

**ORIGINAL**



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**BEFORE THE ARIZONA CORPORATION COMMISSION**

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 TOMAS 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**

**RESPONDENTS' BRIEF ON  
ADDITIONAL EVIDENCE**

Arizona Corporation Commission  
**DOCKETED**

APR 17 2012

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**RESPONDENTS' BRIEF ON ADDITIONAL EVIDENCE**

**LaVELLE & LaVELLE, PLC**

**Michael J. LaVelle (#002296)  
Matthew K. LaVelle (#018828)  
Camelback Esplanade II Center  
2525 E. Camelback Road, Suite 888  
Phoenix, Arizona 85016**

## **A. INTRODUCTION**

The Court will recall that in the prior testimony, Mr. Hoffman said that on May 2, 2007, he told the Respondents that they have violated the Securities Law and they needed to immediately stop selling new participations or rolling over prior participations. (T 2121).

### **The Previous Testimony**

The staff went to great lengths to cast the Respondents as evil people who would ignore the instructions of their attorneys. The key question in this case is whether the Respondents received instruction from Christian Hoffman to stop making or rolling over the loans to Mortgages, Ltd. and to stop fractionizing those loans and providing them to their participants.

Before the resumed hearing, that was problematic. His notes made during a telephone call said nothing like that. (S-22i) He had a separate page of notes which he claimed were an agenda that contained that information on it (S-22(g)) but it could have been created anytime. There was no research memoranda in the Quarles & Brady's files which reached that conclusion. No one supported his testimony concerning such an important admonition, and there was no follow up letter from what is, after all, a large law firm with procedures and checks to be certain the advice to a client is documented. No one in this large firm, several of whom were working on related Radical Bunny matters supported Mr. Hoffman's claimed "stop" order. No one testified to it and nothing in writing went out internally. No face to face meetings were called; no memorandum of applicable law went to any file. The next day his notes say "is Radical Bunny raising the money legally?" (RS-22(j)), an odd question for someone who supposedly informed his clients he had concluded the program to be illegal the day before.

A May 27, 2007 semi-annual meeting was scheduled. (T 801) If Mr. Hoffman really thought he had ordered the program stopped, preparation and careful communication would have been needed.<sup>1</sup> No such thing occurred.

Finally, no one at Quarles & Brady seems to have been checking to see if the rollovers and the new participations stopped.

### **B. R 11 Shows Quarles & Brady Knew Business Was Continuing**

Then R 11 appeared. R 11 is a fax cover sheet with text on it which was not disclosed by Quarles & Brady in response to a subpoena in the joint SEC, ACC investigation even though Mr. Bornhoft acknowledged that if normal procedures had been followed it would have been in the Quarles & Brady files. (T 2163) Instead it was belatedly found in the Bankruptcy Trustee's boxes of documents. R 11 says, "Attached for your review is a draft of the participation agreement we are recommending as an interim step." The date of R 11 is May 21, 2007, nineteen days after Mr. Hoffman supposedly told Respondents they were prohibited from admitting new participants or allowing rollovers.

At the hearing, Mr. Hoffman had to acknowledge the following conduct inconsistent with his claimed advice: he cannot recall telling his partner Mr. Moya that he had advised Respondents that they were to stop selling rollover securities (T 2121-2222). He cannot recall telling his partner Mr. Bornhoft who was working on the same case that he had told the clients to stop selling (T 2123). There are no reference in any of his notes of telling Mr. Bornhoft or Mr. Moya that he advised the Respondents they were operating in violation of securities laws or that he told them to stop selling or rolling over (T 2124). Mr. Hoffman agreed that it would have been important for Mr. Bornhoft to know that he had told the clients

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<sup>1</sup> (T 801) Mr., Hoffman knew that the meeting held on May 27, 2007 was the target date "that we need to have whatever we are going to do put together by then." (T 801).

that it was operating in violation of securities laws and to know that he had advised the clients that it had to stop the roll overs and participations (T 2125).

Mr. Hoffman acknowledged that it was a goal to develop a program by which it would be legal for Radical Bunny to offer participations to investors one way or another (T 2130-2131). Mr. Hoffman knew that Radical Bunny was earning something like \$2.8 million a year in compensation for the Mortgages Ltd. program (T 2135). Yet he says that he told the Respondents to close it down on May 2<sup>nd</sup> and he did not give them any estimate of when the program could be reopened (T 2132-2134). Between May 2, 2007, the supposed date of the “stop order” and May 21, 2007, the date of the document to be used “in the interim,” Mr. Hoffman never heard from Mr. Hirsch that he objected to having to stop new participations and rollovers (T 2137).

R 11 calls the attached documents “an interim step.” R 11 says, “an investor would execute this each time a new loan is created.” Mr. Hoffman tried to say that it was just a transmittal of a draft and that he was not planning that it be used (T 2141).

The draft participation agreement that accompanied the memorandum, contemplates Exhibits A, B and C. A was to be a copy of the promissory note which already was being used and executed as each new loan was made by Radical Bunny to Mortgages, Ltd. B was to be the security agreement and C was to be the loan participation disclosures and acknowledgement (T 2146).

