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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2011 FEB 18 P 3:45

GARY PIERCE, Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

AZ CORP COMMISSION
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 POST-HEARING
MEMORANDUM

Arizona Corporation Commission
DOCKETED

FEB 18 2011

DOCKETED BY [Signature]

The Securities Division ("Securities Division") of the Arizona Corporation Commission
("Commission") hereby submits its Post-hearing Memorandum with respect to the administrative
hearing for 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. This Post-Hearing Memorandum is supported by the following Memorandum
of Points and Authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 ***I. PROCEDURAL BACKGROUND***

3 On March 12, 2009, the Securities Division filed a Notice of Opportunity for Hearing
4 against Radical Bunny, L.L.C. (“Radical Bunny”),¹ Horizon Partners, L.L.C. (“Horizon Partners”),
5 Tom Hirsch (aka Thomas N. Hirsch) (“Hirsch”), Diane Rose Hirsch,² Berta Friedman Walder (“B.
6 Walder”), Howard Evan Walder (“H. Walder”), Harish Pannalal Shah (“Shah”), and Madhavi H.
7 Shah (“Respondents”) alleging multiple violations of the registration and antifraud provisions of
8 the Arizona Securities Act in connection with the offer and sale of securities (“Notice”). On
9 March 26, 2009, Respondents filed a request for hearing. On April 15, 2009, Respondents filed a
10 verified answer to the Notice (“Verified Answer”). On April 29, 2010, Respondents filed a
11 Motion for Summary Disposition and, in support thereof, Respondents filed the sworn Declaration
12 of Tom Hirsch (“Hirsch Declaration”). A Procedural Order denying the Respondents’ Motion for
13 Summary Disposition was entered on August 2, 2010. An administrative hearing in this matter
14 was held on October 14, 15, 18, 21, 22, 25, and 26, 2010, and November 3, 5, 8, 9, and 17, 2010.

15 ***II. STATEMENT OF FACTS***

16 ***A. Jurisdiction***

17 1. The Commission has jurisdiction over this matter pursuant to Article XV of the
18 Arizona Constitution and the Securities Act. *See* Notice ¶1 and Verified Answer ¶1.

19 ***B. The origin and management of Horizon Partners and Radical Bunny.***

20 2. Horizon Partners is an Arizona limited liability company organized on August 19,
21 1997. Since its inception, Horizon Partners conducted business from its sole business office located
22 in Phoenix, Arizona. *See* Notice ¶4 and Verified Answer ¶4.³)

23 3. The business of Horizon was governed pursuant to the terms of an Operating
24

25 ¹ Radical Bunny, LLC entered into a Order to Cease and Desist, Order for Restitution and Consent to Same which was
approved by the Commission on April 27, 2010 and docketed on April 28, 2010 as Decision No. 71682.

26 ² Diane Rose Hirsch and Madhavi H. Shah were joined in the action pursuant to A.R.S. § 44-2031(C) solely for
purposes of determining the liability of the marital communities of Hirsch and Diane Rose Hirsch, husband and wife,
and Shah and Madhavi H. Shah, husband and wife.

³ *See also* Hearing Exhibit (“Exhibit”) S-4.

1 Agreement, the terms of which were identical to the Operating Agreement of Radical Bunny.

2 *See* Vol. IX at 1513:23-25 and 1530:6-1531:3.

3 4. Horizon Partners was a manager-operated entity in which its non-manager members
4 were unable to actively participate in the business operations of the entity (i.e., passive). *See* Vol.
5 IX at 1557:20:24; Exhibit S-9(a) at §6.1.

6 5. All of the members of Horizon Partners were required to execute its Operating
7 Agreement. *See* Vol. IX at 1513:12-22; Exhibits S-10 and S-55.

8 6. Hirsch has been the manager of Horizon Partners since August 19, 1997. *See* Notice
9 ¶5 and Verified Answer ¶5.⁴

10 7. As the manager of Horizon Partners, Hirsch was authorized to offer and sell its
11 membership interests. *See* Exhibit S-9(a) at §6.6.14.

12 8. Horizon Partners is not, and has never been, registered as a securities dealer with the
13 Commission. *See* Notice ¶25 and Verified Answer ¶25.⁵

14 9. Radical Bunny was an Arizona limited liability company organized on June 24,
15 1999. Since its inception, Radical Bunny conducted business from its sole business office located
16 in Phoenix, Arizona. *See* Notice ¶2 and Verified Answer ¶2.⁶

17 10. The articles of organization of Radical Bunny were amended on February 26, 2006,
18 and filed with the Commission on July 15, 2008. *See* Exhibit S-3(b).

19 11. The business of Radical Bunny was governed pursuant to the terms of an
20 Operating Agreement dated June 25, 1999. *See* Vol. IX 15 1530:6-16; Exhibit S-9(a).

21 12. Radical Bunny was a manager-operated entity in which its non-manager members
22 were unable to actively participate in the business operations of the entity (i.e., passive). *See*
23 Vol. IX at 1557:25-1558:8; Exhibit S-9(a) at §6.1.

24 13. All of the members of Radical Bunny were required to execute its Operating
25

26 ⁴ *See also* Exhibit S-4.

⁵ *See also* Exhibit S-1(b).

⁶ *See also* Exhibits S-3(a), S-3(b), and S-40.

1 Agreement. *See* Vol. IX at 1537:20-1538:2 and 1538:1416; Exhibits S-9(b), S-53, and S-54.

2 14. Hirsch has been a manager of Radical Bunny since June 24, 1999. *See* Notice ¶3
3 and Verified Answer ¶3.⁷

4 15. Shah has been a manager of Radical Bunny since 2005. *See* Notice ¶60 and
5 Verified Answer ¶60.

6 16. B. Walder has been a manager of Radical Bunny since June 2005. *See* Notice ¶61
7 and Verified Answer ¶61.

8 17. H. Walder has been a manager of Radical Bunny since September 2005. *See*
9 Notice ¶62 and Verified Answer ¶62.⁸

10 18. As the manager of Radical Bunny, Hirsch was authorized to offer and sell its
11 membership interests. *See* Exhibit S-9(a) at §6.6.14.

12 19. As a manager of Radical Bunny, Hirsch, B. Walder, H. Walder, and Shah were each
13 authorized to borrow and loan money and/or enter into contracts on behalf of Radical Bunny. *See*
14 Exhibit S-9(a) at §6.6.

15 20. As a manager of Radical Bunny, Hirsch, B. Walder, H. Walder, and Shah each were
16 an authorized signatory on Radical Bunny's bank accounts. *See* Vol. I at 984:13-987:19 and Vol.
17 VII at 1148:24-1149:22; Exhibit S-25.

18 21. Radical Bunny is not, and has never been, registered as a securities dealer with the
19 Commission. *See* Notice ¶25 and Verified Answer ¶25.⁹

20 ***C. Hirsch, Shah, B. Walder, and H. Walder.***

21 22. Hirsch is a married person who, at all times relevant hereto, resided in Maricopa
22 County, Arizona. *See* Notice ¶6 and Verified Answer ¶6.

23 23. Diane Rose Hirsch was at all relevant times the spouse of Hirsch. *See* Notice ¶11
24 and Verified Answer ¶11.

25
26 ⁷ *See also* Exhibits S-3(a), S-3(b), S-9(a) at ACC000653/RB00104, and S-12(a) at ACC00005.

⁸ *See also* Vol. VI at 970:14-17.

⁹ *See also* Exhibit S-1(a).

1 24. Hirsch is a certified public accountant who has been licensed with the Arizona State
2 Board of Accountancy since October 19, 1979. *See* Notice ¶24 and Verified Answer ¶24.

3 25. Hirsch is not, and has never been, registered as a securities salesman with the
4 Commission. *See* Notice ¶26 and Verified Answer ¶26.¹⁰⁾

5 26. Shah is a married person who, at all times relevant hereto, resided in Maricopa
6 County, Arizona. *See* Notice ¶9 and Verified Answer ¶9.

7 27. Madhavi H. Shah was at all relevant times the spouse of Shah. *See* Notice ¶12 and
8 Verified Answer ¶12.

9 28. Shah is a certified public accountant who has been licensed with the Arizona State
10 Board of Accountancy since January 11, 1993. *See* Notice ¶24 and Verified Answer ¶24.

11 29. Shah is not, and has never been, registered as a securities salesman with the
12 Commission. *See* Notice ¶26 and Verified Answer ¶26.¹¹

13 30. In or around September 2001, Hirsch and Shah became business partners conducting
14 business as Hirsch & Shah CPA'S, LLC, an Arizona limited liability company. *See* Notice ¶24 and
15 Verified Answer ¶24.¹²

16 31. B. Walder is a married person who, at all times relevant hereto, resided in Maricopa
17 County, Arizona. *See* Notice ¶7 and Verified Answer ¶7.

18 32. B. Walder earned a doctorate of education, and is a retired school teacher, principal,
19 and superintendent. *See* Verified Answer ¶7.

20 33. B. Walder was once a registered securities salesman and was associated with an
21 SEC-registered broker-dealer and, as such, became familiar with rules governing representations
22 that can be made to investors as well as distribution of disclosure documents to investors.

23 34. B. Walder is not, and has never been, registered as a securities salesman with the
24 Commission. *See* Notice ¶26 and Verified Answer ¶26.¹³

25 _____
¹⁰ *See also* Exhibit S-1(c).

26 ¹¹ *See also* Exhibit S-1(f).

¹² *See also* Exhibit S-8.

¹³ *See also* Exhibit S-1(d).

1 35. H. Walder is a married person who, at all times relevant hereto, resided in Maricopa
2 County, Arizona. *See* Notice ¶8 and Verified Answer ¶8.

3 36. H. Walder is a pharmacist. *See* Verified Answer ¶8.¹⁴

4 37. H. Walder is not, and has never been, registered as a securities salesman with the
5 Commission. *See* Notice ¶26 and Verified Answer ¶26.¹⁵

6 38. At all times relevant, Hirsch, B. Walder, H. Walder, and Shah were acting for their
7 own benefit and for the benefit or in furtherance of their respective and respective Respondent
8 Spouse's marital communities. *See* Notice ¶15 and Verified Answer ¶15.

9 ***D. The origin and continued relationship with MLtd.***

10 39. MLtd ("MLtd") was incorporated on April 1, 1964. *See* Exhibit S-5(a).

11 40. MLtd was a licensed mortgage banker until its license, Number BK-0005755, was
12 revoked by the Arizona Department of Financial Institutions pursuant to a Consent Order entered
13 on July 28, 2009. *See* Exhibits S-6(a), S-6(b), and S-56 at 10:8-9.

14 41. MLtd operated as a private mortgage lender for residential property since its
15 inception and in connection with commercial real estate since the late 1980s. Scott M. Coles
16 ("Coles") acted as the CEO/Chairman of MLtd from 1997 until his death on June 2, 2008. The
17 sole shareholder of MLtd was the SMC Revocable Trust U/T/A dated December 22, 1994, as
18 amended ("SMC Trust"). *See* Exhibits S-5(b) and S-56 at 9:23-10:3.

19 42. MLtd originated, invested in, sold and serviced its own short-term real estate loans.
20 MLtd's loans ranged from \$1 million to \$150 million, with an average term of 6 to 18 months,
21 carried higher interest rates than traditional institutional lenders, and often were used as bridge
22 financing. All of MLtd's loans were secured by real estate, including multifamily residential
23 projects, office buildings, and mixed-use projects within Arizona. *See* Vol. IX at 1522:23- 1523:7;
24 Exhibit S-56 at 9:14-22.

25 43. As of June 23, 2008, MLtd had outstanding loans of approximately \$894 million in

26 ¹⁴ *See also* Vol. VI at 969:22-970:10.

¹⁵ *See also* Exhibit S-1(e).

1 approximately sixty-six (66) real estate projects (“MLtd Loan(s)”). *See* Exhibit S-56 at 10:14-16.

2 44. The MLtd Loans were funded, in part, from the sale to investors of direct, “pass-
3 through” fractional loan and lien interests in the real estate collateral securing each MLtd Loan
4 (“MLtd Pass-Through Investor”). Each MLtd Pass-Through Investor acquired an interest in the
5 MLtd Loan and signed an agency agreement, among other documents, which appointed MLtd as
6 their agent (“MLtd Pass-Through Participation Program”). *See* Vol. IX at 1510:24-1512:1; Exhibit
7 S-56 at 10:16-21.

8 45. Each MLtd Pass-Through Investor was assigned (i.e., endorsed) an interest in the
9 secured promissory note evidencing the MLtd Loan, and a corresponding assignment of beneficial
10 interest in the real estate collateral (i.e., first lien position deed of trust) was duly recorded. *See*
11 Hirsch Declaration at 2:2-6.¹⁶

12 46. The fractional interest of the MLtd Pass-Through Investor in the MLtd Loan
13 promissory note and lien on real estate collateral belong to and are the property of the Pass-
14 Through Investor. *See* Exhibit S-56 at 10:24-11:1.

15 47. MLtd owned, in its own name, a portion of the fractional interests in the MLtd Loan
16 promissory notes and liens on real estate collateral (“MLtd Loan Portfolio”). *See* Exhibit S-56 at
17 11:16-20 and at 15:4-6.

18 48. MLtd also raised funds for the MLtd Loans through the sale of membership interests
19 in limited liability companies to investors (“MP Funds”). The MP Funds were manager-run
20 entities with MLtd acting as the manager. The MP Funds would then invest in the MLtd Pass-
21 Through Participation Program. *See* S-56 at 11:3-17.

22 49. As of June 2008, there were nine (9) MP Funds—MP122009 (known as MP9),
23 MP062011 LLC (known as MP10), MP122030 LLC (known as MP11), Mortgages Ltd.
24 Opportunity Fund MP12 LLC (known as MP12), Mortgages Ltd. Opportunity Fund MP13 LLC
25 (known as MP13), Mortgages Ltd. Opportunity Fund MP14 LLC (known as MP14), Mortgages
26

¹⁶ *See also* Vol. IX at 1510:24-1512:1 Exhibits S-39(a) and S-39(b).

1 Ltd. Opportunity Fund MP15 LLC (known as MP15), Mortgages Ltd. Opportunity Fund MP16
2 LLC (known as MP16), and Mortgages Ltd. Opportunity Fund MP17 LLC (known as MP17)
3 (“MLtd Pools”). *See* Exhibit S-56 at 11:5-13.

4 50. The MLtd Loan secured promissory notes were sold to investors through MLtd
5 Securities, L.L.C. (“MLS”), a wholly owned subsidiary of MLtd. MLtd also uses its own funds for
6 loans that it originates. *See* Exhibit S-56 at 9:15-18.

7 51. MLS, an Arizona limited liability company, was organized on February 1, 2001.
8 *See* Exhibit S-7(a).

9 52. The articles of organization of MLS were amended and filed with the Commission
10 on April 4, 2008, and again amended and filed with the Commission on October 8, 2008. *See*
11 Exhibits S-7(b) and S-7(c).

