page 993, lines 14 – 19.

23 <sup>329</sup> Hearing Transcript Volume VII, page 998, lines 2 – 11; Exhibit S-30.

24 <sup>330</sup> Hearing Transcript Volume VII, page 998, lines 12 – 23; Exhibit S-30.

25 <sup>331</sup> Hearing Transcript Volume VII, page 999, lines 1 – 4; Exhibit S-30.

26 <sup>332</sup> Hearing Transcript Volume VII, page 999, lines 5 – 11; Exhibit S-30.

<sup>333</sup> Hearing Transcript Volume VII, page 999, lines 12 – 15; Exhibit S-30.

<sup>334</sup> Hearing Transcript Volume VII, page 1005, lines 21 – 24; Exhibit R-124.

<sup>335</sup> Hearing Transcript Volume VII, page 1006, lines 2 – 25; Exhibit R-124.

<sup>336</sup> Hearing Transcript Volume VII, page 1006, lines 5 – 22; Exhibit R-124.

<sup>337</sup> Hearing Transcript Volume VII, page 1004, line 25 – page 1005, line 6.

<sup>338</sup> Hearing Transcript Volume VII, page 1008, lines 1 – 13, page 1010, lines 10 - 11.

<sup>339</sup> Hearing Transcript Volume VII, page 1008, lines 17 – 20.

1 purchase property.<sup>340</sup> Investors in Dazzle Dental were to earn 36% return on their investments.<sup>341</sup>  
2 Dazzle Dental did not pay the investors back nor did they receive a 36% return on their  
3 investment.<sup>342</sup> Dazzle Dental was not successful.<sup>343</sup>

4 134. After the failure of Dazzle Dental, Mr. Murray was involved in another offering  
5 called the Joint Venture Program that was the early name of what became the DSPF program that is  
6 at issue.<sup>344</sup> The investors in the Joint Venture Program also lost their money.<sup>345</sup> After the failure of  
7 the Joint Venture Program, then Mr. Murray and Mr. White became vendors for MAERKI and  
8 DSPF.

9 135. Mr. Murray testified that he thought DSPF raised an amount estimated to be around  
10 \$10 million from investors.<sup>346</sup> Although, DSPF investors received some funds back but not close to  
11 even \$1 million from the efforts of MetroMedia and/or Oracare.<sup>347</sup>

12 136. Steven Vereen was a consultant with MetroMedia and Oracare.<sup>348</sup> No disclosure was  
13 made to investors that Steven Vereen had a Cease and Desist Order against him for violations of  
14 the Arizona Securities Act.<sup>349</sup>

15 137. Mr. Murray agreed that the FDD and what the salespeople stated to potential  
16 investors should be accurate.<sup>350</sup>

17 138. Mr. Murray testified that he was not aware of the permanent injunction against  
18 MAERKI.<sup>351</sup>

19 . . .

20 . . .

21 <sup>340</sup> Hearing Transcript Volume VII, page 1008, line 21 – page 1009, line 6.

22 <sup>341</sup> Hearing Transcript Volume VII, page 1009, lines 7 – 11.

23 <sup>342</sup> Hearing Transcript Volume VII, page 1009, lines 12 – 19; page 1010, lines 13 - 20.

24 <sup>343</sup> Hearing Transcript Volume VII, page 1021, lines 4 – 9; Exhibit S-61b.

25 <sup>344</sup> Hearing Transcript Volume VII, page 1009, lines 21 – page 1011, line 15; page 1015, line 22 – page 1016, line 1;  
page 1017, lines 1 – 11.

26 <sup>345</sup> Hearing Transcript Volume VII, page 1011, lines 15 – 20.

<sup>346</sup> Hearing Transcript Volume VII, page 1017, line 20 – page 1018, line 8.

<sup>347</sup> Hearing Transcript Volume VII, page 1018, lines 2 – 8.

<sup>348</sup> Hearing Transcript Volume VII, page 1024, lines 14 – 22.

<sup>349</sup> Hearing Transcript Volume VII, page 1024, lines 23 – 25.

<sup>350</sup> Hearing Transcript Volume VII, page 1034, lines 10 – 16.

<sup>351</sup> Hearing Transcript Volume VII, page 1011, lines 17 – 21.

1           **DENTAL SUPPORT GROUP LLC**

2           139. Starting in August of 2012, MAERKI began operating Dental Support Group, LLC  
3 (“Dental Support Group”), a Nevada limited liability company, managed by COFFIN.<sup>352</sup> Dental  
4 Support Group became an approved vendor of DSPF.<sup>353</sup>

5           140. An email sent to Investigator Clapper outlined Dental Support Group.<sup>354</sup> However,  
6 nowhere is it disclosed that MetroMedia and Oracare had not performed and most franchisees were  
7 far behind the 180 days that were represented to have a fully functioning franchise.<sup>355</sup>

8           141. Investigator Clapper received a brochure describing Dental Support Group.<sup>356</sup>

9           **THE FRANCHISE EXPERT**

10           **LYNNE SHELTON**

11           142. Lynne Shelton<sup>357</sup> is a franchise lawyer MAERKI retained for DSPF and is now  
12 designated as an expert witness.<sup>358</sup> Ms. Shelton is not a securities lawyer nor is she a licensed  
13 Arizona attorney.<sup>359</sup> The Securities Division objected to Ms. Shelton’s testimony as irrelevant to  
14 the current action.<sup>360</sup> Ultimately, Ms. Shelton’s testimony goes to the form not the substance of this  
15 case. She created the forms to operate as a franchise however; the manner in which it was sold and  
16 operated is a security. Further, Ms. Shelton is not a disinterested expert in this matter. She was  
17 retained by DSPF to create the form documents for a franchise. Ms. Shelton reputation is on the  
18 line if this matter is determined to be a security and not a franchise.

19           143. Ms. Shelton may have completed the forms to create a franchise however once  
20 DSPF began soliciting salesmen she does not know substance of what happened. Ms. Shelton  
21  
22

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23 <sup>352</sup> Exhibit S-4.

24 <sup>353</sup> Exhibit S-11, ACC044745.

25 <sup>354</sup> Exhibit S-11, ACC044745.

26 <sup>355</sup> Exhibit S-11, ACC044745.

<sup>356</sup> Exhibit S-11, ACC044751.

<sup>357</sup> Hearing Transcript Volume VI, page 727 and VIII, page 1057.

<sup>358</sup> Hearing Transcript Volume VI, page 805, lines 1 – 3; page 868, lines 18 - 24.

<sup>359</sup> Hearing Transcript Volume VI, page 805, lines 15 – 17.

<sup>360</sup> Hearing Transcript Volume VI, page 736, lines 12 – 20; page 738, lines 5 – 9; page 739, line 4 – page 740, line 25.