Mr. Hoffman also testified, as Respondents have argued, “The fact that Radical Bunny had elected to use the structure of, if you will, dividing up a promissory note it received from Mortgage Ltd. into various interests and participations, that program in and of itself, that structure, that contractual structure, does not violate the securities law in and of itself.” (T 2147-48).

While Mr. Hoffman did not want to answer questions at the hearing about whether he knew about the contractual program that he purported to stop, in his deposition, he answered the question, “Did you know the structure of the existing program which you had concluded violated securities law? A.... I’m sorry, the existing program prior to May 2<sup>nd</sup>? Mr. Hoffman responded “we did know that.” (T 2150).

Mr. Hoffman denied that the document was intended as an interim step to provide Radical Bunny protection against liability for ongoing securities violations (T 2152) He said it was produced only and solely for use with a compliant offering (T 2153). Notwithstanding that, nothing in the document refers to a private offering memorandum (T 2153).

His testimony that the document attached in R 11 was not for use in the interim but was going to be part of a future offering ran into serious trouble when he had to acknowledged a new entity, other than Radical Bunny, LLC was to be used in any new offering (T 2164).

While at the hearing Mr. Hoffman said a new entity was one of the items we were “looking at,” in fact in his prior deposition, he acknowledged the requirement of a compliant offering was a new entity, meaning some entity other than Radical Bunny, LLC (T 2165). Unfortunately for Mr. Hoffman’s position, the participation agreement attached to the fax sheet, R 11, had the party listed as Radical Bunny, LLC, not an LLC to be created later (T 2165).

The list of disclosures that were prepared and sent over did not qualify as a private placement memorandum (T 2169). Neither the participation agreement nor the message contained in R 11 talks about a private placement memorandum anywhere (T 2170).

Finally when pressed as to whether “interim” means something that occurs in a finite period of time in between two events, Mr. Hoffman’s testimony was that

his use of the word “interim” redefined the word so that it did not mean in between two events. “My use of the word interim was one of a number of steps. It wasn’t used like you are talking about.” (T 2172). “So I am talking about requested or other steps that were going to be taken” (T 2172). Nonsense. Nonsense from a lawyer who know exactly that he meant that the document was intended for the interim until his firm got around to a “compliant offering.”

While Mr. Hoffman denied it, (T 2126) it is obvious from the document that it describes the current Radical Bunny program. The participation and administration fee was the same (T 2177) and the payment arrangements were the same (T 2177-78).

The clear reason for the Respondents’ handwritten corrections which appear on R 12 was to accurately describe the current manner of utilizing the program and the Respondents understood that it was to describe the current program (T 2195). After all, the proposed document had the Radical Bunny, LLC as the operating entity.

### **C. The Law**

Where does all that leave us? In the first place, this Commission is unlikely to believe the a large law firm would shut down an almost \$200 million program over the phone without a letter or any subsequent verification and without other witnesses who could support Mr. Hoffman’s testimony. Mr. Hoffman’s “agenda” on a separate piece of paper which he says was prepared before the call hardly supports his contention. The notes taken during his call say nothing about shutting down the program and now the document his law firm should have produced long ago has turned up. There Mr. Hoffman wrote “attached for your review is a draft of the participation agreement we are recommending as an interim step.” (T 2127).

The fact that Mr. Hoffman really did not shut the program down has two consequences; 1) it is significant of his true thinking. That is something that under

an unguarded moment he admitted. He knew the basic structure of the program did not constitute a securities violation (T 2147-48). 2) If the program itself did not constitute a securities violation and Mr. Hoffman is just stuck with his imagined testimony, then there has been no violation as set forth in previous memoranda and this case must be dismissed.

At the very least, his testimony that he told Respondents that they are in violation of law is bogus. Respondents were never told that they were in violation of the law and had no idea that someone would contend that they had been told to stop when in fact they never were.

That lack of scienter is a defense to all related federal securities matters, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), (negligent behavior is not enough). It is also clearly a defense to A.R.S. §44-1991 (A)(1) charges. “Proof of scienter is required to succeed on a claim under A.R.S. §44-1991 (A)(1)...” *Orthologic Corp. v. Columbia/HCA Healthcare Corp.*, 2002 WL 1331735 at p. 5 (D. Ariz. 2002). Under the older pre-existing case law, A.R.S. §44-1991 (A)(2) and (A)(3) claims are said not to require scienter. *State v. Guzman*, 127 Ariz. 110, 618 P.2d 604 (1980). That position has been repeatedly recently. *Allstate Life Ins. Co., v. Robert W. Baird & Co., et al*, 756 F. Supp. 1113(D. Ariz. 2010).<sup>2</sup>

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<sup>2</sup> We reserve the right to contend in further proceedings here and do assert that if scienter was previously not required under A.R.S. §A(2) and A(3), the 1996 statement of legislative intent changed all that.

“It is the intent of the legislation that in construing the provisions of title 44, chapter 12, Arizona Revised Statutes, the courts may use as a guide the interpretations given by the Securities and Exchange Commissions and the Federal courts or other courts in construing substantially similar provisions in the Federal Securities Laws of the United States.” 1996 Ariz. Sess. Laws Ch 198, §11 (c).

