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BEFORE THE ARIZONA CORPORATION COMMISSION

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2012 JUL 20 P 3:05

GARY PIERCE, Chairman
BOB STUMP
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AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:)
 RADICAL BUNNY, L.L.C., an Arizona)
 limited liability company,)
 HORIZON PARTNERS, L.L.C., an Arizona)
 limited liability company,)
 TOM HIRSCH (aka THOMAS N. HIRSCH))
 and DIANE ROSE HIRSCH, husband and)
 wife,)
 BERTA FRIEDMAN. WALDER (aka)
 BUNNY WALDER), a married person,)
 HOWARD EVAN WALDER, a married)
 person,)
 HARISH PANNALAL SHAH and)
 MADHAVI H. SHAH, husband and wife,)
 Respondents.)

DOCKET NO. S-20660A-09-0107

SECURITIES DIVISION'S RESPONSE TO
RESPONDENTS' AMENDED MOTION TO
SUPPLEMENT THE RECORD

Arizona Corporation Commission
DOCKETED

JUL 20 2012

DOCKETED BY	<i>JM</i>
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The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby submits its Response to Respondents' Amended Motion to Supplement the Record filed on July 20, 2012, ("Respondents' Amended 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 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 supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 The Arizona Administrative Code and the Arizona Rules of Practice and Procedure before the
3 Corporation Commission (“Commission Rule(s)”) contain explicit provisions addressing procedures
4 in contested adjudicative proceedings before the Commission. *See* A.R.S. § 44-1601, *et seq.* and
5 A.A.C. R14-3-101, *et seq.* Rule R14-3-101(A) states that the Rules of Practice and Procedure
6 govern in all cases before the Commission, including cases arising out of Securities Act. A.A.C.
7 R-14-3-101(A). Commission Rule R14-3-109(G) permits the administrative law judge (“ALJ”) to
8 consent to the introduction of further evidence even after a party “has rested his case.” A.A.C.
9 R14-3-109(G). Commission Rule R14-3-109(T)(5) permits the ALJ to take official notice of
10 “such other matters as may be judicially noticed by the Courts of the state of Arizona.” A.A.C.
11 R14-3-109(T)(5).

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

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

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 (“Greenberg”) (“Greenberg Settlement”) (collectively, the “Settlements”) which have been
2 publically filed in the class action *Robert Facciola v. Greenberg Traurig, LLP, et al.*, Case No.
3 2:10-cv-01025-FJM (D. Ariz.), currently pending against Greenberg and Quarles in the United
4 States District Court for the District of Arizona (“Facciola Litigation”). The Facciola Litigation
5 involves approximately 900 RB Participants and 1,100 Mortgages Ltd. investors who lost in excess
6 of \$940 million as a result of their investments with these entities. The Settlements await final
7 approval by the U.S. District Court. Respondents are requesting that the ALJ take judicial notice
8 of certain facts contained in the Settlements that are relevant to this administrative proceeding, but
9 they fail state with specificity which facts contained in the Settlements are relevant to the
10 determination of Respondents’ liability for their respective violations of the registration and anti-
11 fraud provisions of the Arizona Securities Act. The Settlements contain no such facts.
12 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 \$88.5 million as
21 an 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* Quarles Settlement at p. 3, line 26- p.4, line 16 and p. 27, line 19 – p. 28, line 17;
26 Greenberg Settlement at p. 4, lines 4 – 21 and p. 29, line 26- p. 30, line 17 . Moreover, the stated

1 reason for the resolution of the Facciola Litigation was an assessment by both Lead Plaintiffs and
2 these defendants of the mounting cost of protracted litigation. *See Quarles Settlement* at p. 4, line
3 17- p. 5, line 23; *Greenberg Settlement* at p. 4, line 22 – p. 6, line 3. Simply put, the Settlements do
4 not provide any additional factual evidence relevant to either the credibility of these witnesses
5 testimony or the liability of Respondents for their violation of the Arizona Securities Act.