1 agreed that it was important to include accurate information in the FDD.<sup>361</sup> In fact, inaccurate  
2 information in the FDD would be a violation of FTC regulations.<sup>362</sup>

3 144. Ms. Shelton admitted that she did not conduct due diligence on the vendors.<sup>363</sup> Ms.  
4 Shelton did not know the number of salespeople working for DSPF, the requirement for being a  
5 salesperson with DSPF or if background checks were done on the salespeople.<sup>364</sup> Nor was Ms.  
6 Shelton aware of the manner in which the DSPF program was being sold to investors.<sup>365</sup> Although  
7 Ms. Shelton testified that she reviewed sales materials that were submitted to her office, there were  
8 documents that were used that were not submitted to her.<sup>366</sup> Ms. Shelton testified that she would  
9 have liked to know about the regulatory background for the salespeople, she was unaware of the  
10 regulatory history of MAERKI, let alone Darryl Bank and Steven Vereen.<sup>367</sup> Ms. Shelton even  
11 testified that the regulatory information should have been disclosed to her in order to accurately  
12 prepare the FDD.<sup>368</sup>

13 145. DSPF provided a tri-fold brochure to prospective investors and investors.<sup>369</sup> Ms.  
14 Shelton was aware of the document.<sup>370</sup> Ms. Shelton testified that some of the information of the tri-  
15 fold brochure was from an affiliate.<sup>371</sup> Ms. Shelton agreed that if the information contained in the  
16 tri-fold brochure was inaccurate that would be a problem.<sup>372</sup> According to the testimony, Ms.  
17 Shelton was not on sales calls with the DSPF salespeople therefore, she cannot testify as to how  
18 DSPF was sold.<sup>373</sup>

20 <sup>361</sup> Hearing Transcript Volume VI, page 807, lines 19 – 22.

21 <sup>362</sup> Hearing Transcript Volume VI, page 807, line 23 – page 808, line 10.

22 <sup>363</sup> Hearing Transcript Volume VI, page 816, line 15 – page 817, line 1; page 818, lines 17 – 23..

23 <sup>364</sup> Hearing Transcript Volume VI, page 820, lines 5 – 12.

24 <sup>365</sup> Hearing Transcript Volume VI, page 820, lines 13 – 21; page 823, lines 7 – 9; page 868, lines 1 – 17; page 869,  
lines 16 – 21; page 870, lines 10 – 24.

25 <sup>366</sup> Hearing Transcript Volume VI, page 821, lines 16 – 22.

26 <sup>367</sup> Hearing Transcript Volume VI, page 822, lines 5 – 21; page 817, lines 2 – 25; page 879, lines 20 – 25; page 880,  
lines 1 - 16\*\*\*add maerki

<sup>368</sup> Hearing Transcript Volume VI, page 823, lines 1 – 6.

<sup>369</sup> Exhibits S-13; S-24; R-124.

<sup>370</sup> Hearing Transcript Volume VI, page 823, line 25 – page 824, line 8.

<sup>371</sup> Hearing Transcript Volume VI, page 824, line 9 – page 826, line 14.

<sup>372</sup> Hearing Transcript Volume VI, page 831, lines 1 – 3.

<sup>373</sup> Hearing Transcript Volume VI, page 835, lines 7 – 21.

1           146. Ms. Shelton testified that an operation manual was to be provided to the investors  
2 and was disclosed in the FDD.<sup>374</sup> Ms. Shelton admitted that she did not know if the operations  
3 manual was actually provided to every investor.<sup>375</sup> Further, Ms. Shelton testified that there was  
4 some type of training for the investors.<sup>376</sup> However, Ms. Shelton did not know if the training was  
5 given to every investor.<sup>377</sup> There were other manuals that were to be given to the investors however  
6 Ms. Shelton could not state whether those manuals were actually given to investors.<sup>378</sup>

7           147. Throughout Ms. Shelton testimony, she kept referring to Exhibit 7 of the FDD as a  
8 way to transfer any responsibility of DSPF, MAERKI and the salesforce to be truthful to potential  
9 investors.<sup>379</sup> Ms. Shelton admitted that she did not know that MAERKI was at one time president of  
10 Oracare.<sup>380</sup> Ms. Shelton testified that several changes, modifications and additions would have to be  
11 included in the disclosure document if MAERKI was at one time the president of Oracare.<sup>381</sup>

## 12 THE WEBSITE

13           148. The website in 2011 for DSPF stated that the DSPF program already provided  
14 profitable “dental practices with their most sought after assets – pre-qualified (ready, willing and  
15 able to buy) patients who want dental services now.”<sup>382</sup> The 2011 website describes that DSPF  
16 program has “been founded on 8 years of Research and Development and 5 years of real-time  
17 business operations establishing a track records greater than projections.”<sup>383</sup> There is no disclosure  
18 that the business operations were not from DSPF and that real-time businesses failed.<sup>384</sup>

19           149. In 2012, DSPF had a website that described its business program.<sup>385</sup> The website  
20 stated “[o]ur unique, carefree, business model is a highly qualified, patient delivery system

21  
22 <sup>374</sup> Hearing Transcript Volume VI, page 844, line 20 – page 845, line 16.

<sup>375</sup> Hearing Transcript Volume VI, page 844, line 20 – page 845, line 16.

<sup>376</sup> Hearing Transcript Volume VI, page 845, lines 17 – 24.

<sup>377</sup> Hearing Transcript Volume VI, page 845, line 25 – page 846, line 7.

<sup>378</sup> Hearing Transcript Volume VI, page 846, lines 8 – 15.

<sup>379</sup> Hearing Transcript Volume VI, page 852, lines 2 – 17.

<sup>380</sup> Hearing Transcript Volume VI, page 857, line 18 – page 858, line 22.

<sup>381</sup> Hearing Transcript Volume VI, page 859, lines 1 – 6.

<sup>382</sup> Exhibit S-18b.

<sup>383</sup> Exhibit S-18b, ACC063143.

<sup>384</sup> Exhibit S-18b, ACC063143.

<sup>385</sup> Exhibits S-18a.

1 designed to provide a dentist with an average of 10 new patients weekly, earning the franchisee a  
 2 net annual profit of \$6,448 (a return on equity of 21.49%)[manager option selected].<sup>386</sup> The  
 3 website provided a franchise overview outlining the program.<sup>387</sup> The website stated that DSPF  
 4 would provide “pre-qualified” patients to dentists.<sup>388</sup> “Pre-qualified” patients were described as  
 5 “ready, willing and able to buy.”<sup>389</sup> The website provided information to the investor that they  
 6 could choose to operate the DSPF program or they can choose to place their franchise under  
 7 management with our approved vendors with a description of the responsibilities of the approved  
 8 vendors.<sup>390</sup> The website describes how DSPF has been built on “an 8-year time period which  
 9 included 7-years of research and development” without disclosing that the experience is not DSPF  
 10 and that investors in the first year of DSPF were not yet receiving the returns as promised or having  
 11 a fully-operational business within 180 days.<sup>391</sup>

12 150. The website continues with a section titled “About Us.”<sup>392</sup> This section described  
 13 how the DSPF program is based upon a prove 8-year business model by the Management Team  
 14 without describing that it was not the DSPF management team nor was the model successful for  
 15 investors.<sup>393</sup>

16 151. According to interviews with DSPF dentists conducted by Investigator Clapper, the  
 17 dentists expected pre-qualified patients that had the ability to pay for dental treatment.<sup>394</sup> According  
 18 the Partner Dentists the patients were not pre-screened, were unable to pay for services, and failed  
 19 to appear for their appointments.<sup>395</sup> As the result of the lack of pre-qualified patients, a number of  
 20 Partner Dentists have since cancelled their agreements.<sup>396</sup>

21 . . .

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22 <sup>386</sup> Exhibit S-18a.  
 23 <sup>387</sup> Exhibit S-18a.  
 24 <sup>388</sup> Exhibit S-18a.  
 25 <sup>389</sup> Exhibit S-18a.  
 26 <sup>390</sup> Exhibit S-18a.  
<sup>391</sup> Exhibit S-18a.  
<sup>392</sup> Exhibit S-18a.  
<sup>393</sup> Exhibit S-18a. Testimony of David White and Dale Murray.  
<sup>394</sup> Hearing Transcript Volume IV, page 559, line 2 – page 560, line 17.  
<sup>395</sup> Hearing Transcript Volume IV, page 559, line 10 – page 560, line 1.  
<sup>396</sup> Hearing Transcript Volume IV, page 559, line 2 – page 560, line 17.