12 53. MLS was registered as a securities dealer with the Commission on March 9, 2004.
13 On December 31, 2008, MLS terminated its registration with the Commission. *See* Exhibit S-2.

14 54. Horizon Partners and Radical Bunny were formed by Hirsch and others for the
15 purpose of investing in the MLtd Pass-Through Participation program through the use of pooled
16 investor funds. *See* Hirsch Declaration at 2:6-8.¹⁷

17 55. Horizon Partners and Radical Bunny were vehicles for Hirsch, H. Walder, and Shah
18 to pool their money to become accredited investors and purchase, for themselves and others,
19 securities offered by MLtd. *See* Vol. IX at 1510:2-9.

20 56. Radical Bunny was a client of MLS. *See* Vol. IX at 1554:12-1555:6; Exhibit R-2 at
21 RAD00079 (duplicate at RAD00080).

22 57. As of June 2008, Radical Bunny was owed the principal amount of \$3,748,000 from
23 MLtd, as the servicing agent for its borrowers, as a result of Radical Bunny’s investments in the
24 MLtd Pass-Through Participation Program.. *See* Vols. IX at 1554:12-1555:13 and XI at 1958:6-
25 1959:9; Exhibits S-48 and S-49.

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¹⁷ *See also* Vol. IX at 1510:2-9.

1 58. From January 1998 until June 2008, investors learned of the Horizon Partners and
2 Radical Bunny investment opportunities from their accountant, Hirsch and/or Shah, or by “word of
3 mouth” from existing investors or their friends and/or family. Investors were friends, relatives,
4 friends of relatives, friends of friends of friends, and friends of clients. Some of the Radical Bunny
5 investors did not have any pre-existing relationship with either Radical Bunny or Hirsch prior to
6 making an investment. *See* Vols. IX at 1558:14-18, III at 347:21-348:3, VI at 1055:13-1057:6,
7 and XI at 1947:4-1948:20.

8 59. Investors reside in Arizona and at least twenty-four other states and five foreign
9 countries. *See* Vol. IX at 1558:19-1559:4; Exhibits S-34 and S-35.

10 ***E. Horizon Partners: January 1998 through December 2005.***

11 60. From January 1998 until September 2005, Horizon Partners invested in the MLtd
12 Pass Through Participation Program. *See* Notice ¶27 and Verified Answer ¶27.¹⁸

13 61. From January 1998 until the fall of 2005, all endorsements of the secured
14 promissory notes and corresponding assignments of the beneficial interests in the deeds of trust
15 were issued in the name of Horizon Partners and duly recorded. *See* Notice ¶27 and Verified
16 Answer ¶27.¹⁹

17 62. From at least January 1998 through the fall of 2005, Horizon Partners and Hirsch
18 raised in excess of \$65 million from investors (“HP Participants”) through the sale of limited
19 liability company membership interests in Horizon Partners in order to participate in the MLtd
20 Pass-Through Participation Program. *See* Vol. IX at 1518:18-23 and 1559:22-1560:20.

21 63. Each of the HP Participants was required to execute its Operating Agreement. *See*
22 Vol. IX at 1513:12-22; Exhibits S-10 and S-55.

23 64. Horizon Partners did not register the offer and sale of the limited liability company
24 interests with the Commission. *See* Exhibit S-1(b).

25 65. Until late 2005, Hirsch represented to investors that Horizon Partners would then

26 ¹⁸ *See also* Hirsch Declaration at 2:28-3:1.

¹⁹ *See also* Exhibit S-39(a).

1 “invest” all or a part of the HP Participant’s capital account into a specific loan pursuant to the
2 investor’s instruction or “Direction to Purchase” executed by the investor and Hirsch on behalf of
3 Horizon. The Direction to Purchase authorized Hirsch, as the “purchaser’s agent,” to acquire an
4 interest in a specific MLtd Loan. The Direction to Purchase also set forth the amount invested, the
5 percent interest in the MLtd Loan that was represented by the HP Participant’s investment, the
6 annual interest rate to be paid to the HP Participant, the maturity date of the MLtd Loan, and the
7 interest payment due date. *See* Notice ¶30 and Verified Answer ¶30.

8 66. Hirsch patterned the Direction to Purchase after a similar form that had been used
9 by MLtd. The same version of the Direction to Purchase form was used by Horizon Partners until
10 the fall of 2005 when Horizon Partners ceased making investments in the MLtd. Pass-Through
11 Participation Program. *See* Vol. IX at 1564:3-20 and IX at 1516:14-24; Exhibits S-12(b) and S-
12 12(f).

13 67. From June 24, 1999 until September 2005, Horizon Partners was compensated for
14 the management services that it provided on behalf of the HP Participants. The management fee
15 was calculated based on a “spread” (i.e., one quarter of one percent) between the stated annual
16 interest rate being paid to Horizon Partners under the terms of the MLtd Loan and the reduced
17 annual interest rate being paid by Horizon Partners to the HP Participants. The fee was assessed as
18 interest payments on each of the MLtd Loans were made by MLtd, as the servicing agent, to
19 Horizon Partners. *See* Hirsch Declaration at 2:16-22 and 2:25-3:1.²⁰

20 68. Until late 2005, as the MLtd Loans matured or were repaid, the HP Participants
21 were given the following options: (a) receive a complete distribution of their principal amounts
22 invested in the MLtd Loan; (b) “roll-over” all of their principal amounts invested in the MLtd Loan
23 for participation in another MLtd Loan; (c) “roll-over” a portion of their principal amounts invested
24 in the MLtd Loan for participation in another MLtd Loan and receive a distribution of their
25 remaining principal amounts; or (d) “roll-over” all of their principal amounts invested in the MLtd
26

²⁰ *See also* Vol. VI at 983:15-984:1.

1 Loan along with additional funds for participation in another MLtd Loan. See Notice ¶31 and
2 Verified Answer ¶31.

3 69. Until late 2005, Horizon Partners and Hirsch made all investments in the MLtd
4 Pass-Through Participation Program on behalf of the HP Participants, made all distributions of
5 interest and/or principal to HP Participants, prepared and maintained all investment documents for
6 each of the HP Participants, sent out quarterly account statements for each of the HP Participants,
7 reviewed the loan summary sheets for each of the MLtd Loans in which Horizon Partners invested
8 and provided them to potential and existing HP Participants for review, and issued an IRS Form
9 1065 (“Schedule K-1”) to the HP Participants at the conclusion of each tax year. The HP
10 Participants completed “Application” forms and provided funds for and received distributions of
11 principal and interest from their investments pursuant to Direction to Purchases and/or
12 “Instructions for Maturing Funds.” See Notice ¶33 and Verified Answer ¶33.²¹

13 70. U.S. income tax law requires a pass-through entity (e.g., partnership, limited
14 liability company, S corporation, or income trust) to issue at year-end a Schedule K-1 to each
15 owner outlining that owner’s share of the pass-through entity’s income, deductions, and credits.
16 As members of Horizon Partners, a Schedule K-1 was distributed to each HP Participant at the end
17 of each tax year. See Vols. II at 263:16-264:24, V at 763:3-764:3, and VII at 1111:16-1112:7.

18 71. As of December 2005, the minimum investment for each HP Participant in Horizon
19 Partners was \$25,000. See Notice ¶34 and Verified Answer ¶34.

20 72. In September 2005, Horizon Partners ceased investing in the MLtd Pass-Through
21 Participation Program on behalf of the HP Participants. See Hirsch Declaration at 2:28–3:1.²²

22 ***F. Radical Bunny: June 1999 through August 2005.***

23 73. Radical Bunny began investing in the MLtd Pass-Through Participation Program
24 beginning in June 1999. All endorsements of the secured promissory notes and corresponding
25 assignments of the beneficial interest in the deeds of trust were issued in the name of Radical

26 ²¹ See also Hirsch Declaration at 2:18-22.

²² See also Vol. IX at 1519:2-13.

1 Bunny and duly recorded. *See* Hirsch Declaration at 2:6-8 and 2:23-25.²³

2 74. From at least January 1, 2000 through approximately December 2005, Radical
3 Bunny, Hirsch, B. Walder, and Shah raised at least \$40 million from investors (“RB Participants”)
4 through the sale of limited liability company membership interests in Radical Bunny in order to
5 participate in the MLtd Pass-Through Participation Program. *See* Vol. IX at 1559:22-1560:10.

6 75. Radical Bunny did not register the offer and sale of the limited liability company
7 interests with the Commission. *See* Notice ¶37 and Verified Answer ¶37.²⁴

8 76. All of the RB Participants were required to execute its Operating Agreement. *See*
9 Vol. IX at 1513:12-22 and 1537:20-1538:2; Exhibits S-9(b), S-53, and S-54.

10 77. In 2002, Radical Bunny provided a copy of its Operating Agreement, which listed
11 the other members in Schedule 3.1.2. *See* Vol. I at 50:20-52:10; Exhibit S-12(a) at ACC000047-
12 000074 and ACC000076-ACC000080.

13 78. Until late 2005, Hirsch, B. Walder, and Shah represented to investors that Radical
14 Bunny would then “invest” all or a part of the RB Participant’s capital account into a specific loan
15 pursuant to the investor’s instruction or “Direction to Purchase” executed by the investor and
16 Hirsch and/or a “managing member” on behalf of Radical Bunny. The Direction to Purchase
17 authorized Hirsch and/or a “managing member,” as the “purchaser’s agent,” to acquire an interest
18 in a specific MLtd Loan. The Direction to Purchase also set forth the amount invested, the percent
19 interest in the MLtd Loan that was represented by the RB Participant’s investment, the annual
20 interest rate to be paid to the RB Participant, the maturity date of the MLtd Loan, and the interest
21 payment due date. *See* Notice ¶38 and Verified Answer ¶38.

22 79. The minimum investment in Radical Bunny was \$50,000. *See* Vol. IX at 1516:3-11
23 and 1516:14-24.

24 80. Hirsch patterned the Direction to Purchase from a form that had been used by MLtd.
25 The same version of the Direction to Purchase form was used by Radical Bunny until the fall of

26 ²³ *See also* Exhibit S-39(b).

²⁴ *See also* Exhibit S-1(b).

1 2005. *See* Vol. IX at 1564:3-20 and 1516:14-24; Exhibits S-12(b) and S-12(f).

2 81. From June 24, 1999 until September 2005, Radical Bunny was compensated for the
3 management services that it provided on behalf of the RB Participants. The management fee was
4 calculated based on a “spread” (i.e., one quarter of one percent) between the stated annual interest
5 rate being paid to Radical Bunny under the terms of the MLtd Loan and the reduced annual interest
6 rate being paid by Radical Bunny to the RB Participants. The fee was assessed as interest
7 payments on each of the MLtd Loans were made by MLtd, as the servicing agent, to Radical
8 Bunny. *See* Hirsch Declaration at 2:25-3:1.

9 82. Until late 2005, as the MLtd Loans matured or were repaid, the RB Participants
10 were given the following options: (a) receive a complete distribution of their principal amounts
11 invested in the MLtd Loan; (b) “roll-over” all of their principal amounts invested in the MLtd Loan
12 for participation in another MLtd Loan; (c) “roll-over” a portion of their principal amounts invested
13 in the MLtd Loan for participation in another MLtd Loan and receive a distribution of the
14 remaining principal amounts; or (d) “roll-over” all of their principal amounts invested in the MLtd
15 Loan along with additional funds for participation in another MLtd Loan. *See* Notice ¶39 and
16 Verified Answer ¶39.

17 83. Until late 2005, Radical Bunny, Hirsch, B. Walder, H. Walder, and Shah made all
18 investments in the MLtd Pass-Through Participation Program on behalf of the RB Participants,
19 made all distributions of interest and/or principal to RB Participants, prepared and maintained all
20 investment documents for each of the RB Participants, sent out quarterly account statements for
21 each of the RB Participants, reviewed the loan summary sheets for each of the MLtd Loans in
22 which Radical Bunny invested and provided them to potential and existing RB Participants for
23 review, and issued a Schedule K-1 to the RB Participants at the conclusion of each tax year. The
24 RB Participants completed “Application” forms and provided funds for and received distributions
25 of principal and interest from their investments pursuant to Directions to Purchase and/or
26

1 “Instructions for Maturing Funds.” See Notice ¶41 and Verified Answer ¶41.²⁵

2 84. U.S. income tax law requires a pass-through entity (e.g., partnership, limited
3 liability company, S corporation, or income trust) to issue at year-end a Schedule K-1 to each
4 owner outlining that owner’s share of the pass-through entity’s income, deductions, and credits.
5 As members of Radical Bunny, a Schedule K-1 was distributed to each RB Participant at the end of
6 each tax year. See Vols. II at 263:16-264:24, V at 763:3-764:3, and VII at 1111:16-1112:7.

7 85. By December 31, 2002, Shah had invested in Radical Bunny. See Vol. VII
8 at 1105:23-1107:8; Exhibit S-12(c) at ACC000041.

9 86. Prior to 2005, Shah understood that the collateral for the repayment of the loan
10 associated with the MLtd Pass-Through Participation Program was tied to the beneficial interest in
11 a specific deed of trust in the name of Radical Bunny. It was important to Shah that his investment
12 was collateralized in this matter due the foreclosure rights which Radical Bunny possessed with
13 respect to a specific piece of real estate in the event of default by the MLtd borrower. See Vol. VII
14 at 1108:1-1110:19 and 1112:8-1114:3.

15 **G. Radical Bunny: the RB-MLtd Loan Program - September 2005 through June 2008.**

16 87. Since at September 2005, Hirsch, B. Walder, H. Walder, and Shah were all
17 managers of Radical Bunny (“RB Managers”). See Vol. IX at 1536:20-1537:13 and 1540:19-
18 1541:8.

19 88. In late August 2005, Hirsch and Shah and one or more of the other RB Managers
20 met with James Sell (“Sell”), a certified public accountant licensed in Arizona and former
21 securities regulator for the state of Arizona. See Vol. III at 327:24-327:4, 330:9-331:22, 333:7-16.

22 89. Sell was introduced to Hirsch in the summer of 2005 by a lawyer with whom Sell
23 and Hirsch were both acquainted and who was a tax client of Hirsch and Shah CPAs. The lawyer
24 told Sell that he was “concerned” and had suggested to Hirsch and his partners to consider
25 retaining Sell to advise them on their compliance with the Arizona securities laws with respect to
26

²⁵ See also Hirsch Declaration at 2:25-28.

1 the business [Horizon Partners' and Radical Bunny's] activities in which the RB Managers were
2 engaging. *See* Vol. III at 344:5-345:3 and 385:23-386:13.

3 90. Hirsch described the past and prospective business activities of Radical Bunny to
4 Sell. *See* Vol. III at 345:4-346:18 and 386:18-388:6.

5 91. Hirsch told Sell that "they" [Horizon Partners, Radical Bunny, and the RB
6 Managers] did not do any independent due diligence with respect to the MLtd Loans; rather, "they"
7 [Horizon Partners, Radical Bunny, and the RB Managers] relied solely on MLtd to perform due
8 diligence. *See* Vol. III at 389:21-25 and 395:20-25.

