



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP - Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

Arizona Corporation Commission
DOCKETED

MAR 21 2013

DOCKETED BY

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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 TOMAS N. HIRSCH) and
DIANE ROSE HIRSCH, husband and wife,

BERTA FREIDMAN 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

DECISION NO. 73768

OPINION AND ORDER

DATES OF HEARING:

June 16, 2009, November 3, 2009, May 25, 2010, October 13, 2010, (pre-hearing conferences); September 20, 2011 (oral arguments); December 12, 2011 (procedural conference); October 14, 15, 18, 21, 22, 25, 26, November 3, 5, 8, and 9, 2010, and March 19, 2012 (hearing).

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Lyn Farmer

APPEARANCES:

Mr. Michael J. LaVelle and Mr. Matthew K. LaVelle, LAVELLE & LAVELLE, PLC, on behalf of the Respondents Horizon Partners, LLC, Tom Hirsch, Diane Rose Hirsch, Berta Freidman Walder, Howard Evan Walder, Harish Pannalal Shah and Madhavi H. Shah;

Mr. Martin Galbut, GALBUT & GALBUT, P.C., Mr. Kevin Downey and Mr. Patrick J. Houlihan, WILLIAMS & CONNOLLY, LLP, Ms. Susan Tarbe, GREENBERG TRAURIG, P.A., on behalf of witness,

Robert S. Kant; and

Ms. Julie Coleman, Staff Attorney, Securities Division,
on behalf of the Arizona Corporation Commission.

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BY THE COMMISSION:

On March 12, 2009, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing against Radical Bunny, L.L.C., Horizon Partners, L.L.C., Tom Hirsch (aka Tomas N. Hirsch), Berta Friedman Walder (aka Bunny Walder), Howard Evan Walder, Harish Pannalal Shah, and Madhavi H. Shah ("Notice"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of notes and investment contracts.

On March 26, 2009, a request for hearing was filed on behalf of Horizon Partners, L.L.C. ("Horizon Partners"), Tom Hirsch ("Hirsch"), Diane Rose Hirsch, Berta Friedman Walder ("B. Walder"), Howard Evan Walder ("H. Walder"), Harish Pannalal Shah ("Shah") and Madhavi H. Shah (collectively, "Respondents").

On April 28, 2010, the Commission issued Decision No. 71682, a Consent Order against Respondent Radical Bunny, L.L.C. ("Radical Bunny"), an Arizona limited liability company.

On April 30, 2010, a Motion for Summary Judgment or to Dismiss (Oral Argument Requested) ("Motion to Dismiss"); a Statement of Facts; and a Declaration of Tom Hirsch were filed on behalf of the Respondents.

On May 10, 2010, the Division filed its Response to the Motion to Dismiss.

By Procedural Order issued May 19, 2010, oral argument on the Motion to Dismiss was scheduled to be held during the May 25, 2010 Procedural Conference.

On May 20, 2010, the Respondents filed their Reply on Motion for Summary Judgment and the Division filed a Motion to Allow Telephonic Testimony.

The May 25, 2010 Procedural Conference was held as scheduled and oral argument was heard on the Motion.

On May 27, 2010, the Division filed a Notice of Availability for Administrative Hearing and on July 13, 2010, the Division filed a Motion to Set Procedural (Status) Conference.

On June 2, 2010, the Respondents filed their Response to the Motion to Allow Telephonic Testimony.

By Procedural Order issued August 2, 2010, the Motion to Dismiss was denied and new dates

1 for hearing were set.

2 On August 31, 2010, the Division filed a Motion to Reschedule Additional Administrative
3 Hearing Dates of October 29 – November 2, 2010.

4 On September 3, 2010, a Procedural Order was issued modifying certain dates for hearing.

5 On October 7, 2010, Respondents filed a Motion in Limine, requesting that all “evidence
6 going to Respondents’ notice that their conduct might violate the law should be excluded.”

7 On October 12, 2010, the Division filed its Response to the Respondents’ Motion in Limine,
8 requesting that the motion be “denied because (1) the Arizona courts have not construed the language
9 of all the antifraud provisions contained in A.R.S. § 44-1991(A); (2) the testimony by the witnesses
10 sought to be excluded by Respondents is relevant to contested facts and not overly prejudicial; and
11 (3) the testimony by the witnesses sought to be excluded by Respondents is relevant to the
12 assessment of an administrative penalty against them for violations of the registration and antifraud
13 provisions of the Arizona Securities Act.”

14 On October 12, 2010, the Division filed its Reply to Response to Motion to Allow Telephonic
15 Testimony.

16 On October 13, 2010, a pre-hearing conference was held and the Motion in Limine was
17 denied.

18 On October 14, 2010, Acknowledgments of Possible Conflicts signed by Tom Hirsch, Diane
19 Hirsch, Berta Walder, Howard Walder, Harish Shah, and Madhavi Shah were filed on their behalf by
20 their attorneys, Michael J. LaVelle and Matthew K. LaVelle of the law firm of LaVelle & LaVelle,
21 PLC.

22 On November 5, 2010, a Procedural Order was issued granting Kevin M. Downey admission
23 *pro hac vice* to appear on behalf of interested parties Greenberg Traurig, LLP and Robert S. Kant.

24 The hearing was held on October 14, 15, 18, 21, 22, 25, 26, and November 3, 5, 8, and 9,
25 2010.

26 The Division called as witnesses Richard Friedberg, Kelly Levine, Ronald James Logan,
27 Ronald Clark, Barbara Ellen Mathis, James C. Sell, Donna Hinman, Donna Herbranson, Nunzio
28 Schiliro, Robert Scott Bornhoft, Christian J. Hoffmann III, Howard E. Walder, Harish P. Shah,

1 Robert S. Kant, Berta Walder, Steven Friedberg, and Tom Hirsch.¹ The Respondents called as
2 witnesses Alfred William Ferry, Tom Hirsch, Pramod Patel, Scott Calbers Grainger, Berta Walder,
3 Howard Walder, and BJ Raval. The Division also called Jordan Kroop as a rebuttal witness.

