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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

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AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

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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
MOTION TO SUPPLEMENT THE
EVIDENTIARY RECORD

(Assigned to the Hon. Lyn Farmer)

Pursuant to A.A.C. R14-3-109(G) and A.A.C. R14-3-109(T)(5), the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby moves to supplement the administrative hearing evidentiary record with a copy of the order filed on April 12, 2011, as document no. 99 in the official court docket for *Securities and Exchange Commission v. Radical Bunny, LLC, Tom Hirsch, Berta Walder, Howard Walder, and Harish P. Shah*, case no. CV-09-1560-PHX-SRB in the United States District Court for the District of Arizona ("SEC Case"), granting the Securities and Exchange Commission's ("SEC") Motion for Summary Judgment against Tom Hirsch, Berta Walder, Howard Walder, and Harish P. Shah ("SEC MSJ")

1 (“Order”) because (1) consent by the Administrative Law Judge (“ALJ”) to the post-hearing
2 introduction of the proposed evidence which will aid in ascertaining the facts in these proceedings;
3 and (2) the standard for the ALJ to take judicial notice of the proposed evidence has been met. A
4 true and correct copy of the Order is attached as Exhibit “A.” This Motion is supported by the
5 following Memorandum of Points and Authorities.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 The Arizona Administrative Code and the Arizona Rules of Practice and Procedure before
8 the Corporation Commission (“Commission Rule(s)”) contain explicit provisions addressing
9 procedures in contested adjudicative proceedings before the Commission. *See* A.R.S. § 44-1601, *et*
10 *seq.* and A.A.C. R14-3-101, *et seq.* Rule R14-3-101(A) states that the Rules of Practice and
11 Procedure govern in all cases before the Commission, including cases arising out of Securities
12 Act. A.A.C. R-14-3-101(A). Commission Rule R14-3-109(G) permits the ALJ to consent to the
13 introduction of further evidence even after a party “has rested his case.” A.A.C. R14-3-109(G).
14 Commission Rule R14-3-109(T)(5) permits the ALJ to take official notice of “such other matters
15 as may be judicially noticed by the Courts of the state of Arizona.” A.A.C. R14-3-109(T)(5).

16 ***I. The introduction into evidence of the Order will aid the ALJ in ascertaining the facts in***
17 ***these proceedings.***

18 At dispute in these proceedings are precisely *which* facts are relevant for purposes of
19 determining whether or not Respondents Horizon Partners, LLC (“Horizon Partners”), Radical
20 Bunny, LLC (“Radical Bunny, LLC”), Tom Hirsch (“Hirsch”), Berta Walder (“B. Walder”),
21 Howard Walder (“H. Walder”), and Harish Shah (“Shah”) were engaged in the offer and sale of
22 securities and, therefore, liable for their respective violations of the registration and antifraud
23 provisions of the Arizona Securities Act. *See* A.R.S. §§ 44-1841, 44-1842, and 44-1991(A). It
24 is the position of the Division that Radical Bunny, Horizon Partners, Hirsch, B. Walder, H. Walder,
25 and Shah were engaged in the offer and sale of securities in the form of investment contracts to the
26 HP Participants, RB Participants, and the Participants. *See* Division’s Post-hearing Memorandum

1 (“Division Memorandum”) at 39:9-44:19. The three different types of investment contracts offered
2 and sold by Horizon Partners and Radical Bunny were: (1) limited liability company membership
3 interests in Horizon Partners from approximately 1998 until September 2005; (2) limited liability
4 company membership interests in Radical Bunny from approximately 1999 until September 2005;
5 and (3) the RB-MLtd Loan Program from approximately September 2005 until June 2008. *Id.*

6 Respondents Horizon Partners and the Radical Bunny Managers, Hirsch, B. Walder, H.
7 Walder, and Shah, argue that the loan participation interests offered as part of the RB-MLtd Loan
8 Program are not securities and, therefore, they could not be liable for violations of the registration
9 and antifraud provisions of the Arizona Securities Act. *See* A.R.S. §§ 44-1841, 44-1842, and 44-
10 1991(A); Respondents’ Post-Hearing Memorandum (“Respondents’ Memorandum”) at 2:1-4:8
11 and 14:12-20:10. The flaw in the Respondents’ argument is that it focuses only on those facts
12 relevant to the securities transactions between Mortgages Ltd. and its borrowers. Respondents
13 completely ignore those facts relevant to the securities transactions between (1) Mortgages Ltd.
14 and its investors, (2) Horizon Partners and its investors, and (3) Radical Bunny and its investors.
15 *Id.*

16 The facts giving rise to the SEC’s complaint against Radical Bunny and its managers,
17 Hirsch, B. Walder, H. Walder, and Shah, (“RB Managers”) for violations of the registration and
18 antifraud provisions of the federal securities laws are the same as those at issue in these
19 proceedings with respect to the Division’s Notice concerning the RB-MLtd Loan Program.¹ *See*
20 Notice; SEC Complaint for Violations of the Federal Securities Laws filed on July 28, 2009, as
21 document no. 1 in the official court docket for the SEC Case attached as Exhibit “B;” and
22 Answer to Complaint for Violations of the Federal Securities Laws filed on October 23, 2009, as
23 document no. 10 in the official court docket for the SEC Case attached as Exhibit “C.” The
24 Order is, in part, a judicial determination of the facts giving rise to a finding that the participation
25

26 ¹ The SEC Complaint does not address the securities offerings (i.e., limited liability company interests) made by and on behalf of Horizon Partners and Radical Bunny prior to the institution of the RB-MLtd Loan Program in September 2005.

1 interests in the RB-MLtd Loan Program offered and sold by Radical Bunny and the RB Managers
2 to Participants constituted investment contracts under federal securities law. *See* Order at 1:23-3:27
3 and 4:19-7:2. The federal courts and the Arizona courts both apply the *Howey* test to determine
4 when an investment contract exists. *See S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946); *Rose v.*
5 *Dobras*, 128 Ariz. 209, 211, 624 P.2d 887, 889 (Ct. App. 1981). An investment contract is
6 included in the definition of “security” under the Arizona Securities Act. *See* A.R.S. § 44-
7 1801(26). Accordingly, the introduction of the Order into evidence will aid this tribunal in
8 ascertaining the relevant facts in these proceedings.

9 ***II. The standard for the ALJ to take judicial notice of the Order has been met.***

10 In order to be judicially noticed, the fact in question must be one which is not subject to
11 reasonable dispute. *See Beyerle Sand & Gravel, Inc. v. Martinez*, 118 Ariz. 60, 574 P.2d 853 (Ct.
12 App. 1977). In the SEC Case and in these proceedings, the following facts are *uncontested*
13 relative to the RB-MLtd Loan Program: (1) Participants became lenders to Radical Bunny; (2)
14 Participants provided their funds to Radical Bunny; (3) Radical Bunny funded the RB-MLtd Loans
15 from the use of the Participants’ pooled investment funds; (4) all notes evidencing the RB-MLtd
16 Loans were issued by MLtd directly to Radical Bunny; (5) as evidence of their participation,
17 Participants received a Direction to Purchase from Radical Bunny after Radical Bunny had used
18 their money to fund the RB-MLtd Loan; (6) the Direction to Purchase was the sole document
19 evidencing their investment; (7) Participants were each issued an IRS form 1099-INT from Radical
20 Bunny at the end of each tax year; (8) Radical Bunny invested the Participants’ funds in the RB-
21 MLtd Loans, made all distributions of interest and principal to the Participants, maintained
22 accounts for Participants, provided regular account statements for each of the Participants, and
23 communicated directly with the Participants with regard to their investments; (9) Participants had
24 no managerial roles in Radical Bunny whatsoever; and (10) Participants were promised guaranteed
25 rates of return on their principal investments by Respondents, which would result substantially
26 from the investment and management activities of Radical Bunny, by and through their managers,

1 and/or MLtd and/or its borrowers on behalf of the Participants. See Order at 1:23-3:27 and 4:19-
2 7:2; Division Memorandum at ¶¶9-21, 54-56, 59, 87, 100-103, 107-120, 122-137, 188-189, and
3 248. Accordingly, the taking of judicial notice of the Order is appropriate in these proceedings.

4 **III. Conclusion**

5 For the reasons set forth above, the Division requests that this post-hearing motion to
6 supplement the administrative hearing evidentiary record with the Order be granted.

7 RESPECTFULLY SUBMITTED this 13th day of April, 2011.

8 

9 Julie Coleman
10 Chief Counsel of Enforcement for the Securities
Division of the Arizona Corporation Commission

11 ORIGINAL and 13 copies of the foregoing
12 filed this 13th day of April, 2011, with:

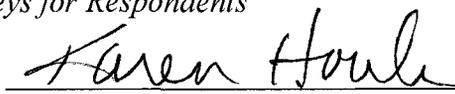
13 Docket Control
14 Arizona Corporation Commission
15 1200 W. Washington St.
Phoenix, AZ 85007

16 COPY of the foregoing hand-delivered
17 this 13th day of April, 2011, to:

18 Lyn Farmer
19 Administrative Law Judge
20 Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

21 COPY of the foregoing mailed
22 this 13th day of April, 2011, to:

23 Michael J. LaVelle
24 Matthew K. LaVelle
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EXHIBIT A

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NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Securities and Exchange Commission,

Plaintiff,

vs.

Radical Bunny, LLC; Tom Hirsch; Berta
Walder; Howard Walder; Harish P. Shah,

Defendants.