9 92. Hirsch told Sell that the "participants" [HP Participants and RB Participants] were
10 "passive investors," relying essentially on "their" [Horizon Partners', Radical Bunny's, and the RB
11 Managers'] efforts. *See* Vol. III at 346:24-18.

12 93. Hirsch told Sell that the investors were "friends, relatives, friends of relatives,
13 friends of friends of friends, and friends of clients." *See* Vol. III at 347:21-348:3.

14 94. Sell told Hirsch and Shah that based on what Hirsch described to him, in Sell's
15 opinion, "they" [Horizon Partners, Radical Bunny, and the RB Managers] were selling unregistered
16 securities. *See* Vol. III at 348:4-349:6, 369:8-19, 375:18-376:1, and 377:3-378:11.

17 95. Sell told Hirsch and Shah that, at a minimum, "they" [Horizon Partners, Radical
18 Bunny, and/or the RB Managers] needed to be registered as a securities dealer with the
19 Commission. *See* Vol. III at 348:4-349:6 and 352:17-25.

20 96. Sell told Hirsch and Shah that "they" [Horizon Partners and Radical Bunny] should
21 offer rescission to their existing investors, but Hirsch responded, "[N]obody would rescind because
22 everybody was making money." *See* Vol. III at 349:6-21, 350:8-351:2, and 388:9-20.

23 97. Sell told Hirsch and Shah that Hirsch should self-report "their" [Horizon Partners,
24 Radical Bunny, and the RB Managers] securities-related violations to the Commission. *See* Vol.
25 III at 349:6-8 and 354:24-355:13.

26 98. Sell told Hirsch and Shah that they should stop making sales to investors until their

1 securities related issues were resolved. *See* Vol. III at 373:18-25 and 388:2-6.

2 99. Sell told Hirsch and Shah that he could assist them and that he would prepare a
3 consulting agreement and send it to them, which he did on or about September 1, 2005. However,
4 Sell was not retained. *See* Vol. III at 349:22-7 and 354:1-22.

5 100. In September 2005, Radical Bunny instituted a new program in which Radical
6 Bunny would advance funds to MLtd, the proceeds of which would be used, in part, to fund MLtd
7 Loans to the MLtd borrowers. In order to raise funds for this new venture, Radical Bunny sold
8 “participations” or fractional interests in the RB-MLtd Loans to investors (“Participants”) (the
9 “RB-MLtd Loan Program”). *See* Vol. IX at 1519:2-1520:24, 1541:23-1546:7, and 1548:7-1549:1;
10 Exhibit R-8.

11 101. Radical Bunny did not register the RB-MLtd Loan Program with the Commission.
12 *See* Notice ¶44 and Verified Answer ¶44.²⁶

13 102. From December 2005, the minimum investment for each existing RB Participant or
14 HP Participant in the RB-MLtd Loan Program was \$50,000.²⁷ *See* Notice ¶42 and Verified Answer
15 ¶42.

16 103. Between at least January 2006 and June 2008, Radical Bunny received the principal
17 amount of \$189,800,867.00 from investors (excluding \$11,179,893 from the RB Managers) from at
18 least 900 account holders. This sum remains due and owing. *See* Vol. X at 1678:12-19; Exhibits
19 S-34, S-35, S-37(a), and S-37(b).

20 104. With the institution of the RB-MLtd Loan Program, Horizon Partners ceased to
21 operate effective December 31, 2005, and “any and all remaining investments” with Horizon
22 Partners “would be rolled over” to the RB-MLtd Loan Program. *See* Vol. IX at 1519:23-1546:7;
23 Exhibit S-12(i).

24 105. Effective December 1, 2005, as the MLtd Loans in which Horizon Partners or

25 ²⁶ *See also* Exhibit S-1(a).

26 ²⁷ If a RB Participant had more than one investment account with RADICAL BUNNY (e.g., an individual account and an IRA account), then the total amount invested in all accounts had to total the minimum investment amount of \$50,000.

1 Radical Bunny held a fractionalized interest under the MLtd Participation Pass Through Program
2 matured or were repaid, the HP Participants and/or RB Participants were given the following
3 options: (a) receive a complete distribution of their principal amounts invested in the MLtd Loan;
4 (b) “roll-over” all of their principal amounts invested in the MLtd Loan for participation in the new
5 Radical Bunny investment program; (c) “roll-over” a portion of their principal amounts invested in
6 the MLtd Loan for participation in the new Radical Bunny investment program and receive a
7 distribution of their remaining principal amounts; or (d) “roll-over” all of their principal amounts
8 invested in the MLtd Loan and add additional funds for participation in the new Radical Bunny
9 investment program. *See* Notice ¶46 and Verified Answer ¶46.

10 106. From September 2005 through June 2008, as the RB-MLtd Loans matured, the
11 Participants were to execute and deliver to Radical Bunny a form created by Hirsch entitled
12 “Instructions for Maturing Funds” which included the following options: (a) receive a complete
13 distribution of their principal amounts invested in the RB-MLtd Loan; (b) “roll-over” all of their
14 principal amounts invested in the RB-MLtd Loan for participation in a new RB-MLtd Loan; (c)
15 “roll-over” a portion of their principal amounts invested in the RB-MLtd Loan for participation in a
16 new RB-MLtd Loan and receive a distribution of their remaining principal amounts; or (d) “roll-
17 over” all of their principal amounts invested in the RB-MLtd Loan for participation in a new RB-
18 MLtd Loan. *See* Vol. VI at 1008:22-1010:25; Exhibit S-12(1) at ACC000192.

19 107. Under the RB-MLtd Loan Program, investor funds were advanced to Radical Bunny
20 and held until a RB-MLtd Loan became available. Radical Bunny would then pool the
21 Participants’ monies and fund the RB-MLtd Loan. Depending on the duration of the loan period,
22 the stated interest rate of the RB-MLtd Loan ranged between eleven and fourteen percent per
23 annum. Interest was to be paid to Radical Bunny by MLtd on at least monthly basis. Participants
24 would then receive their interest payments from Radical Bunny on a monthly basis. *See* Notice ¶47
25 and Verified Answer ¶47.

26 108. For most of the RB-MLtd Loans, MLtd paid Radical Bunny either thirteen percent

1 (13%) or fourteen percent (14%) interest for a one-year term. Radical Bunny, in turn, paid most
2 investors either eleven percent (11%) or twelve percent (12%) for a one-year term. *See* Vol. VIII at
3 1355:17-24; Exhibits S-33, S-37(a) at pp.15-17and S-37(b) at p.2.

4 109. Radical Bunny and the RB Managers accepted money from investors regardless of
5 whether the investor was "accredited." *See* Vols. III at 412:4-24 and V at 768:1-9; Exhibit S-45(a).

6 110. In September 2005, Radical Bunny imposed upon the Participants a fee of two
7 percent (2%) for its management services. The two percent (2%) fee represented the difference
8 between the stated annual interest rate being paid to Radical Bunny under the terms of the RB-MLtd
9 Loan and the annual interest rate being paid by Radical Bunny to the Participants. The management
10 fee was assessed as interest payments were made by MLtd to Radical Bunny. *See* Hirsch
11 Declaration at 3:4-5.

12 111. Between January 2006 and June 2008, the RB Managers received approximately
13 \$3.5 million in management fees. *See* Vol. IX at 1579:19-23.

14 112. In September 2005, the Direction to Purchase was modified by Hirsch to include the
15 language: "[Y]our investment is collateralized by the beneficial interest under various deeds of
16 trusts held by Mortgages Ltd." The Direction to Purchase was also modified by Hirsch to
17 reference to a specific RB-MLtd Loan, rather than to a specific MLtd Loan. This new Direction to
18 Purchase was used until June 2008, and was sent to all investors. *See* Vol. VI at 995:22-996:10,
19 997:11-1000:7, 1000:12-20, and 1002:2-1003:2; Vol. IX 1564:23-1566:13; Exhibits S-(e), S-12(g)
20 and S-13(f) at ACC053943; S-13(g) at ACC053955, S-13(h) at ACC053960.

21 113. In December 2005, all existing Participants received a letter which stated:

22 *Effective December 01, 2005, the member managers have adopted the following*
23 *changes and reaffirmation of several existing policies:*

- 24 • Horizon Partners, LLC, will cease operating on December 31, 2005. Any
25 and all remaining investments with Horizon Partners, LLC will be rolled
26 over to the Radical Bunny LLC.

- 1 • Investor request for partial or complete redemption of their investment must
2 be in writing. A thirty (30) day notice of the investor's intention is required.
- 3 • Beginning December 01, 2005, all NEW investments will be subject to a
4 reduction of 2% from the stated interest rate if redeemed prior to the
5 maturity date. The reduction of the stated interest rate will be retroactive to
6 the funding date of the investment.
- 7 • A management fee of 2% per annum was negotiated with Mortgages LTD.
8 and will be paid to the member managers. The aforementioned payment is
9 over and above the stated interest rate earned by the investor.
- 10 • A minimum investment of \$25,000 will apply to all NEW investors.
- 11 • Interest earned on the investment commences one (1) day after the funding
12 date.
- 13 • Payments of interest and/or principal will be distributed at the end of each
14 month.
- 15 • Interest earned is not static. Be sure to consult the member manager for the
16 rate in effect.

17 *See* Vol. VII at 1122:10-20; Exhibit S-12(i).

18 114. Radical Bunny, Hirsch, B. Walder, and Shah represented to investors that Radical
19 Bunny would "invest" the Participant's funds "in MLtd," which investment would be evidenced by
20 a "secured" promissory note pursuant to the investor's instruction or "Direction to Purchase"
21 executed by the investor and a "managing member" on behalf of Radical Bunny. The Direction to
22 Purchase authorized a "managing member," as the "purchaser's agent," to acquire an interest in a
23 specific RB-MLtd Loan as well as set forth the amount invested, the percent interest in the loan
24 that the investment amount represented, the annual interest rate to be paid to the Participant, the
25 loan maturity date, and the interest due dates. *See* Hirsch Declaration at 3:13-20; Hirsch
26 Declaration Exhibits A and B.

115. If a Participant desired to redeem his/her principal prior to the RB-MLtd Loan
maturity date, Radical Bunny imposed a redemption fee of an additional two or five percent above
the stated interest rate being paid to the Participant retroactive to the date of investment. *See*
Hirsch Declaration Exhibits A and B.

1 116. From January 2006 until June 2008, the sources of money used to honor Participant
2 liquidation or redemption requests were new investor funds, the assets of Radical Bunny, and the
3 personal funds of the Radical Bunny managers. This was not disclosed to investors. *See* Vols. IX
4 at 1481:4-24, XII at 1976:7-25 and 1979:12-18, and XII at 1982:3-15.

5 117. From 2006 until June 2008, MLtd did not repay any of the principal due to Radical
6 Bunny under the RB-MLtd Loans. *See* Vo. XII at 19821:18-1982:2; Exhibit S-37(a) at p.34, §(11).

7 118. The unpaid principal advances are evidenced by ninety-nine separate promissory
8 notes executed by MLtd in favor of Radical Bunny. *See* Notice ¶54 and Verified Answer ¶54.²⁸

9 119. Hirsch and H. Walder executed promissory notes evidencing the RB-MLtd Loans
10 on behalf of Radical Bunny (the "RB-MLtd Notes"). The RB-MLtd Notes do not refer to any
11 collateral. *See* Exhibits S-38(b), S-38(c), S-38(d), S-38(e), and S-38(f).

12 120. Hirsch, B. Walder, and H. Walder communicated with MLtd regarding the RB-
13 MLtd Loans. *See* Exhibit R-2 at RAD00081-83.

14 121. From at least December 2005, Radical Bunny and the RB Managers failed to advise
15 offerees and Participants that promissory notes evidencing the RB-MLtd Loans did not contain any
16 language that limited the use of the RB-MLtd Loan proceeds to funding of MLtd Loans. *See*
17 Notice ¶74 and Verified Answer ¶74.

18 122. As of July 18, 2008, Radical Bunny was owed the aggregate principal amount of
19 \$197,232,758.05 by MLtd. *See* Notice ¶54 and Verified Answer ¶54.²⁹

20 123. Since at least December 2005, Radical Bunny, Hirsch, B. Walder, H. Walder, and
21 Shah made all distributions of interest and/or principal to the Participants, prepared and maintained
22 all investment documents for each of the Participants, sent out quarterly account statements for
23 each of the Participants, reviewed the loan summary sheets and other loan documentation for each
24 of the MLtd Loans for which RB-MLtd Loan proceeds were to be used to fund, visited the real
25 estate subject to the MLtd Loans, received and reviewed audited and unaudited financial statements

26
²⁸ *See also* Exhibits S-38(a), S-33, and S-37(b).

²⁹ *See also* Exhibits S-37(a) and S-37(b).

1 of MLtd, and issued an IRS Form 1099-INT to the Participants at the conclusion of each tax year.
2 The Participants completed various application forms and provided funds for and received
3 distributions of principal and interest from their investments pursuant to Directions to Purchase
4 and/or "Instructions for Maturing Funds." *See* Notice ¶55 and Verified Answer ¶55.

5 124. As of December 31, 2006, none of the HP Participants held a membership interest in
6 Horizon Partners with the exception of Hirsch, B. Walder, and H. Walder. *See* Notice ¶56 and
7 Verified Answer ¶56.

8 125. As of December 31, 2006, none of the RB Participants held a membership interest
9 in Radical Bunny with the exception of Hirsch as Trustee of the Hirsch Family Trust, B. H.
10 Walder, and Shah and Modhavi Shah. *See* Notice ¶57 and Verified Answer ¶57.

11 126. Despite the institution of the MLtd-RB Loan Program, Radical Bunny continued to
12 be a manager-operated entity in which their non-manager members were unable to actively
13 participate in the business operations of the entities (i.e., passive). *See* Vols. II at 270:18:14 and III
14 at 468:1-3 and 511:20-23; Exhibits S-3(b) and 9(a).

15 127. Since at least January 2000, Radical Bunny and Hirsch represented to offerees and
16 investors that he was a member and manager of Radical Bunny. As a manager of Radical Bunny,
17 Hirsch received a management fee for the performance of certain business activities of Radical
18 Bunny including meeting with potential investors to discuss the investment program, serving as a
19 contact for existing investors, collecting investment checks from investors, attending and making
20 presentations at the Orange Tree investor meetings, participating in meetings with Radical Bunny
21 attorneys, acting as a signatory on the Radical Bunny bank accounts, preparing income tax returns
22 of Radical Bunny, preparing financial statements of Radical Bunny and negotiating the RB-MLtd
23 Loans with Coles. *See* Notice ¶59 and Verified Answer ¶59.

