

ORIGINAL



0000124990

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

2011 MAY -3 P 1:17

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 REPLY TO
RESPONDENTS' RESPONSE AND
OBJECTION TO MOTION TO
SUPPLEMENT THE EVIDENTIARY
RECORD

(Assigned to the Hon. Lyn Farmer)

Arizona Corporation Commission
DOCKETED

MAY 3 2011

DOCKETED BY

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 replies to Respondents' Response and Objection ("Respondents' Objection") to the Division's Post-Hearing request that the Administrative Law Judge take judicial notice of the factual findings in 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

1 Summary Judgment against Tom Hirsch, Berta Walder, Howard Walder, and Harish P. Shah
2 (“SEC MSJ”) (“Order”). The Division’s Motion should be granted because (1) the Order is a final
3 order, and (2) the uncontested factual findings in the Order are relevant to these proceedings.

4 Despite the Respondents’ statement to the contrary, the Oder is a final order. *See*
5 Respondents’ Objection at 2:3 and 2:7-8. On April 21, 2011, Respondents’ lodged an Objection to
6 Lodged: [Proposed] Final Judgment of Permanent Injunction and Monetary Relief Against them in
7 the SEC Case, arguing that since the Order resolved all claims against the Respondents, the
8 judgment was a final judgment and should not contain the federal Rule 54(a) language
9 (“Respondents’ Objection to Form of Final Judgment”). *See* Exhibit “A,” Respondents’
10 Objection to Form of filed as document no. 101 in the official court docket for the SEC Case.
11 The court agreed, removed the federal Rule 54(a) language, and filed the final judgment on April
12 28, 2011, as document no. 104 in the official docket for the SEC Case (“SEC Final Judgment”).
13 *See* Exhibit “B,” SEC Final Judgment. No appeal from the SEC Final Judgment has been taken.

14 Respondents also argue that the record in the SEC Case “cannot be presumed to be the
15 same as the one before this body” and, therefore, the Order is irrelevant to these proceedings. *See*
16 Respondents’ Objection at 2:4-6 and 2:9. The Respondents fail to provide any example of how the
17 *uncontested facts* in the SEC Case differ from *the uncontested facts* in evidence in these
18 proceedings. Respondents cannot provide such an example simply because the uncontested facts
19 in the SEC Case and in these proceedings are the same. *See* Division’s Motion at 2:16-4:8.
20 Furthermore, Respondents filed a cross-motion for summary judgment in the SEC Case.
21 Accordingly, it may be legally presumed that while Respondents disputed the applicable law in the
22 SEC Case, all of the underlying facts were undisputed. *See* Order at 1:19-21 and 15:7-8.

23 ...

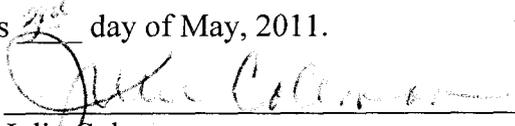
24 ...

25 ...

26 ...

1 For the reasons set forth above, the Division requests that its Post-Hearing Motion to
2 Supplement the Evidentiary Record be granted.

3 RESPECTFULLY SUBMITTED this 3rd day of May, 2011.

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

8 ORIGINAL and 13 copies of the foregoing
9 filed this 3rd day of May, 2011, with:

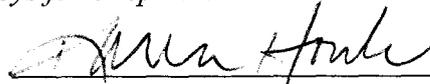
10 Docket Control
11 Arizona Corporation Commission
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing hand-delivered
15 this 3rd day of May, 2011, to:

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

21 COPY of the foregoing mailed
22 this 3rd day of May, to:

23 Michael J. LaVelle
24 Matthew K. LaVelle
25 LAVELLE & LAVELLE, PLC
26 2525 E. Camelback Road, Suite 888
Phoenix, AZ 85016
Attorneys for Respondents

By: 

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EXHIBIT A

1 Michael J. LaVelle – State Bar No. 002296
2 Matthew K. LaVelle – State Bar No. 018828
3 **LAVELLE & LAVELLE, PLC**
4 2525 East Camelback Road, Suite 888
5 Phoenix, AZ 85016
6 MJL@LaVelle-LaVelle.com
7 Matt@LaVelle-LaVelle.com
8 Telephone: (602) 279-2100
9 Facsimile: (602) 279-2114
10 *Attorneys for Defendants Tom Hirsch,*
11 *Berta Walder, Howard Walder and Harish P. Shah*

9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF ARIZONA**

12 Securities and Exchange Commission,

13 Plaintiff,

14 vs.

