

ORIGINAL



0000140621

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2012 NOV 29 A 8:22

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

ARIZONA 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 IN
OPPOSITION TO RESPONDENTS' MOTION
TO STAY THE ISSUANCE OF A
RECOMMENDED OPINION AND ORDER

(Assigned to Hon. Lyn Farmer)

Arizona Corporation Commission

DOCKETED

NOV 29 2012

DOCKETED BY [Signature]

The Securities Division ("Division") of the Arizona Corporation Commission
("Commission") hereby submits its Response in Opposition to Respondents' Motion to Stay the
Issuance of a Recommended Opinion and Order ("Motion to Stay") 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 to Stay should be denied because (1) the Arizona
Legislature has expressly declined to instruct the Arizona courts to always follow federal case law
in construing the provisions of Arizona Securities Act ("Act") in instances when there are
substantially similar provisions in the federal securities statutes; and (2) the Division has brought

1 an action against the Respondents as primary actors for their respective violations of the
 2 registration and anti-fraud provisions of the Act; therefore, whether the Arizona Supreme Court
 3 continues to recognize an implied cause of action against a secondary actor for aiding and abetting
 4 the primary violations of the Act by another person is not relevant to the determination of
 5 Respondents' liability under the Act by the Commission. This response is supported by the
 6 following Memorandum of Points and Authorities.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **A. The Arizona Legislature has expressly declined to instruct the Arizona Courts to**
 9 **always follow federal case law in construing the provisions of the Act.**

10 The Respondents argue that the Administrative Law Judge ("ALJ") should stay the issuance
 11 of a recommended opinion and order ("ROO") in these proceedings because the issue of "whether
 12 the Radical Bunny interests [in the RB-Participant Loan Program] were securities [as defined under
 13 the federal securities laws] is presently pending before the Ninth Circuit [Court of Appeals]" in an
 14 "appeal relied upon by the Commission." See Motion to Stay at p.1, line 28 to p.2, line 3.¹ The
 15 Division disagrees because (1) the Respondents misconstrue the 1996 Legislative mandate; and (2)
 16 the Commission has not "relied" on the SEC Judgment.

17 1. Respondents misconstrue the 1996 Legislative Mandate.

18 Here, the Commission must determine whether the interests in the RB-Participant Loan
 19 Program constitute securities in the form of investment contracts² and/or notes (for purposes of

20 ¹ The appeal to which Respondents refer is their appeal from U.S. District Court's entry of summary
 21 judgment against the Respondents in the civil regulatory enforcement brought by the United States
 22 Securities and Exchange Commission ("SEC") for violations of the federal securities laws ("SEC
 23 Judgment"). See *SEC v. Radical Bunny, LLC, Tom Hirsch, Berta Walder, Howard Walder, and Harish P.*
 24 *Shah*, case no. CV-09-1560PHX-SRB in the United States District Court for the District of Arizona ("SEC
 25 Enforcement Action"). The Administrative Law Judge ("ALJ") took judicial notice of the SEC Judgment
 26 on July 1, 2011. See Procedural Order dated July 1, 2011 ("Procedural Order"), at p.2, line 4 through p. 3,
 line 15. Interestingly, the notice of appeal for the SEC Judgment was filed on May 20, 2011 – over a year
 and a half ago.

² See Securities Division's Post-Hearing Memorandum at p. 40, line 6 through p.41, line 11 filed on
 February 18, 2011, for the applicable law regarding when an investment constitutes an investment contract,
 thus a security, under the Act.

1 fraud only)³ under the Act. *See* A.R.S. § 44-1801(26). Whether an instrument is a security is a
2 question of law. *See Nutek Info. Sys. Inc. v. Arizona Corp. Comm'n*, 194 Ariz. 104, 107, 977 P.2d
3 826, 829 (1998). The “determination of the law, however, must be based on the facts determined
4 by the fact finder [Commission].” *Id.* citing *United States v. Carman*, 577 F.2d 556, 562 (9th Cir.
5 1978) (“[T]he ultimate issue of whether or not a particular set of facts, as resolved by the fact
6 finder, constitutes an investment contract is a question of law.”). Furthermore, even though the
7 facts in issue may be substantially the same as those in the SEC Enforcement Action,⁴ the
8 Commission is not bound by the reasoning of the federal district court in the application of the
9 federal securities laws to the factual findings as set forth in the SEC Judgment, nor will be it bound
10 by federal appellate court’s affirmation or reversal of the SEC Judgment. *See State v. Gunnison*,
11 127 Ariz. 110, 112-13, 618 P.2d 604, 606-7 (1980) (holding that Arizona courts will follow the
12 reasoning of the federal courts in interpreting provisions of the Act which are identical or similar to
13 federal securities statutes unless there is good reason to deviate); *Nutek*, 194 Ariz. at 108, 977 P.2d
14 at 830 (holding that Arizona courts do not, however, defer to federal case law when to do so would
15 be inconsistent with the policies embraced by the Act); *see also* 1951 Ariz. Sess. Laws ch. 18, § 20
16 (stating the intent and purpose of the Act).⁵