4 On December 23, 2010, Respondents filed a Motion to Supplement the Record.

5 On January 5, 2011, the Division filed its Response to the Motion to Supplement the Record.

6 On January 18, 2011, the Respondents filed their Reply to the Division's Response on Motion
7 to Supplement the Record.

8 On February 2, 2011, the Division filed its Supplemental Response to Respondents' Motion
9 to Supplement the Record.

10 On February 11, 2011, a Procedural Order was issued granting the Motion to Supplement the
11 Record, and administrative notice was taken of the December 21, 2010 order entered as document no.
12 3024 in the official court docket for *In re Mortgages Ltd.*, case no. 2:08-bk-07465-RJH in the United
13 States Bankruptcy Court for the District of Arizona; the Notice of Appeal filed by the ML
14 Liquidating Trust on January 5, 2011; and the January 25, 2011 Minute Entry granting the stay.

15 On February 18, 2011, the Division filed its Post-Hearing Memorandum.

16 On April 4, 2011, the Respondents filed their Post-Hearing Memorandum.

17 On April 13, 2011, the Division filed a Post-Hearing Motion to Supplement the Evidentiary
18 Record.

19 On April 25, 2011, the Division filed its Reply to Respondents' Post-Hearing Memorandum.

20 On April 29, 2011, Respondents filed their Response and Objection to Post-Hearing Motion
21 to Supplement the Evidentiary Record.

22 On May 3, 2011, the Division filed its Reply to Respondents' Response and Objection to
23 Post-Hearing Motion to Supplement the Evidentiary Record.

24 On July 1, 2011, a Procedural Order was issued granting the Division's Post-Hearing Motion
25 to Supplement the Evidentiary Record, and official notice was taken of the April 12, 2011 Order
26 entered as document no. 99; as well as the April 21, 2011 Objection to Lodged: [Proposed] Final

27
28 ¹ The Respondents waived their attorney-client and work product privileges with Quarles & Brady, LLC, (Exhibit S-18(a)), and with Ronald J. Logan; and their accountant-client privileges with James Sells. (Exhibit S-18(b))

1 Judgment of Permanent Injunction and Monetary Relief Against Defendants Tom Hirsch, Berta
2 Walder, Howard Walder, and Harish P. Shah, entered as document no. 104, all in the official court
3 docket for *Securities and Exchange Commission v. Radical Bunny, LLC, Tom Hirsch, Berta Walder,*
4 *Howard Walder, and Harish P. Shah*, case no. CV-09-1560-PHX-SRB in the United States District
5 Court for the District of Arizona.

6 On August 1, 2011, Respondents filed a Motion to Reopen Hearing and to Add Evidence to
7 the Record.

8 On August 15, 2011, the Division filed its Opposition to Respondents' Motion to Reopen
9 Hearing and to Add Evidence to the Record.

10 On August 26, 2011, the Respondents filed their Reply on Motion to Reopen Hearing and to
11 Add Evidence to the Record.

12 On September 9, 2011, a Procedural Order was issued setting oral argument on the Motion to
13 Reopen Hearing and to Add Evidence to the Record.

14 Oral arguments were held on September 20, 2011 and upon conclusion of argument, the
15 Motion was granted. The parties were instructed to discuss how the additional testimony should be
16 made part of the record and make a filing with the Commission.

17 As of November 10, 2011, the parties had not made a filing, and so a Procedural Order was
18 issued directing the parties to file either a joint or separate update with the Commission no later than
19 November 22, 2011.

20 On November 15, 2011, the Division filed its Status Report.

21 On November 22, 2011, the Respondents filed their Status Report and Response to the
22 Division's Status Report.

23 On November 22, 2011, the Division filed its Updated Status Report, noting that the parties
24 were at an impasse and requesting a procedural conference be scheduled.

25 On November 28, 2011, a Procedural Order was issued scheduling a Procedural Conference
26 for December 1, 2011.

27 On November 29, 2011, an Amended Procedural Order was issued rescheduling the
28 Procedural Conference to December 12, 2011.

1 The Procedural Conference was held as scheduled on December 12, 2011, and the parties
2 reported that they were unable to resolve the issue of the appropriate method of supplementing the
3 record. They were directed to make filings delineating the transcript portions from Mr. Hoffmann's
4 deposition that each wanted to be included in the record, and then to file any objections to the
5 portions identified by the other party.

6 On December 16, 2011, the Respondents filed their Proposed Hoffman Deposition Excerpts
7 with their proposal for the admission of additional evidence.

8 On December 16, 2011, the Division filed its Proposal Regarding the Respondents' Request
9 to Add Evidence to the Administrative Hearing Record.

10 On December 23, 2011, the Respondents filed their Memo Regarding State's Proposed Scope
11 of Reopened Hearing.

12 On December 23, 2011, the Division filed its Response in Opposition to Respondents'
13 Proposed Hoffmann Deposition Excerpts.

14 On January 17, 2012, a Procedural Order was issued concluding that as the parties were
15 unable to agree upon the use of the Hoffmann deposition as additional testimony, a hearing should be
16 scheduled, and directing the Division to file dates on which Mr. Hoffmann was available to testify, no
17 later than January 27, 2012.

18 On January 27, 2012, the Division filed its Compliance With Procedural Order Dated January
19 17, 2012, indicating that Mr. Hoffmann was available to testify on March 19 and 20, 2012.

20 By Procedural Order issued February 1, 2012, the hearing was scheduled to reconvene on
21 March 19, 2012.

22 The hearing reconvened on March 19, 2012 as scheduled, with Mr. Hoffmann, Berta Walder,
23 and Tom Hirsch testifying.

24 On April 17, 2012, the Respondents filed a Motion to Allow Late Filing of Brief and also
25 filed their Brief on Additional Evidence.

26 On April 24, 2012, the Division filed its Response to Motion to Allow Late Filing of Brief,
27 stating the Division had no objection.