That statement of intent now makes it clear that like the Federal Law, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) scienter is required. If the Arizona law is to conform to the Federal law, scienter is an element of every offense in Arizona.

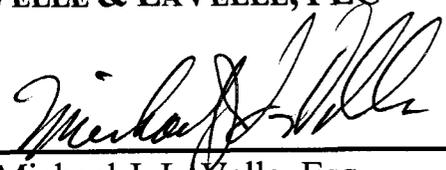
There were only documents and testimony in this record related to eight such participants. How many violations the state claims is unclear. The state did not prove how many transactions each may have had. On this record, the most the hearing officer can find are eight violations of A.R.S. §44-1991 (A)(2) and (A)(3) with an appropriate sanction as limited by the statute, \$5,000. A.R.S. §44-2037.

Mr. Hoffman's "story" has already had serious consequences. Judge Martone dismissed the Federal case against Mr. Hoffman's law firm when it was first filed under the requirement of specific allegations for federal securities fraud. But when this missing memo, on the record, R 11, came to light, the Judge not only refused to dismiss the amended claim against Mr. Hoffman and Quarles & Brady, it is now also a certified class action against them. See attached Exhibits A and B.

It is at best incredible that a lawyer at a major law firm would shut down an almost \$200 million operation, terminating some \$2.8 million in profits a year to its client, without protest from the Respondents, without a memorandum concerning the conversation, with no opinion letter, and with no research memorandum in the file indicating that a shut down was required even though Mr. Hoffman thought the basic program did not violate securities laws. Mr. Hoffman says he concluded that there was something about that program that required him to advise that it be shut down. A practicing law firm would never be drafting a participation agreement for the "interim" which was clearly designed for and used by Radical Bunny, LLC, if Mr. Hoffman thought all sales had stopped. Mr. Hoffman lied. The Respondents were never told they were violating securities law and Mr. Hoffman never reached a conclusion that they were.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of April, 2012.

**LAVELLE & LAVELLE, PLC**

BY: 

Michael J. LaVelle, Esq.

*Attorneys for Respondents Tom  
Hirsch, Diane Rose Hirsch,  
Berta Walder, Howard Walder,  
Harish P. Shah, Madhavi H. Shah and  
Horizon Partners, LLC*

ORIGINAL and 13 COPIES filed this  
16th day of April, 2012 with:

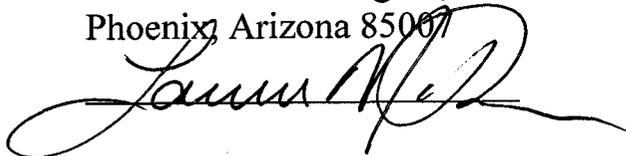
ARIZONA CORPORATION COMMISSION  
Securities Division  
1300 West Washington, Third Floor  
Phoenix, Arizona 85007

COPY of the foregoing MAILED this  
16th day of April, 2012 to:

Lyn Farmer  
Chief Administrative Law Judge  
ARIZONA CORPORATION COMMISSION  
1200 West Washington  
Phoenix, Arizona 85007

COPY of the foregoing MAILED and EMAILED this  
16th day of April, 2012 to:

Julie Coleman  
ARIZONA CORPORATION COMMISSION  
Securities Division  
1300 West Washington, Third Floor  
Phoenix, Arizona 85007



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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Robert Facciola, et al.,

No. CV-10-1025-PHX-FJM

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Plaintiffs,

**ORDER**

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vs.

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Greenberg Traurig LLP, et al.,

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Defendants.

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The court has before it Greenberg Traurig, LLP's motion to dismiss count 1 of the amended complaint (doc. 299), the lead plaintiffs' joint response (doc. 302), and Greenberg's reply (doc. 307). We also have before us Quarles & Brady LLP's motion to dismiss the first amended complaint (doc. 294), lead plaintiffs' joint response (doc. 297) and Quarles' reply (doc. 301).

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**I. Greenberg Motion to Dismiss**

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Greenberg moves to dismiss the Radical Bunny ("RB") plaintiffs' primary liability claim under the Arizona Securities Act ("ASA"), A.R.S. § 44-1991(A). We granted Greenberg's first motion to dismiss the RB plaintiffs' primary liability claim, concluding that the allegations related to Greenberg's involvement in RB securities transactions were insufficient to state a claim under A.R.S. § 44-1991(A). Order (doc. 200). Plaintiffs then filed a first amended complaint ("FAC") asserting new allegations against Greenberg.

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1 Greenberg now argues that the FAC does not cure the pleading deficiencies and asks us again  
2 to conclude that the RB plaintiffs have failed to state a claim for a primary securities fraud  
3 violation against Greenberg.

4 Plaintiffs first argue that Greenberg's motion to dismiss is untimely because  
5 Greenberg failed to oppose plaintiffs' motion for leave to amend. The Federal Rules of Civil  
6 Procedure, however, do not require a party to oppose a motion to amend instead of filing a  
7 motion to dismiss. While judicial efficiency and expediency would have favored a resolution  
8 of all pleading issues in connection with plaintiffs' motion to amend, there is nothing in the  
9 Rules that prohibits defendant's decision to file a motion to dismiss.