No. CV 09-1560-PHX-SRB

ORDER

Pending before the Court is Plaintiff Securities and Exchange Commission’s (“SEC”) Motion for Summary Judgment Against Defendants Tom Hirsch, Berta Walder, Howard Walder, and Harish P. Shah (“SEC MSJ”) (Doc. 63). The Court also resolves Defendants Tom Hirsch, Berta Walder, Howard Walder, and Harish P. Shah’s (collectively, “the individual Defendants”) Cross-Motion for Summary Judgment (“Defs.’ MSJ”) (Doc. 75).¹

I. BACKGROUND

Each of the individual Defendants was a managing member of Radical Bunny, an Arizona limited liability company that was the subject of a Chapter 11 bankruptcy case in

¹ Defendants’ MSJ states that “Radical Bunny” cross-moves for summary judgment, when, in fact, only the individual Defendants remain in this matter. (*See* Defs.’ MSJ at 1; *see also* Doc. 16, Consent J. of Permanent Inj. & Other Relief (“Consent J.”).) The Court construes Defendants’ MSJ as being brought on behalf of the individual Defendants.

1 this district. (Pl.'s Statement of Material Facts in Supp. of SEC MSJ ("PSOF") ¶¶ 1-3.)²
2 Hirsch and Shah are licensed Certified Public Accountants ("CPAs"). (*Id.* ¶¶ 14-15.) Berta
3 Walder once held a securities license and has a doctorate of education. (*Id.* ¶¶ 16-17.)
4 Howard Walder also once held a securities license and is a pharmacist. (*Id.* ¶¶ 18-19.) Each
5 individual Defendant was a signatory to Radical Bunny's operating agreement. (*Id.* ¶ 4.)

6 Both Radical Bunny and its predecessor were formed to make investments in
7 Mortgages Ltd. ("ML"), a mortgage lender that was also the subject of a Chapter 11
8 bankruptcy case in this district. (*Id.* ¶¶ 5, 7.) From 2004 to June 2008, the individual
9 Defendants, via Radical Bunny, invested \$3.5 million in ML for projects called Panwebster
10 and Tempe Land. (*Id.* ¶ 11.) Radical Bunny characterized these investments as "pass-through
11 investments." (Doc. 64, Decl. of David S. Brown in Supp. of SEC MSJ ("Brown Decl."), Ex.
12 1, Dep. of Tom Hirsch ("Hirsch Dep.") 17:2-11.)

13 In late 2005, the individual Defendants directed Radical Bunny's business into loaning
14 money directly to ML, in order for ML to loan it to real estate developers. (PSOF ¶ 12.)
15 Between at least January 2006 and June 2008, Radical Bunny raised money from other
16 investors, totaling \$189.5 million in 900 separate accounts from 20 different states. (*Id.* ¶ 13;
17 Hirsch Dep. 27:18-21, 37:3-25.)³ Although Radical Bunny describes itself as "just a
18 servicer," none of the investors except the individual Defendants had managerial or
19 operational authority over Radical Bunny or its investments. (*See* DSOF ¶ 9; PSOF ¶ 30.)
20 None of the individual Defendants was or is registered with the SEC as a broker-dealer, nor
21 were they associated with registered broker-dealers. (PSOF ¶ 20.) Radical Bunny was not
22 registered with the SEC and did not register any offering of securities. (*Id.* ¶ 21.)

23
24 ² Through the Chapter 11 Trustee, Radical Bunny consented in this matter to the entry
of a judgment of permanent injunction. (*See* Consent J.)

25
26 ³ The individual Defendants contest the use of the word "raised," arguing that the
investors elected to "pool" their funds and jointly invest them. (*See* Defs.' Separate Statement
27 of Facts ("DSOF") ¶ 7.) For the reasons explained more fully below, the Court finds that it
is appropriate to describe Radical Bunny's activities as including raising funds from
28 investors.

1 The individual Defendants found investors for Radical Bunny through clients or
2 friends of clients of Hirsch and Shah's accounting firm and through word of mouth; the
3 individual Defendants did not know some of the investors. (*Id.* ¶ 25.) Radical Bunny
4 accepted money from investors regardless of whether the investors were accredited by the
5 SEC and also accepted money from investors' Individual Retirement Accounts. (*Id.* ¶¶ 27,
6 29.) For most loans, ML paid Radical Bunny 13% interest for a one-year term. (*Id.* ¶ 32.) In
7 turn, Radical Bunny paid most of its investors 11% interest for a one-year term. (*Id.* ¶ 33.)
8 The individual Defendants retained the remaining 2% interest for themselves. (*Id.* ¶¶ 34-35.)

9 The individual Defendants made representations to investors about the security of
10 their investments, including stating that the investments were "collateralized by the beneficial
11 interest under various deeds of trust held by ML." (*Id.* ¶¶ 45-53, 70.) The individual
12 Defendants also represented to investors that their investments were "secured." (*E.g., id.* ¶
13 78.) The individual Defendants did not provide investors with any disclosure documents,
14 such as any offering materials like a private placement memorandum or a private offering
15 memorandum. (*Id.* ¶ 55.) The individual Defendants did not provide investors with audited
16 financial statements for Radical Bunny. (*Id.* ¶ 56.) The individual Defendants were advised
17 by multiple attorneys and other experts that their interest might not be secured or was
18 defective, but they did not disclose this information to investors. (*Id.* ¶¶ 126-37, 159-61.)

19 The SEC filed the Complaint in this case on July 28, 2009. (*See* Doc. 1, Compl.) The
20 Complaint contains the following four claims: (1) unregistered offer and sale of securities,
21 in violation of Sections 5(a) and 5(c) of the Securities Act; (2) fraud in the offer or sale of
22 securities, in violation of Section 17(a) of the Securities Act; (3) fraud in connection with the
23 purchase or sale of securities, in violation of Section 10(b) of the Exchange Act and SEC
24 Rule 10b-5; (4) failure to register as a broker-dealer, in violation of Section 15(a) of the
25 Exchange Act. (*See id.* ¶¶ 51-63.) The SEC now moves for summary judgment on all four
26 claims. (SEC MSJ at 2.) The individual Defendants cross-move for summary judgment in
27 their favor on all four claims. (Defs.' MSJ at 1.)

28 **II. LEGAL STANDARDS AND ANALYSIS**

1 **A. Summary Judgment Standard**

2 The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of
3 Civil Procedure. Under Rule 56, summary judgment is properly granted when: (1) no genuine
4 issues of material fact remain; and (2) after viewing the evidence most favorably to the
5 non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ.
6 P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*,
7 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is “material” when, under the governing
8 substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477
9 U.S. 242, 248 (1986). A “genuine issue” of material fact arises if “the evidence is such that
10 a reasonable jury could return a verdict for the nonmoving party.” *Id.*

11 In considering a motion for summary judgment, the court must regard as true the
12 non-moving party’s evidence, if it is supported by affidavits or other evidentiary material.
13 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may
14 not merely rest on its pleadings; it must produce some significant probative evidence tending
15 to contradict the moving party’s allegations, thereby creating a material question of fact.
16 *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence
17 in order to defeat a properly supported motion for summary judgment); *First Nat’l Bank of*
18 *Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

19 **B. Count One: Unregistered Offer and Sale of Securities**

20 The SEC moves for summary judgment on its first claim, that the individual
21 Defendants violated Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. § 77e(a)
22 and (c). (Pl.’s Mem. of P. & A. Supporting SEC MSJ (“SEC Mem.”) at 14.) These provisions
23 make it unlawful to offer to sell, offer to buy, sell, or deliver a security, using any means or
24 instrument of transportation in interstate commerce, unless a registration statement is in
25 effect and filed. *See* 15 U.S.C. § 77e(a), (c). The parties dispute whether Radical Bunny was
26 selling “securities.” (SEC Mem. at 12-14; Defs.’ Resp. at 6-11.) The individual Defendants
27 admit that they “did issue the notes in question.” (Defs.’ Resp. at 1.)

28 The statute defines “security” as including any “note,” any “investment contract,” or

1 any “instrument commonly known as a ‘security.’” *See* 15 U.S.C. §§ 77b(a)(1), 78c(a)(10).
2 The Supreme Court articulated a test for whether a particular scheme is an investment
3 contract in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). Under the *Howey* test, courts
4 look to “whether the scheme involves an investment of money in a common enterprise with
5 profits to come solely from the efforts of others.” *SEC v. Edwards*, 540 U.S. 389, 393 (2004)
6 (quoting *Howey*, 328 U.S. at 301). “This definition ‘embodies a flexible rather than a static
7 principle, one that is capable of adaptation to meet the countless and variable schemes
8 devised by those who seek the use of the money of others on the promise of profits.’” *Id.*
9 (quoting *Howey*, 328 U.S. at 299).

10 All the elements of the *Howey* test are present here. Participants invested money in
11 Radical Bunny in a common enterprise, and all profits were to come from the efforts of the
12 individual Defendants. The individual Defendants attempt to classify their role as that of a
13 “servicer” that simply passed along investments in ML, but it is clear from the evidence in
14 the record that participants invested in Radical Bunny. Checks from participants were made
15 out to Radical Bunny, not ML. (*See* DSOE, Ex. 3, ACC Hr’g Tr. 1652:13, Nov. 5, 2010.)
16 Radical Bunny—not the participants—had an account with ML. (Hirsch Dep. 19: 6-22.)
17 Radical Bunny—not the participants—lent money directly to ML. (*Id.* at 21:11-20, 28:25-
18 29:14.) Radical Bunny—not the participants—had a secured interest in the assets of ML. (*E.g.*,
19 *id.* at 33:4-10.) Radical Bunny had approximately 900 nonowner participant accounts. (*Id.*
20 at 37:3-20; Brown Decl., Ex. 20 at 3, Ex. 22 at 7, Ex. 24 at 3, Ex. 26 at 7.)

