



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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Deputy Director

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Legal Director

JAMES P. WYSE
Counsel

May 21, 2003

The Honorable Peter Harvey
Acting Attorney General
Hughes Justice Complex
25 West Market Street
P.O. Box 080
Trenton, NJ 08625-0080

**Re: Request for an Advisory Opinion
ELEC File No. A.O. 03-2003**

Dear Acting General Harvey:

The Commission has directed me to refer to your office as a request for an advisory opinion the attached correspondence from Robert A. Schwartz, Esq., submitted on behalf of Fred A. Daibes. Mr. Schwartz asks whether or not the prohibition against making political contributions set forth in N.J.S.A. 19:34-45 is applicable to Mr. Daibes, who holds stock in a New Jersey bank; see attached correspondence received April 22, 2003, and referenced by the Commission as Advisory Opinion Request No. 03-2003. N.J.S.A. 19:34-45, which prohibits persons who own or hold the majority of stock in a corporation carrying on the business of a bank from making political contributions, is not within the Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Campaign Reporting Act) and therefore not within the Commission's subject matter jurisdiction.

At its May 19, 2003 meeting, the Commission directed its staff to refer this request for advice to your office because the question presented has not been addressed in prior opinions issued by your office, and because the Commission's jurisdiction to issue advisory opinions is limited to questions arising under the Campaign Reporting Act; see N.J.S.A. 19:44A-6f.. I am also forwarding copies of this request to Assistant Attorney General John Bender and Deputy Attorney General Lewis Scheindlin.

N.J.S.A. 19:34-45 prohibits certain regulated corporations, including corporations carrying on the business of a bank, and persons "owning or holding the majority of stock" in such corporations, from making political contributions to a candidate or political party and provides criminal penalties for violations. Mr. Schwartz writes that Mr. Daibes "holds voting rights to 24.9% of the outstanding stock of Mariner's Bank, a New Jersey-chartered commercial bank, but holds the economic benefit

Located at: 28 W. State Street, 13th Floor, Trenton, New Jersey

associated with 64.4% of the Bank's outstanding common stock. . . ." Mr. Schwartz further explained that, pursuant to an order of the New Jersey Department of Banking and Insurance, an unrelated third party exercises voting control of Mr. Daibes' Mariner's Bank stock in excess of 24.9%. As a result of this arrangement, Mr. Schwartz states that Mr. Daibes "does not directly own or hold a majority of the outstanding stock of Mariner's Bank." Based upon the structure of Mr. Daibes' ownership of Mariner's Bank stock, Mr. Schwartz seeks an opinion that the prohibition in N.J.S.A. 19:34-45 against making political contributions does not apply to Mr. Daibes.

Thank you for your consideration of this request. If my staff or I may be of any assistance, please do not hesitate to call upon staff or me.

Very truly yours,

ELECTION LAW ENFORCEMENT
COMMISSION

By: _____
Frederick M. Herrmann, Ph.D.

enclosure

c. AAG John Bender
DAG Lewis Scheindlin
Robert A. Schwartz, Esq.



ADVISORY OPINION REQUEST

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must be in writing (please type or print) and must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full Name of Person, Committee or Entity

Fred A. Daibes

Mailing Address
c/o Daibes Enterprises, Inc.

*Day Telephone No.

100 Portside Drive, Edgewater, NJ 07020

*Evening Telephone No.

2. Indicate if the above named person, committee or entity currently files reports with the Commission:

Yes No

a. If yes, indicate in what capacity it is filing:

FILED RECEIVED

APR 22 2003

- | | | | |
|----------------------------------|--------------------------|-----------------------------------------|--------------------------|
| Candidate committee | <input type="checkbox"/> | Recall committee | <input type="checkbox"/> |
| Joint candidates committee | <input type="checkbox"/> | Recall defense committee | <input type="checkbox"/> |
| Political committee | <input type="checkbox"/> | Lobbyist | <input type="checkbox"/> |
| Continuing political committee | <input type="checkbox"/> | Legislative agent | <input type="checkbox"/> |
| Political party committee | <input type="checkbox"/> | Personal financial disclosure statement | <input type="checkbox"/> |
| Legislative leadership committee | <input type="checkbox"/> | Other (please describe): _____ | <input type="checkbox"/> |

b. If no, indicate if the above named person, committee or entity has in the past filed reports with the Commission, giving elections (i.e., 1992 general election) or calendar years, and identify filing capacity:

_____ N/A _____

c. If reports are or were filed under a different name than that appearing in 1 above, provide that name:

_____ N/A _____

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

Is Mr. Daibes, who holds voting rights to 24.9% of the outstanding stock of Mariner's Bank, a New Jersey-chartered commercial bank, but holds the economic benefit associated with 64.4% of the Bank's outstanding common stock, prohibited from making political contributions pursuant to N.J.S.A. 19:34-45 because he is deemed to own or hold a majority of the Bank's stock?

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee or entity requesting the opinion, and that the person, committee or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. (Attach additional sheets if necessary).

Statement of Facts:

Please see attached Rider A.

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result.

Please see attached Rider B.

6. Person who is submitting request on behalf of committee or entity listed in Item 1 above:

Full Name: Robert A. Schwartz

Mailing Address: c/o Windels Marx Lane & Mittendorf, LLP

*Day Telephone No. (732) 448-2548

*Evening Telephone No.

Fax Number: (732) 846-8877

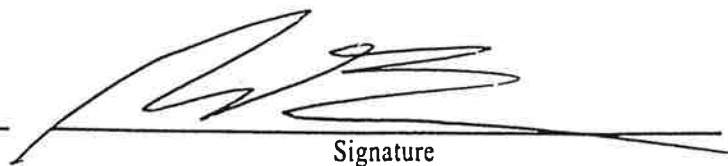
a. Official Capacity of Person Requesting Opinion:

- Candidate
- Treasurer
- Organizational Treasurer
- New Jersey Attorney representing requesting person, committee or entity
- Other (please describe): _____

7. I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request. (CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

4/21/07
Dated:


Signature

*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.

RIDER A

Mr. Daibes is the owner, through a brokerage account, of 186,757 shares of Mariner's Bank (the "Bank") common stock, or 24.9% of its outstanding stock. In addition, Mr. Daibes has the sole economic interest in an additional 298,543 shares of the Bank's common stock, or an additional 39% of the Bank's common stock outstanding. Pursuant to an order of the New Jersey Department of Banking and Insurance ("DOBI"), which will be discussed below, the 298,543 shares are held by United Trust Bank as voting trustee for Mr. Daibes. Although Mr. Daibes can sell shares out of the voting trust, he may not give the voting trustee direction on how the shares are to be voted at any meeting of the shareholders of the Bank. Pursuant to the voting trust agreement and the order of the Department of Banking and Insurance, the voting trustee is required to vote those shares in the same manner as the other outstanding shares of the Bank, excluding those held directly by Mr. Daibes, are voted.

The restrictions on Mr. Daibes' voting rights and stock ownership arise under regulations of the DOBI. NJAC 3:1-2.20(d) generally prohibits any individual from owning in excess of 24.9% of a bank's total minimum capitalization. In connection with the original chartering of the Bank, Mr. Daibes sought a waiver from this restriction. By order dated November 17, 2000 (a copy of which is attached hereto as Exhibit A), then Commissioner Karen L. Suter granted Mr. Daibes the waiver, and imposed certain conditions. Among the conditions were a requirement that "... Mr. Daibes will not exercise voting control of more than 24.9% of the Bank's outstanding stock;...the stock in excess of the 24.9% shall be placed in a trust that will be **managed by an unrelated third party**, approved by this Department, and will be voted in line with the majority of votes (exclusive of Mr. Daibes' 24.9%) at any meeting where a vote is necessary...". [emphasis added] By an additional order of the Commissioner of the DOBI dated July 29, 2002 (a copy of which is attached as Exhibit B), the original order was amended to permit Mr. Daibes to subscribe for additional shares of the Bank's common stock, provided that his ownership would not exceed 67% of the Bank's outstanding stock, and to reaffirm the requirement that all shares in excess of 24.9% be maintained in a voting trust.

