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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

Arizona Corporation Commission

DOCKETED

APR 30 2012

DOCKETED BY [Signature]

DOCKET NO. S-20660A-09-0107

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.

SECURITIES DIVISION'S RESPONSE TO
RESPONDENTS' BRIEF ON ADDITIONAL
EVIDENCE

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The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby submits its Response to Respondents' Brief on Additional Evidence ("Respondents' Supplemental Brief") with respect to the administrative hearing for Respondents Horizon Partners, L.L.C., Tom Hirsch, Diane Rose Hirsch, Berta Friedman Walder, Howard Evan Walder, Harish Pannalal Shah, and Madhavi H. Shah ("Respondents"). This response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Mr. Christian J. Hoffmann II (“Hoffmann”) was recalled to testify because of the
3 emergence after the conclusion of the administrative hearing of two facsimiles dated May 21, 2007,
4 which were sent by Quarles & Brady (“Quarles”) [Hoffmann], their attorneys, to the Respondents.
5 See Exhibits R-11, R-12, and R-13. Respondents’ moved to re-open the administrative hearing in
6 order to examine Hoffmann and Respondents Hirsch and B. Walder with respect to these May 21,
7 2007, facsimiles (“Supplemental Evidence”). The Supplemental Evidence relates solely to the
8 issue of whether or not the Respondents were told on May 2, 2007, by Quarles [Hoffmann] that
9 Radical Bunny and Respondents had been engaged in the unlawful sale of securities and to
10 immediately stop raising funds for participation in the RB-MLtd Loan Program Specifically, the
11 Supplemental Evidence relates to the Division’s allegation that the Respondents violated the
12 antifraud provisions of the Arizona Securities Act when,

13 As early as the fall of 2005, and again in May 2007, Radical Bunny and the RB
14 Managers were advised by individuals who had extensive experience in securities
15 and other regulatory matters to stop selling securities until a [new] program could be
16 instituted that was compliant with applicable Arizona and federal securities laws.
17 They chose, however, to ignore the advice of such experienced securities
18 professionals, including Radical Bunny’s attorneys. Instead, they continued to
19 accept in excess of \$80 million additional funds from new and existing Participants
20 in the RB-MLtd Loan Program; continued to fund new RB-MLtd Loans in at least
21 \$1 million increments, allowing the total outstanding principal due to Radical
22 Bunny from MLtd to reach in excess of \$190 million; and continued to collect their
23 monthly management fee of two percent (2%) per annum, allowing the total to
24 reach approximately \$3.5 million in just over a two-year period.

25 See Securities Division’s Post-Hearing Memorandum at 47:22 to 48:5. Accordingly, this
26 response will not address Respondents’ numerous other violations of the antifraud provisions of
the Arizona Securities Act. *Id.* at 45:15 to 48:25.

27 Respondents focus only on the use of the phrase “interim step” in the first of the May 21,
28 2007, facsimile cover sheets as their “smoking gun,” conclusive the proof that Hoffmann could not
29 have possibly told the Respondents to stop raising money from Participants in violation of state and

1 federal securities laws. *See* Exhibits R-11 and R-12. The first of the May 21, 2007, facsimile
2 cover sheets states,

3 Attached for your review is a draft of the Participation Agreement we are
4 recommending as an interim step. An investor would execute this each time a new
5 loan is created with Mortgages Ltd to document the investor's participation in a
portion of that loan.

6 (emphasis added). Exhibits R-11 and R-12. However, the Respondents ignore the use of the
7 words "draft" and "would" as well as facts surrounding the creation of the draft documents
8 attached thereto.

9 In their Supplemental Brief, Respondents state that "the key question in this case is whether
10 the Respondents received instruction from Quarles to stop making or rolling over the loans [from
11 Radical Bunny] to Mortgages, Ltd. and to stop fractionalizing those loans and providing them to
12 their [Radical Bunny] participants [investors]." *See* Respondents' Supplemental Brief at 2:6-10
13 and 6:25 to 7:18. Stated another way, Respondents incredulously posit that if they were not
14 advised by Quarles that they (a) were, in fact, engaged in the offer and sale of securities and (b) to
15 stop selling securities, then they cannot be held liable for their violations of the registration¹ and
16 antifraud provisions of the Arizona Securities Act.² *Id.*; *see* A.R.S. §§ 44-1841, 44-1842, and 44-