28 On April 26, 2012, a Procedural Order was issued granting the Motion to Allow Late Filing of

1 Brief.

2 On April 30, 2012, the Division filed its Response to Respondents' Brief on Additional
3 Evidence.

4 On May 7, 2012, the Respondents filed their Reply Brief on Additional Evidence.

5 On July 16, 2012, the Respondents filed their Motion to Supplement the Record.

6 On July 18, 2012, the Division filed its Response to Respondents' Motion to Supplement the
7 Record.

8 On July 19, 2012, the Respondents filed their Amended Motion to Supplement the Record.

9 On July 20, 2012, the Division filed its Response to the Respondents' Amended Motion to
10 Supplement the Record.

11 On August 1, 2012, the Respondents filed their Reply to Securities Division's Response to
12 Respondents' Amended Motion to Supplement the Record.

13 On November 15, 2012, the Respondents filed a Motion to Stay Ruling.

14 On November 19, 2012, the Division filed its Response in Opposition to Respondents'
15 Motion to Stay Issuance of a Recommended Opinion and Order.

16 On December 13, 2012, the Respondents filed their Reply to the Division's Response.

17 **Procedural Motions**

18 **Motion for Directed Verdict**

19 Upon the conclusion of the Division's case, the Respondents moved for a directed verdict on
20 the grounds that there had been no proof that "the interests in question here are securities...and no
21 proof of a consistent groupwide allegation of fraud or material misrepresentations;" and "to the extent
22 'security' doesn't mean investment contracts, there has been no proof that these are investment
23 contracts either."² The Respondents also moved for a Directed Verdict at the conclusion of the
24 hearing.³ The parties agreed to brief the issues involved in the Motion for Directed Verdict, and
25 consistent with the determinations made herein, the Motion for Directed Verdict is denied.

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28 ² Tr. at 1703.

³ Tr. at 2111.

1 Motion to Strike Testimony

2 The Respondents also moved to strike the testimony of attorney of Jordan Kroop on the basis
 3 that when a witness is allowed to testify about a representation as long as a question does not call for
 4 attorney/client privileged information, there is not an opportunity for full cross-examination.⁴ The
 5 attorney for the Respondents asked Mr. Kroop “And did you write any sort, or did your firm, write
 6 any sort of written report to Mr. Lyon about that subject;” “And if I ask you what it said you’re going
 7 to tell me that’s privileged, aren’t you?”⁵ and “As Radical Bunny’s lawyer, was there anything else
 8 you were hoping to get?”⁶ Although the Respondents’ counsel stated on the record that he would
 9 brief the Motion to Strike, the Respondent’s Brief did not address the Motion or the Division’s
 10 response, and therefore, it is denied.⁷ We find that the testimony of Mr. Kroop is helpful in its
 11 explanation of the bankruptcy proceeding and the impact it had on Radical Bunny’s Participants.

12 Motion to Supplement the Record

13 The Respondents’ July 16, 2012, Motion to Supplement the Record, as amended by their July
 14 19, 2012 filing, requests that the Commission take administrative notice of documents filed in a civil
 15 case pending before the Federal District Court in a class action brought by Mortgages Limited
 16 investors and Radical Bunny participants against Quarles & Brady, LLP, and Greenberg Traurig,
 17 LLP, et. al.⁸ The documents are a June 4, 2012 stipulation of settlement between the plaintiffs and
 18 Quarles & Brady in the amount of \$26.5 million, and a June 20, 2012 stipulation of settlement
 19 between the plaintiffs and Greenberg Traurig in the amount of approximately \$62 million (together,
 20 “Settlements”). The Respondents argue that the documents “relate to offsets for any judgment that
 21 might be awarded, but more importantly they demonstrate that the testimony of Mr. Kant and Mr.
 22 Hoffman was not trustworthy enough for their law firms to take the risk of relying on that

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 24 _____
⁴ Tr. at 2109-2111.

25 ⁵ Tr. at 2092.

26 ⁶ Tr. at 2110.

27 ⁷ At hearing, the Division responded that Mr. Kroop’s testimony was rebuttal to testimony given by Mr. Hirsch
 concerning Mr. Hirsch’s understanding of the bankruptcy proceeding, and that Mr. Kroop’s testimony was limited only to
 information that was already in the public record. Tr. at 2110. Further, we note that Respondents’ Brief cited portions of
 Mr. Kroop’s testimony in support of the Respondents’ arguments and positions. Respondents’ Post Hearing
 Memorandum at 8, 14, and 21.

28 ⁸ Case No. 2:10-cv-01025-FJM (D. Ariz.) (“Facciola Litigation”).

1 testimony.”⁹

2 The Division’s Response argues that the Motion to Supplement should be denied because the
3 proposed evidence does not contain any adjudicative facts that are relevant to the Respondents’
4 liability for violations of the Arizona Securities Act or that are not subject to reasonable dispute. The
5 Division noted that the Settlements specifically state that both law firms “denied, and continue[s] to
6 deny, each and every claim and contention alleged against them” and that the stated reason for the
7 Settlements was an assessment by both the plaintiffs and defendants of the increasing costs of the
8 protracted litigation.¹⁰

9 Although we agree with the Division that the Settlements contain no adjudicative facts that
10 are relevant Respondents’ liability for securities violations, we will take administrative notice of the
11 Settlements filed with the District Court. The relevance, if any, they have to the credibility of the
12 testimony of Mr. Kant and Mr. Hoffmann, will be determined in our discussion of their testimony
13 herein. Accordingly, the Motion to Supplement the Record is hereby granted and we will take
14 administrative notice of the June 4, 2012 and June 20, 2012 stipulations of settlement filed with the
15 Federal District Court.

16 Motion to Stay Issuance of Ruling

17 On November 15, 2012, Respondents filed a Motion to Stay Ruling, which asked the
18 Commission to stay any ruling in this matter until the conclusion of what they believe are two related
19 judicial matters. On November 19, 2012, the Division filed its Response in Opposition to
20 Respondents’ Motion to Stay Issuance of a Recommended Opinion and Order. On December 13,
21 2012, the Respondents filed their Reply to the Division’s Response. Accordingly, with the issuance
22 of this Recommended Opinion and Order, the Respondents’ Motion is denied.