ELEC's opinion on the application of N.J.S.A. 19:34-45 will affect Mr. Daibes' legal requirements. He has historically been politically active, and will continue to support political candidates and causes if he is able. Because his political activities could be deemed to violate N.J.S.A. 19:34-45 if ELEC does not agree with this opinion request, Mr. Daibes clearly has standing to request this advisory opinion.

RIDER B

Mr. Daibes seeks a determination that the prohibitions on political contributions applicable to a person "...owing or holding the majority of stock in any [bank]..." contained in N.J.S.A. 19:34-45 will not apply to him. As discussed above, Mr. Daibes does not directly own or hold a majority of the outstanding stock of Mariner's Bank. He directly, through his brokerage account, owns 24.9% of the Bank's outstanding stock. The remainder of the outstanding stock is registered in the name of the voting trustee. Although Mr. Daibes may receive the economic benefit of that stock, he may not direct its voting or use it to influence the policies of the Bank. Creation of the voting trust was not done to avoid application of Section 45, but rather the voting trust was established at the direction of the DOBI specifically to alleviate the agency's concerns about the ability of a single individual to control the policies of a regulated financial institution. The voting trustee must be independent of Mr. Daibes, and any change in the trustee must be approved by the DOBI. The DOBI restrictions were aimed to address the same concerns as Section 45, i.e., to ensure that a single individual could not cause a regulated entity indirectly to undertake prohibited activity. For these reasons, we ask the Election Law Enforcement Commission to issue an advisory opinion that the prohibitions contained in N.J.S.A. 19:34-45 do not apply to Mr. Daibes because of his economic interest in the stock of Mariner's Bank.

STATE OF NEW JERSEY



A.O. 03-2003

EXHIBIT A

DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

IN THE MATTER OF THE APPLICATION OF MARINER'S BANK FOR A
NEW BANK CHARTER TO BE LOCATED AT 935 RIVER ROAD,
BOROUGH OF EDGEWATER, BERGEN COUNTY, NEW JERSEY.

ADDENDUM TO
COMMISSIONER'S
DECISION AND ORDER

Mariner's Bank (the "Bank" or "Mariner's") is a bank whose charter was approved by the Department in a Decision and Order dated June 26, 2000, a copy of which is attached hereto. On November 17, 2000 an Addendum to the Commissioner's Decision and Order was filed, a copy of which is attached. The Addendum permitted the Bank's chairman, Fred Daibes, to purchase a majority of the shares of common stock to be issued by the Bank subject to certain limitations and conditions.

Mr. Daibes had indicated that he was willing to fund the balance of the capital needed to open the bank and that he was willing to accept the following limitations if granted this approval:

1. For a period of 5 years, from the opening of the bank, no loans will be made to Mr. Daibes or any of his affiliates, and
2. For the bank's first 5 years of operation, Mr. Daibes is willing not to exercise voting control of more than 24.9% of the bank's outstanding stock. He is also prepared to restrict the voting rights of any of his shares held beyond the 24.9% of the bank's outstanding common stock.

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The request was approved subject to the following conditions:

1. That Mr. Daibes cannot purchase more than 67% of the \$6,000,000 of stock to be issued pursuant to Commissioner's Decision and Order dated June 26, 2000;
2. For the Bank's first five years of operation, Mr. Daibes will not exercise voting control of more than 24.9% of the Bank's outstanding stock;
3. That the stock in excess of the 24.9% shall be placed in a trust that will be managed by an unrelated third party, approved by this Department, and will be voted in line with the majority of votes (exclusive of Mr. Daibes 24.9%) at any meeting where a vote is necessary, and that such voting of this block shall be so noted in the minutes of the meeting, a copy of which shall be attached to the minutes of the regular board meeting;
4. That within three years after the date of this approval, the board of directors of the Bank shall perform an analysis of Mr. Daibes percentage of ownership in the bank. At that time, should Mr. Daibes percentage of ownership exceed 40% of the Bank's outstanding stock, they shall consider a secondary stock offering in order to reduce his percentage of ownership and bolster the capital of the bank. Such consideration shall be noted within the minutes of the meeting and a resolution shall be passed setting forth a determination of what, if any, actions the board shall take in regard to Mr. Daibes level of ownership of the bank. The Bank shall provide this Department with an affidavit attesting to the percentage of stock held by Mr. Daibes, at that time, as well as certified copies of the minutes of the meeting and the board resolution;
5. That each year, Mr. Daibes, shall sell a portion of his shares, that may vary by year, so that his percentage of stock ownership shall amount to 24.9% or less of the bank's outstanding stock by the end of the bank's fifth year of operation. A confirmation of the stock sales shall be noted in the minutes of the Board of Directors' and a certified copy of the minutes shall be provided to the Department;
6. That Mr. Daibes provide the Department with a report, on a semiannual basis, which discusses his efforts with respect to the disposal of his stock in excess of the 24.9% regulatory limitation; and
7. That Mariner's Bank receive all necessary regulatory approvals for Mr. Fred Daibes, stock purchase and deliver notice of such approval to the Commissioner.

The management of Bank is now requesting that the Department amend condition (1) and (5) of the Addendum to the Commissioner's Decision and Order ("Addendum"), dated November 17, 2000. They have proposed that condition (1) be amended to permit Mr. Daibes to maintain his 67% ownership of the outstanding stock of the bank via the purchase of additional

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stock at any subsequent stock offerings. Furthermore, in light of his increased stock holdings resulting from amending condition (1) they have also requested that condition (5), that requires the reduction of his stock holdings over a period of five years, commencing with the opening of the bank, be amended to provided for the five year period to begin on the date that Mr. Daibes purchases the additional stock.

After careful consideration of the conditions set forth in the November 17, 2000 Addendum I have made a determination to amend condition (1) to permit Mr. Daibes to maintain his 67% ownership in the bank indefinitely. The provisions of condition (2) and (3), requiring stock owned in excess of 24.9% be maintained in a trust, shall remain in effect. Furthermore, it is deemed that the provisions of conditions (4), (5), (6), and (7), of the November 17, 2000 Addendum to the Commissioner's Decision and Order, are no longer necessary and are hereby waived subject to the following conditions:

- (1) That the bank does not grant any loans to Mr. Daibes, or any of his affiliates, for a period of five years from the date of the opening of the bank.
- (2) That if it is determined, at any future examination, that Mr. Daibes has abused any of the Bank's practices or is found to be in violation of any law applicable to the Bank, he will immediately resign his post as Chairman of the Bank.

AND IT IS SO ORDERED



Holly C. Bakke
Commissioner

DATED: 7/29/02

STATE OF NEW JERSEY



A.O. 03-2003

EXHIBIT B

DEPARTMENT OF BANKING AND INSURANCE DIVISION OF BANKING

IN THE MATTER OF THE APPLICATION OF MARINER'S BANK FOR A
NEW BANK CHARTER TO BE LOCATED AT 935 RIVER ROAD,
BOROUGH OF EDGEWATER, BERGEN COUNTY, NEW JERSEY.

ADDENDUM TO COMMISSIONER'S DECISION AND ORDER

Mariner's Bank (the "Bank" or "Mariner's") is a bank in organization whose charter was approved by the Department in a Decision and Order dated June 26, 2000, a copy of which is attached hereto. Pursuant to condition one, of the decision and order, the bank will have to raise \$6,000,000 in capital before it can commence operations. The Bank has filed with the Department a request to permit Fred Daibes, an incorporator, director and the proposed Chairman of the bank, to purchase up to approximately \$4,000,000 or 66 2/3 percent of the projected \$6,000,000 of common stock to be issued by the bank.