17
18 ¹ Respondents suggest, without legal basis or analysis, that advice of counsel is an affirmative defense to
19 violations of the registration and antifraud provisions of the Arizona Securities Act. *See* Respondents'
20 Supplemental Brief at 7:6-10. The Division disagrees because the Arizona courts have held that the
21 registration and antifraud provisions of the Arizona Securities Act are strict liability statutes. This means
22 that Radical Bunny and/or the RB Managers need not know that the conduct in which they are engaging in
23 is proscribed, or even know that the investment involved is a security. Therefore, "advice of counsel" is not
24 an available defense to any violation under the Arizona Securities Act. *See e.g., State v. Gummison*, 127
Ariz. 110, 112-113, 618 P.2d 604, 606-607 (1980) (holding that scienter is not an element of a violation of
A.R.S. § 44-1991(A)(2) in civil cases); *State v. Tober*, 173 Ariz. 211, 213-214, 841 P.2d 206, 208-209
(holding that for purposes of A.R.S. § 44-1841(A) all notes are securities and therefore must be registered
unless exempt from registration under the Arizona Securities Act); *cf. S.E.C. v. Goldfield Deep Mines Co. of
Nevada*, 758 F.2d 459, 467 (9th Cir. 1985) (holding that, under federal law, even if the evidence that the
respondents could establish a good faith reliance on advice of counsel, "such reliance does not operate as an
automatic defense, but is only one factor to be considered in determining the propriety of injunctive relief").

25 ² Respondents also address the issue of the assessment of administrative penalties for violations of A.R.S. §
26 44-1991(A)(2) and A.R.S. § 44-1991A(3). The Division simply incorporates by reference the factual and
legal basis of its request as set forth in the Securities Division's Post-Hearing Memorandum and the
Securities Division's Reply to Respondents' Post-Hearing Memorandum.

1 1991(A). Nonsense. The Respondents' argument is unsupported in fact. In addition, even if
2 Respondents' argument is to be believed, so what? It is unsupported in law.

3 ***A. Respondents own argument contains an admission of liability under the antifraud***
4 ***provisions of the Arizona Securities Act.***

5 Respondents attach a copy of the U.S. District Court for the District of Arizona order dated
6 March 19, 2012, in the pending private class action³ ("Class Action") denying the motion to
7 dismiss the Radical Bunny Participant Plaintiffs' ("RB Plaintiffs") first amended complaint claims
8 of aiding and abetting statutory securities fraud and aiding and abetting common law fraud against
9 Quarles ("District Court Order") along with the class certification ("Class Action Certification") in
10 support of their arguments regarding the May 21, 2007, facsimiles (i.e., Exhibits R-11 and R-13).
11 See Respondents' Supplemental Brief, Exhibits A and B. Apart from another transparent attempt
12 to confuse the issues and deflect accountability, the Division is perplexed as to the reason why
13 Respondents chose to include these documents as part of their additional arguments. As to
14 Respondents' unsubtle attempt to shift the burden of responsibility for their own violations of the
15 Arizona Securities Act on Quarles, the comparative fault provisions of A.R.S. § 44-2003, which
16 allocate damages in private civil securities litigation among defendant and nonparty securities
17 violators who were at fault in the securities law violation are not applicable to regulatory
18 enforcement actions. See A.R.S. §§ 44-2001(B), 44-202(B), and 44-2003(C) to (E).

19 Furthermore, the District Court Order and Class Action Certification are not evidence in
20 these proceedings because Respondents haven't requested that this tribunal take judicial notice
21 of this evidence, pursuant to A.A.C. R14-3-109(G) and A.A.C. R14-3-109(T)(5). The Division,
22 however, does not object to their inclusion because the legal analysis contained in the District
23 Court Order concerning the unadjudicated factual allegations by the RB Plaintiffs against Quarles
24 in their first amended complaint belies Respondents' own arguments in these proceedings. The
25 Class Action involves private civil securities litigation whereby any finding of liability for

26 ³ *Facciola v. Greenberg Traurig, LLP*, U.S. District Court for the District of Arizona case no. CV2010-1025-PHX-MHM.