10 The FAC broadly alleges a fraudulent scheme perpetrated by Mortgages Ltd. ("ML")  
11 and RB, whereby ML raised millions of dollars through RB's unlawful securities sales to RB  
12 investors. ML is alleged to have issued promissory notes to RB in exchange for loans that  
13 ML used to operate its business. The ongoing infusion of funds from the securities sales to  
14 RB investors was critical to ML's survival because ML was insolvent and continuing to  
15 operate only because of its Ponzi scheme. RB syndicated and sold nearly \$200 million in  
16 pass-through interests in ML notes to RB investors through false representations that the  
17 investments were secured by deeds of trust, when in reality there was no security. RB is  
18 alleged to have operated as an unlicensed securities dealer for ML in selling nonexempt,  
19 unregistered note participations that funded ML's operations. Greenberg, as legal counsel  
20 for ML, and Quarles, as legal counsel for RB, are alleged to have jointly encouraged,  
21 advanced and participated in the fraudulent scheme.

22 By its express terms, A.R.S. § 44-1991(A) prohibits direct or indirect fraud in  
23 connection with the purchase or sale of securities. Section 44-2003 extends the civil remedy  
24 in § 44-2001, to the "narrower range of persons 'who made, participated in or induced the  
25 unlawful sale.'" See Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 22, 945 P.2d  
26 317, 333 (Ct. App. 1996) (quoting A.R.S. § 44-2003(A)).

27 In support of their securities fraud claim against Greenberg, the RB Plaintiffs contend  
28 that the FAC includes new allegations demonstrating the manner in which Greenberg

1 indirectly took part in the scheme to sell securities to RB investors. Specifically, plaintiffs  
2 assert that Greenberg encouraged ML to continue the illegal fundraising program between  
3 ML and RB, FAC ¶¶ 131-44; Greenberg knew of the illegal RB securities sales, FAC ¶ 143;  
4 Greenberg's Robert Kant knew that the illegal RB securities sales was a critical source of  
5 ongoing funding for ML, FAC ¶ 147; Kant explored alternative ways to keep the ML-RB  
6 program operating, FAC ¶¶ 140-41, 358, 363; Greenberg provided assurances to ML's  
7 president, Michael Denning, that ML could properly accept the proceeds of RB's securities  
8 violations, FAC ¶ 144; Kant suggested that RB's Tom Hirsch become an employee of ML's  
9 in-house brokerage firm or that he obtain a securities license through the ML firm, FAC ¶  
10 154; Kant continually provided false assurances to ML that RB's securities violations were  
11 not an ML problem, thereby encouraging ML to continue to accept funds raised in unlawful  
12 sales to RB's investors, FAC ¶ 144.

13 In essence, the RB Plaintiffs argue that because Greenberg directly encouraged and  
14 assisted in ML's fraudulent scheme, including the sale of ML securities, combined with the  
15 interdependence of the ML and RB schemes, Greenberg also "participated" in RB's  
16 securities sales, within the meaning of the ASA. While we recognize that § 44-1991 and its  
17 remedies are described as "broad," "sweeping," "remedial measure[s]" that are to be  
18 "liberally construed," Grand v. Nacchio ("Grand II"), 225 Ariz. 171, 174, 236 P.3d 398, 401  
19 (2010), we believe that the RB Plaintiffs' theory of primary liability against Greenberg would  
20 sweep too far. It is not enough to assert that a defendant had some attenuated connection to  
21 a fraudulent scheme. To support a claim of primary liability under A.R.S. § 44-1991(A), a  
22 plaintiff must show that the defendant "participated in" or "induced" the sale or purchase of  
23 securities. See A.R.S. § 44-2003(A). The requisite participation or inducement can have an  
24 "indirect" relationship with the sale of securities, see A.R.S. § 44-1991(A), but Greenberg's  
25 involvement must have some identifiable connection to the sale of RB securities.

26 Greenberg's alleged involvement in the RB fraudulent scheme through its assistance  
27 and encouragement of ML is too attenuated and remote from the sale of RB securities to  
28 satisfy the participation or inducement requirements. Although it is alleged that Greenberg

1 made various efforts to assist RB, none of those efforts are connected, directly or indirectly,  
2 to any eventual sale of RB securities.

3 In so holding, we reject plaintiffs' reliance on Barnes v. Vozack, 113 Ariz. 269, 550  
4 P.2d 1070 (1976), where the Arizona Supreme Court examined liability for indirect fraud.  
5 Through various misstatements, a salesman sold stock in Budget Control, Inc. to plaintiff.  
6 The salesman was directly liable under § 1991(A). The court also concluded, however, that  
7 three additional defendants, who controlled Budget through stock ownership and a  
8 management contract, were also primarily liable for violating § 1991(A), although there was  
9 no evidence that any of the three defendants personally solicited the plaintiff's investment.  
10 The court based its decision on the defendants' control over Budget and the salesman who  
11 sold the stock. In Barnes, the "connection" to the securities transaction was defendants'  
12 indirect control over the salesman. No similar connection is asserted by RB Plaintiffs against  
13 Greenberg.

