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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2010 OCT 12 A 11:38

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

DOCKET CONTROL

In the matter of:)
RADICAL BUNNY, L.L.C., an Arizona)
limited liability company,)
HORIZON PARTNERS, L.L.C., an Arizona)
limited liability company,)
TOM HIRSCH (aka THOMAS N. HIRSCH))
and DIANE ROSE HIRSCH, husband and)
wife,)
BERTA FRIEDMAN. WALDER (aka)
BUNNY WALDER), a married person,)
HOWARD EVAN WALDER, a married)
person,)
HARISH PANNALAL SHAH and)
MADHAVI H. SHAH, husband and wife,)
Respondents.)

DOCKET NO. S-20660A-09-0107

SECURITIES DIVISION'S RESPONSE TO
RESPONDENTS' MOTION IN LIMINE

(Assigned to the Hon. Lyn Farmer)

Arizona Corporation Commission
DOCKETED

OCT 12 2010

DOCKETED BY [Signature]

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby responds to the Motion *in Limine* filed on behalf of Respondents Horizon Partners, L.L.C., an Arizona limited liability company, Tom Hirsch, Diane Rose Hirsch, Berta Friedman Walder, Howard Evan Walder, Harish Pannalal Shah, and Madhavi H. Shah ("Respondents"), and requests that the Motion *in Limine* be denied because (1) the Arizona courts have not construed the language of all of the antifraud provisions contained in A.R.S. §44 1991(A); (2) the testimony by the witnesses sought to be excluded by Respondents is relevant to contested facts and not overly prejudicial; and (3) the testimony by the witnesses sought to be excluded by

1 Respondents is relevant to the assessment of an administrative penalty against them for violations
 2 of the registration and antifraud provisions of the Arizona Securities Act. This Response is
 3 supported by the following Memorandum of Points and Authorities.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 ***I. Motions in Lime must, insofar as practicable, be brought in accordance with Rule 7.2***
 6 ***of the Arizona Rules of Civil Procedure.***

7 The Arizona Administrative Code and the Arizona Rules of Practice and Procedure before
 8 the Corporation Commission (“Rules of Practice and Procedure”) contain explicit provisions
 9 addressing procedures in contested adjudicative proceedings before the Commission. *See* A.R.S. §
 10 44-1601, *et seq.* and A.A.C. R14-3-101, *et seq.* Rule R14-3-101(A) states that the Rules of
 11 Practice and Procedure govern in all cases before the Commission, including cases arising out of
 12 Securities Act. A.A.C. R-14-3-101(A). This rule states that the Arizona Rules of Civil
 13 Procedure apply only if procedures are not otherwise set forth by law, by the Rules of Practice
 14 and Procedure, or by regulations or orders of the Commission. Motions are addressed in Rule
 15 R14-3-106(K) which states, “[m]otions shall conform insofar as practicable with the Rules of Civil
 16 Procedure of the state of Arizona.” A.A.C. R14-3-106(K). As the procedure is set forth neither b
 17 law of the Commission Rules, a motion *in limine* should be brought in accordance with Rule 7.2 of
 18 the Arizona Rules of Civil Procedure.¹

19 The purpose of a motion *in limine* is to obtain a pretrial ruling on evidentiary disputes and
 20 to avoid the admission of unduly prejudicial evidence to a jury. *See State v. Superior Court*, 108
 21 Ariz. 396, 499 P.2d 152 (Ct. App. 1972). A motion *in limine* directed to a specific category or
 22 type of evidence, which is denied, obviates the necessity for making repeated objections to the
 23 evidence during the course of the trial, and preserves the issue for appeal. *See State v. Burton*,
 24 144 Ariz. 248, 697 P.2d 331 (1985).

25
 26 ¹ Pursuant to Rule 7.2(a) of the Arizona Rules of Civil Procedure, the parties are to confer regarding the disputed
 evidentiary issues that are anticipated being the subject of motions *in limine*. This requirement has been met.