The management of the bank is requesting this approval in order to facilitate the opening of the bank. Management has advised the Department that it is ready to open but that weakness in the financial markets has made it difficult, at this time, to raise the \$6,000,000 of capital as required by the Commissioner's decision and order.

Mr. Daibes has indicated that he is willing to fund the balance of the capital and is willing to accept the following limitations:

1. For a period of 5 years, from the opening of the bank, no loans will be made to Mr. Daibes or any of his affiliates, and

2. For the bank's first 5 years of operation, Mr. Daibes is willing not to exercise voting control of more than 24.9% of the bank's outstanding stock. He is also prepared to restrict the voting rights of any of his shares held beyond the 24.9% of the bank's outstanding common stock.

I find that pursuant to the provisions of *N.J.A.C. 3:1-2.20(d)*, no individual can subscribe for stock in excess of 24.9% of the total capital required to be raised by the bank. However, *N.J.A.C. 3:1-2.15* provides for the relaxation or dispensation of the requirements of the subchapter:

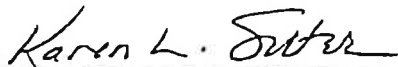
"In any instance where the Commissioner or her designee shall determine that the foregoing requirements or procedures of this subchapter shall be unwarranted, inapplicable, unreasonable, unnecessary or not required, the Commissioner may relax or dispense with the requirements of procedures established herein."

I have considered Mr. Daibes' request to increase his investment in Mariner's Bank. I find the motive behind the request, and his willingness to accept certain voting limitations, to be reasonable. I also recognize the ultimate benefit the public will realize from the opening of this bank in their community. Therefore, pursuant to the authority granted to me, by *N.J.A.C. 3:1-2.15*, I will dispense with the requirement of *N.J.A.C. 3:1-2.20(d)*, at this time, and permit Mr. Daibes to increase his investment in the bank in order to facilitate its opening. However, this approval is conditioned upon the following:

1. That Mr. Daibes cannot purchase more than 67% of the \$6,000,000 of stock to be issued pursuant to Commissioner's Decision and Order dated June 26, 2000;
2. For the Bank's first five years of operation, Mr. Daibes will not exercise voting control of more than 24.9% of the Bank's outstanding stock;
3. That the stock in excess of the 24.9% shall be placed in a trust that will be managed by an unrelated third party, approved by this Department, and will be voted in line with the majority of votes (exclusive of Mr. Daibes 24.9%) at any meeting where a vote is necessary, and that such voting of this block shall be so noted in the minutes of the meeting, a copy of which shall be attached to the minutes of the regular board meeting;

4. That within three years after the date of this approval, the board of directors of the Bank shall perform an analysis of Mr. Daibes percentage of ownership in the bank. At that time, should Mr. Daibes percentage of ownership exceed 40% of the Bank's outstanding stock, they shall consider a secondary stock offering in order to reduce his percentage of ownership and bolster the capital of the bank. Such consideration shall be noted within the minutes of the meeting and a resolution shall be passed setting forth a determination of what, if any, actions the board shall take in regard to Mr. Daibes level of ownership of the bank. The Bank shall provide this Department with an affidavit attesting to the percentage of stock held by Mr. Daibes, at that time, as well as certified copies of the minutes of the meeting and the board resolution;
5. That each year, Mr. Daibes, shall sell a portion of his shares, that may vary by year, so that his percentage of stock ownership shall amount to 24.9% or less of the bank's outstanding stock by the end of the bank's fifth year of operation. A confirmation of the stock sales shall be noted in the minutes of the Board of Directors' and a certified copy of the minutes shall be provided to the Department;
6. That Mr. Daibes provide the Department with a report, on a semiannual basis, which discusses his efforts with respect to the disposal of his stock in excess of the 24.9% regulatory limitation; and
7. That Mariner's Bank receive all necessary regulatory approvals for Mr. Fred Daibes, stock purchase and deliver notice of such approval to the Commissioner.

AND IT IS SO ORDERED



Karen L. Suter
Commissioner

DATED 11/17/2000.