14 We grant Greenberg's motion to dismiss the RB Plaintiffs' primary liability claim  
15 against Greenberg (doc. 299).

## 16 **II. Quarles Motion to Dismiss**

17 In our order on plaintiffs' motion for leave to amend the complaint, we concluded that  
18 the RB Plaintiffs sufficiently stated a claim against Quarles for primary liability under A.R.S.  
19 § 44-1991(A); that the ML Plaintiffs failed to state a claim against Quarles for primary  
20 liability under § 1991(A); and that both the ML and RB Plaintiffs sufficiently pled claims  
21 against Quarles for aiding and abetting securities fraud. Order (doc. 289). Quarles now  
22 moves to dismiss the aiding and abetting claims by both the ML and RB plaintiffs.

### 23 **A. ML Plaintiffs' Aiding and Abetting Claims**

24 To state a claim for aiding and abetting fraud, a plaintiff must plead (1) a primary  
25 violation has occurred; (2) defendant's knowledge or duty of inquiry with regard to the  
26 primary violation; and (3) the defendant "substantially assist[ed] or encourage[d]" the  
27 primary actor's violation. Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement  
28 Masons, 201 Ariz. 474, 485, 38 P.3d 12, 23 (2002). In their motion to dismiss, Quarles

1 focuses solely on the substantial assistance prong, arguing that under Arizona's aiding and  
2 abetting law plaintiffs must show that a defendant provided substantial assistance in the  
3 fraudulent sale of securities, and not just in the fraudulent scheme. Without citation to  
4 authority, Quarles contends that because A.R.S. § 44-2003(A) extends liability under the  
5 ASA only to those who "made, participated in or induced" a *fraudulent sale*, aiding and  
6 abetting liability must similarly be tied to fraudulent sales. In other words, Quarles argues  
7 that the secondary violator—the aider and abettor—must also be a primary violator under §  
8 44-2003. According to Quarles, our conclusion that the ML Plaintiffs failed to adequately  
9 plead that Quarles participated in or induced ML sales, forecloses the ML Plaintiffs' aiding  
10 and abetting claim as well.

11 Quarles' argument is contradicted by the Arizona Supreme Court's definition of  
12 "substantial assistance" in the context of a claim for aiding and abetting a violation of the  
13 ASA. In State v. Superior Court, 123 Ariz. 324, 331, 599 P.2d 777, 784 (1979), overruled  
14 on other grounds by State v. Gunnison, 127 Ariz. 110, 618 P.2d 604 (1980), the court defined  
15 "substantial assistance" as "a necessary contribution to the underlying [fraudulent] scheme  
16 by the person charged." State v. Superior Court "stands as the law currently controlling"  
17 secondary liability for aiding and abetting securities fraud under A.R.S. § 44-1991(A).  
18 Wojtunik v. Kealy, 394 F. Supp. 2d 1149, 1170 (D. Ariz. 2005). The Arizona Supreme Court  
19 recently cited Wojtunik with approval, and reaffirmed the three-part State v. Superior Court  
20 test. See Grand II, 225 Ariz. at 177, 236 P.3d at 404. Therefore, the relevant inquiry is  
21 whether the plaintiffs have sufficiently pled that Quarles provided a necessary contribution  
22 to ML's underlying fraudulent scheme.<sup>1</sup>

23 The primary statutory securities fraud violation in this case is the fraudulent scheme  
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26 <sup>1</sup>We note that in Wells Fargo, the Arizona Supreme Court defined the "substantial  
27 assistance" prong of the aiding and abetting test as "whether the assistance makes it 'easier'  
28 for the violation to occur, not whether the assistance was necessary." 201 Ariz. at 489, 38  
P.3d at 27. Rather than resolve the apparent inconsistency, we apply the stricter "necessary  
contribution" test.

1 perpetrated by ML and RB. ML sold its own stock and also raised millions of dollars  
2 through RB's unlawful securities sales to RB investors. The ongoing infusion of funds by  
3 RB investors into ML was critical to ML's survival and continued ability to sell ML  
4 securities. Plaintiffs allege that although Quarles knew that RB was continuing to raise  
5 money for ML, Quarles declined to withdraw its representation, and instead prepared  
6 temporary disclosure documents to be used "right away" to raise more money for ML. These  
7 temporary documents did not disclose the past securities violations that exposed ML and RB  
8 to regulatory shutdowns and hundreds of millions of dollars in contingent liabilities. FAC  
9 ¶ 346. Thus, Quarles is alleged to have provided the advice and assistance needed to allow  
10 RB to continue to raise funds for ML, thereby allowing ML to hide its insolvency and to  
11 continue the fraudulent sale of ML securities. In this way, Quarles provided a necessary  
12 contribution to ML's underlying fraudulent scheme.

13 We conclude that ML Plaintiffs have sufficiently pled an aiding and abetting securities  
14 fraud claim against Quarles.

#### 15 **B. RB Plaintiffs' Aiding and Abetting Claim**

16 Quarles also moves to dismiss the RB Plaintiffs' claim for aiding and abetting  
17 securities fraud, arguing that the common law aiding and abetting claim is duplicative of and  
18 therefore subsumed by the state statutory securities fraud claim. Again, Quarles argues that  
19 Arizona's securities fraud statutes provide the only form of aiding and abetting liability.