6 Even if the ALJ were to agree with Respondents' speculation and take judicial notice of the
7 Settlements, as the Division has already stated, in order for Greenberg and/or Quarles to have aided
8 and abetted the violation of the registration and antifraud provisions of the Arizona Securities Act
9 by the Respondents (i.e., secondary liability), then the Respondents (1) engaged in the offer and
10 sale of unregistered securities under the Arizona Securities Act, (2) engaged in the offer and sale of
11 securities under the Arizona Securities Act while not registered as securities salesmen, and (3)
12 committed fraud in connection with the offer and sale of securities within or from Arizona, all in
13 violation of the Arizona Securities Act (i.e., primary liability). *See Securities Division's Response*
14 *to Respondents' Brief on Additional Evidence* filed on April 30, 2012, at p. 4, line 5-p.5, line 9.
15 The Division is again perplexed as to why the Respondents would request that this adverse and
16 prejudicial evidence be included in the administrative hearing record because a fact judicially
17 noticed is *conclusively established*, and evidence cannot thereafter be received to dispute it. *See*
18 *Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 203 P. 2d 633; *Bade v. Drachman*, 4 Ariz. 55, 417 P.2d
19 689 (1966). Accordingly, the Division can only assume from Respondents' repeated attempts to
20 include this evidence in the administrative hearing record that Respondents have conceded that
21 each of them repeatedly violated A.R.S. §§ 44-1841, 44-1842, and 44-1991(A).

22 The only other purpose that the Settlements may serve the Respondents is that they are
23 using the fact that Greenberg and Quarles settled the private party class action as an attempt to
24 underscore the egregiousness of their conduct by "finger pointing" in the hope that the Commission
25 will assess against them a lesser amount in administrative penalties than that amount requested by
26 the Division. *See Respondents Motion in Limine* filed on October 7, 2010, *Securities Division's*

1 Response to Respondents' Motion in Limine filed on October 12, 2010, and Securities Division's
2 Post-Hearing Memorandum filed on February 18, 2011, at p.51, line 6-p. 52, line 21. Respondents
3 incredulously ignore and continue to deny accountability for their own actions in violation of the
4 Arizona Securities Act. Respondents refuse to acknowledge the admonishments concerning the
5 applicability of the Arizona and federal securities laws to the business activities of Radical Bunny
6 which given to them by securities law professionals and Mortgages Ltd. representatives well in
7 advance of the time that Radical Bunny retained Quarles in early 2007, not to mention what legal
8 advice was provided by their attorneys afterwards. *See* Securities Division's Response to
9 Respondents' Brief on Additional Evidence filed on April 30, 2012, at p.9, line 8-p. 13, line 3.
10 Common sense should have prevailed on the part of the Respondents -- when there was even an
11 inkling of a doubt as to whether or not the offer and sale of the RB-ML Loan Program to the RB
12 Participants was in compliance with the Arizona and federal securities laws, Respondents should
13 have immediately stopped taking money from investors.² *Id.* No instruction from Mr. Sell (fall
14 2005), Mr. Logan (fall 2006), Mr. Kant (fall 2006), or even Quarles (January 2007) was necessary
15 because it was enough that the securities' questions remained unanswered, as alleged by the
16 Respondents. Respondents did not wait; rather, they elected to raise an additional \$80 million
17 from investors after they retained Quarles. *Id.* To compound the problem, Respondents continued
18 to misrepresent to RB Participants that the Arizona Securities Act did not apply to their activities.
19 *See e.g., id.* at p. 12, lines 1-4; *see* A.R.S. § 44-1991(A)(2).

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

24 If the Settlements are approved, the members of the Settlement Class, including the RB
25 Participants, will receive a pro-rata distribution of the "Net Settlement Fund," which is defined to

26 ² Respondents were under no obligation to discontinue the servicing of the RB-ML Loans, as the repayment to the RB Participants of interest that was received from Mortgages Ltd. was not in violation of the Arizona Securities Act.

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

16 CONCLUSION

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

20 RESPECTFULLY SUBMITTED this 20th day of July, 2012.

21 

22 Julie Coleman
23 Chief Counsel of Enforcement for the Securities
24 Division of the Arizona Corporation Commission
25
26

1 ORIGINAL and 13 copies of the foregoing
2 filed this 18th day of July, 2012, with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 this 20th day of July, 2012, to:

9 Lyn Farmer
10 Administrative Law Judge
11 Arizona Corporation Commission
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed (along with a courtesy copy via electronic mail)
15 this 20th day of July, 2012, to:

16 Michael J. LaVelle
17 Matthew K. LaVelle
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19 2525 E. Camelback Road, Suite 888
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By: 