1 securities fraud on the part of Quarles is contingent upon the finding that the Respondents also
2 violated A.R.S. § 44-1991(A). In order for the U.S. District Court to find that Quarles aided and
3 abetted securities fraud under the Arizona Securities Act (i.e., secondary liability), there must first
4 be a finding that (a) Radical Bunny, through the conduct on the part of Respondents, was engaged
5 in the offer and sale of securities under the Arizona Securities Act; and (b) Radical Bunny, through
6 the conduct on the part of Respondents, violated A.R.S. §§ 44- 1991(A)(1), 44-1991(A)(2), and/or
7 44-1991(A)(3) (i.e., primary liability). See U.S. District Court Order at 6:28-7:28, citing A.R.S. §
8 44-2003(A) and *State v. Superior Court*, 123 Ariz. 324, 331, 599 P.2d 777, 784 (1979), *overruled*
9 *in part on other grounds by State v. Gunnison*, 127 Ariz. 110, 618 P.2d 604 (1980).

10
11 ***B. The Arizona Supreme Court has determined that A.R.S. § 44-1991(A)(2) is a strict liability statute, which decision remains binding precedent.***

12 The Respondents argue, and the Division agrees, that Arizona courts look to federal courts for
13 guidance in interpreting the Arizona Securities Act. See 1951 Ariz. Sess. Laws ch. 18 § 20; 1996
14 Ariz. Sess. Laws ch. 198, § 11(c). Consistent with the legislative history of the Arizona Securities
15 Act, the Arizona courts have repeatedly held that the purpose of the Arizona Securities Act is broad
16 public protection. See *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980) (explaining that
17 state securities laws are “designed to protect the public from fraud and deceit arising in [securities]
18 transactions.”); *Siporin v. Carrington*, 200 Ariz. 95, 103, 23 P.3d 92, 100 (Ct. App. 2001) (stating that
19 the Arizona Securities “Act ‘shall not be given a narrow or restricted interpretation or construction, but
20 shall be liberally construed as a remedial measure in order not to defeat the purpose thereof”);
21 *Eastern Vanguard Forex Ltd. v. Arizona Corp. Comm’n*, 206 Ariz. 399, 411-12, 79 P.3d 86, 98-99
22 (Ct. App. 2003) (finding federal case law “too restrictive to guard the public interests as directed by
23 our state legislature”); *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (Ct. App. 1981)
24 (departing from federal law and holding that reliance is a not an element of a violation of A.R.S. § 44-
25 1991(A)(2)); *Aaron v. Fromkin*, 196 Ariz. 224, 227, 9954 P.2d 1039, 1042 (Ct. App. 2000) (“The
26 speakers knowledge of the falsity of the statements is not a required element to proving fraud under

1 A.R.S. § 44-1991(A)(2). The statute instead imposes only an affirmative duty not to mislead.”). Such
2 a broad and liberal interpretation and construction satisfies the “intent and purpose this Act [which] is
3 for the protection of the public, the preservation of fair and equitable business practices, the
4 suppression of fraudulent or deceptive practices in the sale or purchase of securities.” 1951 Ariz. Sess.
5 Laws ch. 18, § 20. Accordingly, Arizona courts do not defer to federal securities case law when doing
6 so fails to “advance the Arizona policy of protecting the public from unscrupulous investment
7 promoters.” *Siporin*, 200 Ariz. at 103, 23 P.2d at 98.

8 Under the Securities Act, it is a fraudulent practice for any person in connection with a
9 transaction involving an offer or sale of securities do any of the following: (1) employ any
10 device, scheme or artifice to defraud; (2) make untrue statements of material fact, or omit to state
11 any material fact necessary in order to make the statements made, in the light of the
12 circumstances in which they were made, not misleading; or (3) engage in any transaction,
13 practice or course of business which operates or would operate as a fraud or deceit. A.R.S. § 44-
14 1991(A). Securities fraud may be proven by any one of these acts. See *Hernandez v. Superior*
15 *Ct.*, 179 Ariz. 515, 521, 880 P.2d 735, 741 (Ct. App. 1994).