23 ...

24 ...

25 ...

26 ⁹ Respondents’ July 16, Motion to Supplement the Record at 2. The Division also notes that the Respondents’ request to
27 include the Settlement could be seen as a concession that Respondents repeatedly violated A.R.S. § § 44-1841, 44-1842,
28 and 44-1991(A) and (2) because Quarles & Brady and Greenberg Traurig’s liability is based upon aiding and abetting the
violations of the registration and antifraud provisions of the Arizona Securities Act.

¹⁰ Division July 18, Response to Respondents’ Motion to Supplement the Record at 3.

DISCUSSION**I. Testimony****Introduction**

This is an action brought against Horizon Partners and Mr. Hirsch; and Radical Bunny, Mr. Hirsch, Mr. and Mrs. Walder, and Mr. Shah for violations of the Arizona Securities Act.

Horizon Partners and Radical Bunny are Arizona limited liability companies whose business was governed pursuant to the terms of Operating Agreements. Both were manager-operated entities where the non-manager members were unable to actively participate in the business operations of the entity.¹¹ Horizon Partners and Radical Bunny were formed by Mr. Hirsch and others for the purpose of investing in the Mortgages Limited Pass-Through Participation Program and were vehicles for Mr. Hirsch, Mr. and Mrs. Walder, and Mr. Shah to pool money to become accredited investors and purchase (for themselves and others) securities offered by Mortgages Limited.¹²

Mortgages Limited was a licensed mortgage banker until its license was revoked, and it operated as a private mortgage lender for residential property since its inception in the 1960s, and in connection with commercial real estate since the late 1980s. Mortgages Limited originated, invested in, sold and serviced its own short-term real estate loans. The Mortgages Limited Loans ranged from \$1 to \$150 million, had average terms of 6 to 18 months, carried higher interest rates than those of a traditional institutional lender, were often used as bridge financing, and they all were secured by real estate.¹³ The Mortgages Limited Loans were funded in part, from the sale to investors of direct, "pass-through" fractional loan and lien interests in the real estate collateral securing each loan ("Mortgages Limited Pass-Through Investor"). The Mortgages Limited Pass-Through Investor acquired an interest in the loan and signed an agency agreement that appointed Mortgages Limited as their agent ("Mortgages Limited Pass-Through Participation Program"). The Mortgages Limited Pass-Through Investor was assigned an interest in the secured promissory note evidencing the Mortgages Limited Loan, and also received an assignment of the beneficial interest in the real estate

¹¹ Tr. at 1557-1558; Exhibit S-9(a).

¹² Tr. at 1610.

¹³ Tr. at 1510-1512; 1522-1523; Exhibit S-56.

1 collateral (first lien position deed of trust) that was duly recorded. Mortgages Limited was an owner
2 of some of the fractional interests in its promissory notes and liens on real estate collateral.

3 Mortgages Limited also raised funds through the sale of membership interests in limited
4 liability companies to investors. These "MP Funds" were manager-run entities with Mortgages
5 Limited as the manager investing in the Mortgages Limited Pass-Through Participation Program.¹⁴
6 The Mortgages Limited Loan secured promissory notes were sold to investors through Mortgages
7 Limited Securities, L.L.C., a wholly-owned subsidiary of Mortgages Limited that was organized as a
8 limited liability company in Arizona on February 1, 2001.¹⁵ Mortgages Limited Securities was
9 registered as a securities dealer with the Commission on March 9, 2004.¹⁶

10 Horizon Partners and Radical Bunny invested in the Mortgages Limited Pass-Through
11 Participation Program until September, 2005.¹⁷ In late 2005, Radical Bunny instituted a new
12 investment program ("Radical Bunny-Mortgages Limited Loan Program" or "RB-ML Loan
13 Program") where Radical Bunny would advance proceeds to Mortgages Limited so the funds could
14 be used, in part, to fund Mortgages Limited loans to Mortgages Limited borrowers. Radical Bunny
15 raised proceeds by selling fractional interests in the RB-ML loans ("participations") to investors
16 ("Participants").¹⁸ In December, 2005, Horizon Partners ceased operations and its remaining
17 investments were rolled over to Radical Bunny's new program.

18 Scott M. Coles acted as the Chief Executive Officer/Chairman of Mortgages Limited from
19 1997 until his death by suicide on June 2, 2008. The sole shareholder of Mortgages Limited was the
20 SMC Revocable Trust U/T/A dated December 22, 1994, as amended ("SMC Trust").¹⁹ On June 23,
21 2008, an involuntary petition for relief was filed against Mortgages Limited under Chapter 7 of Title
22 11 of the United States Bankruptcy Code in the United States District Court for the District of
23 Arizona ("Mortgages Limited Bankruptcy") which was subsequently converted to a proceeding under
24

25 ¹⁴ Exhibit S-56.

26 ¹⁵ Exhibit S-7(a),(b),(c).

27 ¹⁶ Exhibit S-2; The registration was terminated on December 31, 2008.

28 ¹⁷ Radical Bunny continued to make a few investments in the Mortgages Limited Pass-Through Participation Program after September, 2005. Tr. at 1550.

¹⁸ Tr. at 1519-1520; 1541-1550.

¹⁹ Exhibit S-5(b), Exhibit S-56.

Chapter 11.²⁰ In the Mortgages Limited Bankruptcy, Radical Bunny asserted that it had lent Mortgages Limited approximately \$197 million which was secured by a lien in substantially all of Mortgages Limited's assets. The amount of the claim was not disputed but the alleged security interest in Mortgages Limited's assets was challenged by Mortgages Limited and other creditors.

On October 8, 2008, an involuntary petition for relief was filed against Radical Bunny under Chapter 7 of the United States Bankruptcy Code in the United States District Court for the District of Arizona ("Radical Bunny Bankruptcy"), which was subsequently converted to a proceeding under Chapter 11.²¹ Radical Bunny did not remain the debtor-in-possession in the Radical Bunny Bankruptcy, and a Chapter 11 Trustee was appointed.