15 Radical Bunny, LLC; Tom Hirsch;
16 Berta Walder; Howard Walder; and
17 Harish P. Shah,

18 Defendants.
19

Case No. CIV-09-01560-PHX-SRB

**Objection to Lodged: [Proposed]
Final Judgment of Permanent
Injunction and Monetary Relief
Against Defendants Tom Hirsch,
Berta Walder, Howard Walder,
and Harish P. Shah**

21
22 Defendants Tom Hirsch, Berta Walder, Howard Walder and Harish Shah
23 object to the Proposed Final Judgment lodged by the Security and Exchange
24 Commission for the single reason it should not include a Rule 54(b) finding.

25 The SEC has inserted without explanation a Rule 54(b) finding. This invites
26 error. Rule 54(b) findings can be made in Federal Court only with exemption.
27 *Lowery v. Federal Exp. Corp.*, 426 F.3d 817 (6th Cir. 2005) (trial court has to “spell
28 out its reasons.” 426 F.2d at 821-22). *Slockman’s Water Co., LLC v. Voca*
Partners, L.P., 425 F.2d 1263 (10th Cir. 2005) (trial court should “clearly articulate

1 its reasons 425 F.3d at 1265). The Ninth Circuit is no different. There is no
2 discretion as to what can be deemed final. *United States v. State of Washington*,
3 730 F.2d 1314 (9th Cir. 1984).

4 In fact, this is a final judgment. It resolves all remaining claims against all
5 remaining parties. The Court should remove the Rule 54(b) language and insert,
6 “This judgment resolves, except for any enforcement issues that may arise, all
7 remaining claims against all remaining parties and its immediate entry as a final
8 judgment by the Clerk is hereby directed.

9 DATED this 21st day of April, 2011.

10 **LAVELLE & LAVELLE, PLC**

11
12 By: s/Matthew K. LaVelle

13 Michael J. LaVelle

14 Matthew K. LaVelle

15 2525 E. Camelback Rd., Ste. 888

16 Phoenix, AZ 85016

17 *Attorneys for Defendants Tom Hirsch,*

18 *Berta Walder, Howard Walder and Harish P. Shah*

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that on April 21, 2011, I electronically transmitted a PDF
21 version of this document to the Clerk of the United States District Court, District
22 of Arizona, using the CM/ECF System for filing and transmittal of a Notice of
23 Electronic Filing to the following CM/ECF registrants:

24 COPIES sent via U.S. MAIL on this
25 21st day of April, 2011 to:

26 Jordan A. Kroop, Esq.

27 **SQUIRE, SANDERS & DEMPSEY, L.L.P**

28 Two Renaissance Square

40 North Central Avenue, Suite 2700

Phoenix, Arizona 85004

Attorneys for Chapter 11 Trustee G. Grant Lyon,

Trustee for Defendant Radical Bunny, LLC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Spencer E. Bendell

David S. Brown

SECURITIES AND EXCHANGE COMMISSION

5670 Wilshire Boulevard, 11th Floor

Los Angeles, California 90036-3648

Attorneys for Plaintiff Securities and Exchange Commission

s/Kristal L. Holbrook

1

2

3

4

5

6

7

8

9

10

11

12

EXHIBIT B

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

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

Defendants.

Case No. CIV-09-01560-PHX-SRB

**FINAL JUDGMENT OF PERMANENT
INJUNCTION AND MONETARY
RELIEF AGAINST DEFENDANTS
TOM HIRSCH, BERTA WALDER,
HOWARD WALDER, AND HARISH
P. SHAH**

The motion of plaintiff Securities and Exchange Commission (“Commission”), pursuant to Fed. R. Civ. P. 56, for summary judgment against defendants Tom Hirsch (“Hirsch”), Berta Walder (“Berta Walder”), Howard Walder (“Howard Walder”, and Harish P. Shah (“Shah”) (collectively the “Defendants”) came before the Court as did the Defendants’ cross-motion for summary judgment against the Commission. On April 12, 2011, the Court issued an Order granting the Commission’s motion for summary judgment against the Defendants, denying the Defendants’ cross-motion for summary judgment against the Commission, ordering that the Defendants be enjoined from committing future violations of the securities registration, antifraud, and broker-dealer registration provisions of the federal securities laws, ordering the Defendants pay disgorgement (Hirsch in the amount of \$1,245,220, Berta and Howard Walder in the

1 amount of \$1,245,217, and Shah in the amount of \$740,160) plus prejudgment interest,
2 directing each Defendant to pay a civil penalty of \$120,000, and directing the
3 Commission to lodge a proposed judgment including the amount of prejudgment interest.
4 Having considered the motions, evidence, declarations and exhibits, and other documents
5 filed in support of and in opposition to the motions, the Court enters judgment as follows:

6 **I.**

7 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendants
8 Hirsch, Berta Walder, Howard Walder, and Shah, and their agents, servants, employees,
9 attorneys, and all persons in active concert or participation with them who receive actual
10 notice of this Final Judgment by personal service or otherwise are permanently restrained
11 and enjoined from violating Section 5 of the Securities Act of 1933 (the "Securities Act")
12 [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

- 13 (a) Unless a registration statement is in effect as to a security, making use of
14 any means or instruments of transportation or communication in interstate
15 commerce or of the mails to sell such security through the use or medium
16 of any prospectus or otherwise;
- 17 (b) Unless a registration statement is in effect as to a security, carrying or
18 causing to be carried through the mails or in interstate commerce, by any
19 means or instruments of transportation, any such security for the purpose of
20 sale or for delivery after sale; or
- 21 (c) Making use of any means or instruments of transportation or
22 communication in interstate commerce or of the mails to offer to sell or
23 offer to buy through the use or medium of any prospectus or otherwise any
24 security, unless a registration statement has been filed with the Commission
25 as to such security, or while the registration statement is the subject of a
26 refusal order or stop order or (prior to the effective date of the registration
27 statement) any public proceeding or examination under Section 8 of the
28 Securities Act [15 U.S.C. § 77h].

1
2 **II.**

3 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
4 Defendants Hirsch, Berta Walder, Howard Walder, and Shah, and their agents, servants,
5 employees, attorneys, and all persons in active concert or participation with them who
6 receive actual notice of this Final Judgment by personal service or otherwise are
7 permanently restrained and enjoined from violating Section 17(a) of the Securities Act
8 [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or
9 instruments of transportation or communication in interstate commerce or by use of the
10 mails, directly or indirectly:

- 11 (a) to employ any device, scheme, or artifice to defraud;
- 12 (b) to obtain money or property by means of any untrue statement of a material
13 fact or any omission of a material fact necessary in order to make the
14 statements made, in light of the circumstances under which they were
15 made, not misleading; or
- 16 (c) to engage in any transaction, practice, or course of business which operates
17 or would operate as a fraud or deceit upon the purchaser.

18 **III.**

19 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
20 Defendants Hirsch, Berta Walder, Howard Walder, and Shah, and their agents, servants,
21 employees, attorneys, and all persons in active concert or participation with them who
22 receive actual notice of this Final Judgment by personal service or otherwise are
23 permanently restrained and enjoined from violating, directly or indirectly, Section 10(b)
24 of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and
25 Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or
26 instrumentality of interstate commerce, or of the mails, or of any facility of any national
27 securities exchange, in connection with the purchase or sale of any security:

- 28 (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material

1 fact necessary in order to make the statements made, in the light of the
2 circumstances under which they were made, not misleading; or

3 (c) to engage in any act, practice, or course of business which operates or
4 would operate as a fraud or deceit upon any person.

5 **IV.**

6 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
7 Defendants Hirsch, Berta Walder, Howard Walder, and Shah, and their agents, servants,
8 employees, attorneys, and all persons in active concert or participation with them who
9 receive actual notice of this Final Judgment by personal service or otherwise are
10 permanently restrained and enjoined from violating, directly or indirectly, from making
11 use of the mails or any means or instrumentality of interstate commerce to effect any
12 transactions in, or to induce or attempt to induce the purchase or sale of, any security,
13 without being registered as a broker or dealer pursuant to Section 15(b) of the Exchange
14 Act [15 U.S.C. § 78o(b)] in violation of Section 15(a) of the Exchange Act [15 U.S.C.
15 § 78o(a)].

16 **V.**

17 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
18 Defendant Hirsch is liable for disgorgement of \$1,245,220 representing profits gained as
19 a result of the conduct alleged in the Complaint, together with prejudgment interest
20 thereon in the amount of \$314,964.48 and a civil penalty in the amount of \$120,000
21 pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3)
22 of the Exchange Act [15 U.S.C. § 78u(d)(3)], for a total of \$1,680,184.48. Defendant
23 Hirsch shall satisfy this obligation by paying \$1,680,184.48 within 14 days after entry of
24 this Final Judgment to the Clerk of this Court, together with a cover letter identifying
25 Hirsch's name as a defendant in this action; setting forth the title and civil action number
26 of this action and the name of this Court; and specifying that payment is made pursuant to
27 this Final Judgment. Defendant Hirsch shall simultaneously transmit photocopies of such
28 payment and letter to the Commission's counsel in this action. By making this payment,

