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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

112 JUL 18 P 3:38

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 RESPONSE TO
RESPONDENTS' MOTION TO
SUPPLEMENT THE RECORD

Arizona Corporation Commission

DOCKETED

JUL 18 2012

DOCKETED BY [Signature]

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby submits its Response to Respondents' Motion to Supplement the Record filed on July 16, 2012, ("Respondents' Motion") 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"). The Respondents' Motion should be denied because (1) Respondents fail to attach to their motion the proposed evidence they seek to be judicially noticed; and (2) the proposed evidence does not contain any adjudicative facts that are not subject to reasonable dispute or otherwise relevant to the issue of Respondents' liability for violations of the Arizona Securities Act. This response is

1 supported by the following Memorandum of Points and Authorities.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

13 Rule 201 of the Arizona Rules of Evidence applies to judicial notice of so-called
14 “adjudicative facts” – facts which are relevant to determining the rights and liabilities of the parties
15 in a particular case. *See* Ariz. R. Evid. 201(a). In order to be judicially noticed, the fact in question
16 must be one which is not subject to reasonable dispute in that it is either (1) generally known
17 within the territorial jurisdiction of the trial court or (2) capable of accurate and ready
18 determination by resort to sources whose accuracy cannot reasonably be questioned. *See* Ariz. R.
19 Evid. 201(b); *Beyerle Sand & Gravel, Inc. v. Martinez*, 118 Ariz. 60, 574 P.2d 853 (Ct. App.
20 1977).¹ A high degree of the probability of the truth of the fact is not enough. *See Phelps Dodge*
21 *Corp. v. Ford*, 68 Ariz. 190, 203 P.2d 633 (1949).

22 Respondents request that the ALJ take judicial notice of and include in the administrative
23 hearing record (1) a stipulation of settlement dated June 4, 2012, between the Lead Plaintiffs and
24 Defendant Quarles & Brady, LLP (“Quarles”); and (2) a stipulation of settlement dated June 20,

25 _____
26 ¹ In support of their motion, Respondents rely on the Federal Rules of Evidence and federal judicial
decisions construing the Federal Rules of Evidence, both of which are inapplicable to proceedings before
the Commission.

1 2012, between the Lead Plaintiffs and Defendant Greenberg Traurig (“Greenberg”) (collectively,
2 the “Settlements”) which have been publically filed in the class action *Robert Facciola v.*
3 *Greenberg Traurig, LLP, et al.*, Case No. 2:10-cv-01025-FJM (D. Ariz.), currently pending against
4 Greenberg and Quarles in the United States District Court for the District of Arizona (“Facciola
5 Litigation”). The Facciola Litigation involves approximately 900 RB Participants and 1,100
6 Mortgages Ltd. investors who lost in excess of \$940 million as a result of their investments with
7 these entities. The Settlements await final approval by the U.S. District Court. Respondents are
8 requesting that the ALJ take judicial notice of certain facts contained in the Settlements that are
9 relevant to this administrative proceeding, but they fail state with specificity which facts contained
10 in the Settlements are relevant to the determination of Respondents’ liability for their respective
11 violations of the registration and anti-fraud provisions of the Arizona Securities Act. The
12 Settlements contain no such facts. Accordingly, the Respondents’ Motion should be denied.

13 ***A. The Settlements contain no factual evidence in which to reconcile disputed facts in these***
14 ***proceedings.***

15 The proposed evidence offers no factual evidence in which to reconcile the disputed facts
16 that (1) Greenberg [Robert Kant] told Tom Hirsch that Radical Bunny and the RB Managers were
17 engaging in criminal conduct as a result of their repeated violations of the Arizona and federal
18 securities laws and (2) Quarles [Christian J. Hoffmann II] told Respondents to stop selling
19 securities to investors on May 2, 2007. Rather, Respondents attempt to equate the fact that
20 Greenberg and Quarles agreed to settle the \$940 million class action litigation for \$88 million as an
21 admission of liability (i.e., this portion of their testimony cannot be believed). *See* Respondents’
22 Motion at p. 2, lines 5-8. Contrary to Respondents’ mere speculation and duplicative argument, the
23 Settlements specifically state that both Greenberg and Quarles “denied, and continue[s] to deny,
24 each and every claim and contention alleged against [them] by Lead Plaintiffs in the Facciola
25 Litigation.” *See* Settlements at ¶¶H-I. Moreover, the stated reason for the resolution of the
26 Facciola Litigation was an assessment by both Lead Plaintiffs and these defendants of the

1 mounting cost of protracted litigation. *Id.* at ¶¶H-K. Simply put, the Settlements do not provide
2 any additional factual evidence relevant to either the credibility of these witnesses testimony or the
3 liability of Respondents for their violation of the Arizona Securities Act.