The Division alleges that Horizon Partners, Radical Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah were involved in the offer and sale of securities in the form of investment contracts. According to the Division, the offer and sale of securities were in the form of three different investment contracts:

- 1) Limited liability company membership interests in Horizon Partners from approximately 1998 until September 2005 ("HP LLC Program");
- 2) Limited liability company membership interests in Radical Bunny from approximately 1999 until September 2005 ("RB LLC Program"); and
- 3) The Radical Bunny-Mortgages Limited Loan Program²² from approximately September 2005 until June 2008 (RB-ML Loan Program).

The witnesses at hearing included the Respondents, Investors (who are also called "Participants"), and attorneys and other professionals who advised the Respondents concerning their business operations and the law.

The Investors/Participants

Richard Friedberg

Richard Friedberg testified that he first met Mr. Hirsch in approximately 1978.²³ Mr. Hirsch was the certified public accountant ("CPA") for Mr. Friedberg's parents²⁴ and he prepared their

²⁰ Exhibit S-6(b); Exhibit S-56.

²¹ Exhibit S-36.

²² Sometimes also called the "Radical Bunny-Participant Loan Program" or the "RB-ML Loan Program."

1 income tax returns. Richard Friedberg accompanied his parents to meetings with Mr. Hirsch to
 2 discuss their income tax returns. After Richard Friedberg's father died, Mr. Hirsch remained the
 3 CPA for Libby Friedberg. Mr. Friedberg testified that Mr. Hirsch always talked about the importance
 4 of preservation of capital and principal, and because he had done Mrs. Friedberg's taxes and knew
 5 her income, he told the Friedbergs that they could get a better yield than the stock market or the real
 6 estate they had invested in.²⁵ Richard Friedberg testified that Mr. Hirsch told his mother and him
 7 how "he invested money in first deeds of trust and how secure they were and the track record of
 8 Mortgages Limited."²⁶ Mr. Friedberg testified that Mr. Hirsch told them it "was the safest place to
 9 put your money"²⁷ because "Mortgages Limited had a very long track record of never losing any
 10 investors any money."²⁸ Mr. Friedberg testified that his mother's first investment was in 2002 when
 11 she liquidated her stock portfolio and put all her money with Horizon Partners, with what was
 12 "supposed to be first deeds of trust secured by commercial real estate with no more than 65 percent
 13 loan-to-value ratio."²⁹ Mr. Friedberg testified that his mom had no input as to which loans were
 14 invested in prior to 2005, that "she left all that up to Tom."³⁰ He testified that by 2006, his mother
 15 was sick from cancer and all of their energy was needed to take care of her.³¹

16 Mr. Friedberg testified that they received a letter dated December 1, 2005, with a document
 17 attached saying that "Horizon Partners was going to cease to exist and that all remaining investments
 18 would be rolled over into Radical Bunny;" that the management fee would change from 1 to 2
 19 percent; there would be a minimum investment of \$25,000; and that they would be paid interest on
 20 the principal at the end of the month.³² Mr. Friedberg stated that at this time, his mother was "pretty
 21 sick" and he was more concerned about taking care of her.³³

23 ²³ Tr. at 46.

24 ²⁴ Jack and Libby Friedberg.

25 ²⁵ Tr. at 66.

26 ²⁶ Tr. at 67.

27 ²⁷ *Id.*

28 ²⁸ Tr. at 69.

29 ²⁹ Tr. at 47-48.

30 ³⁰ Tr. at 69.

31 ³¹ Tr. at 65-66; Libby Friedberg died during 2007, and the proceeds from her trust were to pass through to a trust for her son. Tr. at 49.

32 ³² Tr. at 91-92; Exhibit S-12(i).

33 ³³ Tr. at 92.

1 In November 2006, one of Libby Friedberg's existing loans matured and Radical Bunny sent
2 a new document titled "Instructions for Maturing Funds" with three options to choose from.³⁴ Mr.
3 Friedberg testified that this form was not used in the early years when they rolled over the principal.³⁵

4 Mr. Friedberg testified that they never had any communication with Mortgages Limited, and
5 that requests to roll over or for liquidation were directed to Mrs. Walder.³⁶ When Libby Friedberg
6 had to go into a nursing home, Mr. Friedberg testified that they liquidated \$35,000 to pay her medical
7 bills, and that because Radical Bunny had the Friedberg account number and routing number, the
8 funds were deposited directly into their account.³⁷

9 Mr. Friedberg testified that at the two Radical Bunny Orange Tree Resort meetings he
10 attended, the Radical Bunny managers represented that the investments were in a first deed of trust,
11 not an uncollateralized loan.³⁸ According to Mr. Friedberg, Mr. Hirsch "emphasized that we were in
12 commercial real estate with nothing – no more than a 65 percent loan-to-value ratio in commercial
13 properties and we were in first position."³⁹

14 Mr. Friedberg also testified that at meetings Mr. Hirsch told the Participants that he took care
15 of Scott Coles' taxes and was the trustee of his estate.⁴⁰ Mr. Friedberg testified that this information
16 was significant to him because it showed that Scott Coles placed trust in Mr. Hirsch and because it
17 showed that Mr. Hirsch knew what was going on behind the scenes with Scott Coles personally,
18 "whether he has a high loan-to-debt ratio."⁴¹ Mr. Friedberg testified that the Radical Bunny
19 managers talked about Scott Coles' net worth and "made him sound like he was a very conservative
20 investor with a lot of money to back up what he was saying."⁴² Mr. Friedberg testified that during the
21 2008 meeting, Mr. Hirsch discussed rumors about Scott Coles and tried to alleviate people's fears by
22 talking about Mr. Coles' net worth and preservation of capital. Mr. Friedberg testified that he was
23 led to believe that the Participants in Radical Bunny had been given a personal guarantee by Scott

24 ³⁴ Exhibit S-12(l).