24 128. Since at least 2005, Radical Bunny and Shah represented to offerees and investors
25 that he was a "managing member" of Radical Bunny. As a "managing member" of Radical Bunny,
26 Shah received a management fee for the performance of certain business activities of Radical

1 Bunny including meeting with potential investors to discuss the investment program, serving as a
2 contact for existing investors, collecting investment checks from investors, attending and making
3 presentations at the Orange Tree investor meetings, participating in meetings with Radical Bunny
4 attorneys, acting as a signatory on the Radical Bunny bank accounts, preparing income tax returns
5 of Radical Bunny, and preparing financial statements of Radical Bunny. *See* Notice ¶60 and
6 Verified Answer ¶60.

7 129. As part of his management responsibilities, Shah was to provide RB-MLtd Loan
8 Program information to “friends or relatives.” *See* Vol. VII at 1114:13-19 and 1117:7-18.

9 130. Shah includes immediate family members to distant relatives of distant relatives as
10 part of his definition of “relative,” and CPA clients to someone he was just introduced by a casual
11 acquaintances as part of his definition of “friend.” *See* Vol. II at 1114:20-1115:24.

12 131. Between 2005 and 2008, about 150 families from whom approximately \$40 million
13 was received by Radical Bunny through Shah. *See* Vol. VII at 1115:25-1116:8.

14 132. Since the inception of the RB-MLtd Loan Program, Shah understood that the
15 collateral for the repayment of the RB-MLtd Loans was in the nature of a purported blanket lien on
16 all of the assets of MLtd, including the MLtd Portfolio Loans. However, Radical Bunny did not
17 receive an assignment of the beneficial interest in the deeds of trust associated with the MLtd
18 Portfolio Loans. *See* Vol. VII at 1118:5-1119:1.

19 133. Since June 2005, Radical Bunny and B. Walder represented to offerees and
20 investors that she was a “managing member” of Radical Bunny. As a “managing member” of
21 Radical Bunny, B. Walder received a management fee for the performance of certain business
22 activities of Radical Bunny including meeting with potential investors to discuss the investment
23 program, serving as the primary contact with existing investors, collecting and depositing
24 investment checks from investors, setting up IRA accounts for investors to participate in Radical
25 Bunny investment opportunities, attending and making presentations at the Orange Tree investor
26 meetings, participating in meetings with Radical Bunny attorneys, participating in weekly meetings

1 with MLtd management, acting as a signatory on the Radical Bunny bank accounts, and making
2 distributions to investors. *See* Notice ¶61 and Verified Answer ¶61.

3 134. Since September 2005, Radical Bunny and H. Walder represented to offerees and
4 investors that he was a “managing member” of Radical Bunny. As a “managing member” of
5 Radical Bunny, H. Walder received a management fee for the performance of certain business
6 activities of Radical Bunny including collecting and depositing investment checks from investors,
7 assisting in setting up IRA accounts for investors to participate in Radical Bunny investment
8 opportunities, attending the Orange Tree investor meetings, participating in meetings with Radical
9 Bunny attorneys, participating in weekly meetings with MLtd management, serving as a signatory
10 on the Radical Bunny bank accounts, maintaining bank account records, preparing distributions to
11 investors, maintaining the IT system of Radical Bunny, and serving as a contact for MLtd for the
12 funding of the RB-MLtd Loans. *See* Notice ¶62 and Verified Answer ¶62.

13 135. Since September 2005, H. Walder, on behalf of Radical Bunny, also made certain
14 that all of the investors’ accounts balanced, meticulously reviewed the distributions of interest and
15 principal to investors, made certain that MLtd had paid the correct amount of interest due on a
16 monthly basis under the terms of the RB-MLtd Loans, maintained investor files, and executed
17 some of the RB-MLtd Loan promissory notes on behalf of Radical Bunny. *See* Vol. VI at 981:19-
18 983:14, 994:2-995:1, 1019:15-1024:25; Exhibits S-38(c), S-38(d), S-38(e), and S3-38(f).

19 136. In the fourth quarter of 2006, Radical Bunny and Hirsch were advised by MLtd
20 representatives that Radical Bunny may be engaged in the offer and sale of unregistered securities
21 and they should seek legal advice regarding the conduct of the business activities of Radical
22 Bunny. *See* Notice ¶63 and Verified Answer ¶63.

23 137. In response to a request from MLtd regarding how many of the Participants were
24 accredited, Radical Bunny sent out a form in early 2007 to all existing Participants requesting them
25 to disclose whether or not they were accredited. *See* Vol. VI at 1064:4-1066:9 and 1069:13-14;
26 Exhibit S-15(a).

1 138. At the request of his client MLtd, Robert Kant, an attorney with the law firm
2 Greenberg Traurig, (“Kant”) met with Hirsch, Coles, and other MLtd representatives in December
3 2006 or January 2007 because Kant and MLtd were concerned about the manner in which Radical
4 Bunny was raising money from investors. Specifically, Kant and MLtd were concerned about the
5 absence of a private offering memorandum, subscription agreements to ascertain the qualification
6 of investors, and a registered securities dealer. *See* Vol. VIII at 1224:15-1225:6.

7 139. Kant believed that Hirsch was selling securities. *See* Vol. VIII at 1228:21-1229:2.

8 140. In late January 2006, the RB Managers met with attorneys Ronald Logan (“Logan”)
9 and Carl Ranno (“Ranno”)³⁰ to discuss securities-related issues and get legal advice. *See* Vols. II at
10 193:1-24 and 1156:5-12, and VI at 1046:1-20.

11 141. Hirsch advised Logan Radical Bunny had sold investments to individuals residing in
12 over twenty (20) states. *See* Vol. II at 203:17-204:8.

13 142. Hirsch provided Logan and Ranno with a description of the business activities of
14 Radical Bunny. Hirsch advised Logan and Ranno that Radical Bunny and the RB Managers had
15 been either “brokering” or issuing” “notes” to investors; However, Hirsch did not believe that the
16 “notes” were securities. Ranno advised Hirsch to the contrary. *See* Vols. II at 205:5-206:4 and
17 214:1-23 and VII at 1157:9-1158:17.

18 143. Hirsch told Logan and Ranno that the managers were receiving compensation for
19 raising funds from investors. *See* Vol. II at 13-19.

20 144. Based on the description provided by Hirsch regarding the business operations of
21 Radical Bunny, Logan told the RB Managers that they “could not do business in the future without
22 violating some state or regulatory scheme.” *See* Vol. II at 212:14-19, 222:1-13, 224:22-225:1.

23 145. Logan advised the RB Managers that they were in violation of some federal or state
24 law in operating their business without a license. *See* Vol. II at 208:11-21.

25 146. Hirsch told Logan and Ranno that based on advice that he had previously received
26

³⁰ Respondents waived attorney-client privilege. *See* Exhibits S-18(a) and S-18(b).

1 Radical Bunny did not need any license to continue to engage in the same business activities. *See*
2 Vol. II at 225:8-18 and 222:4-232:5.

3 147. Logan and Ranno believed that no other attorney could come to a different
4 conclusion that the “notes” were not securities. *See* Vol. II at 228:8-12.

5 148. Logan advised them that Radical Bunny may be required by a federal or state
6 regulator to conduct a rescission offering. *See* Vol. II 232:6-233:6.

7 149. Logan told the RB Managers that an investor complaint to state or federal regulators
8 or an audit of MLtd could expose their unlicensed conduct and they should be “concerned.” *See*
9 Vol. II at 229:5-230:12.

10 150. Logan sent an engagement letter to the RB Managers for the purpose of resolving
11 licensing issues including compliance with the securities laws, but was not retained. *See* Vol. II at
12 209:8-210:10; Exhibit S-21.

13 151. As of late January 2007, Radical Bunny had raised in excess of \$110 million from
14 investors. *See* Vol. II at 203:17-204:8.

15 152. In February 2007, the RB Managers retained the law firm of Quarles & Brady
16 (“Q&B”) on behalf of Radical Bunny to provide legal advice whether Radical Bunny held a valid
17 security interest in the assets of MLtd. and on Radical Bunny’s securities-related activities. *See*
18 Vols. VII at 1199:21-9 and V at 798:15-16.

19 153. Q& B was advised by Hirsch on February 12, 2007, that as of January 2007, Radical
20 Bunny had 200-300 accredited investors and 200-300 non-accredited investors. *See* Vol. V at
21 768:1-9; Exhibit S-45(a).

22 154. On February 12, 2007, were advised by Q&B that it was likely that Radical Bunny
23 and the RB Managers: (a) were offering securities in the form of investment contracts; (b) they
24 would be required to register as a securities dealer or securities salesmen, obtain an investment
25 adviser or investment adviser representative license, and/or obtain a mortgage banker’s or brokers
26 license in order to continue to conduct the business of Radical Bunny; and (c) they had violated the

1 registration provisions of Arizona and federal securities laws. *See* Vol. V at 794:6-796:12 and
2 798:3-14; Exhibits S-42 at Q&B-SEC 002750 and S-45(b) and S-24 at RB70535.

3 155. In March 2007, the RB Managers were advised by Q&B that the collateral for the
4 RB-MLtd Loans was either in question or outright nonexistent. *See* Vol. IV at 586:5-587:11.

5 156. During the week of April 6-13, 2007, Steven Friedberg ("Friedberg") met with B.
6 Walder at the offices of Radical Bunny to discuss a potential investment. Friedberg was not a
7 resident of Arizona; rather, he was in Phoenix for the purpose of visiting his ailing mother. *See*
8 Vol. IX at 1447:20-25 and 1448:18.

9 157. B. Walder represented to Friedberg that "since everything is collateralized, the only
10 thing that could actually go wrong is if all of a sudden a dirty bomb and the land got polluted." *See*
11 Vol. X at 1652:17; Exhibit S-14 at 00:45:17.

12 158. B. Walder represented to Friedberg that the investment was "safe." *See* Vol. X at
13 1653:10-18.

14 159. B. represented Friedberg that Radical Bunny had four "non-negotiables." She stated
15 that: (a) MLtd does not loan outside of Arizona; (b) MLtd loans on commercial properties only, no
16 residential; (c) the loan-to-value ratio for the MLtd Loans was 65 percent; and (d) MLtd was
17 "always in first position." She stated that with those four things, "you stay pretty safe." *See* Vol.
18 X at 1657:5-22; Exhibit S-14 at 00:12:00.

19 160. B. Walder represented to Friedberg MLtd had been in business since 1963 providing
20 commercial bridge loans and made hard money loans, "always commercial." She told Friedberg
21 that Radical Bunny pools monies from investors and loans it to MLtd, which used the money to
22 loan to borrowers. *See* Exhibit S-14 at 00:06:00.

23 161. B. Walder represented to Friedberg that MLtd meets with borrowers and reviews
24 loan applications with "its team of people including an appraiser and title people," and MLtd is
25 "licensed by rigorous banking and securities regulators," and "MLtd has to be very strict because it
26 is subject to inspections and audits all the time." *See* Exhibit S-14 at 00:30:00 and 1:06:00.

1 162. B. Walder represented to Friedberg, “[W]e’ve never lost a single penny. MLtd has
2 never lost a single penny.” See Exhibit S-14 at 00:15:00.

3 163. B. Walder represented Friedberg that Radical Bunny paid interest to investors “like
4 clockwork.” She said that with the interest payments Radical Bunny paid, investors could “buy a
5 car or house or take a vacation” because “you know you’re getting these payments on time every
6 month -- every single month. There’s never any question.” See Exhibit S-14 at 00:28:00 and
7 00:41:00.

8 164. B. Walder represented Friedberg that the “best part” of the Radical Bunny
9 investment was that Hirsch and Shah did the taxes on MLtd’s pools of mortgages. She told
10 Friedberg that Hirsh and Shah “know what the pools are like, the strength of the [MLtd] pools, the
11 strength of the [MLtd Loan] portfolio. I sleep very well at night... we’ve taken about every single
12 security measure you can think of.” B. Walder also stated that Hirsch and Shah, “know the
13 strength of the [MLtd Loan] portfolio” because “they see what is coming in---and they see the flow
14 of monies coming in. They prepare all of the K-1s. They prepare- they answer the questions on
15 those [MLtd] pools.” See Exhibit S-14 at 00:42:40.

16 165. In April 2007, B. Walder told Friedberg:

17 [N]one of this is guaranteed... we have a history. You have people involved that t
18 one time or another, like myself, were licensed, have careers that showed the
19 integrity, the—the way they dealt with people in their own professions. You have
20 two CPAs that are still licensed, still actively involved in taxes and working,
21 actively involved in doing the pools, but there’s no guarantees. I mean, there can’t
be. Otherwise it wouldn’t be an investment. You know, even if you put your
mattress, there’s no guarantee it’s going to be there tomorrow or *if you hid it in the
ground, somebody could fin it, huh?*”

22 See Exhibit S-14 at 00:44:27.

23 166. B. Walder represented to Friedberg that so long as Radical Bunny did not actively
24 solicit for investors, then Radical Bunny would not be subject to the securities laws. See Vol. X at
25 1657:23-1658:12.

1 167. B. Walder was not acquainted with Friedberg prior to the April 2007 meeting. *See*
2 Vol. X at 1666:4-11.

3 168. In June 2007, the Friedberg received the Direction to Purchase after he provided his
4 investment funds to Radical Bunny. Vol. X at 1654:8-1655:1; Exhibit S-52.

5 169. Friedberg did not receive a financial statement, private offering memorandum, or
6 any written risk disclosures from Radical Bunny. *See* Vol. X at 1655:2-10.

7 170. Friedberg would not have invested if he was told that there may be an issue with the
8 purported collateral for the RB-MLtd Loans and that Radical Bunny had retained counsel to
9 examine that issue. *See* Vol. X at 1655:11-22.

10 171. On May 2, 2007, the RB Managers were advised by Q&B that Radical Bunny and
11 the RB Managers had, in fact, violated Arizona and federal securities laws and they were all
12 subject to both civil and criminal liability. *See* Vol. V at 819:3-826:9; Exhibit S-22(g).

13 172. On May 2, 2007, the RB Managers were advised by Q&B that since the Radical
14 Bunny's collateral documents for the RB-MLtd Loans were defective, their representations to
15 investors that their funds were collateralized and secured could be fraudulent. *See* Vols. XI at
16 1882:21-1883:1 and V at 827:16-828:6; Exhibit S-22(g).

17 173. On May 2, 2007, the RB Managers were advised to immediately stop offering and
18 selling securities. Q&B did not put this legal advice to the RB Managers in writing because its
19 advice to stop selling securities was "simple, straight forward, 'no' is not a hard word to
20 understand, and Q&B gave a lot of credence to the people with whom Q&B was discussing these
21 matters." *See* Vol. V at 823:1-13, 827:12-13, and 945:19-946:18.

22 174. On May 2, 2007, Hirsch told Q&B that he wanted Radical Bunny to be compliant
23 with the securities laws and he understood what needed to be done to become complaint. *See* Vol.
24 V at 799:6-22 and 826:16-24; Exhibit S-22(g).

25 175. On May 11, 2007, the RB Managers were advised by Q&B that, among other
26 things, "the documentation to create and/or perfect the necessary liens and security interests [in

1 MLtd's assets] is either non-existent or defective in numerous respects." However, this
2 information was never disclosed to investors. *See* Vol. IV at 594:16-601:16; Exhibit S-43 at Q&B-
3 SEC-RB 000272-E.