1 **THE REGULATORY ACTIONS**

2 152. As part of the investigation into DSPF and MAERKI, Investigator Clapper  
 3 conducted a background investigation on MAERKI.<sup>397</sup> Investigator Clapper discovered a number of  
 4 regulatory actions filed against MAERKI.<sup>398</sup> The Securities and Exchange Commission (“SEC”)  
 5 brought action against MAERKI and a company he was involved with named Foodsource, Inc. for  
 6 violations of Federal securities laws.<sup>399</sup> MAERKI consented to an Order of Permanent Injunction  
 7 against him and it was signed by a Federal Judge.<sup>400</sup>

8 153. Investigator Clapper also related facts that MAERKI was the subject of another  
 9 permanent injunction issued by the Federal Trade Commission (“FTC”).<sup>401</sup> The FTC brought  
 10 action against MAERKI and another of his companies, The Cellular Corporation and Spectra  
 11 Financial Corporation.<sup>402</sup> MAERKI signed a Stipulation for Consent Decree and Permanent  
 12 Injunction.<sup>403</sup> The Consent Decree and Permanent Injunction were entered against MAERKI and  
 13 his entities.<sup>404</sup> MAERKI admitted to various regulatory matters against him.<sup>405</sup>

14 154. Steven Vereen is subject to a Decision of the Arizona Corporation Commission for  
 15 violations of the Arizona Securities Act.<sup>406</sup>

16 155. The FTC brought action against Lynne Shelton for violations of Section 5 of the  
 17 FTC Act and the Franchise Rule.<sup>407</sup> Ms. Shelton signed a Stipulated Final Judgment and Order for  
 18 Permanent Injunction related to the violations of the FTC Act and the Franchise Rule.<sup>408</sup>

19 156. Under oath, Ms. Shelton initially denied that she had been permanently enjoined by  
 20 the FTC related to Section 5 of the FTC Act and the Franchise Rules.<sup>409</sup> In fact, Ms. Shelton stated

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21 <sup>397</sup> Hearing Transcript Volume IV, page 525, lines 12 – 14.  
 22 <sup>398</sup> Hearing Transcript Volume IV, page 525, lines 15 – 17.  
<sup>399</sup> Exhibit S-6a.  
<sup>400</sup> Exhibits S-6b and S-6c.  
 23 <sup>401</sup> Hearing Transcript Volume IV, page 527, line 12 – page 528, line 23; Exhibit S-70a – f.  
<sup>402</sup> Exhibit S-70a.  
 24 <sup>403</sup> Exhibit S-70d.  
<sup>404</sup> Exhibit S-70f.  
 25 <sup>405</sup> Hearing Transcript Volume IV, page 530, line 12 – page 531, line 11; Exhibit 7a, page 23 – 25; Exhibit S-71a – b.  
<sup>406</sup> Exhibit S-74.  
<sup>407</sup> Exhibit S-72.  
 26 <sup>408</sup> Exhibit S-72.  
<sup>409</sup> Hearing Transcript Volume VI, page 729, line 16 – 23; Exhibit 72.

1 that the charge was dropped.<sup>410</sup> Subsequently, Ms. Shelton stated that the fine amount was not  
2 paid.<sup>411</sup>

### 3 THE FRANCHISE DISCLOSURE DOCUMENT

4 157. Both MAERKI and Ms. Shelton place great emphasis on the FDD especially Exhibit  
5 7. According to Ms. Shelton, the investor signs a document that states they are not relying on  
6 anything that was given to them by the salesman that is not part of the FDD.<sup>412</sup> MAERKI elicited  
7 testimony from Mr. Murray stating that it does not matter what the salesman stated to the  
8 prospective investor that the FDD was the only thing the investors should rely.<sup>413</sup> In other words it  
9 does not matter that the offerees and investors have been lied to and provided with false and  
10 misleading information by their salesperson, MAERKI and by DSPF such as through the DSPF  
11 website, the tri-fold brochure and various emails sent to offerees and investors.

12 158. The Franchise Disclosure Document provided to offerees and investors provided  
13 information regarding MAERKI's business background and experience.<sup>414</sup> "From 1971 to current,  
14 Mr. Maerki has assisted numerous companies through consultation, business development or sales  
15 and marketing. Companies which Mr. Maerki has assisted include: Food Source in Larkspur,  
16 California (Capital Equipment Manufacturing and Management) . . . The Cellular Corporation . . .  
17 and the Spectra Financial Network."<sup>415</sup> However, the information regarding MAERKI's business  
18 background and experience fails to disclose that the SEC and the FTC obtained permanent  
19 injunctions against MAERKI.<sup>416</sup> MAERKI's bio also lists that he was an Independent Marketing  
20 Organization for Smartcomm LLC.<sup>417</sup> What MAERKI fails to include is that he was in litigation  
21 with Smartcomm LLC since 2010.<sup>418</sup>

22  
23 <sup>410</sup> Hearing Transcript Volume VI, page 732, line 25; Exhibit 72.

24 <sup>411</sup> Hearing Transcript Volume VIII, page 1116, lines 15 – 19; Exhibit 72.

25 <sup>412</sup> Hearing Transcript Volume VI, page 833, line 15 – page 834, line 1.

26 <sup>413</sup> Hearing Transcript Volume VII, page 1027, lines 5- 19.

<sup>414</sup> Exhibit S-10, ACC000069.

<sup>415</sup> Exhibit S-10, ACC000069 – 70.

<sup>416</sup> Exhibits S-6a-c and S-70a-f.

<sup>417</sup> Exhibit S-10, ACC000069.

<sup>418</sup> Exhibit S-75a-b.

1           159. Contrary to the testimony of Ms. Shelton, the DSPF salespeople using DSPF  
 2 materials to induce investors to invest are responsible to provide accurate information. Under 16  
 3 CFR 436.9, it is unfair or deceptive act or practice in violation of Section 5 of the FTC Act for any  
 4 franchise seller covered by part 436 to make any claim or representation, orally, visually, or in  
 5 writing, that contradicts the information required to be disclosed by this part. Under Section 5 of  
 6 the FTC Act (15 USC §45), a deceptive act or practice where 1) a representation, omission, or  
 7 practice misleads or is likely to mislead the consumer; 2) a consumer’s interpretation of the  
 8 representation, omission, or practice is considered reasonable under the circumstances; and 3) the  
 9 misleading representation, omission, or practice is material.

10           160. Ms. Shelton’s testimony stating that MAERKI’s permanent injunctions did not have  
 11 to be disclosed since they were older than ten years is not accurate.<sup>419</sup> Under 16 CFR §436, Subpart  
 12 C, §436.5(c)(2), MAERKI should have disclosed the permanent injunctions that are currently  
 13 effective. “Currently effective” is defined in a document available to the public on the FTC website  
 14 titled “Franchise Rule Compliance Guide” and it states that:

The franchisor must disclose whether it, any related entity identified in the chart  
 below, or any person identified in Item 2 is subject to a currently effective  
 injunctive or restrictive order or decree resulting from a pending or concluded  
 action brought by a governmental agency – such as the FTC, SEC, or state  
 Attorney General – under a federal, state, or Canadian franchise, securities,  
 antitrust, trade regulation, or trade practice law, or that otherwise related to the  
 franchise. An injunctive or restrictive order or decree is “currently effective”  
 unless it has (1) been vacated or rescinded by a court or by the issuing agency, or  
 (2) expired by its own terms. If the name parties have fully complied with an  
 order requiring a specific course of action – such as registering its disclosure  
 document – then the order is no longer “currently effective.” However, a party  
 cannot fully comply with an order to act or to refrain from acting until the order  
 expires by its own terms. Most, if not all, Federal Trade Commission injunctive  
 orders pursued in federal district court contain no expiration term and, therefore,  
 will almost always be deemed “currently effective.” Franchise Rule Compliance  
 Guide pages 38 and 39.<sup>420</sup>

24           ...

