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ARIZONA CORPORATION COMMISSION  
Arizona Corporation Commission

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MAY 07 2012

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11 *Berta Walder, Howard Walder, Harish P. Shah, Madhavi H. Shah and Horizon Partners, LLC*

DOCKETED  
HORIZON PARTNERS, LLC  
JM

**BEFORE THE ARIZONA CORPORATION COMMISSION**

10 In the matter of:  
11  
12 **RADICAL BUNNY, L.L.C.**, an Arizona  
13 limited liability company,  
14 **HORIZON PARTNERS, L.L.C.**, an  
15 Arizona limited liability company,  
16 **TOM HIRSCH** (aka **TOMAS N.**  
17 **HIRSCH**) and **DIANE ROSE HIRSCH**,  
18 husband and wife;  
19 **BERTA FRIEDMAN. WALDER** (aka  
20 **BUNNY WALDER**, a married person,  
21 **HOWARD EVAN WALDER**, a  
22 married person,  
23 **HARISH PANNALAL SHAH** and  
24 **MADHAVI H. SHAH**, husband and  
25 wife,  
26 Respondents.

**DOCKET NO. S-20660A-09-0107**

**RESPONDENTS' REPLY BRIEF  
ON ADDITIONAL EVIDENCE**

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1 While the Staff's paperwork has become increasingly strident with respect  
2 to Mr. Hoffman's unsupported claims that fervor has not caused the staff to deal  
3 with the raw facts. Why, if the documents of April 21, 2007 (Ex. R-11, R-12) did  
4 not recognize that Radical Bunny's operations were continuing, did the proposed  
5 new document contain the name of the existing entity rather than one  
6 contemplated for future use? Why did such a big, well organized firm fail to send  
7 a letter documenting advice, which if it actually was given, would have been  
8 "momentous" in Mr. Hoffman's own words? Why did the notes made during the  
9 crucial phone call fail to reflect the supposed stop order? Why were there no  
10 instructions or planning for the upcoming participants' meeting where the  
11 "instruction" would have a profound effect on the participants? And finally,  
12 where is the analysis of the effect of taking almost \$200 million out of Mortgages  
13 Ltd. during what was a very apparent market down turn?

14 Unable to answer or even deal with those questions the Staff instead claims,  
15 as did Mr. Hoffman, that the word interim does not mean interim. In fact, Staff as  
16 much as concedes that there was no instruction to stop at p. 4 of its memorandum,  
17 "...even if Respondents' argument is to be believed so what?"

18 "So what" is that no Respondent had the necessary intent required to find an  
19 act subject to penalty under our statute. The present state of the law is that in  
20 1980, *State v. Gunnison*, 127 Ariz. 110, 618 P.2d, 604 (1980) held no scienter was  
21 required under A.R.S. §44-1991 (A)(2). Subsection (A)(1) has been held by the  
22 courts to require scienter. See *Allstate Life Ins. Co., v. Robert W. Baird & Co.,*  
23 *Inc.*, 756 F. Supp. 2<sup>nd</sup> 1113 (D. Ariz. 2010) and the cases cited therein. The  
24 Commission apparently has held no scienter required for an A(3) violation. In  
25 *Nutek Info. Sys. Inc. Dec. # 59 808*, 1996 WL T4745 (1996). But both *Nutek* and  
26 *Gunnison* arise from facts that predate the legislature's mandate to conform to the  
27 Federal interpretation. 1996 Ariz. Sess. Laws Ch. 198 §11(c). That should mean  
28 that, as in Federal law, every violation of an Arizona securities statute requires the

1 same intent as the Federal law which requires scienter for each violation, *Ernst &*  
2 *Ernst v. Hochfelder*, 425 U.S. 185 (1976). Under *Hochfelder* a mental state  
3 “embracing intent to deceive, manipulate or defraud” must be found. *Hochfelder*,  
4 *supra*, at 193, n.12.

5 There is simply no intent to defraud in this case. The Radical Bunny  
6 Respondents never tried to deceive anybody. They sought legal advice from a  
7 number of sources. As Mr. Hoffman put it, the Radical Bunny business structure  
8 “in and of itself, that structure, that contractual structure does not violate the  
9 securities law in and of itself” (T.2147-2148).

10 The first bullet points of the Staff’s supposed wrongful conduct only relates  
11 to organizing a business. The alleged May 2, 2007 stop order never happened and  
12 Mr. Kant’s self-serving claim that he thought Radical Bunny was violating  
13 securities laws is belied by his client Mortgages Ltd.’s failure to disassociate itself  
14 from what Mr. Kant now says he thought to be an illegal operation.

15 The only other real evidence that related to intent or scienter is Mr. Hirsch’s  
16 re-write of a disclosure document. Mr. Hirsch, not a lawyer, admittedly made  
17 errors but his intent in creating the document was to provide a disclosure more  
18 extensive than had previously been given. Nothing shows the re-write was  
19 deliberately false or even careless. It was a reasonable attempt by Mr. Hirsch to  
20 provide an immediate disclosure, one his indolent lawyers never seemed to get  
21 finalized. Worse for the Staff, no evidence ties any number of participations to  
22 the brief use of this document, nor has anyone tied Mr. Hirsch’s technical errors to  
23 any participants’ determination to become involved or continue as notes rolled  
24 over. None of the non-contested facts shows any attempt to “deceive, manipulate,  
25 or defraud.” They show four earnest individuals attempting to learn what to do to  
26 continue a program that had benefited many. That is not scienter. The entire case  
27 falls.

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1 In the alternative, if the pre-legislative administration case of *Gunnison* is to  
2 be followed and the 1998 mandate read out of the law, then the Staff has proven at  
3 best 8 violations and the Commission's powers are limited accordingly.

4 Conclusion

5 This case should be dismissed.

6  
7 RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of May, 2012.  
8  
9

10 **LAVELLE & LAVELLE, PLC**

11  
12 By: 

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

17 ORIGINAL and 13 COPIES filed this  
18 7<sup>th</sup> day of May, 2012 with:

19 **ARIZONA CORPORATION COMMISSION**  
20 Securities Division  
21 1300 West Washington, Third Floor  
22 Phoenix, Arizona 85007

23 COPY of the foregoing MAILED this  
24 17<sup>th</sup> day of April, 2012 to:

25 Lyn Farmer  
26 Chief Administrative Law Judge  
27 **ARIZONA CORPORATION COMMISSION**  
28 1200 West Washington  
Phoenix, Arizona 85007

1 COPY of the foregoing MAILED this  
2 7<sup>th</sup> day of May, 2012 to:

3 Julie Coleman  
4 **ARIZONA CORPORATION COMMISSION**  
5 Securities Division  
6 1300 West Washington, Third Floor  
7 Phoenix, Arizona 85007

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