21 The common enterprise at issue here was lending money to ML. (Hirsch Dep. 28:25-
22 29:14.) Participants’ investments were pooled and loaned to ML. (*Id.* at 38:5-9.) In return for
23 the investment, participants expected to earn interest from Radical Bunny’s loans to ML. (*Id.*
24 at 39:9-13, 45:14-46:8; *see also* PSOF ¶ 28.) Participants in Radical Bunny shared in the
25 profits of the loans made to ML. (PSOF ¶¶ 32-33; Hirsch Dep. 45:14-46:8.) Therefore, this
26 enterprise involved both horizontal commonality (an investment common to a group of
27 investors) and vertical commonality (whereby the investors’ funds are linked with those of
28 the promoter). *See SEC v. R.G. Reynolds Enters., Inc.*, 952 F.2d 1225, 1130 (9th Cir. 1991)

1 (explaining principles of horizontal and vertical commonality).

2 Finally, participants in Radical Bunny's loans were passive and relied entirely on the
3 efforts of the individual Defendants to receive a return on their investment, satisfying the
4 third element of the *Howey* test. (See Hirsch Dep. 49:5-51-15.) Participants in Radical Bunny
5 did not exercise any control over the loans; only the individual Defendants had managing
6 authority. (*Id.*) See *SEC v. Alliance Leasing Corp.*, 28 F. App'x 648, 651 (9th Cir. 2002)
7 (unpublished); *SEC v. Cont'l Wireless Cable Television, Inc.*, 110 F.3d 69, *1 (9th Cir. 1997)
8 (unpublished). The investments promoted by Radical Bunny were clearly securities, as
9 contemplated by federal law.⁴

10 Section 2(3) of the Securities Act provides the following definitions:

11 The term 'sale' or 'sell' shall include every contract of sale or disposition of
12 a security or interest in a security, for value. The term 'offer to sell,' 'offer for
13 sale,' or 'offer' shall include every attempt or offer to dispose of, or
solicitation of an offer to buy, a security or interest in a security, for value.

14 15 U.S.C. § 77b(3). The evidence of record shows that the individual Defendants made
15 numerous offers to sell and sales of securities during the relevant time period. (See PSOF ¶¶
16 22-29.) It is undisputed that no registration statement was filed by Radical Bunny or was
17 otherwise in effect during the pertinent time period. (*Id.* ¶ 21.) The record in this matter
18 establishes that no genuine issue of material fact exists as to whether Defendants improperly
19 made unregistered offers to sell and unregistered sales of securities between January 2006

20
21 ⁴ Even if the Court had not found that the elements of *Howey* were met, it would
22 alternatively have held that Radical Bunny's notes were securities under the test set forth in
23 *Reves v. Ernst & Young*, 494 U.S. 56, 66-67 (1990) (adopting a "family resemblance" test
24 to determine if a note is a security and instructing courts to consider the following factors:
25 (1) the motivation of the buyer and the seller, (2) the plan of distribution of the instrument,
26 (3) the reasonable expectations of the investing public, and (4) whether there is any risk-
27 reducing factor, such as another regulatory scheme). Radical Bunny's notes satisfy this test
28 as well. Radical Bunny's investors expected to profit by earning interest on their investment.
The Radical Bunny offering was widely disseminated, leading to 900 separate accounts. A
reasonable investor would have viewed the investment as involving an initial investment of
money with the expectation of profit. And finally, no regulatory scheme reduces the risk
inherent in these investments.

1 and June 2008. (See PSOF ¶¶ 22-29.) The SEC is entitled to summary judgment on Count
2 One of its Complaint.

3 **C. Counts Two and Three: Fraud in the Purchase, Offer, or Sale of**
4 **Securities**

5 The SEC also seeks summary judgment on Count Two of the Complaint, for fraud in
6 the offer or sale of securities, and Count Three of the Complaint, for fraud in connection with
7 the purchase or sale of securities. (SEC Mem. at 18-20.) Pursuant to 15 U.S.C. § 77q(a), it
8 is unlawful

9 for any person in the offer or sale of any securities or any security-based swap
10 agreement . . . by the use of any means or instruments of transportation or
11 communication in interstate commerce or by use of the mails, directly or
12 indirectly

13 (1) to employ any device, scheme, or artifice to defraud, or

14 (2) to obtain money or property by means of any untrue statement of a material
15 fact or any omission to state a material fact necessary in order to make the
16 statements made, in light of the circumstances under which they were made,
17 not misleading; or

18 (3) to engage in any transaction, practice, or course of business which operates
19 or would operate as a fraud or deceit upon the purchaser.

20 Similarly, under 15 U.S.C. § 78j(b), it is unlawful “to use any means of interstate commerce
21 to use or employ, in connection with the purchase or sale of any security registered on a
22 national securities exchange or any security not so registered, or any securities-based swap
23 agreement . . . , any manipulative or deceptive device or contrivance.” *See also* 17 C.F.R. §
24 240.10b-5.

25 To prevail on its fraud claims, the SEC must “show that there has been a misstatement
26 or omission of material fact, made with scienter,” in connection with the purchase, offer, or
27 sale of a security. *Gebhart v. SEC*, 595 F.3d 1034, 1040 & n.8 (9th Cir. 2010) (internal
28 quotations and citations omitted); *see also SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364
(9th Cir. 1993). Materiality is a crucial component of such a claim. *See In re Cutera Secs.*
Litig., 610 F.3d 1103, 1108 (9th Cir. 2010) (“Central to a 10b-5 claim is the requirement that
a misrepresentation or omission of fact must be material.”). A fact is material if its disclosure
would be viewed as important by a reasonable investor. *Basic Inc. v. Levinson*, 485 U.S. 224,

1 231-32 (1988). “The plaintiffs may establish scienter by proving either actual knowledge or
2 recklessness.” *In re Software Toolworks Inc.*, 50 F.3d 615, 626 (9th Cir. 1994); *see also*
3 *Ponce v. SEC*, 345 F.3d 722, 729-30 (9th Cir. 2003) (holding that scienter is established
4 where defendants make “statements that they know, or are reckless in not knowing, are
5 false”); *United States v. Farris*, 614 F.2d 634, 638 (9th Cir. 1979) (“[T]he reckless disregard
6 for truth or falsity is sufficient to sustain a finding of securities fraud . . .”).

7 The SEC argues that the individual Defendants “violated the antifraud provisions by
8 making numerous material misrepresentations and omissions to investors, both in writing and
9 verbally, from at least January 2006 to June 2008.” (SEC Mem. at 19.) The Court agrees. The
10 evidence shows that Radical Bunny, controlled by the individual Defendants, and several of
11 the individual Defendants, made direct misrepresentations to investors. (*See* PSOF ¶¶ 78-
12 125.) First, the individual Defendants misrepresented the security of the investment they
13 were marketing. In the Direction to Purchase, which was sent to every investor between
14 January 2006 and June 2008, Radical Bunny represented to investors, “Your investment is
15 collateralized by the beneficial interest under various deeds of trust held by ML.” (*See* Doc.
16 10, Defs.’ Answer ¶ 23; Hirsch Dep. 66:18-68:4; Brown Decl., Ex. 20 at 6, 8; Ex. 22 at 6,
17 9; Ex. 24 at 6, 8; Ex. 26 at 6, 9.) The evidence in the record shows that the individual
18 Defendants knew or were reckless in not knowing that these statements regarding
19 collateralization were untrue. Earlier, Radical Bunny had structured its investments
20 differently, with a documented security interest in the loans it made; the individual
21 Defendants were aware of the difference between the true pass-through investments they
22 were involved in before 2006 and the later version. (Brown Decl., Ex. 2, Dep. of Berta
23 Walder 28:20-23; Ex. 4, Dep. of Harish Shah 16:5-11, 20:3-21:2.) In fact, no document
24 assigns Radical Bunny or any of its investors a beneficial interest in any of the deeds of trust
25 held by ML. (*See* PSOF ¶¶ 73-77.)

26 Furthermore, Radical Bunny retained the law firm of Quarles & Brady to advise on
27 various issues, including the status of Radical Bunny’s loans to ML. (*Id.* ¶ 126; Hirsch Dep.
28 130:18-25.) Attorneys at Quarles & Brady informed Radical Bunny, in writing and orally,

1 that their loan documents might be defective and that investors might not hold beneficial
2 interests in ML's loans. (See PSOF ¶¶ 127-33; *see also, e.g.*, Hirsch Dep. 151:6-153:10;
3 Brown Decl., Ex. 17, Test. of Robert Bornhoft 78:5-79:11.) This opinion was conveyed by
4 Quarles & Brady to Radical Bunny for the first time around June or July 2007, according to
5 Mr. Hirsch. (Hirsch Dep. 142:19-21.) Nevertheless, Radical Bunny did not change its
6 practices or inform investors that their loans were not secured. (*E.g.*, Hirsch Dep. 142:15-
7 143:21; PSOF ¶¶ 137-43.) Radical Bunny also prepared a "Loan Participation Disclosure
8 Statement and Acknowledgments," using documents originally drafted by Quarles & Brady
9 attorneys. (PSOF ¶ 144.) This document was given to all new investors after July 2007 and
10 represented that the investor "will have a security interest in the Loan in that the Note is
11 secured by a lien on the assets of the Borrower as described in the Security Agreement," even
12 though *no* secured interest existed. (*Id.* ¶¶ 145-47; Hirsch Dep. 192:6-15.)⁵ Quarles & Brady
13 did not instruct Hirsch to use portions of the documents the law firm drafted, which were
14 intended to be used in a future, compliant securities offering. (PSOF ¶ 156.)