1 In filing their incredibly untimely motion *in limine*,² Respondents argue that “all evidence
2 that Respondents had knowledge or warnings that they were operating in violation of the law”
3 should be excluded because “certain witnesses” that will be called to testify by the Division have
4 been sued in a private action involving the Respondents’ conduct which is subject of these
5 proceedings.³ Respondents fail to cite to any legal authority for the *exclusion* of evidence based
6 simply on a claim of lack of credibility of a particular witness.

7 Rule 402 of the Arizona Rules of Evidence provides that “[a]ll relevant evidence is
8 admissible, except as otherwise provided by the Constitution of the United States, by the
9 Constitution of Arizona or by applicable statutes or rules.” Ariz. R. Evid. 402. Relevant
10 evidence is “evidence having any tendency to make the existence of any fact that is of
11 consequence to the determination of the action more probable or less probable than it would be
12 without the evidence.” Ariz. R. Evid. 401.

13 Evidence that is otherwise admissible may be excluded if its probative value is
14 *substantially* outweighed by the danger of *unfair* prejudice. *See* Ariz. R. Evid. 403. The “unfair
15 prejudice” to which Rule 403 refers is an undue tendency of the evidence to suggest or invite a
16 decision on an improper basis, such as emotion, sympathy, or horror. *See State v. Schurz*, 176
17 Ariz. 46, 52, 859 P.2d 156, 162, *cert. denied*, 510 U.S. 1026 (1993). Not all harmful evidence is
18 unfairly prejudicial; evidence which is relevant and material will generally be adverse to the
19

20 ² Rule 7.2(b) of the Arizona Rules of Civil Procedure requires that a motion *in limine* be filed *no later than* 30 days
21 *prior* to the final pre-trial conference. Even if Rule 7.2(b) is inapplicable to this administrative hearing, the
22 Respondents’ Motion *In Limine* is nevertheless untimely. The Division’s witnesses have been disclosed to
23 Respondents since July 17, 2009, and the substance of the non-party lawyer witness testimony has been disclosed to
24 Respondents since October 23, 2009. The pending administrative hearing has been continued twice over the objection
25 of the Division. Respondents’ first and only request for an agreement to exclude this category of testimonial evidence
26 took place by written correspondence to the Division on September 28, 2010. The request was rejected on September
29, 2010 for the reasons set forth in this response.

³ Respondents Motion *in Limine*, p. 2. lines 1-7. First, Division witnesses James C. Sell, a licensed CPA, and Ronald
Logan, a licensed attorney, and/or their employers have not been named as defendants in any private lawsuit involving
the conduct on the part of Respondents which is the subject of these proceedings. The employers, Greenberg Traurig,
LLP and Quarles & Brady, LLP, of Division witnesses Robert Kant, Christian Hoffmann III, Robert Bornhoft, and S.
Gary Shullaw are defendants in *Facciola, et al v. Greenberg Traurig, LLP*, currently pending in the United States
District Court for the District of Arizona, case no. 2:10-cv-01025-MHM (the “Class Action”). Second, the
Respondents have also been sued in their individual capacities in the Class Action as well as in *SEC v. Radical Bunny,*
et al, currently pending in the United States District Court for the District of Arizona, case no. 2:09-cv-10560-SRB.

1 opponent of the party offering it and, in that sense, “prejudicial.” That form of prejudice is not
 2 the basis for exclusion under Rule 403. *Id.*; *Henry ex rel. Estate of Wilson v. Health Partners of*
 3 *Southern Arizona*, 203 Ariz. 393, 398, 55 P.3d 87, 92 (Ct. App. 2002).

4 Evidence that is otherwise admissible may also be excluded if its probative value is
 5 substantially outweighed by considerations of *undue* delay. Ariz. R. Evid. 403. Interestingly,
 6 Respondents argue that the exclusion of this testimonial evidence would shorten the
 7 administrative hearing because Respondents would not have to engage in their own “tedious
 8 *cross examination*” of these witnesses.⁴ It is incredulous that Respondents seek the exclusion of
 9 relevant testimonial evidence of a Division witness on the basis of that it will result in *undue*
 10 delay because the Respondents do not desire to be burdened by the exercise of their own right to
 11 conduct the cross-examination of witnesses that may provide adverse testimonial evidence during
 12 the adjudication on the merits of a matter in which *they* requested a hearing regarding allegations
 13 of facts that are presently contested.⁵

14 Respondents also argue that the evidence should be excluded because it is “irrelevant”
 15 and “prejudicial.”⁶ The Division disagrees.