1 Defendant Hirsch relinquishes all legal and equitable right, title, and interest in such
2 funds, and no part of the funds shall be returned to Defendant Hirsch. The Clerk shall
3 deposit the funds into an interest bearing account with the Court Registry Investment
4 System ("CRIS") or any other type of interest bearing account that is utilized by the
5 Court. These funds, together with any interest and income earned thereon (collectively,
6 the "Fund"), shall be held in the interest bearing account until further order of the Court.
7 In accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the
8 Administrative Office of the United States Courts, the Clerk is directed, without further
9 order of this Court, to deduct from the income earned on the money in the Fund a fee
10 equal to ten percent of the income earned on the Fund. Such fee shall not exceed that
11 authorized by the Judicial Conference of the United States. The Commission may
12 propose a plan to distribute the Fund subject to the Court's approval. Defendant Hirsch
13 shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

14 **VI.**

15 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
16 Defendants Berta Walder and Howard Walder are jointly and severally liable for
17 disgorgement of \$1,245,217 representing profits gained as a result of the conduct alleged
18 in the Complaint, together with prejudgment interest thereon in the amount of
19 \$314,963.73, and must each pay a civil penalty in the amount of \$120,000 pursuant to
20 Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the
21 Exchange Act [15 U.S.C. § 78u(d)(3)], for a total of \$1,800,180.73. Defendants Berta
22 Walder and Howard Walder shall satisfy this obligation by paying \$1,800,180.73 within
23 14 days after entry of this Final Judgment to the Clerk of this Court, together with a cover
24 letter identifying Berta Walder's and Howard Walder's names as defendants in this
25 action; setting forth the title and civil action number of this action and the name of this
26 Court; and specifying that payment is made pursuant to this Final Judgment. Defendants
27 Berta Walder and Howard Walder shall simultaneously transmit photocopies of such
28 payment and letter to the Commission's counsel in this action. By making this payment,

1 Defendants Berta Walder and Howard Walder relinquish all legal and equitable right,
2 title, and interest in such funds, and no part of the funds shall be returned to Defendants
3 Berta Walder or Howard Walder. The Clerk shall deposit the funds into an interest
4 bearing account with the CRIS or any other type of interest bearing account that is
5 utilized by the Court. These funds, together with any interest and income earned thereon
6 , shall be held in the interest bearing account until further order of the Court. In
7 accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the
8 Administrative Office of the United States Courts, the Clerk is directed, without further
9 order of this Court, to deduct from the income earned on the money in the Fund a fee
10 equal to ten percent of the income earned on the Fund. Such fee shall not exceed that
11 authorized by the Judicial Conference of the United States. The Commission may
12 propose a plan to distribute the Fund subject to the Court's approval. Defendants Berta
13 Walder and Howard Walder shall pay post-judgment interest on any delinquent amounts
14 pursuant to 28 USC § 1961.

15 **VII.**

16 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
17 Defendant Shah is liable for disgorgement of \$740,160 representing profits gained as a
18 result of the conduct alleged in the Complaint, together with prejudgment interest thereon
19 in the amount of \$187,215.20 and a civil penalty in the amount of \$120,000 pursuant to
20 Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the
21 Exchange Act [15 U.S.C. § 78u(d)(3)], for a total of \$1,047,375.20. Defendant Shah
22 shall satisfy this obligation by paying \$1,047,375.20 within 14 days after entry of this
23 Final Judgment to the Clerk of this Court, together with a cover letter identifying Shah's
24 name as a defendant in this action; setting forth the title and civil action number of this
25 action and the name of this Court; and specifying that payment is made pursuant to this
26 Final Judgment. Defendant Shah shall simultaneously transmit photocopies of such
27 payment and letter to the Commission's counsel in this action. By making this payment,
28 Defendant Shah relinquishes all legal and equitable right, title, and interest in such funds,

1 and no part of the funds shall be returned to Defendant Shah. The Clerk shall deposit the
2 funds into an interest bearing account with the CRIS or any other type of interest bearing
3 account that is utilized by the Court. These funds, together with any interest and income
4 earned thereon, shall be held in the interest bearing account until further order of the
5 Court. In accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the
6 Administrative Office of the United States Courts, the Clerk is directed, without further
7 order of this Court, to deduct from the income earned on the money in the Fund a fee
8 equal to ten percent of the income earned on the Fund. Such fee shall not exceed that
9 authorized by the Judicial Conference of the United States. The Commission may
10 propose a plan to distribute the Fund subject to the Court's approval. Defendant Shah
11 shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

12 **VIII.**

13 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
14 this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of
15 this Final Judgment.

16 **IX.**

17 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that all other
18 Orders of this Court shall remain in full force and effect.

19
20 Dated this 27th day of April, 2011.

21
22
23 

24 Susan R. Bolton
25 United States District Judge
26
27
28