25           ...

26 <sup>419</sup> Hearing Transcript Volume VI, page 880, line 13 – 18; page 881, lines 2 – 9.  
<sup>420</sup> available at [http:// www.ftc.gov/franchise-rule](http://www.ftc.gov/franchise-rule)

1 **IV. LEGAL ARGUMENT**

2 **A. DSPF “FRANCHISES” ARE INVESTMENT CONTRACTS AS DEFINED BY**  
 3 **THE ARIZONA SECURITIES ACT.**

4 At hearing, the Securities Division provided testimony and evidence to support finding that  
 5 the Respondents’ “franchise” investment program, were securities, in the form of an investment  
 6 contract, under the Act. “[T]he definition of security embodies a flexible rather than a static  
 7 principle, one that is capable of adaption to meet the countless and variable schemes devised by  
 8 those who seek the use of the money of others on the promise of profits.”<sup>421</sup>

9 The evidence and testimony established that although the Respondents labeled the  
 10 investment product as a “franchise” it was nothing but an investment contract designed to get  
 11 around the Act. Therefore, as described by the *Nutek* Court, the Respondents are those who devise  
 12 schemes who seek to use of the money of others on the promise of profits.<sup>422</sup> The Act was  
 13 designed to protect the public from individuals who disguise securities in non-securities titles to  
 14 avoid the Act.

15 **B. RESPONDENTS OFFERED AND SOLD INVESTMENT CONTRACTS**  
 16 **DISGUISED AS FRANCHISES.**

17 Although the Respondents labeled the investment scheme as a “franchise,” the manner in  
 18 which the “franchises” were offered, sold and operated constitutes an investment contract under  
 19 the Act. The definition of security under the Act includes the term “investment contract” without  
 20 defining it further. The Supreme Court defined the term investment contract as an investment of  
 21 money in a common enterprise with profits to come solely from the efforts of other.<sup>423</sup>

22 Arizona Courts have recognized the “*Howey*” test to define investment contract under the  
 23 Act. In *S.E.C. v Glenn W. Turner Enterprises, Inc.*,<sup>424</sup> recognizing that the Supreme Court’s  
 24 “definition of securities should be a flexible one, the word “solely” should not be read as a strict or

25 <sup>421</sup> *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 299.

26 <sup>422</sup> *Nutek Information Systems, Inc. v. Arizona Corporation Commission*, 194 Ariz. 104, 108, ¶17, 977 P.2d 826, 830 (App. 1998).

<sup>423</sup> See *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946).

<sup>424</sup> 474 F.2d 476, 482, (1973) cert denied 414 U.S. 821 (1973)

1 literal limitation on the definition of an investment contract, but rather it must be construed  
2 realistically, so as to include within the definition those schemes which involve in substance, if not  
3 form, securities.<sup>425</sup> Further, the Court adopted a more realistic test; “whether the efforts made by  
4 those other than the investor are the undeniable significant ones, those essential managerial efforts  
5 which affect the failure or success of the enterprise.”<sup>426</sup>

6 Applying the *Howey* test and the analysis made by the Ninth Circuit in *S.E.C. v. Glenn*  
7 *Turner*, to the facts outlined in the Notice of Opportunity filed in this case, there is no question that  
8 Respondents offered and sold securities in the form of investment contracts.

9 The Securities Division will establish that all elements of the *Howey* test are met through  
10 the presentation of evidence and testimony.

11 **1. First Element of *Howey* - Investment of Money.**

12 The first element of the *Howey* test is the investment of money. There is no dispute that the  
13 investors invested money by purchasing the “franchise” program. The Respondents’ legal opinion  
14 states that the first element of *Howey* is met.<sup>427</sup> The evidence showed that beginning in 2011  
15 through 2013, investors purchased their “franchises” starting at \$20,000 per “franchise.” The price  
16 was increased to \$25,000 and then to \$30,000. Investors purchased their “franchises” using cash or  
17 IRA transfers. The Securities Division presented evidence and testimony from investors on how  
18 they wired funds or issued a check to DSPF for the purchase of the “franchises.” Respondents  
19 received more than \$13 million through the sale of “franchise” interests to investors. There is no  
20 question that the first element of *Howey* is met.

21 **2. Second Element of *Howey* – Common Enterprise.**

22 The second element of the *Howey* test is common enterprise. At the time it issued its  
23 opinion in the *Howey* case, the Court did not define the term “common enterprise.” Subsequent  
24 courts have recognized two tests to determine common enterprise; vertical or horizontal  
25

26 <sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> Exhibit R-123.

1 commonality. In Arizona, the second element of *Howey* may be met through either horizontal or  
2 vertical commonality.<sup>428</sup>

3 Vertical commonality requires a correlation between the success of the investor and the  
4 success of the promoter without the requirement of pooling.<sup>429</sup> The promoter's success is tied to  
5 the investors. Such a correlation can be satisfied by an arrangement involving a seller or even a  
6 third party who is different from the promoter.<sup>430</sup> The Court in *R. G. Reynolds, Inc.* found that "one  
7 indicator of vertical commonality, . . . is an arrangement to share profits on a percentage basis  
8 between the investor and the sell or promoter."<sup>431</sup>

9 The Securities Division introduced evidence, from the Respondents' own records, and  
10 testimony from Respondent Maerki, that if the investors do not make money on their "franchise"  
11 purchase, the Respondents do not make money.<sup>432</sup> According to Respondent Maerki's sworn  
12 testimony, "nobody gets paid any money unless the franchise does . . . . In other words, the  
13 franchisor doesn't get paid until that cash flow starts through. Oracare<sup>433</sup> doesn't get paid until it  
14 starts through. They've spent the setup and marketing cost. Metro Media<sup>434</sup> doesn't get paid. It's  
15 all designed to get paid by performance."<sup>435</sup> The investors pay Metro Media 29% of the money  
16 they receive from the dentists. They are to pay the franchisor 4% and Oracare 19%.<sup>436</sup>

17 The Respondents sales practices disclosed that their approved vendors and entities owned  
18 and controlled by the Respondents receive a percentage of the returns paid to the investors.<sup>437</sup>  
19 Neither the Respondents nor the approved vendors receive any compensation unless the investor  
20 receives returns on their investments. The investors do not have to pay for services of the  
21

22 <sup>428</sup> See *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 566, 733 P.2d 1142, 1149 (Ariz. App. 1987).

23 <sup>429</sup> *Id.* at 565.

24 <sup>430</sup> See *S.E.C. v. R. G. Reynolds, Inc.*, 952 F.2d 1125, 1130 (1991).

25 <sup>431</sup> *Id.*

26 <sup>432</sup> Exhibit S-7a<sup>432</sup>, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 119, lines 1 – page 120, lines 3.

<sup>433</sup> Oracare Development, Inc. ("Oracare")

<sup>434</sup> Metro Media Business Services, Inc. ("Metro Media")

<sup>435</sup> Exhibit S-7a, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 157, lines 18 – 24.