16 ***II. The Arizona Supreme Court has determined that A.R.S. 44-1991(A)(2) is a strict liability***
 17 ***statute; however, the language of A.R.S. 44-1991(A)(1) and A.R.S. 44-1991(A)(3) has***
 18 ***not been interpreted by the Arizona courts.***

19 Under the Securities Act, it is a fraudulent practice for any person in connection with a
 20 transaction involving an offer or sale of securities do any of the following: (1) employ any
 21 device, scheme or artifice to defraud; (2) make untrue statements of material fact, or omit to state
 22 any material fact necessary in order to make the statements made, in the light of the
 23 circumstances in which they were made, not misleading; or (3) engage in any transaction,
 24 practice or course of business which operates or would operate as a fraud or deceit. A.R.S. § 44-
 25 1991(A). In *State v. Gunnison*, the Arizona Supreme Court held that scienter (i.e., intent to

26 ⁴ Respondents Motion *In Limine*, p. 2, lines 22-25.

⁵ Notice, ¶¶64-66 and 68 and Answer, ¶¶64-66 and 68.

⁶ Respondents Motion *In Limine*, p.2, lines 10-19 and p.3, lines 1-2. Respondents also cite to an incorrect standard. Only evidence that is *unfairly* prejudicial may be excluded. Ariz. R. Evid. 403.

1 defraud) is not a necessary element of a violation of A.R.S. § 44-1991(A)(2).⁷ 127 Ariz. 110,
 2 113, 618 P.2d 604, 607 (1980). The court, however, left open the issue of whether scienter was
 3 an element of a violation of A.R.S. § 44-1991(A)(1) and A.R.S. § 44-1991(A)(3). *Id.* No other
 4 Arizona court has ruled on this issue.

5 Respondents argue that the *Commission contends* that scienter is not a requirement for a
 6 violation of the antifraud provisions of the Arizona Securities Act. The Division does not
 7 disagree. Respondents fail to state whether or not they disagree with the Commission's position
 8 that scienter is not an element for the violation of any of the antifraud provisions of the Arizona
 9 Securities Act. However, even if the Respondents were to agree with the Commission's
 10 interpretation of A.R.S. §§ 44-1991(A)(1) and 44-1991(A)(3) as not requiring an intent to
 11 defraud on the part of the violator, the Arizona courts may disagree. Respondents are, in effect,
 12 requesting this tribunal to exclude testimonial evidence that would prove *any amount* of mental
 13 culpability - - negligence, recklessness, and/or intent - - on the part of the Respondents. The
 14 exclusion of such testimonial evidence would preclude the Commission from preserving its right
 15 to defend its findings of fact and conclusions of law in the event of an appeal by Respondents
 16 involving this legal issue.

17 ***III. The testimony by these witnesses is relevant to the contested issue that the Respondents***
 18 ***violated one or more provisions of A.R.S. 44-1991(A).***

19 Respondents argue that whether or not they may have been "on notice" that they were
 20 selling securities in violation of federal and state securities laws, but continued to engage in the
 21 same conduct is not relevant to the issue of whether they violated one or more provisions of
 22 A.R.S. § 44-1991(A).⁸ The Division disagrees.

23 The language of A.R.S. §44-1991(A) quite plainly focuses upon the particular *conduct* of
 24 the actor and the *effect* of particular *conduct* on members of the investing public, rather than upon

25 ⁷ In 1996, A.R.S. 44 1991(1) – (3) was redesignated as A.R.S. 44 1991(A)(1) – (3). 1996 Ariz. Sess. Laws 1996, Ch.
 26 197.