20 We have already rejected Quarles' argument that plaintiffs' common law aiding and  
21 abetting claim should no longer be recognized under Arizona law. In an order dated June 9,  
22 2011, we confirmed that State v. Superior Court remains controlling Arizona law for aiding  
23 and abetting liability under the ASA. Order (doc. 200) at 14. Arizona courts have clearly  
24 established that a primary violation of the ASA and a common law aiding and abetting  
25 violation are two distinct claims. In 2010, the Arizona Supreme Court declined to modify  
26 State v. Superior Court and instead reaffirmed the three-part test used for aiding and abetting  
27 liability. See Grand II, 225 Ariz. at 177, 236 P.3d at 404.

28 Quarles now seeks to revise Arizona's aiding and abetting law by adding a fourth

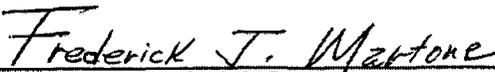
1 element—requiring a defendant’s participation in a particular securities sale. The proposed  
2 fourth element would improperly conflate secondary liability into a form of primary liability  
3 under A.R.S. § 44-2003(A) and is directly contrary to the three-part test recognized in State  
4 v. Superior Court. Moreover, in A.R.S. § 44-2005, the Arizona legislature confirmed that  
5 “[n]othing in this article shall limit any statutory or common law right of any person in any  
6 court for any act involved in the sale of securities,” including, presumably, a common law  
7 claim for aiding and abetting securities fraud. We deny Quarles’ motion to dismiss the RB  
8 Plaintiffs’ aiding and abetting claim.

9 **III. Conclusion**

10 **IT IS ORDERED GRANTING** Greenberg’s motion to dismiss the RB Plaintiffs’  
11 primary statutory securities fraud claim against Greenberg (doc. 299).

12 **IT IS FURTHER ORDERED DENYING** Quarles’ motion to dismiss the ML  
13 Plaintiffs and RB Plaintiffs’ claims against Quarles for aiding and abetting statutory  
14 securities fraud (doc. 294).

15 DATED this 16<sup>th</sup> day of March, 2012.

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 Frederick J. Martone  
19 United States District Judge  
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IN THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

## A class action lawsuit involving Mortgages Ltd. and Radical Bunny LLC may affect your rights.

*A court authorized this notice. This is not a solicitation from a lawyer.*

- Investors have sued Greenberg Traurig, LLP ("Greenberg") and Quarles & Brady LLP ("Quarles") alleging that these law firms are liable for violations of the Arizona Securities Act in connection with the operation and fund-raising activities of Mortgages Ltd. and Radical Bunny LLC ("Radical Bunny"). The lawsuit seeks, among other things, rescission or such other relief as the court may order regarding investments sold by Mortgages Ltd.
- The Court has allowed the lawsuit to proceed as a class action on behalf of all persons who purchased investments sold by Mortgages Ltd. during the period from May 16, 2006 through June 3, 2008. See Questions 10-11 for more details.
- You are receiving this notice because Mortgages Ltd.'s records indicate that you purchased one or more investments sold by Mortgages Ltd. during the applicable time period and you may be a member of the Class on whose behalf this lawsuit was filed.
- The Court has not decided whether Greenberg or Quarles did anything wrong. The case is scheduled to go to trial on September 18, 2012. This notice should not imply that there has been any violation of law or wrongdoing by Greenberg or Quarles, or that there will be a recovery after trial. There is no money available now and no guarantee there will be. But your rights are affected, and you have a choice to make now.

### YOUR LEGAL RIGHTS AND OPTIONS IN THIS LAWSUIT:

<b>DO NOTHING</b>	<b>Stay in this lawsuit. Await the outcome. Share in possible benefits. Give up certain rights.</b> By doing nothing, you keep the possibility of getting money or other benefits that may come from a trial or settlement. But you give up any rights to sue Greenberg or Quarles on your own about the same legal claims in this lawsuit.
<b>ASK TO BE EXCLUDED FROM THE CLASS</b>	<b>Get out of this lawsuit. Get no benefits from it. Keep any rights.</b> If you ask to be excluded and money or benefits are later awarded, you won't share in those. But you keep any rights to sue Greenberg or Quarles on your own about the same legal claims in this lawsuit, subject to potential statute of limitations defenses available to Greenberg or Quarles. See Question 13 for more details.

- Lawyers for the Class must prove the claims against Greenberg and Quarles at a trial. If money or benefits are obtained from the law firms through settlement or trial, you will be notified about how to obtain your share if you did not exclude yourself from the class.
- Your options are explained in this notice. To ask to be excluded, you must act by May 11, 2012.

**QUESTIONS? CALL 1-800-847-9094 ext. 5978 TOLL FREE, OR VISIT [WWW.MLCLASSSUIT.COM](http://WWW.MLCLASSSUIT.COM)**

**PARA UNA NOTIFICACIÓN EN ESPAÑOL, VISITE NUESTRO SITIO DE INTERNET.**

**DO NOT CONTACT THE COURT FOR INFORMATION**

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## BASIC INFORMATION

### 1. Why was this notice issued?

A court has approved, or "certified," this case as a class action lawsuit that may affect you. See Questions 10-11 for more details. If you are included, you may have legal rights and options before the court decides whether the claims being made against Greenberg or Quarles on your behalf are correct. This notice explains all of these things.