16 In *State v. Gunnison*, the Arizona Supreme Court noted that although we are not bound by the
17 United States Supreme Court’s interpretation of the federal securities laws, harmony with the high
18 court held to maintain consistency in the application of the law. Therefore, “[u]nless there is good
19 reason for deviating from the United States Supreme Court’s interpretation; we will follow the
20 reasoning of that court in interpreting sections of our statutes which are identical or similar to federal
21 securities statutes.” 127 Ariz. 110, 113, 618 P.2d 604, 606-07 (1980). Substantially the same
22 language found in A.R.S. § 44-1991(A) appears in section 17(a) of the Securities Act of 1933 (“1933
23 Securities Act”). Compare 1933 Securities Act § 17(a), 15. U.S.C. 77q(a) and A.R.S. § 44-1991(A).
24 Section 17(a) reads:

25 It shall be unlawful for any person in the offer or sale of any securities or any
26 security-based swap agreement (as defined in section 206B of the Gramm-Leach-

Bliley Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly -

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

15 U.S.C. § 77q(a). Nearly the same language appears in Rule 10b-5. But as explained in *Ernst & Ernst v. Hochfelder*, Rule 10b-5 is limited by section 10(b) of the Exchange Act of 1934. 425 U.S. 184, 212-213 (1976). The operative language of section 10(b) makes it,

Unlawful for any person...[t]o use or employ, in connection with the purchase or sale of any security... any manipulative or deceptive device or contrivance contravention of such rules and regulations as the [Securities & Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). *Hochfelder* interpreted this language to require scienter⁴ for violations of § 17(a)(1) of the 1933 Securities Act, but held that arguably broader language in subsections (b) and (c) of Rule 10b-5 is limited by the statute. 425 U.S. at 214. In the Ninth Circuit, scienter may be established by a showing of recklessness. *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc). Proof of recklessness may be inferred from circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983).

In *Aaron v. SEC*, the Court reaffirmed *Hochfelder*, but reached a different conclusion as to subsections (2) and (3) of section 17(a) of the 1933 Securities Act because those subsections, like subsections (2) and (3) of A.R.S. § 44-1991(A), are part of the statute itself. 446 U.S. 680, 695-96 (1980) (“The language of §17(a) strongly suggests that Congress contemplated a scienter requirement under § 17(a)(1) but not under § 17(a)(2) or § 17(a)(3).”). In *Gunnison*, the Arizona

⁴ Scienter is defined as a “mental state embracing intent to deceive, manipulate or defraud.” *Hochfelder*, 425 U.S. at 193 n.12.

1 Supreme Court compared the Securities Act of 1933 § 17(a)(2) with A.R.S. § 44-1991(A)(2).⁵
2 Following *Aaron*, the court held that scienter is not a necessary element of a violation. 127 Ariz. at
3 113, 618 P.2d at 607-08. *Gunnison* remains controlling Arizona law for statutory fraud under
4 A.R.S. § 44-1991(A)(2). However, the court left open the issue of whether scienter was an element
5 of a violation of A.R.S. § 44-1991(A)(1) and/or A.R.S. § 44-1991(A)(3). *Id.* No other Arizona
6 court has ruled on this issue.

7 The Commission⁶ has previously held that scienter is not an element of a violation under
8 A.R.S. § 44-1991(A)(3). See *In re Nutek Info. Sys., Inc.*, Decision No. 59808, 1996 WL 94745 at
9 *10 (Aug. 22, 1996). Furthermore, Respondents acknowledge that when interpreting the antifraud
10 provisions of the Arizona Securities Act, the federal courts have held that scienter is not a required
11 element for a violation of A.R.S. §§ 44-1991(A)(2) or 44-1991(A)(3). See *Allstate Life Ins. Co., v.*
12 *Robert W. Baird & Co., Inc.*, 756 F. Supp. 2d 1113, 1159 (D. Ariz. 2010), citing *Orthologic Corp.*
13 *v. Columbia/HCA Healthcare Corp.*, 2002 WL 133175 at *5 (D. Ariz. Jan. 7, 2002). Accordingly,
14 the Respondents are strictly liable for their violations of two subsections of the antifraud provisions
15 of the Arizona Securities Act.

16 **C. *The facts support a finding by the Commission that Respondents acted with scienter.***

17 It is the position of the Division that scienter is not a required element for a violation of
18 A.R.S. § 44-1991(A)(1) because the Commission must broadly interpret the Arizona Securities Act
19 as a remedial measure to ensure the protection of Arizona investors. See *Siporin*, 200 Ariz. at 103,
20 23 P.3d at 98. However, even if the courts were to require that this subsection of the antifraud
21 provisions of the Arizona Securities Act be construed consistently with federal law, holding that
22 scienter is an element of a violation of A.R.S. § 44-1991(A)(1), Respondents have already been
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24 ⁵ In 1996, A.R.S. 44 1991(1) – (3) was redesignated as A.R.S. 44 1991(A)(1) – (3). 1996 Ariz. Sess. Laws
25 1996, Ch. 197.