17 As Respondents point out, the Legislature made extensive revision to the Act in 1996 (the
18

19 ³ *See State v. Tober*, 173 Ariz. 211, 212-13 (1992) (all notes are securities for purposes of the registration
20 provisions of the Act); *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996)
21 (adopting the *Reves* test for purposes of determining when a note is a non-security for purposes of the
22 antifraud provisions of the Act). *See also* Securities Division’s Reply to Respondents’ Post-Hearing
Memorandum filed on April 25, 2011 (“Division Reply Memorandum”) at p.10, line 5 through p. 12, line 17
regarding when a note is a non-security for purposes of the antifraud provisions of the Act.

23 ⁴ Contrary to their present position regarding the material facts at issue in these proceedings, the
24 Respondents opposed that the ALJ take judicial notice of the SEC Judgment, in part, because it is “[i]t is not
based on the record made in this matter; but on a record made in Federal Court which cannot be presumed to
be the same as the one before this body.” *See* Procedural Order at p.2, lines 16-17.

25 ⁵ *See* Division Reply Memorandum at p.5, lines 4-22; Securities Division’s Response to Respondents’ Brief
26 on Additional Evidence filed on April 30, 2012, at p.5, line 12 through p.8, line 15 for further discussion
regarding the difference in the fundamental purpose of the federal and state securities laws.

1 “1996 Legislation”). See 1996 Ariz. Sess. Laws ch. 197, §§ 1 to 12. Contrary to Respondents’
2 argument, however, the Legislature declined to instruct the Arizona courts to always follow federal
3 case law in construing the provisions of Act in instances when there are substantially similar
4 provisions in the federal securities statutes, stating

5 It is the intent of the legislature that in construing the provisions of title 44, chapter
6 12, Arizona Revised Statutes, the courts may use as a guide the interpretations given
7 by the securities and exchange commission and the federal courts or other [state]
8 courts in construing substantially similar provisions in the federal securities laws of
9 the United States.

10 *Id.* at §11(C) (emphasis added).⁶

11 With the enactment of the 1996 Legislation, the Legislature effectively affirmed *Gunnison*.
12 Following this mandate, the Arizona courts have found good reason to deviate from federal court
13 interpretations of the federal Acts. See *Eastern Vanguard Forex Ltd. v. Arizona Corp. Comm’n*,
14 206 Ariz. 399, 411-412, 79 P.3d 86, 98-9 (App. 2003) (declining to follow federal court
15 interpretations of control liability that do not adequately protect the investing public); *Siporin v.*
16 *Carrington*, 200 Ariz. 97, 103, 23 P.3d 92, 98 (App. 2001) (refusing to follow restrictive federal
17 precedent on the meaning of investment contracts). Accordingly, should the federal appellate court
18 reverse the SEC Judgment, finding that the interests in the RB-Participant Loan Program are not
19 securities as a matter of law under the federal securities laws,⁷ the Commission nevertheless has the
20 option to deviate from the federal appellate court’s ruling if such deference would result in the
21 failure to “advance the Arizona policy of protecting the public from unscrupulous investment
22 promoters.” *Id.* Therefore, Respondents’ argument that the issuance of a ROO should be held in
23 abeyance pending a ruling by the federal appellate court regarding the SEC Judgment because of

24 ⁶ In the 1996 Legislation, the Legislature also instructed, “[n]othing in the act [1996 Legislation] limits or
25 abridges the power or authority of the Arizona corporation commission or the Arizona attorney general.”
26 1996 Legislation at § 11(D).

⁷ The federal appellate court could also find that there are factual disputes precluding the granting of
summary judgment in favor of the SEC, resulting in the remand of the matter to the federal district court for
further adjudication.