4 176. In May 2007, Kelly Levine ("Levine") and his mom, Diane Levine, who had been
5 investing with Radical Bunny since 1999, met with Hirsch for the purpose of investing the
6 proceeds of the sale of his mom's business. *See* Vol. I at 139:19-8, 141:10-18, 142:12-19, and
7 173:20-24.

8 177. Diane Levine was a tax client of Hirsch. *See* Vol. I at 141:22-142:8.

9 178. Levine attended the meeting to help his mom understand the RB-MLtd Loan
10 Program because if she invested the sale proceeds, her entire life savings would be invested in the
11 RB-MLtd. Loan Program. *See* Vol. I at 141: 10-142:19 and 176:3-10.

12 179. While Levine's mom had been investing in Radical Bunny in 1999, Hirsch never
13 explained to Levine or Diane Levine that the specific changes in the investment opportunity to the
14 RB-MLtd Loan Program with respect to the loan collateral. *See* Vol. I at 148:9-149:18.

15 180. Hirsch told Levine that the investment was in commercial real estate and that
16 because he said he said "I" hold the deed of trust to this property, that we [Radical Bunny] can, if
17 the borrower doesn't pay the loan back, we will have -- we can foreclose and then get the property,
18 and that that was much better than something like a stock." *See* Vol. I at 143:15-23.

19 181. At a meeting shortly after the death of Scott Coles, Hirsch described Radical Bunny
20 as being a "bank" for MLtd to Levine and other investors. *See* Vol. I at 147:6-148:8; Exhibit R-8.

21 182. On June 15, 2007, Q&B again advised that, among other things, the RB-MLtd
22 Loans lacked "meaningful collateral security" and that "the loans were to have been collateralized
23 by the assets of ML... however the existing documentation is not adequate to achieve this end."
24 However, this information was never disclosed to investors. *See* Vol. IV at 604:20-607:17; Exhibit
25 S-44 at Q&B-SEC-JS 000170-E.

26 183. On June 19, 2007, Q&B again advised Hirsch that there were not be any roll-overs,

1 no new sales, do not use any draft documents which were intended to be used in a future securities
2 offering. Hirsch agreed and stated that he understood. *See* Vol. V at 829:14-19; Exhibit S-45(c).

3 184. On August 13, 2007, an “all hands” meeting took place at Kant’s office at the
4 request of MLtd. Kant, Coles, Q&B, and the RB Managers all attended. The purpose of the
5 meeting was to address the ongoing issues regarding the defective collateral for the RB-MLtd
6 Loans and Radical Bunny’s compliance with federal and state securities laws. *See* Vol. VIII
7 1235:16-1236:5; Exhibit R-2 at RAD00023-00035 and RAD00039-00040.

8 185. Kant told Hirsch that “if they were continuing to offer securities without addressing
9 the concern that I raised, people go to jail for that, and he [Hirsch] could go to jail.” Following the
10 meeting, Kant received an e-mail from Q&B thanking Kant for making the statement to Hirsch
11 which also stated, “[Y]ou have made my job easier.” *See* Vols. III at 1236:13-1237:3 and VIII at
12 1268:6-14.

13 186. The ongoing issue with respect to the collateral with the RB-MLtd Loans was not
14 addressed because Kant’s goal was not to enhance Radical Bunny’s loan position with MLtd
15 because it would not have been in his client’s best interest. *See* Vol. VIII at 1233:25-1234:25;
16 Exhibit S-43 at Q&B-SEC-RB-000272-E.

17 187. On December 12, 2007, Hirsch and B. Walder were again advised by Q&B that,
18 among other things, the “current loans from [Radical] Bunny to ML [MLtd] are not collateralized.
19 You may recall that a financing statement was provided by ML [MLtd], but the financing statement
20 is not sufficient to create or perfect the security interest that presumably was intended when it was
21 provided.” However, this information was never disclosed to investors. *See* Vol. IV at 626:4-
22 629:8; Exhibits S-22(o) and R-2 at RAD00075-76 (duplicate at RAD00077-78).

23 188. Between January 1, 2007, and April 30, 2008, Radical Bunny, Hirsch, B. Walder,
24 and Shah received at least an additional \$73 million from investors. *See* Notice ¶67 and Verified
25 Answer ¶67.

26 189. Between January 1, 2008, and April 30, 2008, Radical Bunny, Hirsch, B. Walder,

1 and Shah received \$28,933,491 from investors. *See* Vol. VI at 1042:21-23; Exhibit S-24 at
2 RB70534.

3 190. On June 8, 2008, Hirsch admitted to Q&B that Radical Bunny and the RB Managers
4 had not followed their advice which had been articulated to them on May 2, 2007, "We've done
5 everything wrong." *See* Vol. V at 944:24-945:11 and 949:12-950:20; Exhibit S-22(g).

6 191. H. Walder understood the opinion of Q&B with respect to the defective collateral
7 for the RB-MLtd Loans, but dismissed its advice. *See* Vol. VI at 1060:4-1061:23.

8 192. On June 10, 2008, Q&B terminated their representation of Radical Bunny, in part,
9 because Radical Bunny had continued to sell unregistered securities. *See* Vol. V at 834:5-21;
10 Exhibit S-22(p).

11 193. Hirsch understood that the issue with the collateral for the RB-MLtd Loans
12 remained unresolved. *See* Vol. XI at 1883:20-1884:2.

13 194. Radical Bunny and the RB Managers never disclosed to the Participants in writing
14 that Q&B had been retained to examine whether or not they were in compliance with Arizona and
15 federal securities laws. *See* Vol. IX at 1594:25-1595:5.

16 195. Shah participated in conversations about the ongoing RB-MLtd Loan collateral and
17 securities issues with Q&B. *See* Exhibit R-2 at RAD00045 and RAD00053.

18 196. H. Walder participated in conversations about the ongoing RB-MLtd Loan collateral
19 and securities issues with Q&B. *See* Exhibits S-22(k), S-22(m), R-2 at 00042 (duplicate at
20 RAD00047), RAD00045, and RAD00053.

21 197. B. Walder participated in conversations about the ongoing RB-MLtd Loan collateral
22 and securities issues with Q&B. *See* Exhibits S-22(k), S-22(m), R-2 at RAD00035-RAD00041,
23 RAD00045, RAD00053, RAD00055-RAD00056, RAD00058, RAD00060, and RAD00075-
24 RAD00076 (duplicate at RAD00077-RAD00078).

25 198. Hirsch participated in conversations about the ongoing RB-MLtd Loan collateral
26 and securities issues with Q&B. *See* Exhibit S-22(k), S-22(m), R-2 at RAD00045-

1 RAD000RAD000RAD000RAD000RAD00046, RAD00049, RAD00052-RAD00053, RAD00057,
2 RAD00075, RAD00075-RAD00076 (duplicate at RAD00077-RAD00078).

3 199. Since approximately June 2007, Radical Bunny required each new Participant to
4 execute a form entitled "Loan Participation Disclosure Statement and Acknowledgements." The
5 form was created by Hirsch by using various drafts created by Q&B. While the form refers to
6 documents entitled "Security Agreement," "Term Notes," and "Participant Notes," no documents
7 ever existed. The fact that they did not exist was never disclosed to investors. *See* Vols. VI at
8 1070:3-1071:20 and 1072:11-1073:5 and IX at 1596:11-1598:14 and 1598:15-1604:22; Exhibits S-
9 16(a) and S-17.

10 200. On January 28, 2008, Donna Hinman ("Hinman") met with B. Walder at the offices
11 of Radical Bunny along with two other friends, Max McCarty and Dula McCarty, for the purpose
12 of investing in the RB-MLtd Loan Program. *See* Vol. III at 402:4-403:12.

13 201. Mr. McCarty had learned about Radical Bunny from a friend. *See* Vol. III at 460:2-
14 6.

15 202. B. Walder represented to Hinman that she had just returned from a meeting at MLtd
16 in which "they" reviewed the MLtd Loans because "they" wanted to "pick the very best loans for
17 Radical Bunny." B. Walder told Hinman that the RB Managers attended weekly meetings at
18 MLtd. *See* Vol. III at 403:15-22.

19 203. Hirsch represented to Hinman that he attended weekly meetings at MLtd. *See* Vol.
20 III at 418:16-22.

21 204. B. Walder represented to Hinman that Radical Bunny only invested in commercial
22 real estate projects, no residential condominium projects. *See* Vol. III at 404:9-11.

23 205. Hinman understood from the conversation that her investment funds would be
24 pooled then loaned to MLtd "to acquire an interest in a single piece of property." *See* Vol. II at
25 405:12-407:1 and 408:14-18; Exhibit S-12(l) at ACC000190.

26

1 206. B. Walder represented to Hinman that there was a “loophole” in the securities laws
2 in that Radical Bunny could continue to “legally” sell the RB-MLtd Loan Program until \$200
3 million in RB-MLtd Loans was reached. *See* Vol. III at 410:2-13, 423:15-22, and 441:24-15.

4 207. B. Walder told Hinman that she could invest even though she was not accredited.
5 Hinman believed that she was accredited based solely on the definition provided by B. Walder.
6 *See* Vol. III at 412:4-24; Exhibit S-17.

7 208. Hinman had very little investment experience. *See* Vol. III at 424:1-16.

8 209. B. Walder told Hinman that investing in the RB-MLtd Loan Program was “safer
9 than a 401(k).” B. Walder further represented to Hinman, “[n]o one has ever lost any money at
10 Radical Bunny,” and that “it was safer than the stock market because it was actual real estate.” *See*
11 Vol. III at 426:3-14, 458:22-459:4, and 460:11-23.

12 210. Hinman invested with Radical Bunny because she believed that it was a safe
13 investment. *See* Vol. III at 460:17-23.

14 211. B. Walder represented to Hinman that even though foreclosure was a risk,
15 foreclosure was not an issue because the loan default interest rate would be higher. *See* Vol. III at
16 426:22-427:10.

17 212. Hinman did not receive any investment documents other than the Participant Record
18 and Loan Participation Disclosure Statement and Acknowledgements prior to investing. *See* Vol.
19 III at 428:10-430:25; Exhibit S-17.

20 213. Hinman received a Direction to Purchase and monthly account statements after
21 investing. *See* Vol. III at 431:2-15.

22 214. At meeting after the death of Coles in June, 2008, Hirsch represented to Hinman and
23 other Participants that Radical Bunny’s status with respect to the RB-MLtd Loans was secured.
24 *See* Vol. III at 432:8-435:5.

1 215. In November 2, 2007, Barbara Mathis (“Mathis”) met in person with Hirsch and B.
2 Walder to discuss investing in the RB-MLtd Loan Participation Program. *See* Vol. II at 266:15-
3 267:19, 268:7-22, 281:3-7; Exhibits S-16(a) and S-16(b).

4 216. Mathis learned of the investment from a family friend who was a Participant. *See*
5 Vol. II at 265:9-19; Exhibit S-16(b) at RB56142.

6 217. Mathis received and completed the Loan Participation Disclosure Statement and
7 Acknowledgements indicating that she was an unaccredited investor. *See* Vol. II at 311:14-312:11
8 and 317:17-318:5; S-16(b) at RB56143-RB56146.

9 218. Mathis told Hirsch and B. Walder that accreditation was not necessary to invest in
10 the RB-MLtd Loan Program. *See* Vol. II at 292:25-293:14, 314:13-316:1, and 316:16-20.

11 219. Mathis did not have any previous investment experience other than participation in
12 her retirement savings plan, and Hirsch and B. Walder did not inquire into same. *See* Vol. II at
13 293:15-294:3.

14 220. No specific risks associated with the RB-MLtd Loan Participation Program other
15 than those disclosed in the Loan Participation Disclosure Statement were disclosed orally or in
16 writing prior to Mathis making her investment in the RB-MLtd Loan Program. *See* Vol. II at
17 274:9-277:23; Exhibit S-16(b) at RB56143-RB56144.

18 221. Mathis believed that the risks disclosed in the Loan Participation Disclosure
19 Statement were minimized by the representations of Hirsch and B. Walder. *See* Vol. II at 281:8-
20 282:4.

21 222. Ms. Mathis believed that the capitalized term, “Security Agreement” meant that the
22 document existed between MLtd and RB, although she did not receive a copy. *See* Vol. II at
23 282:6-284:7.

24 223. Barbara Mathis understood that she would be a passive investor with Radial Bunny.
25 *See* Vol. II at 270:5-14 and 275:3-6.

26

1 224. Hirsch and B. Walder described the investment as “safe” because it was unlikely
2 that all of the MLtd Loans would go bad at the same time. *See* Vol. II at 272:15-2734:5.

3 225. Hirsch and B. Walder stated that Coles “never lost a dollar of investor money.” *See*
4 Vol. II at 316:21-317:6.

5 226. Following the meeting with Hirsch and B. Walder, Mathis invested her entire
6 retirement savings account with Radical Bunny in December 2007. *See* Vol. II at 266:16-267:8
7 and 298:15-23; Exhibits S-16(a) and S-16(c).

8 227. From at least December 2005, Radical Bunny, Hirsch, B. Walder, and Shah
9 represented to offerees and Participants that repayment of the RB-MLtd Loans was personally
10 guaranteed by Coles. At an Orange Tree Meeting in 2007, Hirsch represented to investors that
11 Coles had a personal net worth of \$100 million. However, Radical Bunny, Hirsch, B. Walder, H.
12 Walder, and Shah never ascertained the nature and/or value of Coles’ personal assets. *See* Vols. I
13 at 135:8-24, 136:4- 137:3, and 137:14-20; Vol. XI at 1820:23-1821:3 and 1830:7-1831:4; Exhibit
14 S-30.

15 228. Radical Bunny, Hirsch, B. Walder, and Shah represented to offerees and
16 Participants that they were well-informed regarding the financial wherewithal of MLtd. However,
17 Radical Bunny did not receive any audited financial statements for MLtd for the 2007 income tax
18 year. *See* Vol. XI at 1834:17-1835:3 and 1858:17-20.

19 229. From at least January 2007 to June 2008, Radical Bunny, Hirsch, B. Walder, and
20 Shah represented to offerees and Participants that Hirsch and Shah prepared the tax returns for
21 Coles and the MLtd Pools. However, they did not prepare the tax returns for the 2007 income tax
22 year for MLtd Pools. They had not prepared the personal income tax returns for Coles for the
23 2005-2007 income tax years because Coles was the subject of an IRS inquiry. This was not
24 disclosed to investors. *See* Vol. XI at 1820:5-1827:9, 1822:8-13, and 1880:2-6.