<sup>436</sup> S-7a, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 90 lines 3 – 10.

<sup>437</sup> Exhibit S-7a, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 119, lines 1 – page 120, lines 3.

1 approved vendors if they do not see a return. In a newsletter to investors, Respondent Maerki  
2 stated “[f]ranchises have not been profitable, and as a result, DSPF has not been profitable.”<sup>438</sup>

3 Horizontal commonality involves the pooling of investor funds managed by the promoter  
4 or third party.<sup>439</sup> DSPF’s National Field Sales Manager, Daryl Bank, owns Dominion Private  
5 Client Group.<sup>440</sup> According to Dominion Private Client Group, investors are able to purchase  
6 franchises or interests in a pool of franchises.<sup>441</sup> Respondent Maerki is included in the offering  
7 document provided to investors.<sup>442</sup>

8 Respondents’ investment program meets the requirements of common enterprise. Vertical  
9 commonality is present. Respondent Maerki’s own statements support finding vertical  
10 commonality. In addition, horizontal commonality is met through the offering of pooled  
11 franchises.

### 12 3. Third Element of *Howey* – Expectation of Profits.

13 The *Howey* test requires that the investor must have an expectation of profits. The  
14 Securities Division must establish that the investors expected profits from their purchase of the  
15 “franchises.” The Respondents agree that this element is met.<sup>443</sup> The investors testified that they  
16 purchased “franchises” with the intent to earn a profit as represented in the offering materials and  
17 by the salespeople. The Respondents were very successful selling this investment program as an  
18 “absentee-owned” program. According to one email an offeree received, DSPF offers an  
19 “[a]bsentee owned, fully-managed dental franchise with a 5-year track record producing annual  
20 profits up to 40% to 60%, or more.”<sup>444</sup> The same email represented that “a fully leveraged  
21 franchise may produce annual profits up to 108.42%, or more, within 2 years.”<sup>445</sup>

22  
23  
24 <sup>438</sup> Exhibit S-61b, Bates Number ACC124155-157, Memorandum from the Desk of Kent Maerki.

<sup>439</sup> Exhibit S-61a, Opportunity Alert and Investment Offering Document, ACC122446 – 122456

<sup>440</sup> Exhibit S-61a, Letter Announcing the Dental Support Group, ACC122431-33.

<sup>441</sup> Exhibit S-61a, Opportunity Alert, ACC122446.

<sup>442</sup> Exhibit S-61a, DSPF Group Investment Offering Document, ACC122454.

<sup>443</sup> Exhibit R-123.

<sup>444</sup> Exhibit S-9, Email from Info@dspf.co, ACC000013.

<sup>445</sup> Exhibit S-9, Email from Info@dspf.co, ACC000014.

1 The Securities Division presented testimony from investors that they only purchased the  
2 “franchises” to make a profit. The Respondents offered and sold the “franchise” to investors with  
3 the expectation of profits.

4 **4. Fourth Element of *Howey* – Through the Efforts of Others.**

5 The *Howey* Court found that the expectation of profits must be solely from the efforts of  
6 others.<sup>446</sup> The Ninth Circuit found that the efforts must be undeniably significant ones; that is,  
7 those essential managerial efforts which effect the failure or success of the enterprise.<sup>447</sup> The  
8 efforts of others do not need to be those of the promoters.<sup>448</sup>

9 Arizona courts recognize that “others” can be third parties not just the promoter or seller.<sup>449</sup>  
10 The Ninth Circuit Court in *Hocking v. Dubois*,<sup>450</sup>, refined “others” in its landmark opinion. In that  
11 case the offering included an optional “collateral arrangement” with a third party manager who  
12 was unreferenced in the sale document and who was without any affiliation, selling arrangement or  
13 link with the seller.<sup>451</sup> The court held this was sufficient to satisfy the “efforts of others” element,  
14 if the third party collateral arrangement was “presented” to the investor “as part of the same  
15 transaction or scheme, and that he purchased them as such.”<sup>452</sup>

16 In this case, the “franchises” were offered and sold as “absentee-owned” investments.<sup>453</sup>  
17 The Respondents even agree that this element of *Howey* would be met “if the investor chooses to  
18 utilizes [sp] a management person or third party company to handle all aspects of their business.”<sup>454</sup>  
19 The investors were given the choice to operate the “franchise” themselves or to retain the vendors  
20 approved by the Respondents. Between 2010 and to mid-2012, Metro Media was only approved  
21 vender for obtaining patients. Between 2010 and mid-2012, Oracare was the only approved vender

22 <sup>446</sup> See *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946).

23 <sup>447</sup> See *Sullivan v. Metro Productions, Inc.*, 150 Ariz. 573, 724 P.2d 1242 (Ariz. App. 1986); *S.E.C. v Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482, (9<sup>th</sup> Cir. 1973) cert denied 414 U.S. 821 (1973).

24 <sup>448</sup> See *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 566, 733 P.2d 1142, 1149 (Ariz. App. 1987).

25 <sup>449</sup> See *Daggett*, 152 Ariz. at 566, 733 P.2d at 1149.

26 <sup>450</sup> 839 F.2d 560 (9<sup>th</sup> Cir. 1988)

<sup>451</sup> See *Hocking*, 885 F.2d at 1457, 1460-62.

<sup>452</sup> *Id.* at 1458.

<sup>453</sup> Exhibit S-7c, Dental Support Plus Franchise Tri-fold Brochure, ACC002281.

<sup>454</sup> Exhibit R-123.

1 for obtaining dentists. In mid-2012, Respondents created Dental Support Group LLC as another  
2 approved vender. According to the information provided to the investors, if the investors retained  
3 the marketing company to be responsible for operating the business, the investors' only  
4 responsibility would be to reconcile monthly reports with accounts, oversight and taxes.<sup>455</sup> The  
5 Respondents offered an approved vender that would handle the reconciliation, oversight and taxes  
6 to the investors.

7 The testimony at hearing established that the investors had no desire to run the day to day  
8 operations of the "franchise." A large portion of the investors were retired individuals who did not  
9 want to start a new career in the dental field. In addition, Respondent Maerki testified that  
10 everyone who purchased the "franchise" program chose the managed program except one. The  
11 only person to attempt to operate their own "franchise" was Respondent Maerki himself.<sup>456</sup>

12 *Hocking* clarified that "others" includes not just the promoter or seller and affiliated third  
13 parties, but even third parties without any legal relationship with either seller or investor at the  
14 time the investment is made. The Court in *Hocking* stated that "[w]hat determines the applicability  
15 of the securities laws here is *what* tangible bundle of rights was actually offered to or purchased by  
16 the buyer, not *who* offered or sold those rights to him."<sup>457</sup> The Courts look to substance of a  
17 transaction rather than the form.

18 In this case, the evidence shows that all the investors (except Respondent Maerki) chose to  
19 retain the approved vendors.<sup>458</sup> Oracare and Metro Media were part of the offering materials.  
20 Oracare and Metro Media received a portion of the "franchise" fees paid by investors.<sup>459</sup> The  
21 representations about DSPF's track record related to the principals of Oracare and MetroMedia,  
22 not Respondents.<sup>460</sup>

23  
24 <sup>455</sup> Exhibit S-7c, Dental Support Plus Franchise Tri-fold Brochure, ACC002281.

25 <sup>456</sup> Exhibit S-7a, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 58, lines 6 -15.

26 <sup>457</sup> *Id.* at 569.

<sup>458</sup> Exhibit S-7a, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 58, lines 6 -15.

<sup>459</sup> Exhibit S-7a, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 155, lines 4 – 11.