26 ⁶ If the statute is one the agency is entrusted to enforce, the agency's interpretation is commonly given
considerable weight by the courts. See *Jenney v. Ariz. Express, Inc.*, 89 Ariz. 343, 346, 362 P.2d 664, 667
(1961); *Eastern Vanguard*, 206 Ariz. at 410, 79 P.3d at 97.

1 found to have acted with the requisite scienter and held liable for statutory fraud under the federal
2 securities laws in a regulatory enforcement action based on the same conduct that is at issue in
3 these administrative proceedings. *See* Securities Division's Post-Hearing Motion to Supplement
4 the Evidentiary Record, Exhibit A ("Order") at 7:4 to 8:9 and 9:7 to 10:6; Procedural Order dated
5 July 1, 2011, at 3:6-14. The federal court found that Respondents acted with scienter when they
6 "misrepresented their knowledge [to investors] as to whether the Radical Bunny investments were
7 subject to governing securities laws." Order at 9:15-10:6.

8 The Supplemental Evidence offers no new evidence in which to reconcile the single
9 disputed fact that Quarles told Respondents to stop selling securities to investors on May 2, 2007.
10 In fact, the Supplemental Evidence is consistent with the previous testimony of Hoffmann and
11 Respondents Hirsch and B. Walder. Quarles was retained to evaluate the RB-MLtd Loan Program
12 and ensure that Radical Bunny was in compliance with the securities laws with respect to any
13 future securities offerings. *See* Vol. XIII 2180:4 to 2188:5. It is simply illogical for Respondents
14 to argue that Quarles would instruct Radical Bunny to use draft documents with either new or
15 existing Participants [investors] absent a final determination on which documents were going to
16 need to be used in conjunction with a future complaint securities offering. In addition,
17 Respondents simply ignore the following facts:

- 18 • Horizon Partners and Radical Bunny were formed by Hirsch and others for
19 the purpose of investing in the MLtd Pass-Through Participation program
20 through the use of pooled investor funds. *See* Vol. IX at 1510:2-9 and
21 Hirsch Declaration at 2:6-8;
- 22 • Horizon Partners and Radical Bunny were vehicles for Hirsch, H. Walder,
23 and Shah to pool their money to become accredited investors and purchase,
24 for themselves and others, securities offered by MLtd. *See* Vol. IX at
25 1510:2-9;
- 26 • Radical Bunny was a client of MLS. *See* Vol. IX at 1554:12 to 1555:6;
 Exhibit R-2 at RAD00079 (duplicate at RAD00080);
- In the fourth quarter of 2006, Radical Bunny and Hirsch were advised by
 MLtd representatives that Radical Bunny may be engaged in the offer and
 sale of unregistered securities and they should seek legal advice regarding

1 the conduct of the business activities of Radical Bunny. *See* Notice ¶63 and
2 Verified Answer ¶63;