1 the 1996 Legislation is without merit.

2 2. The Commission has not “relied” on the SEC Judgment.

3 Respondents’ argument that the issuance of a ROO should be held in abeyance pending a
4 ruling by the federal appellate court regarding the SEC Judgment because the Commission has
5 “relied” on it is also without merit. *See* Motion to Stay at p.2, lines 1-3. In taking judicial notice of
6 the SEC Judgment, the ALJ also stated that “appropriate weight will be given to these documents.”
7 *See* Procedural Order at p. 3, line 15. No ROO has been issued by the ALJ for consideration by the
8 Commission, pursuant to A.A.C. R14-3-110. Therefore, what weight, if any, will be given to the
9 SEC Judgment by either the ALJ and/or the Commission is presently unknown. Furthermore,
10 should the Commission determine that the interests in the RB-Participant Loan Program are
11 securities under the Act, the Respondents may appeal the Commission’s decision regardless of the
12 outcome of the Respondents’ appeal(s) in the SEC Enforcement Action, pursuant to A.R.S. § 44-
13 1981.

14 **B. Whether the Arizona Supreme Court continues to recognize an implied cause of
15 action against a secondary actor for aiding and abetting the primary violations of
16 another person under the Act is not relevant to the determination by the Commission
17 that the Respondents violated the registration and antifraud provisions of the Act.**

18 Respondents’ argument that the issuance of a ROO should be held in abeyance pending a
19 ruling by the Arizona Supreme Court on whether Arizona will continue to recognize an implied
20 cause of action against a secondary actor for aiding and abetting a primary violation of another
21 person under the Act as first recognized by this Court in *State v. Superior Court of Maricopa
22 County*, 123 Ariz. 324, 331, 599 P.2d 777, 784 (1979), *overruled in part on other grounds by State
23 v. Gunnison*, 127 Ariz. 110, 618 P.2d 604 (1980) is without merit. The Division has brought an
24 action against the Respondents as primary actors for their violations of the registration and
25 antifraud provisions of the Act. Furthermore, even if a secondary actor aided and abetted the
26 violations of the Act by Respondents, it does not absolve Respondents, as primary actors, of

1 liability for their respective violations of the Act.⁸

2 Finally, whether the Arizona Supreme Court upholds *Superior Court* is not relevant to the
3 issuance of a permanent cease and desist order or an order for the payment of restitution by the
4 Commission, pursuant to A.R.S. § 44-2032. The only arguable relevance regarding the conduct on
5 the part of secondary actors vis-à-vis Respondents' primary liability under the Act is with respect
6 to the assessment of administrative penalties by the Commission in the maximum of amount of
7 \$5,000 for each violation of A.R.S. §§ 44-1841, 44-1842, and 44-1991(A) with respect to each
8 potential investor and each investor, pursuant to A.R.S. § 44-2036. In these proceedings, however,
9 even this argument is undermined by (1) the fact that one or more of the Respondents were
10 engaged in the sale of securities in violation of the Act for as long as eight years prior to the time
11 that the business activities of the Respondents were known to the purported aiders and abettors
12 (i.e., Quarles and Brady and/or Mortgages Ltd.); and (2) the egregiousness of the Respondents'
13 own conduct in violation of the Act apart from that of the purported aiders and abettors.⁹

14 **CONCLUSION**

15 For the reasons set forth above, the Division requests that the Respondents' Motion to Stay
16 be denied.

17 RESPECTFULLY SUBMITTED this 29th day of November, 2012.

18 

19 Julie Coleman
20 Chief Counsel of Enforcement for the Securities
21 Division of the Arizona Corporation Commission

22
23
24 ⁸ See Securities Division's Response to Respondents' Amended Motion to Supplement the Record filed on
25 July 20, 2012, for further discussion regarding the liability of a secondary actor for aiding and abetting a
primary violation of another person under the Act.

26 ⁹ See e.g., Securities Division's Response to Respondents' Brief on Additional Evidence filed on April 30,
2012, at p.9, line 16 through p.13, line 1.

1 ORIGINAL and 13 copies of the foregoing
2 filed this 29th day of November, 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 29th day of November, 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 29th day of November, 2012, to:

16 Michael J. LaVelle
17 Matthew K. LaVelle
18 LAVELLE & LAVELLE, PLC
19 2525 E. Camelback Road, Suite 888
20 Phoenix, AZ 85016

21
22
23
24
25
26
By: 