<sup>460</sup> Exhibit S-7a, Examination Under Oath Transcript of Kent Maerki dated July 11, 2012, page 132, lines 9 – page 133,  
lines 7.

1 The Securities Division met its burden establishing the fourth element, through the efforts  
2 of others.

3 **D. THE ARIZONA SECURITIES ACT APPLIES TO THE DSPF PROGRAM.**

4 In analyzing cases under the Act, the courts have looked to the substance of the transaction  
5 not the form of the transaction. When interpreting the Act, “substance controls over form.”<sup>461</sup>  
6 “Decision will necessarily turn on the totality of the circumstances, not on any single one “Form  
7 was disregarded for substance and emphasis was placed upon economic reality.”<sup>462</sup>

8 The intent and purpose of the Act is “protection of the public, preservation of fair and  
9 equitable business practices, the suppression of fraudulent or deceptive practices in the sale or  
10 purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive practices  
11 in the sale or purchase of securities. This Act shall not be given a narrow or restricted  
12 interpretation or construction, but shall be liberally construed as a remedial measure in order not to  
13 defeat the purpose thereof.”<sup>463</sup>

14 In a case with very similar facts as the ones presented in DSPF, the court found that the  
15 franchise constituted an investment contract.<sup>464</sup> The main issue was whether or not the *Aqua-Sonic*  
16 offering of a license, coupled with an offer by Ultrasonic to act as a sales agent, constituted the  
17 offer and sale of an “investment contract” under the *Howey* case.<sup>465</sup> The Court recognized the  
18 program as a franchise.<sup>466</sup> The court considered “whether the allegedly optional nature of the sales  
19 agency agreements removes them from the concept of investment contracts.”<sup>467</sup> Further, the court  
20 recognized that the mere existence of such an option is not inconsistent with the entire scheme’s  
21 being an investment contract.<sup>468</sup> The court considered “whether the typical investor who was being  
22

23 <sup>461</sup> *Nutek Information Systems, Inc. v. Arizona Corporation Commission*, 194 Ariz. 104, 108, ¶17, 977 P.2d 826, 830  
(App. 1998).

24 <sup>462</sup> *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298, 66 S.Ct. 1100, 1102, 90 L.Ed. 1244 (1946).

25 <sup>463</sup> 1951 Ariz. Sess. Laws ch. 18, § 20.

26 <sup>464</sup> See *SEC v. Aqua-Sonic Products Corp.*, 687 F.2d 577, (2<sup>nd</sup> Cir. 1982).

<sup>465</sup> *Id.* at 581.

<sup>466</sup> *Aqua-Sonic* at 580.

<sup>467</sup> *Aqua-Sonic* at 582.

<sup>468</sup> *Id.* at 582.

1 solicited would be expected under all the circumstances to accept the option thus remain passive  
2 and deriving profit from the efforts of others.”<sup>469</sup>

3 The *Aqua-Sonic* court raised the issue of whether the offering was aimed in large part at  
4 investors who could not reasonably be believed to be desirous and capable of undertaking  
5 distribution on their own.<sup>470</sup> In the case at hand and the *Aqua-Sonic* case, the franchisor recruited  
6 salesmen who could be expected to and did contact typical passive investors, not persons with  
7 experience in the distribution of dental supplies.<sup>471</sup> None of the licensees had any experience  
8 selling dental products and most of the territories were not close to the licensees.<sup>472</sup> The *Aqua-*  
9 *Sonic* court went on to state that all the licensees signed the sales agreement and that constitutes  
10 significant evidence that the efforts of others would be “undeniably significant.”<sup>473</sup> The court  
11 relied on *SEC v. Glenn W. Turner Enterprises, Inc.* 474 F.2d 476, 482 (9<sup>th</sup> Cir.), cert.denied, 414  
12 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973).<sup>474</sup>

13 Respondents called Lynne Shelton as a franchise expert. Upon redirect, Ms. Shelton  
14 provided several cases that she alleged supported her theories.<sup>475</sup> The fact scenarios in both cases  
15 are far different from the facts of the case at hand. For example, in *Meyer v. Dans un Jardin,*  
16 *S.A.*,<sup>476</sup> the Plaintiffs were to own and operate a retail boutique. There was no third-party  
17 management company offered as there was in DSPF.<sup>477</sup> The Plaintiffs expected to commit and did  
18 commit their full time and best efforts to the management of their retail store.<sup>478</sup> In DSPF, the  
19 investor “franchisees” were provided an opportunity for a “fully managed” “absentee-owned”  
20 franchise. The investors were told they could retain MetroMedia to operate the day-to-day  
21 business.

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22 <sup>469</sup> *Id.* at 582-583.

23 <sup>470</sup> *Id.* at 583.

24 <sup>471</sup> *Id.* at 584.

25 <sup>472</sup> *Id.* at 580.

26 <sup>473</sup> *Id.* at 580.

<sup>474</sup> *Id.* at 582.

<sup>475</sup> Hearing Transcript Volume VIII, page 1059 line 2 – page 1060, line 22.

<sup>476</sup> 816 F.2d 533, (10<sup>th</sup> Cir. 1987)

<sup>477</sup> *Id.* at 534.

<sup>478</sup> *Id.* at 535.

1 Ms. Shelton also testified that *Gotham Print, Inc. v. American Speedy Printing Centers,*  
 2 *Inc.*,<sup>479</sup> also supported a finding that DSPF was a franchise and not a security. Contrary to her  
 3 testimony, the facts of *Gotham* did not match the circumstances of DSPF. The *Gotham* case  
 4 involved a “master franchise agreement” whereby *Gotham* was to recruit franchisees to earn a  
 5 profit.<sup>480</sup> *Gotham* franchises retained duties with respect to hiring and firing of personnel,  
 6 maintenance of good customer relations, and day-to-day business promotion and salesmanship.”<sup>481</sup>  
 7 DSPF facts were completely different.

8 The interests offered and sold by Respondents were investment contracts under the Act.

9 **D. Pursuant to A.R.S. §44-1841, Securities Must Be Registered Or Qualify For A**  
 10 **Valid Exemption.**

11 Pursuant to A.R.S. § 44-1841, it is unlawful to offer or sell securities within or from  
 12 Arizona unless the securities have been registered or there is an applicable exemption. In this case,  
 13 the Securities Division established that MAERKI and DSPF offered and sold securities in the form  
 14 of investment contracts. The securities were not registered and neither MAERKI nor DSPF  
 15 presented any evidence to support a finding that there was an applicable exemption from  
 16 registration available to them.<sup>482</sup> Accordingly, MAERKI and DSPF violated the registration  
 17 provisions of the Securities Act under A.R.S. § 44-1841.

18 **E. Under A.R.S. §44-1842, MAERKI and DSPF Were Required To Be Registered**  
 19 **Or Have A Valid Exemption.**

20 Pursuant to A.R.S. §44-1842, it is unlawful for any dealer or salesman to offer to sell  
 21 securities within or from Arizona unless the dealer or salesman is registered under the Act.

22 Neither MAERKI nor DSPF were registered as dealers or salesmen under the Act.<sup>483</sup>  
 23 Neither MAERKI nor DSPF provided evidence of any exemption.<sup>484</sup> Accordingly, MAERKI and  
 24 DSPF violated the registration provisions of the Securities Act under A.R.S. § 44-1842.

25 <sup>479</sup> 863 F.Supp. 447, (E.D. Michigan 1994)

<sup>480</sup> *Id.* at 454.

<sup>481</sup> *Id.* at 455.