15 The individual Defendants also misrepresented their knowledge as to whether the
16 Radical Bunny investments were subject to governing securities laws. (See PSOF ¶¶ 166-73.)
17 When asked by investors, the individual Defendants said that they were not licensed to sell
18 securities, but after Quarles & Brady was retained, the individual Defendants told investors
19 that the matter was being "investigated." (Hirsch Dep. 111:20-112:15.) The individual
20 Defendants were on notice that their activities were under suspicion as early as August 2005,
21 when they met with James Sell, a former official with the Securities Division of the Arizona
22 Corporation Commission. (See Doc. 65, Ex. 6, Decl. of James C. Sell ¶¶ 9-14.) The
23 individual Defendants were also counseled that they might or did have securities-related
24 problems by other attorneys, including ML's counsel. (PSOF ¶¶ 185-206.) The individual
25

26 ⁵ It is of no moment that the court adjudicating ML's bankruptcy case approved a plan
27 of reorganization that "deemed" Radical Bunny to have a secured interest in a certain
28 amount. (See Doc. 66, Ex. 4, Decl. of Jordan Kroop ¶¶ 5-6.) For purposes of this Order, the
Court relies on the evidence in the record here.

1 Defendants were specifically advised in May 2007 by their own retained counsel that Radical
2 Bunny had run afoul of the securities laws by acting as an unregistered dealer-broker and by
3 violating the antifraud provisions. (Brown Decl., Ex. 16, Test. of Christian Hoffman 54:17-
4 59:13, 95:3-96:12.) Despite this information, Radical Bunny, via the individual Defendants,
5 continued to sell securities and make both affirmative misrepresentations and omissions to
6 investors. (PSOF ¶¶ 215-28.)⁶

7 The Court concludes that no genuine issue of material fact exists as to whether the
8 individual Defendants violated the antifraud provisions. The individual Defendants, acting
9 with scienter, made material misrepresentations and omissions related to the securities they
10 were offering to sell and selling. The SEC is entitled to summary judgment on Counts Two
11 and Three of the Complaint.

12 **D. Count Four: Failure to Register as a Broker-Dealer**

13 The SEC also moves for summary judgment on its claim that the individual
14 Defendants violated Section 15(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1), which
15 requires that brokers or dealers that “effect any transaction in, or to induce or attempt to
16 induce the purchase or sale of, any security” must be registered with the SEC, or, if the
17 broker or dealer is a “natural person,” he or she must be “associated with a broker or dealer
18 which is a person other than a natural person.” The statute defines “broker” to mean “any
19 person engaged in the business of effecting transactions in securities for the account of
20 others.” 15 U.S.C. § 78c(a)(4)(A). “Scienter, or proof of any intent to defraud, is not required
21 under Section 15(a)(1).” *SEC v. Alliance Leasing Corp.*, No. 98-CV-1810-J (CGA), 2000
22 WL 35612001, at *6 (S.D. Cal. Mar. 20, 2000) (citing *SEC v. Interlink Data Network of L.A.,*
23 *Inc.*, No. 93-3073 R, 1993 WL 603274, at *10 (C.D. Cal. Nov. 15, 1993)).

24
25
26 ⁶ In response to the SEC’s arguments, the individual Defendants offer only
27 “uncorroborated and self-serving testimony,” which does not create a triable issue of fact.
28 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (citations omitted).
Much of the evidence relied upon by the SEC is the individual Defendants’ own admissions,
whether through deposition or responses to written discovery.

1 The Court has already concluded that the individual Defendants were offering to sell
2 and selling securities, as defined by the statute. Furthermore, none of the individual
3 Defendants was registered as a broker-dealer, nor were they associated with registered
4 broker-dealers. (*See* PSOF ¶ 20; *see also* Defs.' Answer ¶ 7.) Therefore, no genuine issue of
5 material fact exists as to whether the individual Defendants violated Section 15(a)(1) of the
6 Exchange Act. The SEC is entitled to summary judgment on Count Four of the Complaint.

7 **E. Relief**

8 The SEC seeks three types of relief against the individual Defendants: a permanent
9 injunction, disgorgement of their "ill-gotten gains," and third-tier civil monetary penalties.
10 (SEC Mem. at 23-25.)

11 **1. Injunction**

12 Upon a "proper showing" in actions brought by the SEC, a permanent injunction may
13 be entered against "any person . . . engaged or about to engage in any acts or practices" that
14 violate the securities laws. 15 U.S.C. §§ 77t(b), 78u(d)(1). A court may enter a permanent
15 injunction on summary judgment if "the SEC . . . clearly establishe[s] the absence of any
16 genuine issue of fact material to the granting of the injunction." *SEC v. Murphy*, 626 F.2d
17 633, 655 (9th Cir. 1980) (citing *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 697-98 (9th Cir.
18 1978)); *see also SEC v. Olins*, No. C-07-6423 MMC, 2011 WL 206383, at *1-2 (N.D. Cal.
19 Jan. 21, 2011) (permanently enjoining the defendants from future violations at the summary
20 judgment stage). Whether a permanent injunction should issue "rests within the sound
21 discretion of the trial court." *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 465 (9th Cir.
22 1985). The SEC has "the burden of showing that there [is] a reasonable likelihood of future
23 violations of the securities laws." *Id.* (citations omitted). "In predicting the likelihood of
24 future violations, a court must assess the totality of the circumstances surrounding the
25 defendant and his violations." *Id.* (citations omitted). To make this determination, courts are
26 directed to consider "factors such as the degree of scienter involved; the isolated or recurrent
27 nature of the infraction; the defendant's recognition of the wrongful nature of his conduct;
28 the likelihood, because of defendant's professional occupation, that future violations might

1 occur; and the sincerity of his assurances against future violations.” *Id.* (citations omitted).

2 The above-listed factors militate strongly in favor of a granting a permanent injunction
3 here. The Court finds that the individual Defendants acted knowingly, in that they continued
4 their violations after receiving advice to the contrary from multiple, knowledgeable sources.
5 The violations took place over a period of several years and were in no way isolated. The
6 individual Defendants continue to assert in their briefs on these Motions that they were not
7 selling securities, so the Court is not persuaded that they have recognized the wrongful nature
8 of their conduct or made any sincere assurances against future violations. Finally, two of the
9 individual Defendants are CPAs, which increases the likelihood of future violations
10 occurring. For these reasons, the Court finds that a permanent injunction against the
11 individual Defendants, prohibiting them from violating the securities registration, antifraud,
12 and broker-dealer registration requirements of the federal securities laws, is appropriate. The
13 evidence in the record shows that no genuine issue of material fact exists as to whether the
14 SEC has carried its burden.

15 2. Disgorgement

16 “The district court has broad equity powers to order the disgorgement of ‘ill-gotten
17 gains’ obtained through the violation of the securities laws.” *SEC v. First Pac. Bancorp*, 142
18 F.3d 1186, 1191 (9th Cir. 1998) (citations omitted) (reviewing a ruling on a motion for
19 partial summary judgment). Disgorgement is intended both to deprive a wrongdoer of unjust
20 enrichment and to deter others from violating securities laws. *See id.* at 1192. The amount
21 of disgorgement must include all gains flowing from the illegal activities.” *SEC v. Platforms*
22 *Wireless Int’l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (internal quotation and citation
23 omitted). The court need not trace each dollar to each individual Defendant; rather, the SEC
24 need only show “a reasonable approximation of profits causally connected to the violation.”
25 *Id.* (quoting *First Pac. Bancorp*, 142 F.3d at 1192 n.6). Once the SEC meets its burden of
26 persuasion that its proposed disgorgement number approximates the amount of unjust
27 enrichment, “the burden shifts to the defendants to demonstrate that the disgorgement figure
28 was not a reasonable approximation.” *Id.* (internal quotation and citation omitted).

1 The individual Defendants do not dispute the SEC's figures for disgorgement. (*See*
2 Defs.' Resp. at 14.) Instead, they argue that, because they lost money too, they should not be
3 required to pay any monetary penalties. (*Id.*) The disgorgement numbers proposed by the
4 SEC are drawn from each individual Defendant's share of the 2% fee they charged investors
5 in Radical Bunny and are based on the individual Defendants' responses to interrogatories.
6 (*See* PSOF ¶¶ 35-38.) This is a reasonable approximation of profits causally connected to the
7 individual Defendants violation of the federal securities laws. Therefore, the Court adopts
8 these figures and concludes that the individual Defendants must disgorge their ill-gotten
9 gains in the following amounts: Hirsch-\$1,245,220; B. and H. Walder-\$1,245,217; and
10 Shah-\$740,160.

11 “Disgorgement orders also include prejudgment interest,” to be calculated at the post-
12 judgment rate specified in 28 U.S.C. § 1961. *SEC v. CMKM Diamonds, Inc.*, 635 F. Supp.
13 2d 1185, 1190 (D. Nev. 2009) (citations omitted). The statute provides that interest “shall
14 be calculated . . . at a rate equal to the weekly average 1-year constant maturity Treasury
15 yield, as published by the Board of Governors of the Federal Reserve System, for the
16 calendar week preceding the date of the judgment.” 28 U.S.C. § 1961(a). The Court finds that
17 the SEC is entitled to recover the individual Defendant's ill-gotten gains, plus appropriate
18 prejudgment interest.

19 3. Third-Tier Civil Penalties

20 The securities laws set out a three tier system for assessing monetary sanctions in
21 cases such as this one. *See* 15 U.S.C. §§ 77t(d), 78u(d)(3). The different tiers reflect
22 escalating levels of culpability. *Id.* Upon a proper showing, the court may assess a civil
23 penalty, which is “determined by the court in light of the facts and circumstances.” *See id.*
24 § 77t(d)(1), (d)(2)(A). In addition to serving as a deterrent to future violations of securities
25 laws, civil penalties “are imposed to punish the individual violator.” *CMKM Diamonds*, 635
26 F. Supp. 2d at 1190-91 (citations omitted).

27 Congress directed that the SEC should not seek civil penalties in every case, for
28 instance “when a failure to comply with SEC requirements involves isolated and

1 unintentional conduct.” *SEC v. eConnect*, No. CV 00-02959 MMM (JWJx), 2002 WL
2 34465925, at *13 (C.D. Cal. Dec. 2, 2002) (quoting S. Rep. No. 337, at 10 (1990)). The
3 *Murphy* factors, listed above with regard to injunctive relief, also apply to determination of
4 civil penalties. *SEC v. Alpha Telecom, Inc.*, 187 F. Supp. 2d 1250, 1263 (D. Or. 2002). Civil
5 penalties may be imposed at the summary judgment stage. *See, e.g., eConnect*, 2002 WL
6 34465925, at *13 (assessing a third-tier civil penalty against the defendant in ruling on a
7 motion for summary judgment).