25 ³⁵ Tr. at 93-94.

26 ³⁶ Tr. at 94.

27 ³⁷ Tr. at 95.

28 ³⁸ Tr. at 90.

³⁹ Tr. at 74.

⁴⁰ Tr. at 136.

⁴¹ *Id.*

⁴² Tr. at 136-137.

1 Coles to protect their investments, and that he was concerned when he heard that Chateau on Central
2 had been “taken back” by Mortgages Limited and Scott Coles was “taking that out of his own.”⁴³

3 Mr. Friedberg also testified that during the 2008 Orange Tree Resort meeting, he believed that
4 Mr. Hirsch and Mrs. Walder were making a “solicitation at that meeting in trying to raise money to
5 keep what we now know as Center Pointe afloat, because it was going under.”⁴⁴ He believed that
6 Radical Bunny was trying to raise \$13 million for Mortgages Limited and he was concerned about
7 how that would affect the lien position of the existing investment’s first deeds of trust.

8 Mr. Friedberg testified that he received a letter dated June 17, 2008, from Radical Bunny
9 notifying him of Scott Coles’ death and that the Radical Bunny managers were going to take steps to
10 protect the investments.⁴⁵ He attended a group meeting at Mr. Hirsch’s office with other investors
11 where they discussed putting together an advisory committee⁴⁶ and were told that they would not
12 receive “any more money until things got cleared up,” and were asked to donate money to hire
13 lawyers to protect their interests, so he gave them \$100.⁴⁷

14 Mr. Friedberg testified that statements made by Mr. Hirsch and Mrs. Walder led him and his
15 mother to believe that they had “invested in first deeds of trust secured by commercial real estate with
16 no more than a 65 percent loan-to-value ratio” and that he learned in the bankruptcy court that they
17 had “fractional interests in loans to Mortgages Limited, but they didn’t seem to be secured directly by
18 specific property”⁴⁸ and that if they had known that the loan interest was not fully collateralized, they
19 would not have invested.

20 Mr. Friedberg’s claim in the Radical Bankruptcy is for approximately \$327,000.⁴⁹

21 **Kelly Levine**

22 Kelly Levine testified that his mother, Diane Levine, began investing in Radical Bunny in the
23 late 1990’s and at the time of the Radical Bunny bankruptcy she had \$814,000 invested in Radical
24

25 ⁴³ Tr. at 106-108, 135-136.

26 ⁴⁴ Tr. at 79.

26 ⁴⁵ Ex. S-12(t); Tr. at 96.

27 ⁴⁶ Tr. at 97.

27 ⁴⁷ Tr. at 82-83.

28 ⁴⁸ Tr. at 88-89.

⁴⁹ Tr. at 122.

1 Bunny.⁵⁰ Mr. Levine testified that he attended a meeting that his mother had with Mr. Hirsch in
 2 about May 2007 when she was considering putting the \$400,000 she received from the sale of her
 3 pawn shop into Radical Bunny. Mr. Levine testified that Mr. Hirsch told him that the loans were for
 4 commercial, not residential properties.⁵¹ Mr. Levine testified that in response to his concern that
 5 retirement investments should be in less-risky, more diversified investments, Mr. Hirsch answered
 6 that an investment in Radical Bunny is diversified because "it's spread out among many loans within
 7 Mortgages Limited" and that because Radical Bunny holds the deed of trust to the property, if a
 8 borrower does not pay the loan back, they can get the property, which is better than stock where there
 9 is no recourse on the principal.⁵²

10 Mr. Levine testified that it did not seem that his mother understood that over the years her
 11 investment documents had changed from initially stating the actual borrower's name to later saying
 12 Mortgages Limited's name.⁵³ Mr. Levine also testified that he learned after Scott Coles' death that
 13 "about half of the investments that Radical Bunny has was all in one loan, in Center Pointe...and I
 14 was shocked to find that out because it didn't seem very well diversified to me."⁵⁴ He also testified
 15 that when he went to a meeting after Scott Coles' death, he "understood that it was Mortgages
 16 Limited that actually held a deed of trust"⁵⁵ and not Radical Bunny, as Hirsch had explained in May
 17 2007.

Barbara Mathis

19 Barbara Mathis testified that she had a career as an Internal Revenue Service ("IRS") agent
 20 and that on two occasions her IRS work involved Mr. Hirsch's clients. Ms. Mathis testified that "a
 21 friend of mine identified that her family had been involved in the investment with Radical Bunny for
 22 many years. They had earned a lot of money, and as far as she was concerned it was a very good
 23 investment, very good way for me to take my money from my 401(k) and increase it, because she

24
 25
 26 ⁵⁰ Tr. at 139.

27 ⁵¹ Tr. at 141.

28 ⁵² Tr. at 143.

⁵³ Tr. at 149.

⁵⁴ Tr. at 149-150.

⁵⁵ Tr. at 148.

1 knew I was living on some very tight means.”⁵⁶ Ms. Mathis pulled \$226,881.94 from her Individual
2 Retirement Account (“IRA”) with the IRS and invested it with Radical Bunny in December 2007.⁵⁷

3 Ms. Mathis testified that she met with Mrs. Walder at Radical Bunny’s office and that Mr.
4 Hirsch also spoke to her.⁵⁸ She testified that Mrs. Walder explained the investment as commercial
5 pieces of property, that each have a loan or lien on them and that Radical Bunny would loan on a
6 “loan-to-value ratio of about 60 percent.”⁵⁹ She testified that “[s]o we were supposed to be first-
7 person liens on these people, meaning that there was nobody before us, that we were in the place of a
8 bank, and we were supposed to get the money first as a loan...first lien position.”⁶⁰ She testified that
9 she understood that she would not have an assignment of deed of trust in her own name, but that it
10 would be liened in the name of the investment grouping, Radical Bunny, and that she was a “passive
11 investor” and would not be providing any effort to run Radical Bunny.⁶¹

