

ORIGINAL

OPEN MEETING AGENDA ITEM



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Arizona Corporation Commission

DOCKET

JAN 22 2013

DOCKETED [Signature]

BEFORE THE ARIZONA CORPORATION COMMISSION

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

DOCKET NO. S-20660A-09-0107

RESPONDENTS EXCEPTIONS TO THE PROPOSED RULING AND THE RECOMMENDATION OF THE HEARING OFFICER

(Assigned to Hon. Lyn Farmer)

(Argument Requested)

24 1. Respondents except to the failure of the Hearing Officer to consider all of
 25 the record. The proposed Decision is replete with instances where only the
 26 testimony presented by the Commission has been cited. More importantly, in the
 27 matter of Mr. Hoffman and Mr. Kant, almost one hundred million dollars has been
 28

1 paid by their law firms in settlement of the class action because those law firms
2 were not willing to rely on Mr. Hoffman and Mr. Kant's testimony. They were
3 seriously impeached, others at the meeting do not recall what they now claim they
4 said and the subsequent course of action and the documents are not consistent with
5 what they now claim they said and it is a manifest error to suggest that their
6 testimony was credible.

7
8 2. Respondents except to the conclusion and all of the portions of the Opinion
9 which reach a finding that the participations were securities. In fact, as clearly
10 demonstrated by the record, the participants acquired an interest in a commercial
11 note. The commercial note was issued by Mortgages Limited. Radical Bunny did
12 not issue the note. Radical Bunny did not determine the success or failure of that
13 note. Radical Bunny simply divided up the participants funds and kept track of
14 what percentage they owned. When Mortgages Limited fulfilled its obligation to
15 pay, Radical Bunny, like an escrow company, divided up the money and sent it to
16 the participants, retaining a disclosed fee for its work.

17
18 Nothing about that makes the participations securities. The difference in
19 participation programs at various times offered by Radical Bunny always
20 maintained that distinction. Radical Bunny collected the money from participants
21 and paid it to Mortgages Limited in exchange for specific notes which were
22 fractionalized and Radical Bunny received payments from Mortgages Limited and
23 divided it among the participants. The participants were invested in Mortgages
24 Limited. Mortgages Limited determined the risk of the investment. The
25 participants in Radical Bunny had nothing more than a fractionalized interest in a
26 commercial note. There is no law that supports the concept that only a nine month
27 note is commercial note. The commercial note exception takes into account the
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1 entire nature of the note, not only the length of time of the note and is not limited
2 specifically by the length of time the note was to be outstanding.

3
4 3. Respondents except to the Determination that scienter is not an element of a
5 violation of Arizona Security Laws. Since the Arizona Legislature indicated that
6 Arizona securities laws should be congruent with Federal Securities Laws the older
7 cases indicating that some of the Arizona securities law do not require scienter are
8 no longer valid.

9
10 4. Respondents except to the concept that individual testimony concerning
11 what specific individuals were told can justify an award for every investor. The
12 Hearing Officer cites testimony from seven investors with specific reference to
13 what they individually were told. There is no evidence of fraud related to all of the
14 participants. Even conversations and statements made at one annual meeting do not
15 go to all of the participants, albeit those statements were innocuous and do not rise
16 to the level of fraud.

17
18 5. Respondents except to the determination that Howard Walder was a control
19 person. There is absolutely no testimony that could be cited that indicated Mr.
20 Walder did anything but manage the computers and run the system.

21
22 6. Respondents except to the Order of Restitution. The Commission may or
23 may not have had jurisdiction over Radical Bunny which failed to repay the
24 money. It does not have the power to issue an order directing the Respondents
25 whom, since the Radical Bunny bankruptcy have had no power over Radical
26 Bunny, to restore the funds that Radical Bunny itself took. Restitution is a remedy
27 to be directed at the party who received the assets.

28

1 There is no determination as to what portion of the assets Respondents
2 received. Instructive is the currently appealed District Court Decision which
3 recognized that the only restitution that could be ordered was in the amount that
4 the various Respondents had received from the operation of Radical Bunny.

5
6 Under the applicable statutes the only penalty appropriate for failure to
7 comply with any court order including restitution is twenty thousand dollars. The
8 evidence is clear these Respondents lost everything because of Mortgages Limited
9 demise. There is no point in a penalty for failure to restore funds they do not have.

10
11 7. Respondents except to the penalties assessed. Under the statute an
12 administrative penalty cannot exceed more than five thousand dollars for each
13 violation. There was no determination of the number of violations. In fact the
14 Hearing Officer just assumed that a violation existed with respect to each
15 transaction and each participant. There is no evidence that shows that.

16
17 8. Respondents except because the penalties imposed are beyond the
18 Commission's jurisdiction. Administrative penalties are limited to five thousand
19 dollars for each violation. Civil Penalties are limited to five thousand dollars for
20 each violation. Only when a Court Order, not commission order is violated may a
21 penalty of twenty thousand dollars be imposed. These statutes require a factual
22 itemization of the individual misrepresentation and the nature of the security that
23 went to each of the participants, It is not sufficient to call seven of nine hundred
24 people and assume that anything those seven people said translates to the entire
25 body of nine hundred. No proof beyond seven witnesses established any violations
26 or the number of violations. The maximum penalty possible is \$35,000 for
27 administrative violations and \$35,000 for civil violations.

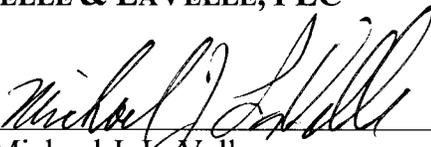
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1 9. Respondents except because this Body has only the specific jurisdiction
2 conferred on it by specific laws and constitutional provisions. It does not have the
3 right to redress every wrong it may find in the investment community. Those
4 powers are left to a court of general jurisdiction. And a court of general jurisdiction
5 has already spoken, although that Decision is on Appeal. All of the remedies, until
6 this body's proposed opinion, have spoken to restitution in terms of what the
7 Respondents obtained from the operation no matter how innocently. A decision
8 that causes Respondents to pay money they do not have for money they never
9 received and equates their liability with the potential liability of Radical Bunny, a
10 different party to this litigation, and is beyond the Commission's jurisdiction.

11
12 IN CONCLUSION, for all of the reasons set forth in the briefings filed in
13 this matter and all of the Objections raised on the record, Respondents object to the
14 proposed Opinion and Order.

15
16 RESPECTFULLY SUBMITTED this 22nd day of January, 2013.

17
18 **LAVELLE & LAVELLE, PLC**

19
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ORIGINAL and 13 COPIES filed this
22nd day of January, 2013 with:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington St.
Phoenix, Arizona 85007

COPY of the foregoing HAND- DELIVERED & MAILED
this 22nd day of January, 2013 to:

Lyn Farmer
Administrative Law Judge
ARIZONA CORPORATION COMMISSION
Hearing Division
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing MAILED
(along with a courtesy copy via electronic mail to Jcoleman@azcc.gov)
this 22nd day of January, 2013 to:

Julie Coleman
Chief Counsel of Enforcement
ARIZONA CORPORATION COMMISSION
Securities Division
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