8 Here, the SEC seeks third-tier penalties for the individual Defendants, which are
9 appropriately imposed where a violation of the securities laws “involved fraud, deceit,
10 manipulation, or deliberate or reckless disregard of a regulatory requirement; and . . . directly
11 or indirectly resulted in substantial losses or created a significant risk of substantial losses
12 to other persons.” 15 U.S.C. § 77t(d)(2)(C). Such penalties are not to exceed the gross
13 amount of the pecuniary gain to the defendant or the statutory rate of \$120,000 for each
14 natural person, whichever is greater. *Id.*; *see also* 17 C.F.R. § 201.1003 & Table III
15 (adjusting third-tier penalties from \$100,000 to \$120,000 for conduct by a natural person
16 occurring in or after 2001 to account for inflation). The SEC seeks a civil penalty against
17 each individual Defendant in the amount of his or her unjust enrichment (the same numbers
18 used in the disgorgement award). The individual Defendants have not made any arguments
19 regarding the fairness of the SEC’s figures or their individual ability to pay a penalty. (*See*
20 *Defs.’ MSJ* at 14.)

21 The Court concluded above that the individual Defendants acted knowingly and that
22 their violations took place over an extended period of time. The *Murphy* factors, which
23 weighed in favor of a permanent injunction, also weigh in favor of a civil penalty. In light
24 of the individual Defendants egregious, continuous, knowing, and substantial federal
25 securities laws violations, the Court imposes a civil penalty of \$120,000 per person. This
26 amount takes into consideration the individual Defendants’ personal financial losses, as well
27 as their culpability.

28

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court finds that no genuine issues of material fact
3 remain. Summary judgment in Plaintiff's favor is appropriate.

4 **IT IS ORDERED** granting Plaintiff Securities and Exchange Commission's Motion
5 for Summary Judgment Against Defendants Tom Hirsch, Berta Walder, Howard Walder, and
6 Harish P. Shah (Doc. 63).

7 **IT IS FURTHER ORDERED** denying Defendants Tom Hirsch, Berta Walder,
8 Howard Walder, and Harish P. Shah's Cross-Motion for Summary Judgment (Doc. 75).

9 **IT IS FURTHER ORDERED** permanently enjoining Defendants Tom Hirsch, Berta
10 Walder, Howard Walder, and Harish P. Shah from future violations of the securities
11 registration, antifraud, and broker-dealer registration requirements of the federal securities
12 laws.

13 **IT IS FURTHER ORDERED** that Defendants Tom Hirsch, Berta Walder, Howard
14 Walder, and Harish P. Shah pay the following amounts, plus prejudgment interest, in
15 disgorgement: Hirsch-\$1,245,220; B. and H. Walder-\$1,245,217; and Shah-\$740,160.

16 **IT IS FURTHER ORDERED** directing Defendants to pay the following amount in
17 civil penalty: \$120,000 per person.

18 **IT IS FURTHER ORDERED** directing Plaintiff Security and Exchange Commission
19 to lodge a proposed form of judgment, including the proper amount of prejudgment interest.

20
21 DATED this 12th day of April, 2011.

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25 Susan R. Bolton
26 United States District Judge
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EXHIBIT B

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8
9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11
12 SECURITIES AND EXCHANGE
COMMISSION,

13 Plaintiff,

14 vs.

15 RADICAL BUNNY, LLC; TOM
HIRSCH; BERTA WALDER;
16 HOWARD WALDER; and HARISH P.
SHAH;
17

18 Defendants.

Case No.

**COMPLAINT FOR VIOLATIONS
OF THE FEDERAL SECURITIES
LAWS**

19
20 Plaintiff Securities and Exchange Commission (the "Commission")

21 alleges:

22 **JURISDICTION AND VENUE**

23 1. This Court has jurisdiction over this action pursuant to
24 Sections 20(b), 20(d)(1) and 22(a) of the Securities Act of 1933 ("Securities
25 Act"), 15 U.S.C. §§ 77t(b), 77t(d)(1), and 77v(a), and Sections 21(d)(1),
26 21(d)(3)(A), 21(e), and 27 of the Securities Exchange Act of 1934
27 ("Exchange Act"), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3)(A), 78u(e), and 78aa.

28

1 The Defendants have, directly or indirectly, made use of the means or
2 instrumentalities of interstate commerce, of the mails, or of the facilities of a
3 national securities exchange in connection with the transactions, acts,
4 practices and courses of business alleged in this Complaint.

5 2. Venue is proper in this district pursuant to Section 22(a) of the
6 Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15
7 U.S.C. § 78aa, because certain of the transactions, acts, practices, and
8 courses of conduct constituting violations of the federal securities laws
9 occurred within this district, and all Defendants reside or are located in this
10 district.

11 SUMMARY

12 3. This matter concerns a securities fraud orchestrated by
13 defendants Radical Bunny, LLC (“Radical Bunny”), and its principals, Tom
14 Hirsch, Berta “Bunny” Walder, Howard Walder, and Harish Shah
15 (collectively, the “Defendants”). From at least late 2005 through June 2008,
16 the Defendants raised over \$197 million from at least 900 investors
17 nationwide through an unregistered offer and sale of securities in the form of
18 promissory notes or investment contracts.

19 4. The Defendants pooled investor funds, which they then used to
20 make loans to Mortgages Ltd., a Phoenix-based private commercial lender.
21 Mortgages Ltd., in turn, used the money to make high-interest, short-term
22 loans to real estate developers in Arizona.

23 5. The Defendants made material misrepresentations to investors
24 in connection with Radical Bunny’s securities offering, including: (a) falsely
25 representing that Radical Bunny held a secured interest in Mortgages Ltd.’s
26 assets, when, in fact, the Defendants’ attorneys repeatedly advised them that
27 the documentation underlying that interest was either non-existent or
28 defective in numerous respects; (b) misrepresenting how Mortgages Ltd.

1 would use the loan proceeds by falsely telling investors that their money
2 would only be used for commercial development, when, in fact, there were
3 no restrictions on how Mortgages Ltd. could use the money and several of
4 the projects Mortgages Ltd. funded were residential in nature; (c) falsely
5 representing that an investment in Radical Bunny was not subject to the
6 securities laws when, in fact, the Defendants received legal advice to the
7 contrary; and (d) falsely representing that the Defendants had access to
8 monitor the performance of Mortgages Ltd., and, consequently, the safety of
9 the Radical Bunny investment when, in fact, the Defendants were mostly
10 unaware of Mortgages Ltd.'s deteriorating financial condition and they did
11 not understand that most of Radical Bunny's funds were being shifted into
12 Mortgage Ltd.'s riskier projects, to the detriment of the Radical Bunny
13 investors.

14 6. The Defendants, by engaging in the conduct described in this
15 Complaint, have violated, and unless permanently enjoined will continue to
16 violate, the securities registration and antifraud provisions of the federal
17 securities laws, and additionally, to each of the individual defendants, they
18 violated, and unless permanently enjoined will continue to violate, the
19 broker-dealer registration provisions of the federal securities laws.

20 **DEFENDANTS**

21 6. Defendant Radical Bunny is an Arizona limited liability
22 company with its principal place of business in Phoenix, Arizona. Radical
23 Bunny is the subject of a Chapter 11 bankruptcy proceeding before the
24 United States Bankruptcy Court for the District of Arizona (Case Number
25 2:08-bk-13884-CGC). On December 29, 2008, the Bankruptcy Court
26 entered a stipulated order directing the appointment of a Chapter 11 trustee
27 to administer the bankruptcy estate.

28

1 7. Defendant Tom Hirsch (“Hirsch”) resides in Paradise Valley,
2 Arizona. He was a managing member of Radical Bunny and he has been
3 licensed as a Certified Public Accountant in Arizona since 1979. He does
4 not hold any securities licenses and has never been registered with the
5 Commission in any capacity. Hirsch, together with defendant Harish Shah,
6 conducts an accounting practice known as Hirsch & Shah CPA’s, LLC.

7 8. Defendant Berta “Bunny” Walder (“Berta Walder”) resides in
8 Phoenix, Arizona. She was a managing member of Radical Bunny and is
9 currently a grade school principal. She has held a Series 63 securities
10 license and was associated with a broker-dealer registered with the
11 Commission in the early 1980s. She is not currently registered with the
12 Commission in any capacity.

13 9. Defendant Howard Walder (“Howard Walder”) resides in
14 Phoenix, Arizona. He was a managing member of Radical Bunny and has
15 been a licensed pharmacist in Arizona since 1974. He has held Series 6 and
16 63 securities licenses but did not associate with a broker-dealer registered
17 with the Commission. He is not currently registered with the Commission in
18 any capacity.

19 10. Defendant Harish Shah (“Shah”) resides in Phoenix, Arizona.
20 He was a managing member of Radical Bunny and he has been licensed as a
21 Certified Public Accountant in Arizona since 1976. He does not hold any
22 securities licenses and has never been registered with the Commission in any
23 capacity.

FACTUAL BACKGROUND

The Defendants Conducted an Unregistered Securities Offering

24
25
26 11. From at least late 2005 through June 2008, the Defendants
27 raised over \$197 million from at least 900 investors nationwide by offering
28 and selling securities in the form of promissory notes or investment contracts

1 to investors, including approximately 240 investors who invested through
2 self-directed IRAs. The minimum for the Radical Bunny investment began
3 at \$25,000, but was raised to \$50,000 as the number of investors grew over
4 time.