25 230. Since at least November 2005, Radical Bunny conducted semiannual meetings for
26 its investors at the Orange Tree Resort in Scottsdale, Arizona (“Orange Tree Meetings”) which

1 included a dinner/luncheon and the RB Managers presented a slide/PowerPoint presentation. They
2 were also available to answer questions from investors. These meetings were conducted over a
3 three-day period in order to accommodate all people who wanted to attend. Announcements were
4 forwarded to the Participants. Included with the invitation was a response card requesting that
5 Radical Bunny be advised of how many people were going to attend. While the invitation stated
6 that the purpose of the meeting was not to solicit new investors, no steps were taken in order to
7 ensure that potential new investors did not attend. *See* Vols. II at 294:15-296:10 and XI at 1947:4-
8 1948:20; Exhibits S-23(a), S-23(b), S-23(c), and S-24.

9 231. An investor first met Hirsch and learned about the RB-MLtd Loan Program at the
10 November 2006 Orange Tree Meeting. He did not know Hirsch prior to the Orange Tree Meeting;
11 rather, he learned of the meeting from his then accountant. He was not an invited guest, nor was he
12 asked to leave by any of the RB Managers. *See* Vol. XI at 1947:4-1948:20.

13 232. H. Walder assisted in the preparation of the Power Point presentations and attended
14 all of the Orange Tree Meetings, but declined to communicate with investors because he did not
15 like to speak in public. *See* Vol. VI at 1036:14-17, 1038:11, and 1044:21-1045:13.

16 ***H. Post June 2008 and the MLtd and Radical Bunny Bankruptcies.***

17 233. On June 23, 2008, an involuntary petition for relief was filed against MLtd under
18 Chapter 7 of Title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") in the United
19 States District Court for the District of Arizona, under case No.2:08-bk-07465-RJH ("MLtd
20 Bankruptcy"). *See* Exhibits S-6(b) at 1:21-22, S-56 at 11:25-26, S-56 at 16:23-24.

21 234. On June 24, 2008, the United States Bankruptcy Court ("the Bankruptcy Court")
22 entered an order converting the MLtd Bankruptcy case to a proceeding under Chapter 11 of the
23 Bankruptcy Code. *See* Exhibits S-6(b) at 1:23-24, S-56 at 11:26-12-2, and S-56 at 16:24-17:1.

24 235. MLtd remained the debtor-in-possession in the MLtd Bankruptcy. *See* Exhibit S-56
25 at 17:1-2.

26 236. In the MLtd Bankruptcy, Radical Bunny asserted that it had lent MLtd

1 approximately \$197 million under approximately 98 promissory notes. Radical Bunny also
2 asserted that the total \$197 million in RB-MLtd Loans was secured by a lien in substantially all
3 MLtd's assets, including all its interest in the MLtd Portfolio Loans (approximately \$162 million)
4 and all real estate owned by MLtd (the "RB Claim"). *See* Vol. XII at 2046:24-2048:23; Exhibits S-
5 37(a), S-37(b), and S-40 at p.7, ¶2.

6 237. Radical Bunny's alleged security interest was the subject of substantial dispute in
7 the MLtd Bankruptcy, with MLtd, the MLtd investors' committee, the MLtd unsecured creditors'
8 committee, and other parties-in-interest asserting that Radical Bunny's security interest in the
9 MLtd assets was invalid or unenforceable under various legal theories. The amount of RB Claim
10 was not in dispute. *See* Exhibit S-40 at p.7, ¶2.

11 238. On October 8, 2008, an involuntary petition for relief was filed against Radical
12 Bunny under Chapter 11 of the United States Code in the United States Bankruptcy Court for the
13 District of Arizona (Phoenix) ("Bankruptcy Court") under case no. 2:08-bk-13884-CGC (the "RB
14 Bankruptcy"). On October 20, 2008, the Bankruptcy Court entered an order converting the case to
15 a voluntary petition under Chapter 11 of the Bankruptcy Code. *See* Exhibit S-36.

16 239. On November 11, 2008, Hirsch, on behalf of Radical Bunny, executed and filed
17 Schedule F-Creditors Holding Unsecured Nonpriority Claims in the RB Bankruptcy ("Schedule
18 F"). Schedule F is a sworn declaration containing the list of individuals and entities to which
19 Radical Bunny owed money. Schedule F contains the same names as those listed on the Radical
20 Bunny "Lender Name & Address Listing." *See* Exhibits S-34 and S-35.

21 240. Radical Bunny did not remain the debtor-in-possession in the RB Bankruptcy. In
22 anticipation of the United States Trustee taking a formal position on a then pending motion,
23 Radical Bunny stipulated to the appointment of a Chapter 11 trustee, and an order directing the
24 United States Trustee to appoint a Chapter 11 trustee was entered by the Bankruptcy Court on
25 December 29, 2008. *See* Vol. XII at 2041:16- 2043:5; Exhibit S-36.

26 241. G. Grant Lyon began serving as the Chapter 11 in the RB Bankruptcy on December

1 30, 2008 (“RB Chapter 11 Trustee”). *See* Vol. XII at 2041:19-2042:5; Exhibit S-40 at p.12, ¶B.

2 242. On May 20, 2009, the Bankruptcy Court entered an Order Confirming the Investors
3 Committee’s First Amended Plan of Reorganization dated March 12, 2009 for MLtd (“MLtd
4 POR”)(“MLtd Bankruptcy Confirmation Order”) after an extensively litigated trial. *See* Exhibits
5 S-6(b) at 1:25-2:1, S-40 at p.8, ¶3, and R-4.

6 243. During the MLtd Bankruptcy proceedings, MLtd and the official committee of
7 investors contested the issue whether Radical Bunny had a valid security interest in MLtd’s assets.
8 As part of the MLtd confirmation trial, the dispute regarding the validity and extent of Radical
9 Bunny’s secured status as against MLtd’s assets became a central issue. The issue was resolved in
10 the MLtd Bankruptcy by agreement among the parties and without an evidentiary hearing and
11 without findings of fact by the Bankruptcy Court in either the MLtd Bankruptcy or the Radical
12 Bunny Bankruptcy. *See* Vol. XII at 2053:8-2064:12, 2077:19-2079:12, 2087:9-11, 2088:5-19, and
13 2089:12-2090:3; Exhibits S-40 at p.8, ¶3 and S-56 at 44:22-45:9.

14 244. The MLtd POR recognizes and eliminates all disputes as to the validity and extent
15 of Radical Bunny’s secured creditor claim in the approximate amount of \$162 million, which
16 represents the principal amount of the MLtd Portfolio Loans. *See* Vol. XII at 2079:4-20 and
17 2079:25-2082:4; Exhibits S-40 at p.8, ¶3, S-56 at 26:3-27:16, R-5 at 21:14-22:16, and S-56 at
18 44:22-45:9.

19 245. The MLtd POR also allows Radical Bunny’s unsecured claim against MLtd for
20 approximately \$35 million. *See* Vol. XII at 2079:4-12, 2082:5-2083:7, and 2103:13-2104:1;
21 Exhibits S-40 at p.8, ¶3, S-56 at 26:3-27:16, and R-5 at 21:14-22:16.

22 246. The repayment of the principal balance of the RB-MLtd Loans will be governed by
23 the MLtd POR. *See* Exhibit S-56.

24 247. On April 28, 2010, the Bankruptcy Court entered an Order Confirming the
25 Amended Plan of Reorganization dated March 9, 2010 for Radical Bunny (“RB POR”). The RB
26 POR treats the Participants as unsecured creditors of Radical Bunny, entitling those creditors to

1 share *pro rata* in all recoveries from Radical Bunny's creditor interests (deemed secured and
2 unsecured) in MLtd's assets and the MLtd liquidating trust. *See* Vol. XII at 2045:18-2046:23;
3 Exhibit S-40.

4 248. While being served with a copy of the Notice on March 12, 2009, Hirsch stated to
5 Ronald Clark, the Chief Investigator of the Securities Division, that "[W]e have already established
6 that we sold unregistered securities; everybody knows that." *See* Vol. II at 245:13-20 and 246:21-
7 2.

8 *III. ARGUMENT*

9 *A. Horizon Partners, Radical Bunny, Hirsch, B. Walder, H. Walder, and Shah were* 10 *involved in the offer and sale of securities in the form of investment contracts.*

11 The Arizona Securities Act provides that a security may not be sold in Arizona unless it is
12 registered with the Commission. *See* A.R.S. § 44-1841. Radical Bunny, Horizon Partners,
13 Hirsch, B. Walder, H. Walder, and Shah were involved in the offer and sale of securities in the form
14 of three different investment contracts. Specifically, the three investment opportunities offered and
15 sold by Horizon Partners and Radical Bunny were: (1) limited liability company membership
16 interests in Horizon Partners from approximately 1998 until September 2005; (2) limited liability
17 company membership interests in Radical Bunny from approximately 1999 until September 2005;
18 and (3) the RB-Participant Loan Program from approximately September 2005 until June 2008. All
19 of these investment opportunities involve the offer and sale of securities in the form of investment
20 contracts.

21 *1. The limited liability company membership interests in Horizon Partners and* 22 *Radical Bunny are securities under the Securities Act.*

23 Membership interests in limited liability companies or partnerships are not specifically
24 named as "securities" in either federal or state securities laws definitions. However, a
25 membership interest in a "member-managed" limited liability company becomes a security if the
26 character of the membership interest falls within the statutory phrase "investment contract." *See*

1 *Nutek Info. Sys., Inc. v. Arizona Corp. Comm'n*, 194 Ariz. 104, 113, 977 P.2d 826, 835 (Ct.
2 App.1998). A membership interest in a limited liability company being operated as “manager-
3 managed” (i.e., akin to a limited partnership) is an investment contract and therefore a security.³¹
4 See *SEC v. Murphy*, 626 F.2d 633, 640-641 (9th Cir. 1980), citing *McGreghar Land Co. v.*
5 *Meguiar*, 521 F.2d 822, 824 (9th Cir. 1975).

6 An investment contract is included in the definition of “security” under the Securities Act.
7 See A.R.S. § 44-1801(26). The core definition of an investment contract was set forth in *S.E.C. v.*
8 *W.J. Howey Co.*, 328 U.S. 293 (1946). Under the *Howey* test, an investment contract exists if it
9 involves (1) an investment of money or other consideration; (2) in a common enterprise; and (3)
10 with the expectation of profits earned solely from the efforts of the promoter or a third party.³²
11 Although the test was designed to interpret federal law, Arizona courts have adopted the *Howey*
12 test and ordinarily apply it to determine whether an investment is a security. See *Rose v. Dobras*,
13 128 Ariz. 209, 211, 624 P.2d 887, 889 (Ct. App. 1981).

14 Arizona courts agree that the “investment contract” definition of a security embodies a
15 flexible principal, “that is capable of adaptation to meet the countless and variable schemes devised
16 by those who seek to use the money of others on the promise of profits.” *Nutek*, 194 Ariz. at 108,
17 977 P.2d at 830. This flexible approach recognizes the investor’s economic reality and maximizes
18 the protection that the Arizona Securities Act provides to Arizona investors.³³ See *Rose*, 128 Ariz.
19 at 212, 624 P.2d at 890 (“The supreme court has consistently construed the definition of ‘security’
20 liberally.”); *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990).

21 Two tests have been developed to determine the existence of the “common enterprise”

22 ³¹ The Commission has also found that a limited partnership interest is a security under the Securities Act. See e.g., *In*
23 *the Matter of the Offering of Securities by Western Universal Fund Company, LLC, et al.*, Decision No. 60784.

24 ³² The *Howey* case originally used the phrase “solely from the efforts of others,” however, this language was later
25 modified to “substantially” in *SEC v. Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (9th Cir. 1973).

26 ³³ The Preamble to the Securities Act states:

The intent and purpose of this Act is for the protection of the public, the preservation of fair and equitable
business practices, the suppression of fraudulent or deceptive practices in the sale or purchase of
securities, and the prosecution of persons engaged in fraudulent or deceptive practices in the sale or
purchase of securities. This Act shall not be given a narrow or restricted interpretation or construction, but
shall be liberally construed as a remedial measure in order not to defeat the purpose thereof.

1 element: (1) horizontal commonality; and (2) vertical commonality. *See Daggert*, 152 Ariz. at
2 565, 733 P.2d at 1148. The commonality element is satisfied if horizontal *or* vertical
3 commonality is demonstrated. *Id.* at 566, 733 P.2d at 1149. Horizontal commonality requires a
4 pooling of investor funds collectively managed by the promoter. *Id.* at 565, 733 P.2d at 1148.
5 Vertical commonality is established if there is a correlation between the potential profits of the
6 investor and the promoter. *Id.*

7 The third and final prong of the *Howey* test has evolved since it was first handed down over
8 50 years ago. In order to satisfy the third *Howey* prong in Arizona, one must only establish that the
9 efforts made by those other than the investors were the undeniably significant ones, and were those
10 essential managerial efforts that affected the failure or success of the enterprise. *See Nutek*, 194
11 Ariz. at 108, 977 P.2d at 830.

12 In this case, the following facts are *uncontested* relative to the time period beginning in at
13 least 1999 through 2005: (1) Horizon Partners and Radical Bunny were both manager-operated
14 entities in which their non-manager members were unable to actively participate in the day-to-day
15 business operations of the entities (i.e., “passive”); (2) Horizon Partners and Radical Bunny
16 conducted business pursuant to the terms of their respective Operating Agreements; (3) HP
17 Participants and RB Participants provided their funds to Horizon Partners and/or Radical Bunny;
18 (4) in exchange for their investment funds, HP Participants and RB Participants became members
19 of either Horizon Partners or Radical Bunny and were required to endorse the respective entity’s
20 Operating Agreement member signature page; (5) Horizon Partners and Radical Bunny
21 participated in the MLtd Pass-Through Participation Program with the use of the entities’
22 members’ pooled accounts; (6) all interests in the MLtd Pass-Through Participation Program were
23 issued by MLtd to Horizon Partners and Radical Bunny in the name of the respective entity; (7)
24 Participants were each issued an Schedule K-1 from Horizon Partners and/or Radical Bunny at the
25 end of each tax year; (8) Horizon Partners and Radical Bunny, by and through their managers, did
26 all due diligence with regard to the MLtd Pass-Through Participation Program (including the

1 decision as to which interests in the Mortgage Ltd loans to its borrowers that would be acquired)
2 on behalf of the HP Participants and RB Participants; (9) Horizon Partners and Radical Bunny
3 made all distributions of interest and principal to the HP Participants and RB Participants,
4 maintained accounts and provided regular account statements for each of the HP Participants and
5 RB Participants, and communicated directly with the investors with regard to their investments;
6 and (10) HP Participants and RB Participants were promised a guaranteed rate of return on their
7 principal investments by Horizon Partners and Radical Bunny which would result substantially
8 from the investment and managerial activities of Horizon Partners and Radical Bunny, by and
9 through their managers, and/or MLtd and/or its borrowers on behalf of the HP Participants and RB
10 Participants.