- 3
- 4 • In response to a request from MLtd regarding how many of the Participants
5 were accredited, Radical Bunny sent out a form in early 2007 to all existing
6 Participants requesting them to disclose whether or not they were accredited.
7 *See* Vol. VI at 1064:4 to 1066:9 and 1069:13-14; Exhibit S-15(a);
 - 8 • At the request of his client MLtd, Robert Kant, an attorney with the law firm
9 Greenberg Traurig, (“Kant”) met with Hirsch, Coles, and other MLtd
10 representatives in December 2006 or January 2007 because Kant and MLtd
11 were concerned about the manner in which Radical Bunny was raising
12 money from investors. Specifically, Kant and MLtd were concerned about
13 the absence of a private offering memorandum, subscription agreements to
14 ascertain the qualification of investors, and a registered securities dealer.
15 *See* Vol. VIII at 1224:15 to 1225:6;
 - 16 • Kant believed that Hirsch was selling securities. *See* Vol. VIII at 1228:21 to
17 1229:2;
 - 18 • In February 2007, the RB Managers retained Quarles on behalf of Radical
19 Bunny to provide legal advice whether Radical Bunny held a valid security
20 interest in the assets of MLtd. and on Radical Bunny’s securities-related
21 activities. *See* Vols. VII at 1199:21-9 and V at 798:15-16;
 - 22 • On February 12, 2007, were advised by Q&B that it was likely that Radical
23 Bunny and the RB Managers: (a) were offering securities in the form of
24 investment contracts; (b) they would be required to register as a securities
25 dealer or securities salesmen, obtain an investment adviser or investment
26 adviser representative license, and/or obtain a mortgage banker’s or brokers
license in order to continue to conduct the business of Radical Bunny; and
(c) they had violated the registration provisions of Arizona and federal
securities laws. *See* Vol. V at 794:6 to 796:12 and 798:3-14; Exhibits S-42
at Q&B-SEC 002750 and S-45(b) and S-24 at RB70535;
 - In April 2007, B. Walder represented to a new Participant that so long as
Radical Bunny did not actively solicit for investors, then Radical Bunny
would not be subject to the securities laws. *See* Vol. X at 1657:23 to
1658:12;
 - On May 2, 2007, the RB Managers were advised to immediately stop
offering and selling securities. Quarles did not put this legal advice to the
RB Managers in writing because its advice to stop selling securities was
“simple, straight forward, ‘no’ is not a hard word to understand, and Quarles
gave a lot of credence to the people with whom Quarles was discussing these
matters.” *See* Vol. V at 823:1-13, 827:12-13, and 945:19 to 946:18;

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- On May 2, 2007, Hirsch told Q&B that he wanted Radical Bunny to be compliant with the securities laws and he understood what needed to be done to become complaint. *See* Vol. V at 799:6-22 and 826:16-24; Exhibit S-22(g);
 - On June 19, 2007, Q&B again advised Hirsch that there were not be any roll-overs, no new sales, do not use any draft documents which were intended to be used in a future securities offering. Hirsch agreed and stated that he understood. *See* Vol. V at 829:14-19; Exhibit S-45(c);
 - On August 13, 2007, an “all hands” meeting took place at Kant’s office at the request of MLtd. Kant, Coles, Q&B, and the RB Managers all attended. The purpose of the meeting was to address the ongoing issues regarding the defective collateral for the RB-MLtd Loans and Radical Bunny’s compliance with federal and state securities laws. *See* Vol. VIII 1235:16 to 1236:5; Exhibit R-2 at RAD00023-00035 and RAD00039-00040;
 - Kant told Hirsch that “if they were continuing to offer securities without addressing the concern that I raised, people go to jail for that, and he [Hirsch] could go to jail.” Following the meeting, Kant received an e-mail from Q&B thanking Kant for making the statement to Hirsch which also stated, “[Y]ou have made my job easier.” *See* Vols. III at 1236:13 to 1237:3 and VIII at 1268:6-14;
 - On June 8, 2008, Hirsch admitted to Quarles that Radical Bunny and the RB Managers had not followed their advice which had been articulated to them on May 2, 2007, “We’ve done everything wrong.” *See* Vol. V at 944:24 to 945:11 and 949:12 to 950:20; Exhibit S-22(g);
 - Radical Bunny and the RB Managers never disclosed to the Participants in writing that Q&B had been retained to examine whether or not they were in compliance with Arizona and federal securities laws. *See* Vol. IX at 1594:25 to 1595:5;
 - All Respondents participated in conversations about compliance with securities laws. *See* Exhibits R-2 at RAD00035-45, RAD00053, RAD00055-RAD00056, RAD00058, RAD00060, and RAD00075-RAD00076 (duplicate at RAD00077-RAD00078); S-22(k); and S-22(m);
 - Since approximately June 2007, Radical Bunny required each new Participant to execute a form entitled “Loan Participation Disclosure Statement and Acknowledgements.” The form was created by Hirsch by using various drafts created by Q&B. While the form refers to documents entitled “Security Agreement,” “Term Notes,” and “Participant Notes,” no documents ever existed. The fact that they did not exist was never disclosed to investors. *See* Vols. VI at 1070:3 to 1071:20 and 1072:11 to 1073:5 and IX at 1596:11 to 1598:14 and 1598:15 to 1604:22; Exhibits S-16(a) and S-17;