5 12. The Defendants pooled investor funds, which they used to
6 make a series of loans to Mortgages Ltd., which, in turn, used the money to
7 make high-interest, short-term loans to real estate developers in Arizona.

8 13. For most of the loans made by Radical Bunny to Mortgages
9 Ltd., Mortgages Ltd. paid Radical Bunny 13% interest for a one-year term,
10 although a small percentage of the loans were for 14%. Radical Bunny, in
11 turn, paid its investors 11%, subject to a 2% early redemption fee. As loans
12 to Mortgages Ltd. matured, the Defendants permitted investors to rollover
13 their funds into Radical Bunny's newest loan to Mortgages Ltd.

14 14. The remaining 2% paid by Mortgages Ltd. was retained by
15 Radical Bunny and allocated among the individual Defendants. As their
16 share of the 2%, Hirsch received at least \$3 million, Berta and Howard
17 Walder received at least \$2 million, and Shah received at least \$700,000.
18 That 2% represented a "vendor fee" that the individual Defendants claimed
19 to have earned for maintaining accounts for the Radical Bunny investors and
20 facilitating loans to Mortgages Ltd.

21 15. Despite the large sums of money Radical Bunny loaned to
22 Mortgages Ltd., the documentation between Radical Bunny and Mortgages
23 Ltd. consisted of form documents that placed no restrictions on how
24 Mortgages Ltd. could use the funds. The only parties to the loans were
25 Radical Bunny and Mortgages Ltd. Radical Bunny investors' names do not
26 appear on any of these documents, but the Defendants provided the Radical
27 Bunny investors with account statements and other documents that
28 referenced a specific loan to Mortgages Ltd. into which their money had

1 been advanced.

2 16. A UCC-1 financing statement was executed by Mortgages Ltd.
3 in favor of Radical Bunny and the CEO of Mortgages Ltd. provided Radical
4 Bunny with a personal guaranty. Radical Bunny otherwise entered into no
5 contracts or agreements with Mortgages Ltd. evidencing or perfecting
6 Radical Bunny's purported security interest in Mortgages Ltd.'s assets.

7 17. Radical Bunny was not registered with the Commission in any
8 capacity and did not register any offering of its securities under the
9 Securities Act or a class of securities under the Exchange Act.

10 **The Defendants' Sales Effort**

11 18. Radical Bunny securities were offered and sold primarily by the
12 individual Defendants to clients, or friends of clients, of Hirsch and Shah's
13 Phoenix-based accounting firm, or through word of mouth of friends and/or
14 relatives who were investors.

15 19. Each of the individual Defendants was a signatory to Radical
16 Bunny's primary bank account into which investor funds were deposited and
17 from which interest payments were made.

18 20. Each of the individual Defendants was involved in the offer and
19 sale of Radical Bunny securities. Hirsch and Berta Walder solicited
20 prospective investors who intended to use non-IRA funds to invest in
21 Radical Bunny. Berta Walder solicited investors who intended to invest in
22 Radical Bunny through self-directed IRAs. Howard Walder set up investor
23 accounts, tracked investor funds that were used towards particular loans
24 made to Mortgages Ltd., and ensured that interest payments were posted to
25 investor accounts. Shah solicited the majority of Radical Bunny investors of
26 South Asian descent and raised approximately \$40 million from about 150
27 families of such background.

28 21. The Defendants gave Radical Bunny updates on the status of

1 their investment primarily through semi-annual meetings held at a luxury
2 golf resort in Scottsdale, Arizona, where investors were provided with
3 presentations on Radical Bunny's loans to Mortgages Ltd. as well as the
4 status of Mortgages Ltd.'s loans to real estate developers. Hirsch, Berta
5 Walder and Howard Walder, and Shah made presentations at the investor
6 meetings. Investors were permitted to invite their friends, family, and others
7 to the meetings even if they were not already investors.

8 **Documentation of the Radical Bunny Investment**

9 22. Radical Bunny investors were not provided with any offering
10 materials or audited financial statements before they invested.

11 23. The document establishing the relationship between Radical
12 Bunny and its investors was the "Direction to Purchase" form, which
13 purported to confirm the investor's instruction and authorization to purchase
14 an interest in one of Radical Bunny's loans to Mortgages Ltd. The
15 "Direction to Purchase" represented that an investor's Radical Bunny
16 investment was "collateralized by the beneficial interest under various deeds
17 of trusts held by Mortgages Ltd."

18 24. The "Direction to Purchase" was originally drafted by Hirsch,
19 prepared for each investor by Howard Walder, and was signed by Berta
20 Walder before being sent to the investor. This document was used by the
21 Defendants from at least January 2007 through June 2008.

22 25. Investors obtained account statements through Radical Bunny's
23 website. The statements showed the loans to Mortgages Ltd. in which the
24 investor purportedly had an ownership interest, the amount of interest
25 generated from the loan, and any interest payments that had been made to
26 the investor. IRA investors received account statements from an IRA
27 custodian, which set forth a CUSIP number associated with the Radical
28 Bunny investment, based on information provided by the Defendants.

1 26. Starting in early 2007, the Defendants asked investors to
2 complete an "Investor Record" and a short questionnaire indicating whether
3 the investors were accredited. Prior to that point, Radical Bunny did not
4 conduct a suitability or accreditation screening for new investors.

5 27. Beginning in the fall of 2007, new investors were asked to
6 complete a "Participant Record" that included a more detailed investor
7 questionnaire prepared by Radical Bunny's counsel, and a certification
8 indicating that the investor was accredited. However, even if investors
9 certified that they were not accredited, Radical Bunny did not automatically
10 exclude them from investing.

11 28. Beginning in the fall of 2007, new Radical Bunny investors
12 were also asked to initial a form called "Loan Participant Disclosure
13 Statement and Acknowledgements" which referred to a number of other
14 undefined terms such as a "Security Agreement," a "Participant's Note,"
15 "Term Notes," and a "Participant Agreement" -- none of which existed at the
16 time. This document falsely represented that the Radical Bunny investment
17 was "secured."

18 **The Defendants' Representations to Investors**

19 29. The Defendants made a series of verbal representations to
20 investors in connection with the offer and sale of Radical Bunny securities.

21 30. The Defendants represented to Radical Bunny investors that
22 investing with Radical Bunny was safe because it held a "secured" or "first
23 position" in the assets of Mortgages Ltd. including, specifically, first deeds
24 of trust recorded on real property securing the loans made by Mortgages Ltd.
25 to developers.

26 31. Hirsch and Berta Walder distinguished investing in Radical
27 Bunny from investing in the stock market, which they claimed was volatile
28 and could cause investors to lose money. Berta Walder told investors that

1 Radical Bunny was a “reliable” investment because real property always
2 retained value and the interest payments made to investors functioned “like
3 clockwork.”

4 32. With at least one prospective investor, Berta Walder
5 represented that, except in the event of contamination from “a dirty bomb
6 directed at Phoenix,” Radical Bunny’s investments through Mortgages Ltd.
7 would retain their value.

8 33. Berta Walder represented that because Hirsch and Shah
9 prepared the personal tax returns for Mortgages Ltd.’s CEO, and the
10 corporate tax returns for affiliates of Mortgages Ltd., they had access to
11 financial information which made Hirsch and Shah “closer to where the
12 money goes.”

13 34. The Defendants represented to investors that there were four
14 conditions, so-called “non-negotiables,” that governed Radical Bunny’s
15 loans to Mortgages Ltd.: first, the real estate projects that Mortgages Ltd.
16 provided financing for had to be located in Arizona; second, the loan-to-
17 value on real estate developments for which Mortgages Ltd. provided
18 financing had to be 60% to 65%; third, Mortgages Ltd.’s loans were for only
19 “commercial real estate development” and not for residential development;
20 and fourth, Mortgages Ltd. had to secure its loan to its borrower through
21 deeds of trust and be in first position. Berta Walder characterized the four
22 conditions as evidence of Radical Bunny having taken “every single security
23 measure” of which one could conceive.

24 35. The Defendants represented to investors that Radical Bunny did
25 not need a license to sell the interests in its promissory notes. In making that
26 representation to at least one investor, Berta Walder conflated an investment
27 in Radical Bunny with being an investment directly with Mortgages Ltd. and
28 she also represented that Radical Bunny was the beneficiary of the rigorous

1 inspections, audits, and examinations that Mortgages Ltd. Securities, LLC, a
2 registered securities firm, routinely received.

3 **The Defendants' Misrepresentations and Omissions**

4 36. In connection with the Radical Bunny securities offering, the
5 Defendants made material misrepresentations, verbally and in writing, to
6 investors.

7 **Radical Bunny's "Secured" Position Was Uncertain**

8 37. The Defendants represented to investors that the Radical Bunny
9 investment was safe because Radical Bunny's loans to Mortgages Ltd. were
10 "secured" or "collateralized" by the assets of Mortgages Ltd., and Radical
11 Bunny was in a "first position" with respect to the underlying properties.
12 These representations were false. The Defendants made these
13 misrepresentations to investors in the "Direction to Purchase" form from at
14 least January 2007 to June 2008 and in the so-called "risk disclosure"
15 document Radical Bunny asked its new investors to sign from at least the
16 fall of 2007 to June 2008. The Defendants also made these
17 misrepresentations to investors verbally in the course of soliciting new
18 investments and as existing investors rolled over their funds into new loans
19 to Mortgages Ltd.

20 38. The Defendants failed to disclose to investors that, as of at least
21 May 2007, their counsel had concluded that the documentation evidencing
22 Radical Bunny's security interest in Mortgages Ltd.'s assets was "either
23 nonexistent or defective in numerous respects."