The case is known as *Facciola et al v. Greenberg Traurig LLP, et al*, Case No. CV-10-1025-PHX-FJM, pending in the United States District Court for the District of Arizona ("the Court"). The persons who sued are called the "Plaintiffs."

### 2. What is this lawsuit about?

The lawsuit is about whether the Greenberg and Quarles law firms are answerable under the Arizona securities laws for losses arising out of the collapse of Mortgages Ltd. and Radical Bunny in 2008. Plaintiffs contend that Greenberg and Quarles are liable under those laws for the losses suffered by the Mortgages Ltd. investors. Greenberg and Quarles have denied all liability under these claims, believe that they did not act wrongfully or unlawfully, and have asserted legal defenses to the claims. The Court has not ruled on Plaintiffs' claims, Greenberg's and Quarles' defenses, or decided whether any Mortgages Ltd. investor is entitled to a recovery. The lawyers for the Plaintiffs and the Class will have to prove the claims at a trial, if the claims are not resolved through a settlement before trial.

### 3. What is a class action?

In a class action, one or more plaintiffs ask to act as "class representatives" to sue on behalf of others who have similar claims. All these people are a class or class members. One court resolves the issues for all class members but not for those who have excluded themselves from the class.

### 4. Why is this lawsuit a class action?

The Court decided that this lawsuit could move towards a trial as a class action because it meets the requirements of Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal court. The Court here, for example, found that:

- the people affected share common characteristics, so they will be able to identify themselves as Class members;
- it would not be practical to bring each individual member of the Class before the Court;
- the case involves questions of law or fact common to all Class members that are at the heart of the case;

- the legal claims of the Plaintiffs are typical of the claims of the Class members, as is the relief they seek;
- the Plaintiffs and their lawyers will fairly and adequately represent all of the Class members; and
- a class action would be a fair and efficient way—the superior alternative—to resolve this lawsuit.

More information about why the Court is allowing this lawsuit to be a class action is in the Class Certification Ruling, which you may view at [www.mlclasssuit.com](http://www.mlclasssuit.com).

## THE CLAIMS IN THE LAWSUIT

### 5. What does the lawsuit complain about?

The lawsuit says that Greenberg and Quarles played a role in the sale of securities by Mortgages Ltd. such that they are legally at fault under the Arizona Securities Act. You can view the Plaintiffs' First Amended Complaint at [www.mlclasssuit.com](http://www.mlclasssuit.com).

### 6. How do Greenberg and Quarles respond?

Greenberg and Quarles deny the claims and allegations in the lawsuit and deny that they did anything wrong. The Answers and Affirmative Defenses of Greenberg and Quarles to the First Amended Complaint and Affirmative Defenses can be viewed at [www.mlclasssuit.com](http://www.mlclasssuit.com).

### 7. Has the Court decided who is right?

No. The Court has not decided whether the Plaintiffs, Greenberg or Quarles is right. By establishing the Class and ordering that this Notice be provided, the Court is not suggesting that the Plaintiffs will win or lose this case. The lawyers for the Plaintiffs and the Class must prove the case at a trial if the claims are not resolved through a settlement before trial.

### 8. What are the Plaintiffs asking for?

Plaintiffs are asking for Greenberg and Quarles to pay money to members of the Class to recover their losses. Plaintiffs are also asking for interest, costs, and attorneys' fees.

### 9. Is there any money available now?

No money or benefits are available now because the Court has not yet decided whether Greenberg or Quarles did anything wrong. The Court has not yet ruled on the merits of Plaintiffs' claims or of Greenberg's and Quarles' defenses, and the two sides have not settled the case. No guarantee exists that money or benefits will ever be obtained. If they are, you will be notified about how to obtain your share of the monies and/or benefits recovered as a result of the lawsuit.

## WHO IS IN THE CLASS

### 10. How do I know if I am part of this?

The Court decided that the following persons are members of the Class:

"All persons who purchased investments sold by Mortgages Ltd. during the period from May 16, 2006 through June 3, 2008."

Excluded from the Class are (a) Scott Coles and the other Mortgages Ltd. and Radical Bunny officers and principals identified in ¶¶ 37-48 of the First Amended Complaint, and members of their immediate families, their estates, or any entity in which they have a controlling interest; (b) any parent, subsidiary or affiliate of Mortgages Ltd. or Radical Bunny and their officers, directors, managers, employees, affiliates, agents, legal representatives, heirs, predecessors, successors and assigns; (c) in-and-out investors; and (d) any Radical Bunny investor who has individually or as part of a group filed separate actions following the financial collapse of Mortgages Ltd. and Radical Bunny.

### 11. I'm still not sure if I am included in the Class.

If you are still not sure whether you are included, you can visit the website [www.mlclasssuit.com](http://www.mlclasssuit.com), call toll free 1-800-847-9094 ext. 5978, or write to Mortgages Ltd. Class Action, PO Box 33519, Phoenix, AZ 85067, for more information. Please do not contact the Court or Greenberg's or Quarles' counsel for information.