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- In January 2008, B. Walder represented to a Participant that there was a “loophole” in the securities laws in that Radical Bunny could continue to “legally” sell the RB-MLtd Loan Program until \$200 million in RB-MLtd Loans was reached. *See* Vol. III at 410:2 -13, 423:15-22, and 441:24-15;
 - B. Walder was once a registered securities salesman and was associated with an SEC-registered broker-dealer and, as such, became familiar with the rules governing representations that can be made to investors as well as distribution of disclosure documents to investors. *See* Vol. VIII at 1287:22 to 1290:1;
 - The first May 21, 2007, facsimile cover sheet contain the words “draft” and “would” are used, implying that the Participation Agreement and its exhibits were not in final form. *See* Exhibits R-11, R-12, and R-13;
 - Following receipt of the May 21, 2007, facsimiles, B. Walder made suggested changes to the draft documents (exhibits A-C to the Participation Agreement) and gave them to Quarles, after which they had ongoing discussions regarding revisions. *See* Vol. XIII at 2210:24 to 2211:23; Exhibit R-12;
 - The Loan Participation Agreement, and the attachments thereto (i.e., Promissory Note, Security Agreement, and Loan Disclosure Statement and Acknowledgements) were never finalized by Quarles. *See* Vols. VI at 1070:3 to 1071:20 and 1072:11 to 1073:5, IX at 1596:11 to 1598:14 and 1598:15 to 1604:22, and XIII at 2200:17 to 2202:9; Exhibits S-16(a) and S-17;
 - Hirsch admitted that he “plagiarized” the form used by Radical Bunny entitled “Loan Disclosure Statement and Acknowledgements” from various drafts prepared by Quarles by picking out bits and pieces then formulated into a form used by Radical Bunny beginning in May 2007 through June 2008. *See* Vol. XIII at 2230:1 to 2241:6; Exhibits R-13 and R-16(b);
 - From 2006 until June 2008, MLtd did not repay any of the principal due to Radical Bunny under the RB-MLtd Loans. *See* Vol. XII at 1982:18 to 1982:2; Exhibit S-37(a) at p.34, §(11); and
 - From May 2007 until June 2008, Radical Bunny continued to service all of the outstanding RB-MLtd Loans by receiving monthly interest payments from MLtd and, in turn, paying monthly interest payments to the Participants in the RB-MLtd Loan Program for which Radical Bunny and Respondents received a management fee. *See* Vol. XIII at 2227:10 to 2229:4.

25 This evidence shows that Respondents knew, or where reckless in not knowing, about potential

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1 securities law violations but failed to disclose this information to investors.⁷ Accordingly, the
2 Respondents violated the antifraud provisions of the Arizona Securities Act. *See* A.R.S. § 44-
3 1991(A).

4 **CONCLUSION**

5 For the reasons set forth above and in the Division post-hearing memoranda, the Division
6 requests that the relief requested in the Securities Division's Post-Hearing Memorandum be
7 granted. *See* Securities Division's Post-Hearing Memorandum at 54:16 to 55:8.

8 RESPECTFULLY SUBMITTED this 30th day of April, 2012.

9 

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

13
14 ORIGINAL and 13 copies of the foregoing
15 filed this 30th day of April, 2012, with:

16 Docket Control
17 Arizona Corporation Commission
18 1200 W. Washington St.
19 Phoenix, AZ 85007

20 COPY of the foregoing hand-delivered
21 this 30th day of April, 2012, to:

22 Lyn Farmer
23 Administrative Law Judge
24 Arizona Corporation Commission
25 1200 W. Washington St.
26 Phoenix, AZ 85007

⁷ The evidentiary record also contains sufficient facts showing that Respondents were advised by other professionals who had extensive experience in securities and other regulatory matters to stop selling securities until a [new] program could be instituted that was compliant with applicable Arizona and federal securities laws. They chose, however, to ignore their advice. *See* Securities Division's Post-Hearing Memorandum at 14:16 to 16:4 and 24:8 to 25:12.

1 COPY of the foregoing mailed (along with a courtesy copy via electronic mail)
this 30th day of April, 2012, to:

2 Michael J. LaVelle
3 Matthew K. LaVelle
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4 2525 E. Camelback Road, Suite 888
Phoenix, AZ 85016

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6 By:  _____
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