24 39. The Defendants knew, based on their own prior experience as
25 investors with Mortgages, Ltd. through Mortgages Ltd. Securities LLC, that
26 a first deed of trust would be issued for properties Mortgages Ltd. purchased
27 with the Defendants' funds. From that experience, the Defendants knew or
28 should have known there needed to be documents evidencing Radical

1 Bunny's interest in the underlying assets and/or property.

2 40. Despite receiving legal advice from their counsel, and based on
3 their own experience receiving documents evidencing a secured position, the
4 Defendants continually misrepresented the secured nature of Radical
5 Bunny's loans to Mortgages Ltd. to Radical Bunny investors. While the
6 Defendants continued to enter into loans with Mortgages Ltd., even after
7 they were told that it was uncertain whether Radical Bunny was a secured
8 creditor of Mortgages Ltd., one of the Defendants' attorneys told the
9 Defendants that Radical Bunny's representations to investors that the
10 Radical Bunny investment was "secured" was likely fraudulent.

11 Radical Bunny Misrepresented How Mortgages Ltd. Would Use
12 Radical Bunny's Investor Funds

13 41. The Defendants represented to investors that there were
14 "conditions" on Mortgages Ltd.'s use of the funds Radical Bunny loaned to
15 Mortgages Ltd. This representation was false. The documentation between
16 Radical Bunny and Mortgages Ltd. consisted of no more than form
17 documents that placed no restrictions on how Mortgages Ltd. could use the
18 loan proceeds received from Radical Bunny.

19 42. The Defendants falsely told investors that their money would be
20 used only for "commercial real estate development." The Defendants failed
21 to disclose to investors that Mortgages Ltd. had loaned money to developers
22 to construct residential property. Mortgages Ltd. provided documents to
23 Radical Bunny which indicated that Mortgages Ltd. had loaned money to
24 developers that were constructing residential properties, including at least
25 \$95 million loaned to develop twin, multi-story, mixed-use condominium
26 towers with 357 residential units.

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1 Radical Bunny Misrepresented To Investors That They Were Not
2 Subject To The Securities Laws

3 43. The Defendants represented to investors from at least late 2006
4 to June 2008 that their pooling of investor funds to be loaned to Mortgages
5 Ltd. was not subject to the securities laws because they were not engaged in
6 the offer and sale of securities. This representation was false. The
7 Defendants failed to disclose that they were repeatedly told by counsel that
8 the securities laws applied to Radical Bunny's offering.

9 44. In late 2006, the Defendants were also told by officers of
10 Mortgages Ltd. that Radical Bunny might be operating in violation of the
11 securities laws, and they encouraged the Defendants to seek the advice of
12 legal counsel. In January 2007, the Defendants met with prospective
13 attorneys to advise them as to the legality of Radical Bunny's securities
14 offering. One of these attorneys told the Defendants that, in his opinion,
15 Radical Bunny was offering and selling securities and they could not legally
16 operate without compliance with the securities laws.

17 45. In May 2007, counsel retained by Radical Bunny advised the
18 Defendants that their offer and sale of securities was in violation of the
19 securities laws and that they should immediately stop the offering. Radical
20 Bunny's counsel further advised the Defendants that they had potential civil
21 and criminal liability for their prior conduct in connection with their offer
22 and sale of securities. The Defendants waived the attorney-client privilege
23 as to communications with such counsel.

24 46. In mid to late 2007, one of Mortgages Ltd.'s attorneys told
25 Hirsch that Radical Bunny's ongoing offer and sale of securities violated the
26 securities laws and, if Radical Bunny's solicitations did not stop, Hirsch
27 could "go to jail."

28 47. Despite all of the warnings the Defendants received, starting in

1 2006 and continuing into 2007, the Defendants continued their unregistered
2 offering of securities up until June 2008.

3 48. The Defendants were not unfamiliar with the securities laws.
4 Both Berta Walder and Howard Walder previously held securities licenses.
5 Berta Walder was an associated person with a broker-dealer registered with
6 the Commission. Further, Radical Bunny itself was a customer of
7 Mortgages Ltd.'s registered broker-dealer, Mortgages Ltd. Securities LLC,
8 from 2004 to 2008, through which the Defendants purchased Mortgages
9 Ltd.'s private placement securities.

10 Radical Bunny Misrepresented Its Knowledge Of Mortgages Ltd.'s
11 Financial Condition

12 49. The Defendants represented to investors that because Radical
13 Bunny's management had access to Mortgage Ltd.'s books and records, it
14 was knowledgeable about the company's financial condition. This
15 representation was false. In making this misrepresentation, the Defendants
16 highlighted that Hirsch and Shah's accounting firm was the tax accountant
17 for Mortgages Ltd.'s CEO and certain affiliates of Mortgage Ltd. and that
18 Hirsch and Berta Walder attended weekly management meetings at
19 Mortgage Ltd.'s offices. Thus, Radical Bunny investors were told that
20 Radical Bunny had unfettered access to Mortgages Ltd.'s books and records,
21 and were well informed of the financial condition of the company, as well as
22 the safety of the loans made to developers by Mortgages Ltd.

23 50. Yet, despite this purported access, the Defendants were caught
24 completely unaware in early to mid-2008 of Mortgages Ltd.'s deteriorating
25 financial condition that ultimately led to its bankruptcy. Mortgages Ltd. sent
26 Hirsch and the Walders spreadsheets detailing what was left of the loans
27 Mortgages Ltd. had made to developers after they were securitized and sold
28 off to Mortgages Ltd.'s investors, and this remaining loan inventory

1 supposedly constituted the majority of the collateral to Radical Bunny's
2 loans to Mortgages Ltd. Had the Defendants closely examined these
3 spreadsheets, they would have noticed that more and more of their money
4 was being shifted into fewer, and riskier, loans. For example, an April 2008
5 spreadsheet sent to Hirsch and Berta Walder reflects that, by that point, one
6 of these large loans represented over 39% of Mortgages Ltd.'s loan
7 inventory (and this project is incomplete and its developer is in bankruptcy).
8 As late as May 2008, Hirsh assured Radical Bunny's investors during its last
9 investor meeting that all was well with Mortgages Ltd., and that they had
10 nothing to worry about in terms of the financial stability of Mortgages Ltd.

11 **FIRST CLAIM FOR RELIEF**

12 **UNREGISTERED OFFER AND SALE OF SECURITIES**

13 **Violations of Sections 5(a) and 5(c) of the Securities Act**

14 **(Against All Defendants)**

15 51. The Commission realleges and incorporates by reference
16 paragraphs 1 through 50 above.

17 52. Defendants Radical Bunny, Hirsch, Berta Walder, Howard
18 Walder, and Shah, and each of them, by engaging in the conduct described
19 above, directly or indirectly, made use of means or instruments of
20 transportation or communication in interstate commerce or of the mails, to
21 offer to sell or to sell securities, or to carry or cause such securities to be
22 carried through the mails or in interstate commerce for the purpose of sale or
23 for delivery after sale.

24 53. No registration statement has been filed with the Commission
25 or has been in effect with respect to the offerings alleged herein.

26 54. By engaging in the conduct described above, the Defendants,
27 and each of them, violated, and unless restrained and enjoined will continue
28 to violate, Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a)

1 and 77e(c).

2 **SECOND CLAIM FOR RELIEF**

3 **FRAUD IN THE OFFER OR SALE OF SECURITIES**

4 **Violations of Section 17(a) of the Securities Act**

5 **(Against All Defendants)**

6 55. The Commission realleges and incorporates by reference
7 paragraphs 1 through 50 above.

8 56. Defendants Radical Bunny, Hirsch, Berta Walder, Howard
9 Walder, and Shah, and each of them, by engaging in the conduct described
10 above, in the offer or sale of securities by the use of means or instruments of
11 transportation or communication in interstate commerce or by use of the
12 mails directly or indirectly:

- 13 a. with scienter, employed devices, schemes, or artifices to
14 defraud;
- 15 b. obtained money or property by means of untrue statements
16 of a material fact or by omitting to state a material fact
17 necessary in order to make the statements made, in light
18 of the circumstances under which they were made, not
19 misleading; or
- 20 c. engaged in transactions, practices, or courses of business
21 which operated or would operate as a fraud or deceit
22 upon the purchaser.

23 57. By engaging in the conduct described above, the Defendants
24 violated, and unless restrained and enjoined will continue to violate,
25 Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

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FOURTH CLAIM FOR RELIEF

FAILURE TO REGISTER AS A BROKER-DEALER

Violation of Section 15(a) of the Exchange Act

(Against Defendants Hirsch, Berta Walder, Howard Walder, and Shah)

61. The Commission realleges and incorporates by reference paragraphs 1 through 50 above.

62. Defendants Hirsch, Berta Walder, Howard Walder, and Shah, and each of them, by engaging in the conduct described above, made use of the mails or means or instrumentalities of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of securities, without being registered as brokers or dealers in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

63. By engaging in the conduct described above, Defendants Hirsch, Berta Walder, Howard Walder, and Shah violated, and unless restrained and enjoined will continue to violate, Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court:

I.

Issue findings of fact and conclusions of law that the Defendants committed the alleged violations.

II.

Issue judgments, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, permanently enjoining the Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the judgment by personal service or otherwise, and each of them, from violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a)

1 and 77e(c), Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a),
2 Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5
3 thereunder, 17 C.F.R. § 240.10b-5, and Section 15(a) of the Exchange Act,
4 15 U.S.C. § 78o(a).

5 **III.**

6 Order Defendants Radical Bunny, Hirsch, Berta Walder, Howard
7 Walder, and Shah, to disgorge all ill-gotten gains from their illegal conduct,
8 together with prejudgment interest thereon.

9 **IV.**

10 Order Defendants Radical Bunny, Hirsch, Berta Walder, Howard
11 Walder, and Shah, to pay civil penalties under Section 20(d) of the
12 Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange
13 Act, 15 U.S.C. § 78u(d)(3).