11 The first prong of the *Howey* test is satisfied because the HP Participants and RB
12 Participants paid their money to Radical Horizon Partners and/or Radical Bunny. The second prong
13 of the *Howey* test, horizontal commonality, is satisfied because the investors' funds were pooled in
14 a common account, and then used by Radical Bunny and/or Horizon Partners to invest in the MLtd
15 Pass-Through Participation Program. The third prong of the *Howey* test is satisfied because it was
16 the investment and managerial efforts of Horizon Partners and Radical Bunny, by and through their
17 managers, Mortgage Ltd, and/or its borrowers, not the investors, which affected the failure or
18 success of the enterprise. Participants had no managerial role whatsoever. The HP Participants
19 and RB Participants simply surrendered their money to one or both limited liability companies.
20 Therefore, the limited liability company membership interests in Horizon Partners and Radical
21 Bunny constitute investment contracts and therefore securities under the Securities Act.

22 2. *Interests in the RB-Participant Loan Program constitute investment contracts and,*
23 *therefore, securities under the Securities Act.*

24 Beginning in September 2005, MLtd wanted to institute a new investment program, by
25 which million dollar notes would be issued by MLtd. Radical Bunny did, in fact, participate in this
26 new program and loaned MLtd approximately \$197,232,000 as of June 2008. This obligation is

1 memorialized by a series of promissory notes evidencing the RB-MLtd Loans. The repayment of
2 RB-MLtd Loans was to be collateralized by a personal guarantee of Coles and a secured interest in
3 all of the assets of MLtd, the primary asset of which was the MLtd Loan Portfolio. The structure
4 of loan transaction was a departure from the MLtd Pass-Through Participation Program. Under the
5 new structure, RB-MLtd Loans would be issued by MLtd, as borrower, and were to be
6 collateralized by a blanket lien on all of the assets of MLtd and a personal guarantee from Scott
7 Coles. In other words, under the RB-MLtd Loan Program, Radical Bunny would not receive a
8 duly recorded beneficial interest in a deed of trust in its own name for a specific parcel of real
9 estate. In order for Radical Bunny to fund the RB-MLtd Loans, it needed to raise enough money to
10 fund each \$1 million loan. In response, Radical Bunny instituted the RB-Participant Loan Program
11 in which to do so. The RB-Participant Loan Program was one in which Radical Bunny, Hirsch, B.
12 Walder, and Shah offered and sold to investors "participations" in the RB-MLtd Loans, purporting
13 to assign to the Participants fractionalized interests in those loans.

14 In this matter, the following facts are *uncontested* relative to the RB-Participant Loan
15 Program: (1) Participants became lenders to Radical Bunny; (2) Participants provided their funds to
16 Radical Bunny; (3) Radical Bunny funded the RB-MLtd Loans from the use of the Participants'
17 pooled investment funds; (4) all notes evidencing the RB-MLtd Loans were issued by MLtd
18 directly to Radical Bunny; (5) as evidence of their participation, Participants received a Direction to
19 Purchase from Radical Bunny *after* Radical Bunny had used their money to fund the RB-MLtd
20 Loan; (6) the Direction to Purchase was the sole document evidencing their investment; (7)
21 Participants were each issued an IRS form 1099-INT from Radical Bunny at the end of each tax
22 year; (8) Radical Bunny invested the Participants' funds in the RB-MLtd Loans, made all
23 distributions of interest and principal to the Participants, maintained accounts for Participants,
24 provided regular account statements for each of the Participants, and communicated directly with
25 the Participants with regard to their investments; (9) Participants had no managerial roles in
26 Radical Bunny whatsoever; and (10) Participants were promised guaranteed rates of return on their

1 principal investments by Respondents, which would result substantially from the investment and
2 management activities of Radical Bunny, by and through their managers, and/or MLtd and/or its
3 borrowers on behalf of the Participants.

4 First, the Participants entered into an agreement under which they would passively invest
5 their funds with Radical Bunny in order to earn a profit in the form of interest. The RB-MLtd
6 Loan Program was instituted so that Radical Bunny could finance substantial investments in MLtd
7 (i.e., the RB-MLtd Loans). Second, the Participants' funds were pooled, purportedly to enable
8 Radical Bunny to make loans to MLtd. Third, the investors were dependent on the substantial
9 efforts of Radical Bunny, by and through its managers, and/or MLtd to succeed or fail and had no
10 way to control or even influence Radical Bunny's decisions regarding its investments. The
11 Participants' bought a package, an investment contract, pursuant to which Radical Bunny took the
12 purchase money and invested it and agreed to perform a number of services for the Participants.
13 Nothing was required of the Participants in order to receive a profit other than to provide their
14 investment funds to Radical Bunny. That *entire* package, all of the components of the agreement
15 with Radical Bunny constituting the RB-Participant Loan Program, constitutes an investment
16 contract and therefore a security under the Securities Act.

17 Horizon Partners and Radical Bunny did not register its securities' offerings with the
18 Commission. Accordingly, Horizon Partners and the RB Managers violated A.R.S. § 44-1841.
19 See A.R.S. § 44-1842.

20 **B. *Horizon Partner acted as an unregistered dealer and Hirsch, B. Walder, and Shah acted***
21 ***as unregistered salesmen in violation of A.R.S. § 44-1842.***

22 A person who sells securities in Arizona must be registered as a dealer or salesman with the
23 Commission. See A.R.S. § 44-1842. Under the Securities Act, a "dealer" is defined, in part, as
24 an issuer, other than an investment company, who, directly or through an officer,
25 director, employee or agent who is not registered as a dealer under this chapter,
26 engages in selling securities issued by such issuer.

1 A.R.S. § 44 1801(9)(b).

2 An “issuer” is defined to include any limited liability company who issues or proposes to
3 issue any security. *See* A.R.S. §§ 44-1801(13) and 44-1801(16). Both Horizon Partners and
4 Radical Bunny issued securities to investors.

5 A “salesman” is defined as “an individual, other than a dealer, employed, appointed or
6 authorized by a dealer to sell securities” within Arizona. A.R.S. § 44-1801(22). As a manager of
7 Horizon Partners, Hirsch was authorized to sell securities on its behalf. The RB Managers were
8 each authorized to sell securities on behalf of Radical Bunny.

9 Respondents admit that none of them were registered as securities dealers or salesmen with
10 the Commission at the time of the securities offerings by Horizon Partners and Radical Bunny.
11 Accordingly, the Horizon Partners and the RB Managers violated A.R.S. § 44-1842. *See* A.R.S. §
12 44-1842.

13 **C. *Radical Bunny and the RB Managers are subject to liability under the antifraud***
14 ***provisions of the Securities Act.***

15 Radical Bunny and the RB Managers engaged in multiple violations of all of the antifraud
16 provisions of the Securities Act. *See* A.R.S. § 44-1991(A)(1)-(3). The Radical Bunny Managers
17 acted on behalf of Radical Bunny at all times. The RB Managers each held themselves out as
18 well-educated professionals. The RB Managers deliberately gave the appearance of professionally
19 conducting a legitimate investment program. What they did, however, was to deliberately describe
20 and structure the RB-MLtd Loan Program in a manner that resembled the MLtd Pass-Through
21 Participation Program, a legitimate investment program. The RB-Managers created the impression
22 that the Participants’ principal investments and returns were secured, adequately collateralized, and
23 safe absent a doomsday scenario. They also created the impression that their conduct with respect
24 to the RB-MLtd Loan Program did not run afoul of the registration provisions of the Securities Act.

25 Under the Securities Act, it is a fraudulent practice for *any* person in connection with a
26 transaction involving an offer or sale of securities do any of the following: (1) employ any device,
scheme or artifice to defraud; (2) make untrue statements of material fact, or omit to state any

1 material fact necessary in order to make the statements made, in the light of the circumstances in
2 which they were made, not misleading; or (3) engage in any transaction, practice or course of
3 business which operates or would operate as a fraud or deceit. *See* A.R.S. § 44-1991(A).
4 Securities fraud may be proven by any *one* of these acts. *See Hernandez v. Superior Court*, 179
5 Ariz. 515, 880 P.2d 735 (Ct. App. 1994).

6 In *State v. Gunnison*, the Arizona Supreme Court held that scienter (i.e., intent to defraud)
7 is not a necessary element of a violation of A.R.S. § 44-1991(A)(2).^{34,35} 27 Ariz. 110, 113, 618
8 P.2d 604, 607 (1980). Reliance also is not an element of a violation of A.R.S. § 44-1991(A)(2).
9 *See Rose*, 128 Ariz. at 214, 624 P.2d at 892.

10 A “material fact” is a statement or omission that would have assumed actual significance in
11 the deliberations of the reasonable buyer. *See Aaron v. Fromkin*, 196 Ariz. 224, 227, 994 P.3d
12 1039, 1042 (Ct. App. 2000). Arizona courts have held that the issuer of securities has an
13 affirmative duty not to mislead potential investors. *See Trimble v. American Sav. Life Ins. Co.*, 152
14 Ariz. 548, 553, 733 P.2d 1131, 1136 (Ct. App. 1986).

15 From at least February 2007 through June 2008, Radical Bunny and the RB Managers were
16 repeatedly advised by Q&B that the collateral for the RB-MLtd Loans was in question or outright
17 nonexistent. Nevertheless, Radical Bunny, Hirsch, B. Walder, and Shah continued to: (1) represent
18 to offerees and Participants that the RB-MLtd Loans were adequately collateralized by [all of] the
19 assets of MLtd; and (2) disseminate to each new and re-investing Participant a Direction to
20 Purchase, the single contractual document evidencing their investment in the RB-MLtd Loan
21 Program, which stated that their investment was “collateralized by the beneficial interest under
22 various deeds of trust held by Mortgages Ltd.”

23 From at least December 2005 through June 2008, Hirsch, B. Walder, and Shah represented
24

25 ³⁴ 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. 197.

26 ³⁵ The court left open the issue of whether scienter was an element of a violation of A.R.S. § 44-1991(A)(1) and/or
A.R.S. § 44-1991(A)(3). *See Gunnison*, 127 Ariz. at 113, 618 P.2d at 607. No other Arizona state court has ruled on
this issue.

1 to offerees and Participants that: (1) the Participants were investing in MLtd Loans when, in fact,
2 the Participants simply provided a pool of money to be used as capital by Radical Bunny; (2) MLtd
3 and/or Coles' had sufficient assets to satisfy all sums due to Radical Bunny under the RB-MLtd
4 Loans when, in fact, Radical Bunny did not perform due diligence with respect to the financial
5 status of MLtd and never ascertained the true nature and/or value of Coles' personal assets.

6 From at least December 2005 through June 2008, Hirsch, B. Walder, and Shah represented
7 to offerees and Participants that the proceeds of the RB-MLtd Loans were to be used solely to fund
8 the MLtd Loans. However, the RB Managers failed to advise offerees and Participants that: (1) the
9 promissory notes evidencing the RB-MLtd Loans did not contain any language that limited the use
10 of the RB-MLtd Loan proceeds; and (2) \$35 million of Participant funds were, in fact, used by
11 MLtd to fund its general business operations. None of the RB Managers chose to take corrective
12 action.

13 Since the fall of 2005, the RB Managers were repeatedly advised by individuals who had
14 extensive experience in securities and other regulatory matters that they may be engaged in the
15 offer and sale of unregistered securities in violation of the Securities Act, had, in fact, been
16 engaged in the offer and sale of unregistered securities in violation of the Securities Act, or that
17 their activities may be subject to another regulatory scheme (e.g., mortgage banker). However,
18 Hirsch and B. Walder ignored this advice and represented to offerees and Participants that Radical
19 Bunny and/or its managers either were not be subject to the securities laws until they reached \$200
20 million in Participant funds or not subject to the securities laws at all. None of the RB Managers
21 chose to take corrective action.

22 As early as the fall of 2005 and, again, in May 2007, Radical Bunny and the RB Managers
23 were advised by individuals who had extensive experience in securities and other regulatory
24 matters to stop selling securities until a [new] program could be instituted that was compliant with
25 applicable Arizona and federal securities laws. They chose, however, to ignore the advice of such
26 experienced securities professions, including Radical Bunny's attorneys. Instead, they continued to

1 accept in excess of \$80 million additional funds from new and existing Participants in the RB-
2 MLtd Loan Program; continued to fund new RB-MLtd Loans in at least \$1 million increments,
3 allowing the total outstanding principal due to Radical Bunny from MLtd to reach in excess of
4 \$190 million; and continued to collect their monthly management fee of two percent (2%) per
5 annum, allowing the total to reach approximately \$3.5 million in just over a two-year period.

6 Since the fall of 2005, Hirsch and B. Walder, and Shah purposefully minimized the
7 potential risks associated with investing in the RB-Loan Program by representing that: (1) no
8 Participant has ever gone without their monthly interest payment because MLtd paid like
9 "clockwork;" (2) foreclosure against real estate has never resulted in a loss of a Participant's
10 principal investment and, in fact, benefitted the Participants because they received a higher interest
11 rate as a result of the borrower's loan default; and (3) the Participants' investment was safe except
12 in a doomsday scenario.

13 Worse yet, H. Walder, B. Walder, and Shah sat idly by during the Orange Tree Meetings in
14 May 2007, November 2007, and, again, in May 2008, and said *nothing* despite knowing that there
15 remained outstanding issues with respect to the existence of the collateral for the RB-MLtd Loans.
16 They were all absolutely complicit by not taking any action to stop the misleading or false
17 representations of the designed speaker, Hirsch. Hirsch did not prevent any other of the RB
18 Managers to speak at the Orange Tree Meetings. H. Walder did nothing simply because he did not
19 like to speak in public. B. Walder and Shah offered no rational explanation as to why they
20 remained silent.

21 The material representations and omissions of the RB Managers with the respect to the RB-
22 MLtd Loan Program were misleading or false. The course of conduct engaged in by the RB
23 Managers with respect to the business operations of Radical Bunny was fraudulent. Accordingly,
24 the RB Managers and Radical Bunny, through the RB Managers' conduct, committed multiple
25 violations of all of the antifraud provision of the Securities Act. *See* A.R.S. §§ 1991(A)(1)-(3).
26

1 **D. The RB Managers are persons who controlled Radical Bunny within the meaning of**
2 **A.R.S. § 44-1999, so that they are jointly and severally liable to the same extent as**
3 **Radical Bunny for violations of the antifraud provisions of the Securities Act.**

4 The RB Managers are not only liable for their own multiple violations of the antifraud
5 provisions of the Securities Act, but they, as control persons, are also liable for the violations of
6 the antifraud provisions committed by Radical Bunny. A.R.S. § 44-1999(B) imposes
7 presumptive liability “on those persons who have the *power* to directly or indirectly control the
8 activities of those persons or entities liable as primary violators of A.R.S. § 44-1991.” *Eastern*
9 *Vanguard Forex Ltd. v. Ariz. Corp. Comm’n*, 206 Ariz. 399, 412, 79 P.3d 86, 89 (Ct. App. 2003)
(emphasis in original); *See also* A.R.S. § 44-1999(B).

10 Pursuant to the terms of Operating Agreement, each of the RB Managers had the power to
11 make management decisions and the authority to participate in the day-to-day operations of
12 Radical Bunny. While Hirsch was the primary decision maker, B. Walder, H. Walder, and Shah
13 all actively contributed to the business operations on a regular basis. Many of the daily duties
14 overlapped, but others were assigned to one or more of the RB Managers.