12 Ms. Mathis testified that Mr. Hirsch oversaw the investment and that he and Scott Coles chose
13 the investments which were “being very closely monitored by Mr. Hirsch and Mr. Coles.”⁶² Ms.
14 Mathis testified that Mrs. Walder and Mr. Hirsch pretty much told her that the investment was safe.⁶³
15 She testified that she does not recall a description of any particular risks disclosed by Mrs. Walder in
16 her meeting, but that Mrs. Walder focused on the “absolutely enormous potential of these loans and
17 all of these different contractors who, you know, were all anxious to borrow money and anxious to
18 pay it back, supposedly.”⁶⁴

19 Ms. Mathis testified that other than the writing in the documents, there was no focus on
20 risks.⁶⁵ She testified that on November 2, 2007, Mr. Hirsch told her that “they never lost a dollar of
21 any investor’s money” and that “Scott Coles, in 35 years of business operations, he had never lost a
22
23

24 ⁵⁶ Tr. at 265.

25 ⁵⁷ Tr. at 266-267; Exhibit S-16(a).

26 ⁵⁸ Tr. at 268.

27 ⁵⁹ Tr. at 269.

28 ⁶⁰ Tr. at 269.

⁶¹ Tr. at 270.

⁶² Tr. at 271-272.

⁶³ Tr. at 273-274.

⁶⁴ Tr. at 274.

⁶⁵ Tr. at 275.

1 dollar of any investor's money, even during the worst real estate downturns in the history of
2 Arizona."⁶⁶

3 Ms. Mathis testified that Mrs. Walder did not explain the acknowledgements contained in the
4 "Loan Participation Disclosure Statement and Acknowledgement," but that she believed that "it was
5 a standard description of ... warnings and items that could, would, should but never will happen, that
6 kind of thing...[b]ecause that is pretty much what everybody indicated."⁶⁷ Ms. Mathis testified that
7 she did not read through all the documents that she signed based upon the trust of the Participants.⁶⁸

8 Ms. Mathis never saw the "Security Agreement" described in the acknowledgement of risk
9 description of the "secured loan"⁶⁹ but she testified that they were described as a "pretty closed and
10 tight collateralized agreement, that we were the first person lienholders on all of these pieces of
11 property that supposedly the various borrowers wished to purchase."⁷⁰ She said she assumed that
12 there was another contractual agreement that collateralized Radical Bunny and Mortgages Limited.⁷¹

13 Ms. Mathis testified that in her meeting there was no discussion about the term "revolving
14 line of credit"⁷² but she also testified that she was told that there "was not supposed to be any
15 revolving line of credit in actuality" because Radical Bunny had the 60 percent loan condition.⁷³ Ms.
16 Mathis testified that Mrs. Walder told her that she would be able to liquidate her investment by
17 putting in a request and it would take 30 days to up to 6 weeks to get the money.⁷⁴ Ms. Mathis
18 testified that the way the language that she may have to hold her interest in a loan for an indefinite
19 period of time without liquidating it was explained to her was that it was something that could happen
20 but that "it was just not a possibility, really, that all of them would go belly up at the same time."⁷⁵

21 Ms. Mathis testified that no one told her that they could not take her investment if she was not
22 an accredited investor.⁷⁶ She also testified that Mrs. Walder explained the issue of accreditation was

23 ⁶⁶ Tr. at 281-282.

24 ⁶⁷ Tr. at 281.

⁶⁸ Tr. at 279.

25 ⁶⁹ Tr. at 283.

⁷⁰ Tr. at 283-284.

26 ⁷¹ Tr. at 308-309.

⁷² Tr. at 317.

27 ⁷³ Tr. at 285-286.

⁷⁴ Tr. at 288.

28 ⁷⁵ Tr. at 289.

⁷⁶ Tr. at 316.

1 just a formality, "it's just paperwork that we all have to sign off on..."⁷⁷ Ms. Mathis testified that
 2 she put the truth on the "Certification of Accredited Investor Status" by indicating that she was not an
 3 accredited investor.⁷⁸ Ms. Mathis indicated that she had "suffered a lot of medical issues that make
 4 things difficult to remember"⁷⁹ however, she is positive that she discussed with Mrs. Walder that she
 5 was not an accredited investor⁸⁰ and that is why she signed the document indicating that she was not
 6 an accredited investor.⁸¹

7 Ms. Mathis testified that she attended two Orange Tree Resort meetings and that she was
 8 requested to sign up ahead of time and indicate whether or not she was bringing a guest.⁸² Ms.
 9 Mathis testified that the subject of registering investment opportunities with the Commission was
 10 never mentioned by Radical Bunny's managers.⁸³ Ms. Mathis testified that she lost "everything I had
 11 worked 23-and-a-half years for"⁸⁴ and that she had not recovered from the shock and that she thought
 12 she would "die very soon, probably" because she no longer had the money for doctors.⁸⁵

13 **Donna Hinman**

14 Ms. Hinman is a real estate agent, a substitute teacher, and a part-time grader who took the
 15 \$45,000 she had obtained in her divorce settlement and invested it in Radical Bunny on March 3,
 16 2008.⁸⁶ She learned of Radical Bunny from a friend's son, and her friend attended the meeting with
 17 her in Bunny Walder's office where Mrs. Walder discussed making an investment in commercial real
 18 estate. She testified that Mrs. Walder explained that she had just returned from a meeting with
 19 Mortgages Limited that morning, and that they went weekly to Mortgages Limited to "look over all
 20 the loans that were presented to them so they could pick the very best loans for Radical Bunny
 21 participants."⁸⁷

22
 23 ⁷⁷ Tr. at 291.

24 ⁷⁸ Tr. at 292.

25 ⁷⁹ Tr. at 311.

26 ⁸⁰ Tr. at 315.

27 ⁸¹ Exhibit S-16(b).

28 ⁸² Tr. at 296.

⁸³ Tr. at 301.

⁸⁴ Tr. at 298.

⁸⁵ Tr. at 290.

⁸⁶ Tr. at 402-403.

⁸⁷ Tr. at 403.