14 **V.**

15 Retain jurisdiction of this action in accordance with the principles of
16 equity and the Federal Rules of Civil Procedure in order to implement and
17 carry out the terms of all orders and decrees that may be entered, or to
18 entertain any suitable application or motion for additional relief within the
19 jurisdiction of this Court.

20 **VI.**

21 Grant such other and further relief as this Court may determine to be
22 just and necessary.

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25 DATED: July 28, 2009

s/ David S. Brown

David S. Brown
Attorneys for Plaintiff
Securities and Exchange Commission

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EXHIBIT C

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8
9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11
12 SECURITIES AND EXCHANGE
COMMISSION,

13 Plaintiff,

14 v.

15 RADICAL BUNNY, LLC; TOM HIRSCH;
16 BERTA WALDER; HOWARD WALDER;
and HARISH P. SHAH:

17 Defendants;
18

CV 09-1560-PHX-SRB

**ANSWER TO COMPLAINT
FOR VIOLATIONS OF THE
FEDERAL SECURITIES LAWS**

19 Only the Defendants named below answer the Complaint for Violations of the
20 Federal Securities Laws ("Complaint"). Those named Defendants do not answer for
21 Radical Bunny, L.L.C. (Radical Bunny), that is in bankruptcy.

22 Tom Hirsch, Berta Walder Howard Walder, and Harish P. Shah, (collectively,
23 "Hirsh-Walder-Shah") answer the Complaint as follows:

24 **JURISDICTION AND VENUE**

25 1. The allegations of paragraph 1 are legal allegations based on factual
26 allegations that are denied. Hirsch-Walder-Shah deny the allegations of paragraph 1
27 and deny any wrongdoing implicit in this paragraph and state that this Court does
28 not have jurisdiction over this action.

1 **FACTUAL BACKGROUND**

2 For all responses, only Hirsch-Walder-Shah were members of Radical
3 Bunny. None of the other Radical Bunny family “invested” in Radical Bunny or
4 Mortgages, Ltd. or had any ownership in Radical Bunny or Mortgages, Ltd. There
5 were no “investors.”

6 **The Defendants Conducted an Unregistered Securities Offering**

7 11. Deny the allegations of paragraph 11.

8 12. Deny the allegations of paragraph 12.

9 13. Deny the allegations of paragraph 13 and state that Hirsch-Walder-
10 Shah were the only Radical Bunny investors.

11 14. Deny the allegations of paragraph 14 and deny that others were
12 investors in Radical Bunny. Admit that all information was disclosed.

13 15. Deny the allegations of paragraph 15.

14 16. Admit the allegations of paragraph 16, except deny the implication that
15 Radical Bunny was not secured.

16 17. Admit the allegations of paragraph 17, except deny any registration
17 requirement or that any “offering” occurred.

18 **The Defendants’ Sales Effort**

19 18. Deny the allegations of paragraph 18.

20 19. Admit the allegations of paragraph 19, except deny the term “investor.”

21 20. Deny the allegations of paragraph 20.

22 21. Admit the allegations of paragraph 21, except deny that the meeting
23 was open to anyone to attend. “Updates” were communicated more often and in
24 other ways.

25 **Documentation of the Radical Bunny Investment**

26 22. Admit the allegations of paragraph 22, except the Radical Bunny family
27 was provided information as requested and none of the Radical Bunny family
28 “invested.”

1 23. Admit the allegations of paragraph 23, state that legal counsel
2 approved the form, and deny the mischaracterizing “investor” and “investment”
3 terms.

4 24. Deny the allegations of paragraph 24.

5 25. Deny the allegations of paragraph 25.

6 26. Admit the allegations of paragraph 26 and state that Hirsch-Walder-
7 Shah relied on advice of legal counsel.

8 27. Admit the allegations of paragraph 27 and state that Hirsch-Walder-
9 Shah relied on advice of legal counsel.

10 28. Admit the allegations of paragraph 28 and state that Hirsch-Walder-
11 Shah relied on advice of legal counsel, but deny any false representation regarding
12 “secured.”

13 **The Defendants’ Representation to Investors**

14 29. Deny the allegations of paragraph 29.

15 30. Admit the allegations of paragraph 30, except deny “investors that
16 investing” and deny the term “safe.”

17 31. Deny the allegations of paragraph 31 but admit that the stock market is
18 volatile.

19 32. Deny the allegations of paragraph 32.

20 33. Deny the allegations of paragraph 33.

21 34. Deny the allegations of paragraph 34.

22 35. Deny the allegations of paragraph 35.

23 **The Defendants’ Misrepresentations and Omissions**

24 36. Deny the allegations of paragraph 36.

25 **Radical Bunny’s “Secured” Position Was Uncertain**

26 37. Deny the allegations of paragraph 37 and state that Hirsch-Walder-
27 Shah relied on advice of legal counsel.

1 38. Deny the allegations of paragraph 38 and state that Hirsch-Walder-
2 Shah relied on advice of legal counsel.

3 39. Deny the allegations of paragraph 39.

4 40. Deny the allegations of paragraph 40 and state that Hirsch-Walder-
5 Shah relied on advice of legal counsel

6 Radical Bunny Misrepresented How Mortgages Ltd. Would Use

7 Radical Bunny's Investor Funds

8 41. Deny the allegations of paragraph 41.

9 42. Deny the allegations of paragraph 42.

10 Radical Bunny Misrepresented To Investors That They Were Not

11 Subject To The Securities Laws

12 43. Deny the allegations of paragraph 43 and state that Hirsch-Walder-
13 Shah relied on advice of legal counsel.

14 44. Deny the allegations of paragraph 44.

15 45. Deny the allegations of paragraph 45.

16 46. Deny the allegations of paragraph 46.

17 47. Deny the allegations of paragraph 47.

18 48. Deny the allegations of paragraph 48 and state that Hirsch-Walder-
19 Shah relied on advice of legal counsel.

20 Radical Bunny Misrepresented Its Knowledge Of Mortgages Ltd.'s

21 Financial Condition

22 49. Deny the allegations of paragraph 49, except admit that Hirsch-Walder-
23 Shah performed due diligence.

24 50. Deny the allegations of paragraph 50.

25 **FIRST CLAIM FOR RELIEF**

26 **UNREGISTERED OFFER AND SALE OF SECURITIES**

27 **Violations of Sections 5(a) and 5(c) of the Securities Act**

28 **(Against All Defendants)**

1 51. Hirsch-Walder-Shah reassert their answers to paragraphs 1 through 50
2 as though fully set forth.

3 52. Deny the allegations of paragraph 52.

4 53. Admit the allegations of paragraph 53, assuming that the allegations
5 somehow refer to Hirsch-Walder-Shah, but deny "offerings."

6 54. Deny the allegations of paragraph 54 and state that the SEC knows that
7 Hirsch-Walder-Shah are not engaged in any alleged securities transactions.

8 **SECOND CLAIM FOR RELIEF**

9 **FRAUD IN THE OFFER OR SALE OF SECURITIES**

10 **Violations of Section 17(a) of the Securities Act**

11 **(Against All Defendants)**

12 55. Hirsch-Walder-Shah reassert their answers to paragraphs 1 through 50
13 (and paragraphs 1 through 55) as though fully set forth.

14 56. Deny the allegations of paragraph 56.

15 57. Deny the allegations of paragraph 57 and state that the SEC knows that
16 Hirsch-Walder-Shah are not engaged in any alleged securities transactions.

17 **THIRD CLAIM FOR RELIEF**

18 **FRAUD IN CONNECTION WITH THE**

19 **PURCHASE OR SALE OF SECURITIES**

20 **Violations of Section 10(b) of the Exchange Act and Rule 10b-5**

21 **(Against All Defendants)**

22 58. Hirsch-Walder-Shah reassert their answers to paragraphs 1 through 50
23 (and paragraphs 1 through 57) as though fully set forth.

24 59. Deny the allegations of paragraph 59.

25 60. Deny the allegations of paragraph 60 and state that the SEC knows that
26 Hirsch-Walder-Shah are not engaged in any securities transactions.

1 FIFTH AFFIRMATIVE DEFENSE

2 68. The Complaint violates Rule 9(b), Federal Rules of Civil Procedure.

3 SIXTH AFFIRMATIVE DEFENSE

4 69. Hirsch-Walder-Shah, in the preparation and use of forms, reports, and
5 filings alleged in this Complaint, received the advice of legal counsel in making
6 those reports and filings and relied upon legal counsel's knowledge, information,
7 and expertise in these matters.

8 SEVENTH AFFIRMATIVE DEFENSE

9 70. Hirsch-Walder-Shah, in preparation and use of forms, reports, and
10 filings alleged in this Complaint, received auditing protocol, expertise, and
11 accounting advice of accounting professionals. No report from any other accountant
12 contained a disclaimer of opinion, or were qualified as to uncertainty, audit scope, or
13 accounting principles relating to any matter.

14 EIGHTH AFFIRMATIVE DEFENSE

15 71. Hirsch-Walder-Shah asserts estoppel, laches, license, statutes of fraud,
16 statutes of limitation, waiver, failure to mitigate damages, and failure of avoid
17 avoidable consequences.

18 NINTH AFFIRMATIVE DEFENSE

19 72. Permanent injunctive relief is improper and moot inasmuch as the
20 activities alleged in the Complaint ceased long ago, as the SEC well knows.

21 DEMAND FOR JURY TRIAL

22 73. Pursuant to Rule 38, Federal Rules of Civil Procedure, Hirsch-Walder-
23 Shah demand a jury trial on all issues.

24 DEMAND FOR RELIEF

25 WHEREFORE, Hirsch-Walder-Shah demand that this Court:

26 74. Deny the SEC's prayer for relief in its entirety;

27 75. Dismiss with prejudice the Complaint against Hirsch-Walder-Shah;

28 76. Enter Judgment in favor of Hirsch-Walder-Shah and against the SEC.