⁸ Respondents make this argument despite denying that such notice was received, but ignored. *See*, Notice, ¶¶64-66
 and 68 and Answer, ¶¶64-66 and 68.

1 the culpability of the actor. For example, Arizona law states that if an untrue statement of
2 material fact is made, or a material fact is omitted that would make the statement made not
3 misleading in a transaction involving the offer or sale of securities, this is a violation of Arizona's
4 antifraud provisions. *See* A.R.S. § 44-1991(A)(2). A "material fact" is a statement or omission
5 that would have assumed actual significance in the deliberations of the reasonable buyer. *See*
6 *Aaron v. Fromkin*, 196 Ariz. 224, 227, 994 P.3d 1039, 1042 (Ct. App. 2000).⁹ Arizona courts
7 have also held that the issuer of securities has an affirmative duty not to mislead potential
8 investors. *See Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136
9 (Ct. App. 1986).

10 As set forth in Section II herein, however, the Arizona courts have *not* ruled on the issue
11 of whether at least some amount of mental culpability (e.g., negligence, reckless or intent) is an
12 element of A.R.S. § 44 1991(A)(1) an/or A.R.S. § 44 1991(A)(3). As such, all testimonial
13 evidence regarding the timing and substance of communications between Respondents and
14 witnesses who are competent to render legal advice on the subject of whether the Respondents'
15 business activities could or did run afoul with federal and state securities laws and what, if
16 anything, Respondents did with such information vis-à-vis investors is relevant to the
17 determination that A.R.S. § 44-1991(A)(1) and/or A.R.S. § 44-1991(A)(3) was violated, and
18 necessary for the preservation of the right of the Commission to argue that there is sufficient
19 evidence in the record to support its findings of fact and conclusions of law under alternative
20 theories of mental culpability as a required element of a violation of these antifraud provisions on
21 an appeal by Respondents regarding this legal issue.

22 ***IV. The testimony by these witnesses is relevant to the determination and assessment of an***
23 ***appropriate administrative penalty against Respondents.***

24 A person who, in an administrative action, is found to have violated any provision of the
25 Arizona Securities Act may be assessed an administrative penalty by the Commission, after a

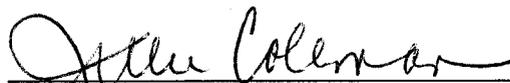
26 ⁹ However, reliance is not an element of a violation of A.R.S. § 44-1991(A)(2). *See Rose v. Dobras*, 128 Ariz. 209,
214, 624 P.2d 887, 892 (Ct. App. 1981).

1 hearing, in an amount of *not to exceed* five thousand dollars for *each* violation. *See* A.R.S. §44-
2 2036(A). Given the discretionary aspect of the amount of the administrative penalty as it relates to
3 each violation of the registration and antifraud provisions of the Arizona Securities Act, the
4 Commission will need to consider the number and egregiousness of the violations. Certainly, the
5 Commission is much more likely to assess the maximum amount (i.e., \$5,000 per violation) for
6 willful violations of the Arizona Securities Act. Accordingly, whether the Respondents had notice
7 that their continued conduct violated securities laws is relevant evidence.

8 ***V. Conclusion***

9 For the reasons set forth above, the Division requests the Respondents' Motion in Limine
10 be denied.

11 RESPECTFULLY SUBMITTED this 12th day of October, 2010.

12
13 
14 Julie Coleman
15 Chief Counsel of Enforcement for the Securities
16 Division of the Arizona Corporation Commission

17 ORIGINAL and 9 copies of the foregoing
18 filed this 12th day of October, 2010 with:

19 Docket Control
20 Arizona Corporation Commission
21 1200 W. Washington St.
22 Phoenix, AZ 85007

23 COPY of the foregoing hand-delivered
24 this 12th day of October, 2010, to:

25 Lyn Farmer
26 Administrative Law Judge
Arizona Corporation Commission
1200 W. Washington St.
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COPY of the foregoing mailed and electronically mailed
this 12th day of October, 2010 to:

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