<sup>482</sup> A.R.S. §44-2033.

<sup>483</sup> Exhibits S-1a – b.

<sup>484</sup> A.R.S. §44-2033.

1           **G. MAERKI and DSPF Violated The Antifraud Provisions Of The Arizona**  
 2           **Securities Act.**

3           Under A.R.S. § 44-1991, it is a fraudulent practice and unlawful for a person, in connection  
 4 with a transaction or transactions within or from this state involving an offer to sell or buy  
 5 securities, or a sale or purchase of securities, to directly or indirectly do any of the following: (1)  
 6 employ any device, scheme or artifice to defraud; (2) make untrue statements of material fact, or  
 7 omit to state any material fact necessary in order to make the statements made, in the light of the  
 8 circumstances in which they were made, not misleading; or (3) engage in any transaction, practice  
 9 or course of business which operates or would operate as a fraud or deceit.<sup>485</sup> Securities fraud may  
 10 be proven by **any one** of these acts.<sup>486</sup>

11           In the context of these provisions, “materiality” requires a showing of substantial likelihood  
 12 that, under all the circumstances, the misstated or omitted fact would have assumed actual significance  
 13 in the deliberations of a **reasonable buyer**.<sup>487</sup> Under this objective test, there is no need to investigate  
 14 whether an omission or misstatement was actually significant to a particular buyer. Courts look to the  
 15 significance of an omitted or misrepresented fact to a **reasonable investor**.<sup>488</sup> “It is whether the  
 16 existence or nonexistence of the fact in question is a matter to which a **reasonable man** would attach  
 17 importance in determining his choice of action in the transaction.”<sup>489</sup>

18           There is an affirmative duty not to mislead potential investors in any way and places a heavy  
 19 burden on the offeror and removes the burden of investigation from the investor.<sup>490</sup>

20           A misrepresentation or omission of a material fact in the offer and sale of a security is  
 21 actionable even though it may be unintended or the falsity or misleading character of the statement  
 22 may be unknown. In other words, scienter or guilty knowledge is not an element of a violation of

23 \_\_\_\_\_  
 24 <sup>485</sup> See A.R.S. § 44-1991(A).

<sup>486</sup> *Hernandez v. Superior Court*, 179 Ariz. 515, 521, 880 P.2d 735, 741 (App. 1994).

<sup>487</sup> See *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (App. 1986) (emphasis added) citing *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981), quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438 (1976).

<sup>488</sup> See *TSC Industries*, 426 U.S. at 445, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976). (emphasis added).

<sup>489</sup> See *SEC v. Seaboard Corporation*, 677 F.2d 1301, 1306 (9<sup>th</sup> Cir. 1982) (emphasis added).

<sup>490</sup> *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136.

1 A.R.S. § 44-1991(A)(2).<sup>491</sup> Stated differently, a seller of securities is strictly liable for any of the  
 2 misrepresentations or omissions he makes.<sup>492</sup> Additionally, there is no requirement to show that  
 3 investors relied on the misrepresentations or omissions or that the misrepresentations or omissions  
 4 caused injury to the investors.<sup>493</sup> “Plaintiffs’ burden of proof requires only that they demonstrate that  
 5 the statements were material and misleading.”<sup>494</sup>

6 A primary violation of A.R.S. § 44-1991(A) can be either direct or indirect.<sup>495</sup> It is now well  
 7 settled the Act is not to be narrowly interpreted.<sup>496</sup> Accordingly, the courts will look at a broad range  
 8 of conduct and levels of participation to determine if a person<sup>497</sup> violated A.R.S. § 44-1991(A).

9 They evidence shows that MAEKRI and DSPF violated the anti-fraud provisions of the  
 10 Arizona Securities Act by:

- 11 a. misrepresenting to offerees and investors that DSPF had a sixty month (or 8-year)  
 12 proven performance record when, in fact, DSPF has only been in business since 2010.
- 13 b. failing to disclose to offerees and investors that most of the DSPF programs sold were  
 14 not fully operational within 180 day when the management company was retained.
- 15 c. failing to disclose to offerees and investors that none of DSPF program investors were  
 16 earning 40 to 60 percent annual profit as represented.
- 17 d. After April 30, 2012, failing to disclose to offerees and investors that MetroMedia and  
 18 Oracare were notified of an alleged default of the agreements with MAERKI and  
 19 DSPF due to a failure by MetroMedia and Oracare to provide the sufficient number of  
 20 Partner Dentists and patients to support the franchisees.

22 <sup>491</sup> See e.g., *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604 (1980); *Allstate Life Ins. Co. v. Baird & Co., Inc.*, 756  
 23 F.Supp.2d 1113 (2010).

<sup>492</sup> *Rose*, 128 Ariz. at 214, 624 P.2d at 892.

<sup>493</sup> *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136.

<sup>494</sup> *Aaron*, 196 Ariz. at 227, 314 P.2d at 1042.

<sup>495</sup> See e.g. *Barnes v. Vozack*, 113 Ariz. 269, 273, 550 P.2d 1070, 1074 (1976)(Officers of company could be liable  
 25 under A.R.S. § 44-1991 for the fraudulent statements of a salesman of the security.)

<sup>496</sup> See *Grand v. Nacchio*, 225 Ariz. 171, 174, 236 P.3d 398, 401 (2010).

<sup>497</sup> “Person” under the Act means “an individual, corporation, partnership, association, joint stock company or trust,  
 26 limited liability company, government or governmental subdivision or agency or any other unincorporated  
 organization.” A.R.S. § 44-1801(16).

1 e. failing to disclose to offerees and investors that many of the patients that were sent to  
2 the Partner Dentists were not pre-qualified by MetroMedia and Oracare as represented  
3 in the offering materials and website.

4 f. failing to disclose to offerees and investors the SEC's permanent injunction and  
5 FINRA's bar against MAERKI while listing his business experience since 1971.

6 Taken together, they show MAERKI and DSPF violated the antifraud provisions of Act.

7 **H. MAERKI Directly Or Indirectly Controlled The Activities Of DSPF And Is**  
8 **Responsible For Any Violations Of A.R.S. § 44-1991 By DSPF.**

9 The Act imposes presumptive secondary liability on a "controlling person" to the same  
10 extent as it does to any person that commits a primary violation of A.R.S. § 44-1991:

11 B. Every person who, directly or indirectly, controls any person liable for a violation  
12 of section 44-1991 or 44-1992 is liable jointly and severally with and to the same  
13 extent as the controlled person to any person to whom the controlled person is liable  
14 unless the controlling person acted in good faith and did not directly or indirectly  
15 induce the act underlying the action.<sup>498</sup>

16 The Arizona Appellate Court has interpreted this provision to impose presumptive  
17 secondary liability "on those persons who have the *power* to directly or indirectly control the  
18 activities of those persons or entities liable as primary violators of A.R.S. § 44-1991."<sup>499</sup>

19 In *Eastern Vanguard*, the issue of how controlling person liability under A.R.S. § 44-1999  
20 was to be interpreted was one of first impression.<sup>500</sup> In reaching its decision, the court followed the  
21 legislature's direction that the Act be "liberally construed to effect its remedial purpose of  
22 protecting the public interest," upholding the finding by the Commission of controlling person  
23 liability.<sup>501</sup> The court (1) rejected the argument by the control appellees that "their mere status as  
24 controlling shareholders and officers or directors of the corporate entity was insufficient to  
25 establish their liability" as controlling persons "because no evidence was presented that they  
26 actually participated in any violation of § 44-1991(A) by directing anyone to make false and

<sup>498</sup> A.R.S. § 44-1999(B).