4 Even if the ALJ were to agree with Respondents' speculation and take judicial notice of the
5 Settlements, as the Division has already stated, in order for Greenberg and/or Quarles to have aided
6 and abetted the violation of the registration and antifraud provisions of the Arizona Securities Act
7 by the Respondents (i.e., secondary liability), then the Respondents (1) engaged in the offer and
8 sale of unregistered securities under the Arizona Securities Act, (2) engaged in the offer and sale of
9 securities under the Arizona Securities Act while not registered as securities salesmen, and (3)
10 committed fraud in connection with the offer and sale of securities within or from Arizona, all in
11 violation of the Arizona Securities Act (i.e., primary liability). *See* Securities Division's Response
12 to Respondents' Brief on Additional Evidence filed on April 30, 2012, at p. 4, line 5-p.5, line 9.
13 The Division is again perplexed as to why the Respondents would request that this adverse and
14 prejudicial evidence be included in the administrative hearing record. The Division can only
15 assume from Respondents' repeated attempts to include this evidence in the administrative hearing
16 record that (1) Respondents have conceded that each of them repeatedly violated A.R.S. §§ 44-
17 1841, 44-1842, and 44-1991(A); and (2) Respondents are attempting to underscore the
18 egregiousness of their conduct by "finger pointing" in the hope that the Commission will assess
19 against them a lesser amount in administrative penalties than that amount requested by the
20 Division. *See* Respondents Motion in Limine filed on October 7, 2010, Securities Division's
21 Response to Respondents' Motion in Limine filed on October 12, 2010, and Securities Division's
22 Post-Hearing Memorandum filed on February 18, 2011, at p.51, line 6-p. 52, line 21.

23 ***B. Any monies received by the RB Participants in the Facciola Litigation is relevant only to***
24 ***the right to receive a legal offset to restitution ordered to be paid by the RB Managers to***
25 ***the Commission, which credit for such payments to the RB Participants can occur after***
26 ***the entry of a Decision by the Commission.***

If the Settlements are approved, the members of the Settlement Class, including the RB

1 Participants, will receive a pro-rata distribution of the "Net Settlement Fund," which is defined to
2 mean the total amount of settlement proceeds from the Settlements in addition to settlements by
3 other named defendants in the Facciola Litigation ("Settlement Fund"), less the payment of (a)
4 attorneys fees in the amount of 15% of the Settlement Fund (i.e., \$9,690,000) plus unreimbursed
5 litigation expenses; (b) attorneys fees in the amount of \$704,000 for counsel for RB Liquidation,
6 LLC; (c) administration costs; and (d) taxes and tax related expenses. *See* Settlements at ¶¶1(y)
7 and 9. Arguably, the ALJ could take judicial notice of the fact that the RB Participants will receive
8 payments in the Facciola Litigation. However, it is not necessary because the Division has already
9 requested that the RB Managers receive a credit for all payments received by the RB Participants in
10 the Facciola Litigation as well as from the Mortgages Ltd. and Radical Bunny bankruptcies. *See*
11 Securities Division's Post-Hearing Memorandum filed on February 18, 2011, at p.55, fn. 37;
12 A.A.C. R14-4-308. Furthermore, until the Settlements receive final approval by the United States
13 District Court and distributions have been made to the RB Participants who are members of the
14 Settlement Class, the credit amount cannot be calculated. As such, the "adjudicative fact" in
15 question (i.e., the actual amount of legal offsets, if any, to the amount of restitution owed) is still
16 subject to reasonable dispute and, thus, cannot be judicially noticed. *See* Ariz. R. Evid. 201(b).

17 CONCLUSION

18 For the reasons set forth above, the Division requests that the Respondents' Motion to
19 Supplement the Record be denied. Furthermore, the Division reiterates its request that an order by
20 the Commission for the payment of restitution by Respondents be subject to legal offsets.

21 RESPECTFULLY SUBMITTED this 18th day of July, 2012.

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23 Julie Coleman
24 Chief Counsel of Enforcement for the Securities
25 Division of the Arizona Corporation Commission
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