## YOUR RIGHTS AND OPTIONS

You have to decide whether to stay in the Class or to exclude yourself before the trial. You must decide this no later than May 11, 2012.

### 12. What happens if I do nothing at all?

By doing nothing, you are staying in the Class. If the Plaintiffs obtain money or benefits for the Class from Greenberg or Quarles—either as a result of a trial or a settlement—you will be able to obtain a share. But if you stay in the Class, you will be legally bound by all of the decisions that the Court makes. No matter whether the Plaintiffs win or lose the case, you will not be able to sue, or continue to sue, Greenberg or Quarles about the legal claims in this case, ever again.

### 13. What happens if I exclude myself?

If you exclude yourself from the Class and the Class gets any money or benefits (as a result of the trial or any settlement that may be reached) you will not be able to get any of that money or those benefits. But if you exclude yourself, you will not be legally bound by the Court's judgments. You will be able to sue, or continue to sue, Greenberg or Quarles on your own about the same legal claims that are involved in this case, now or in the future.

If you do pursue your own lawsuit after you exclude yourself, you will have to hire and pay your own lawyer for that case, and you will have to prove your claims, without the benefit of the work performed by the lawyers in this class action.

You should be aware that, if you exclude yourself from the Class, the lawyers for the Class will no longer represent your interests in the lawsuit or otherwise, and there are time limits that may prevent you from bringing your own lawsuit against Greenberg or Quarles.

Investors who choose to opt-out of the certified Class to pursue claims individually could face statute of limitations defenses not applicable to the Class claims. These statute of limitations defenses, if successfully asserted, would eliminate the ability of opt-out investors to obtain recovery in their own individual lawsuits. While the class action operates to stop the statute of limitations from running against investors who remain as class members, the Arizona Courts have not decided whether the class action would operate to stop the statute of limitations from barring claims by individual investors who opt-out of a certified class. *Albano v. Shea Homes Ltd. Partnership*, 227 Ariz. 121, 254 P.3d 360 (2011). Investors therefore are encouraged to discuss the matter with legal counsel before opting-out of the certified Class in this action.

#### 14. How do I ask to be excluded?

To exclude yourself, send a letter that says you want to be excluded from the Class in *Facciola v. Greenberg Traurig*. You must include your name, address, telephone number, and signature. You must mail your letter postmarked by May 11, 2012, to: MORTGAGES LTD. CLASS ACTION, PO Box 33519, Phoenix, AZ 85067.

### THE LAWYERS REPRESENTING THE CLASS

#### 15. Do I have a lawyer in this case?

Yes. The Court appointed the law firm of Tiffany & Bosco, P.A. to represent the Class as "Class Counsel."

#### 16. Should I get my own lawyer?

You do not need to hire your own lawyer because Class Counsel is working on your behalf. But if you want your own lawyer, you will have to pay that lawyer. You can ask him or her to appear in Court for you in this case if you want someone other than Class Counsel to speak for you.

#### 17. How will the lawyers be paid?

If Class Counsel obtains money or other benefits for the Class, they will ask the Court for fees and expenses. You will not have to pay any of these fees and expenses. If the Court grants their request, the fees and expenses would either be deducted from any money obtained for the Class or paid separately by Greenberg or Quarles.

### A TRIAL

#### 18. How and when will the Court decide who is right?

If the case is not dismissed or settled, the Plaintiffs will have to prove the Class claims at a trial, which will take place at the United States District Courthouse, 401 W. Washington, Phoenix, Arizona, 85003. There is no guarantee that the Plaintiffs will win any money or benefits for the Class unless they prevail at trial.

**19. Do I have to come to the trial?**

No. You will not need to attend unless you choose to do so, or you are asked to attend by the Court. Class Counsel will present the case for the Plaintiffs and the Class, and the lawyers for Greenberg and Quarles will present their defenses. You, your own lawyer, or both you and your lawyer, are welcome to appear in this case, at your own expense. The trial is currently scheduled to begin on September 18, 2012. Check the website or call 1-800-847-9094 ext. 5978 to be kept informed of the trial schedule.

**20. Will I get money after the trial?**

If the Plaintiffs obtain money or benefits as a result of the trial or a settlement, you will be notified about how to ask for a share or what your other options are at that time. These things are not known right now. Court orders and other important information about the case will be posted on the website, [www.mlclasssuit.com](http://www.mlclasssuit.com) as they become available. You can access the website, whether you stay in the lawsuit or exclude yourself, to obtain current information about this case.

**GETTING MORE INFORMATION**

**21. Are more details available?**

Visit the website at [www.mlclasssuit.com](http://www.mlclasssuit.com), where you will find the Class Certification Ruling, the First Amended Complaint that the Plaintiffs filed, and the Answers and Affirmative Defenses to the First Amended Complaint of Greenberg and Quarles. You may also call toll-free at 1-800-847-9094 ext. 5978 for more information, or write to MORTGAGES LTD. CLASS ACTION, PO Box 33519, Phoenix, AZ 85067.