15 The role of Hirsch was that of the “Captain” of Radical Bunny. He was the highest
16 responsible officer with respect to the business operations of Radical Bunny. Hirsch was the
17 helmsman with regard to the business purpose of Radical Bunny. Hirsch met with potential
18 investors to discuss the RB-MLtd Loan Program, served as a contact for Participants, collected
19 investment checks from investors, authored all of the investment documentation, was the primary
20 presenter and answered questions at the Orange Tree Meetings, participated in meetings with
21 attorneys and other professionals, acted as a signatory on the Radical Bunny bank accounts,
22 prepared the income tax returns and financial statements of Radical Bunny, negotiated the terms
23 of the RB-MLtd Loans with MLtd, and executed some of the RB-MLtd Loan promissory notes
24 on behalf of Radical Bunny.

25 The role of B. Walder was that of the “Chief Officer” of Radical Bunny. She was
26 primarily in charge of the navigation of the business operations of Radical Bunny. She was

1 responsible for the carrying out the daily office functions of Radical Bunny on a full-time basis.
2 B. Walder served as the primary contact for new and existing investors; met with potential
3 investors to discuss the RB-MLtd Loan Program; collected and deposited investment checks
4 from investors; made distributions of interest and principal to investors; set up IRA accounts for
5 Participants, attended, participated in presentations, and answered questions at the Orange Tree
6 Meetings; participated in meetings with attorneys and other professionals; participated in weekly
7 meetings with MLtd management; and acted as a signatory on the Radical Bunny bank accounts.

8 The role of Shah was that of the "Second Officer" of Radical Bunny. Although not on a
9 daily basis, Shah assisted in the navigation of the business operations of Radical Bunny. Shah
10 met with potential investors to discuss the RB-MLtd Loan Program, served as the primary
11 contact for a specific group of potential investors and Participants, collected investment checks
12 from investors, attended and was available to answer questions at the Orange Tree Meetings,
13 participated in meetings with attorneys and other professionals, acted as a signatory on the
14 Radical Bunny bank accounts, and prepared income tax returns and financial statements for
15 Radical Bunny.

16 The role of H. Walder was that of the "Third Officer" of Radical Bunny. H. Walder
17 maintained the IT system of Radical Bunny, served as primary contact for MLtd with respect to
18 the funding of the RB-MLtd Loans, executed some of the RB-MLtd Loan promissory notes on
19 behalf of Radical Bunny, verified that MLtd had paid the correct amount of interest due on a
20 monthly basis under the terms of the RB-MLtd Loans, maintained the bank account records,
21 maintained all of the Participant files assisted in setting up IRA accounts for Participants,
22 deposited investment checks from investors, meticulously reviewed the distributions of interest
23 and principal to investors, made certain that all of the investors' accounts balanced, attended and
24 was available to answer questions at the Orange Tree Meetings, participated in meetings with
25 attorneys and professionals, participated in weekly meetings with MLtd management, and served
26 as a signatory on the Radical Bunny bank accounts.

1 Each of the RB Managers not only had the power to control the activities of Radical
2 Bunny, they actively participated in the business operations. Radical Bunny engaged in activity
3 in violation of the antifraud provisions of the Securities Act. *See* A.R.S. § 44-1991(A).
4 Accordingly, the RB Managers are also liable for those violations as control persons of Radical
5 Bunny. *See* A.R.S. § 44-1999(B).

6 **E. Radical Bunny, Horizon Partners, and the RB Managers are liable for the payment of**
7 **restitution and administrative penalties for their violations of the registration and**
8 **antifraud provisions of the Securities Act.**

9 Radical Bunny, Horizon Partners, and the RB Managers are liable for the payment of
10 restitution for their violations of the registration and antifraud provisions of the Securities Act. "If
11 it appears to the [C]ommission ... that any person has engaged in ... any act, practice or transaction
12 that constitutes a violation" of the Arizona Securities Act, the Commission is permitted "...to take
13 appropriate affirmative action to correct the conditions resulting from the [Respondents'] acts,
14 including a requirement to provide restitution as prescribed by rules of the Commission." A.R.S. §
15 44-2032(1) (emphasis added). All of the HP Participant funds have either been returned or rolled-
16 over to Radical Bunny. Over \$190 million was raised from Participants, with the principal amount
17 of \$189,867,000 still due and outstanding to over 900 Participants. As both participants in the
18 violation the registration and antifraud provisions of the Securities Act and as control persons of
19 Radical Bunny, an entity who participated in the violation of the antifraud provisions of the
20 Securities Act, the RB Managers should be liable to repay to the non-manager Participants the
21 principal amount of their investments.

22 The Commission may also assess an administrative penalty of up to \$5,000 per violation of
23 the Securities Act. *See* A.R.S. § 44-2036. For a period of approximately seven and one-half (7½)
24 years, Horizon Partners, an unregistered securities dealer, and Hirsch, an unregistered securities
25 salesman, sold unregistered securities in violation of the Securities Act. *See* A.R.S. §§ 44-1841
26 and 44-1842. Horizon Partners and Hirsch ceased raising funds from investors for the sole reason
that Horizon Partner ceased investing in the MLtd Pass-Through Participation Program. As of the

1 end of December 2005, Horizon Partners still owed in excess of \$65 million to HP Participants.
2 Most of the HP Participants' funds were rolled over by the RB Managers to participate in the RB-
3 MLtd Loan Program. The Securities Division believes that the appropriate amount of
4 administrative penalties to assess against Horizon Partners and Hirsch, jointly and severally, for
5 their multiple violations of A.R.S. §§ 44-1841 and 44-1842 is \$150,000.

6 Hirsch raised in excess of \$40 million from the RB Participants by the end of December
7 2005, and the RB Managers raised in excess of an additional \$150 million by June 2008 while
8 purposefully and repeatedly violating the registration and antifraud provisions of the Securities
9 Act. *See* A.R.S. §§ 44-1841, 44-1842, and 44-1991(A). There are in excess of 900 Participants
10 from Arizona, other states, and multiple foreign countries, most of whom the RB Managers were
11 unacquainted with prior to receiving their investment funds. Their conduct cannot be characterized
12 as anything less than egregious. They ignored the advice of experienced securities professionals,
13 including Radical Bunny's attorneys. Their actions were deliberately designed to mislead investors
14 about the adequacy of the collateral for the RB-MLtd Loans and to minimize the risks associated
15 with the Participants' investments, in part, by suggesting that their investment funds were safe
16 absent a doomsday scenario. While the Commission could assess administrative penalties against
17 *each* of the RB Managers in excess of \$13.5 million for their multiple violations of A.R.S. §§ 44-
18 1841, 44-1842, 44-1991(A)(1), 44-1991(A)(2), and 44-1991(A)(3), the Securities Division believes
19 that the appropriate amount of administrative penalties to assess against the RB Managers is as
20 follows: (1) \$2 million against Hirsch; (2) \$1.25 million against B. Walder; (3) \$1 million against
21 Shah; and (4) \$500,00 against H. Walder.

22 **F. The marital communities of Hirsch, B. Walder, H. Walder, Shah, and the Respondent**
23 **Spouses are subject to liability under the Securities Act.**

24 Pursuant to A.R.S. § 25-211, all property acquired by either husband or wife during the
25 marriage is the community property of the husband and wife except for property that is acquired
26 by gift, devise, descent or is acquired after service of a petition for dissolution of marriage, legal

1 separation or annulment if the petition results in a decree of dissolution of marriage, legal
2 separation or annulment. During marriage, “the spouses have equal management, control and
3 disposition rights over their community property and have equal power to bind the community.”
4 A.R.S. § 25-214(B). In addition, “..., either spouse may contract debts and otherwise act for the
5 benefit of the community” A.R.S. § 25-215(D). “(T)he presumption of law is, in the absence
6 of the contrary showing, that all property acquired and all business done and transacted during
7 coverture, by either spouse, is for the community.” *Johnson v. Johnson*, 131 Ariz. 38, 45, 638
8 P.2d 705, 712 (1981) (emphasis added).

9 First, Hirsch, B. Walder, H. Walder, and Shah each admitted that they were all married
10 during time period in which violations of the registration and antifraud provisions of the
11 Securities Act occurred. Hirsch was married to Diane Rose Hirsch, Shah was married to
12 Madhavi H. Shah, and B. Walder and H. Walder were married to one another. Hirsch, B.
13 Walder, H. Walder, and Shah each admitted that they were acting for their own benefit and for the
14 benefit or in furtherance of their and their respective Respondent Spouse’s marital communities.

15 Second, Hirsch, B. Walder, H. Walder, Shah, and Respondent Spouses failed to rebut the
16 presumption that a debt incurred during marriage is a community obligation. The Arizona Court
17 of Appeals has stated, “[a] debt incurred by a spouse during marriage is presumed to be a
18 community obligation; a party contesting the community nature of a debt bears the burden of
19 overcoming that presumption by clear and convincing evidence.” *Hrudka v. Hrudka*, 186 Ariz. 84,
20 91, 919 P.2d 179, 186 (Ct. App. 1995). Furthermore, “... a debt is incurred at the time of the
21 actions that give rise to the debt.” *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d
22 802, 806 (Ct. App. 2008). Here, the actions giving rise to the debt occurred while Hirsch, B.
23 Walder, H. Walder, and Shah were married. Therefore, the debt was incurred during marriage and
24 is presumed to be a community debt. Since Hirsch, B. Walder, H. Walder, Shah, and the
25 Respondent Spouses failed to overcome this presumption, the debt remains a liability of their
26 respective marital communities.

1 Based on the foregoing, the restitution and administrative penalty is a community debt.
2 The Commission need not determine whether the Respondent Spouses had knowledge,
3 participation, or intent in order to bind the community for the debt incurred. The presumption of
4 intent is enough to bind the community, even if the Respondent Spouse was unaware or did not
5 approve of their participant spouses' actions. The *Ellsworth* court stated, "[I]f the husband acts
6 with the object of benefiting the community, a fact not questioned here, the obligations so
7 incurred by him are community in nature, whether or not the wife approved thereof." *Ellsworth v.*
8 *Ellsworth*, 5 Ariz. App. 89, 92, 423 P.2d 364, 367 (Ct. App. 1967) citing *Donato v. Fishburn*, 90
9 Ariz. 210, 367 P.2d 245 (1961). Since Hirsch, B. Walder, H. Walder, Shah, and the Respondent
10 Spouses failed to meet their burden and present "highly probable" evidence to rebut the
11 presumptions, the debts are liabilities of their respective marital communities. *See* A.R.S. § 25-
12 215. Therefore, the marital communities of Hirsch, B. Walder, H. Walder, Shah, and the
13 Respondent Spouses are subject to any order of restitution, administrative penalties, or other
14 appropriate affirmative. *Id.*

15 **IV. REQUEST FOR RELIEF**

16 For the reasons set forth above, the Securities Division requests the following relief:

17 1. Order Respondents, and any of Respondent's agents, employees, successors and
18 assigns, permanently cease and desist from violating the Securities Act, pursuant to A.R.S. § 44-
19 2032;

20 2. Order Tom Hirsch, individually, the marital community of Tom Hirsch and Diane
21 Rose Hirsch, Berta ("Bunny") Walder, individually, Howard Walder, individually, the marital
22 community of Berta ("Bunny") Walder and Howard Walder, Harish Shah, individually, and the
23 martial community of Harish Shah and Madhavi H. Shah, jointly and severally with Respondent
24 Radical Bunny under Docket No. S-20660A-09-0107,³⁶ to pay restitution to the Commission in
25
26

³⁶ Decision No. 71682.

1 the principal amount of \$189,800,867.00, pursuant to A.R.S. §§ 44-2032 and 25-215;³⁷

2 3. Order Horizon Partners, Hirsch, individually, and the marital community of Tom
3 Hirsch and Diane Rose Hirsch, jointly and severally, to pay the State of Arizona administrative
4 penalties in the amount of \$150,000 for their multiple violations of the registration provisions of the
5 Securities Act, pursuant to A.R.S. §44-2036;

6 4. Order Tom Hirsch, individually, and the marital community of Tom Hirsch and
7 Diane Rose Hirsch, to pay the state of Arizona administrative penalties in the amount of \$2 million
8 for Hirsch's multiple violations of the registration and antifraud provisions of the Securities Act,
9 pursuant to A.R.S. §§ 44-2036 and 25-215

10 5. Order Berta ("Bunny") Walder, individually, and the marital community of Berta
11 ("Bunny") Walder and Howard Walder to pay the state of Arizona administrative penalties in the
12 amount of \$1.25 million for B. Walder's multiple violations of the registration and antifraud
13 provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215;

14 6. Order Harish Shah, individually, and the martial community of Harish Shah and
15 Madhavi H. Shah to pay the state of Arizona administrative penalties in the amount of \$1 million for
16 Shah's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant
17 to A.R.S. §§ 44-2036 and 25-215;

18 7. Order H. Walder, individually, and the marital community of H. Walder of H.
19 Walder and Berta Walder to pay the state of Arizona administrative penalties in the amount of
20 \$500,000 for H. Walder's multiple violations of the registration and antifraud provisions of the
21 Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215; and

22 8. Order any other relief that the Commission deems appropriate.

23
24 ³⁷ The Commission shall credit the amount of restitution owed by Horizon Partners, Hirsch, individually, the marital
25 community of Hirsch and Diane Rose Hirsch, B. Walder, individually, H. Walder, individually, the marital community
26 of B. Walder and H. Walder, Shah, individually, and the martial community of Shah and Madhavi H. Shah with the
amount of any funds recovered by the investors in the following court proceedings: (1) *In re Radical Bunny, LLC*, case
no. 2:08:-bk-13884-CGC in the United States Bankruptcy Court for the District of Arizona (Phoenix); and (2) *Facciola
v. Greenberg Traurig et al.*, case no. 2:10-cv-01025 in the United States District Court for the District of Arizona.
Respondents and Respondent Spouses shall provide to the Commission all information and documentation to verify
that such restitution has been paid, which the Commission in its sole discretion may accept or reject.

1 RESPECTFULLY SUBMITTED this 18th day of February, 2011.

2 

3 Julie Coleman
4 Chief Counsel of Enforcement for the Securities
5 Division of the Arizona Corporation Commission

6 ORIGINAL and 13 copies of the foregoing
7 filed this 18th day of February, 2011, with:

8 Docket Control
9 Arizona Corporation Commission
10 1200 W. Washington St.
11 Phoenix, AZ 85007

12 COPY of the foregoing hand-delivered
13 this 18th day of February, 2011, to:

14 Lyn Farmer
15 Administrative Law Judge
16 Arizona Corporation Commission
17 1200 W. Washington St.
18 Phoenix, AZ 85007

19 COPY of the foregoing mailed this
20 18th day of February, 2011, to:

21 Michael J. LaVelle
22 Matthew K. LaVelle
23 LAVELLE & LAVELLE, PLC
24 2525 E. Camelback Road, Suite 888
25 Phoenix, AZ 85016

26 By: 