<sup>499</sup> *Eastern Vanguard Forex Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 412, 79 P.3d 86, 89 (App. 2003) (emphasis in original).

<sup>500</sup> *Eastern Vanguard*, 206 Ariz. at 410, 79 P.3d at 97.

<sup>501</sup> *Id.*, citing 1951 Ariz. Sess. Laws, ch. 18, § 20.

1 misleading statements;” and (2) held that “actual participation” as a required element of liability  
 2 would be “too restrictive to guard the public interest a directed by our state legislature.”<sup>502</sup>

3 Specifically, first, the *Eastern Vanguard* court held that the plain language of the statute  
 4 does not support the actual participation requirement, stating

5 Indeed, the SEC has long defined “control” as meaning “the possession, direct or  
 6 indirect, of the *power to direct or cause the direction of the management and*  
 7 *policies of a person*, whether through the ownership of voting securities, by  
 8 contract, or otherwise.” 7 C.F.R. § 230.05 (1995) (emphasis added). The SEC’s  
 9 broad definition is consistent with legislative history leading to the passage of §  
 20(a). “In this section ... when reference is made to ‘control,’ the term is intended  
 to include actual control as well as what has been called legally enforceable  
 control.” (citations omitted).<sup>503</sup>

10 Second, the court held that requiring evidence that a controlling person actually participated in the  
 11 fraudulent would “frustrate the intent behind the creation of controlling person liability” under the  
 12 Act.<sup>504</sup>

13 In this case, MAERKI stated that he was the president and owner of DSPF and not only  
 14 had the power to control, but actually controlled and managed the day-to-day affairs of DSPF.  
 15 Accordingly, the Division established control person liability for MAERKI as it relates to DSPF,  
 16 such that MAERKI is jointly and severally liable with DSPF for any violations of A.R.S. § 44-  
 17 1991(A), pursuant to A.R.S. § 44-1999(B).

## 18 V. CONCLUSION

19 The manner in which DSPF and MAERKI offered and sold the DSPF program meets all the  
 20 elements of an investment contract under the *Howey* analysis. Substance over form applies in this case.  
 21 When the layers are peeled away, the DSPF program is a security in the disguise of a franchise. The  
 22 DSPF program needed to be registered and MAERKI needed to registered to sell the DSPF program.

23  
 24 <sup>502</sup> *Id.*

25 <sup>503</sup> *Eastern Vanguard*, 206 Ariz. at 412, 79 P.3d at 99; see also *Id.* at FN21 (“See A.R.S. §10-801(B) (Supp.2002),  
 which generally requires that ‘[a]ll corporate powers shall be exercised by or under the authority of and the business  
 and affairs of the corporation shall be managed under the direction of its board of directors...’”).

26 <sup>504</sup> *Id.*, citing Loftus C. Carson, II, *The Liability of Controlling Persons under the Federal Securities Act*, 72 NOTRE  
 DAME L. REV. 263, 268 -69 (1997) (“I[f] participation was required, ... ‘dummies,’ and other proxies could immunize  
 themselves [sic] from liability.”).

1 MAERKI admitted to drafting the offering materials and providing his franchise attorney the  
2 information contained in the FDD. The salespeople were all consistent in the sales pitch to investors, it  
3 is how they were trained. The testifying investors all testified that this was a passive investment. The  
4 salespeople that testified acknowledged that their clients wanted a passive investment. None of the  
5 testimony indicated that any investor wanted to operate the DSPF program as a business.

6 This is a case of an individual who has a history of securities violations, working with people  
7 who also have a history of securities violations, attempting to skirt the securities laws again. MAERKI  
8 and DSPF violated the anti-fraud provisions of the Arizona Securities Act by representing the amount  
9 of return expected by investors and the length of time before the investors would start receiving a  
10 return on their investments. MAERKI failed to disclose to investors that the DSPF track record was  
11 for a failed securities offering using the same premise, dentists and patients, that had been operated by  
12 David White and Dale Murray.

13 Ms. Shelton's testimony is a red herring. Ms. Shelton's testimony is self-serving. She is the  
14 attorney who completed the legal work for DSPF. Further her name and her firm's name are listed on  
15 the documents. Moreover, her testimony was less than truthful at least at one point. For example, Ms.  
16 Shelton stated that she was not under a permanent injunction issued by the FTC and yet the Securities  
17 Division submitted a copy of the permanent injunction admitted as Exhibit S-72 which goes to Mrs.  
18 Shelton's credibility. Ms. Shelton is not a securities expert nor is she familiar with the Arizona  
19 Securities Act. Even Ms. Shelton stated that there are times when a franchise may be a security.

20 Ms. Shelton fully admitted that she was not on every sales pitch and was not aware of what the  
21 salespeople were representing to investors. All Ms. Shelton can testify was that it was set up as a  
22 franchise. That does not mean that MAERKI offered and sold DSPF as a franchise. In fact, he treated  
23 the DSPF program as an investment. Luring investors with promises of 40% to 60% return and telling  
24 investors both orally and in the offering materials that it was an absentee-owned, fully-managed  
25 program.

26

1 As demonstrated by the *Aqua-Sonic* case, a business may be structured as a franchise however,  
2 how it is sold and to whom it is sold is what is relevant. In this case, DSPF and MAERKI had  
3 salespeople that were mainly insurance and annuity salespeople out selling DSPF to their clients.<sup>505</sup>

4 Based upon the evidence presented, the Division respectfully requests this tribunal to:

- 5 A. MAERKI and DSPF offered and sold unregistered securities in the form of investment  
6 contracts within or from Arizona to 441 offerees and investors in the amount of  
7 \$13,514,958;
- 8 B. MAERKI and DSPF sold unregistered securities in the form of investment contracts  
9 through unregistered dealers or salesmen in or from Arizona;
- 10 C. Every offer and sale of the unregistered securities included fraud in connection with the  
11 offer and sale of securities by Respondents;
- 12 D. MAERKI was the control person for DSPF and as such is jointly and severally liable with  
13 DSPF for the restitution and penalties ordered against DSPF.

14 Based upon the evidence admitted during the administrative hearing, the Securities Division  
15 respectfully requests this tribunal to:

- 16 A. Order MAERKI, COFFIN and DSPF to cease and desist from further violations of the Act  
17 pursuant to A.R.S. §44-2032;
- 18 B. Order Respondents and the marital community of MAERKI and COFFIN and DSPF to pay  
19 an administrative penalty of not less than \$2,000,000 pursuant to A.R.S. §44-2036(A);
- 20 C. Order Respondents and the marital community of MAERKI and COFFIN and DSPF to pay  
21 restitution of not less than \$13,514,958 pursuant to A.R.S. §44-2032, minus any legal offset; and  
22 ...  
23 ...  
24 ...
- 25 D. Order any other relief this tribunal deems appropriate or just.

26  
<sup>505</sup> Hearing Transcript Volume VII, page 20 – page 1031, line 8.

1 RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of October, 2015

2 

3 Wendy Coy, Staff Attorney for the Securities  
4 Division

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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 19<sup>th</sup> day of October, 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 19<sup>th</sup> day of October, 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 19<sup>th</sup> day of October, 2015, to:

19 Kent Maerki  
20 10632 N. Scottsdale Road, Suite B479  
21 Scottsdale, AZ 85254

22 Norma Coffin  
23 10632 N. Scottsdale Road, Suite B479  
24 Scottsdale, AZ 85254

25 Dental Support Plus Franchise, LLC.  
26 10632 N. Scottsdale Road, Suite B479  
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