1 Ms. Hinman understood that her investment “would be going on land, on land, commercial
 2 land in Phoenix probably later to be made an office building” and that she asked Mrs. Walder three
 3 times to make sure that it would not be going into residential, because if it were residential, she
 4 would invest in Tucson; and she specifically said “I do not want condos”⁸⁸ because she knew from
 5 being a realtor that condos were the bottom of residential. Mrs. Walder told Ms. Hinman that they
 6 didn’t invest in that, that her “money would be pooled with other investors that came at this time to
 7 invest until they had enough money to purchase this land, and that is where this money would go.”⁸⁹
 8 She understood that she would be in a pool, but it would be a new loan that would have a number and
 9 it would be her number on the loan and on the deeds of trust.⁹⁰ She received a Direction to
 10 Purchase⁹¹ and Ms. Hinman testified that Mrs. Walder said there was no risk, that it was safer than a
 11 401(k) and that “[n]o one has ever lost any money at Radical Bunny” and that “it was safer than the
 12 stock market because it was actual real estate.”⁹²

13 Ms. Hinman testified that at her meeting with Mrs. Walder, Mrs. Walder said there was no
 14 minimum to invest, but that would change in July when the Private Offering Memorandum (“POM”)
 15 came – Ms. Hinman testified that Mrs. Walder said, “[t]here was a loophole in the law, the securities
 16 law, that at this point they were free to take money...until, you know, until they reached the 200
 17 million. Then at 200 million the law will kick in, and they would have to then – they wouldn’t be
 18 able to accept me after that time...That was her term, that there was a loophole, that until they
 19 reached 200 million that they could sell these deeds of trust and these securities until they reached
 20 200 million...[a]t this point they were at about 186 million, and they had like two months to go. So
 21 they figured like by July they would have the 200 million” and Mrs. Walder brought out a large stack
 22 of papers that the attorneys were having her read.⁹³ Ms. Hinman testified that Mrs. Walder told her
 23 “as soon as the POM went through in July, it would be \$100,000 because you would have to be
 24 accredited.”⁹⁴ Based upon the description that Mrs. Walder gave her, that an accredited investor had

25 ⁸⁸ Tr. at 404.

26 ⁸⁹ Tr. at 405.

27 ⁹⁰ Tr. at 405-406.

28 ⁹¹ Exhibit S-12(l).

⁹² Tr. at 426.

⁹³ Tr. at 410.

⁹⁴ Tr. at 412.

1 to have more than \$1 million in assets, Ms. Hinman did not deem herself to be accredited, but she
 2 testified that Mrs. Walder said, "Well, don't worry about it. We will let you in. We will take your
 3 money."⁹⁵ When Ms. Hinman paused at the part of the form about being an accredited investor, she
 4 testified that Mrs. Walder assured her that she was worth \$1 million "[b]ecause think about your
 5 house, your car, you know, we own furniture, and everything you have, I am sure you have \$1
 6 million."⁹⁶

7 Ms. Hinman attended the May 2008 Orange Tree Resort meeting and took notes about what
 8 was said. She testified that the meeting started with Mr. Hirsch talking about the rumors about Scott
 9 Coles being lies, and that Mr. Coles was financially stable and they had nothing to worry about.⁹⁷
 10 Ms. Hinman testified that Mr. Hirsch discussed new rates and a new condo project and offering 13
 11 percent instead of the 11 percent they were getting; that "if you invested like one million or
 12 something, he would give you 15 percent or something on your money. It was outrageous."⁹⁸ She
 13 testified that Mr. Hirsch brought up the POM and that he "did talk about they were working on that,
 14 and they were going through with that. And at that point they would only take accredited investors,
 15 at that point further."⁹⁹ Ms. Hinman said that Mr. Hirsch said that they were very busy working on it,
 16 and they were very excited about it, and they were getting ready to reach the \$200 million. Ms.
 17 Hinman testified that information seemed to confirm what Mrs. Walder had told her.¹⁰⁰

18 Ms. Hinman testified that her money was not invested into a new loan, that she felt "like the
 19 money was given to Scott Coles, and he spent it."¹⁰¹

20 **Donna Herbranson**

21 Ms. Herbranson worked as a recruiter in Canada and then worked for and retired from the
 22 Arizona Commission of Arts. She invested in Radical Bunny in June 2003 and dealt only with Mr.
 23 Hirsch.¹⁰² She understood that she was dealing in deeds of trust and that they could actually
 24

25 ⁹⁵ *Id.*

26 ⁹⁶ *Id.*

27 ⁹⁷ Tr. at 417-418.

28 ⁹⁸ Tr. at 420.

⁹⁹ Tr. at 422.

¹⁰⁰ Tr. at 423.

¹⁰¹ Tr. at 439.

¹⁰² Tr. at 466.

1 foreclose on property and end up owning the property should something happen.¹⁰³ She testified that
 2 no risks were discussed, and that “all I ever heard was it was principal that was safe.”¹⁰⁴ She testified
 3 that her role was to invest \$60,000.¹⁰⁵

4 Ms. Herbranson testified that the May 2008 Orange Tree Resort meeting was a “dog and
 5 pony” show and that there were two main points: Mr. Hirsch talking about Scott Coles and that he
 6 [Coles] didn’t have financial problems;¹⁰⁶ and the accreditation issue. She said that she felt like it
 7 was a “pep rally for Scott Coles and this Center Pointe and Chateau on Central and I think there was
 8 a Hotel Monroe mentioned as well.”¹⁰⁷ She testified that when Mr. Hirsch told the group that they
 9 now had to be accredited, and in order to be accredited they have to have \$1 million, there was a
 10 crowd noise, and Mr. Hirsch said, “Don’t worry about it. You yourself don’t have to have \$1 million.
 11 You can have a group, and together you will have \$1 million.” She said that Mr. Hirsch told them
 12 that “nobody ever checked on it.”¹⁰⁸

13 Ms. Herbranson testified that she had noticed the change in language on the Direction to
 14 Purchase, but did not do anything about it because she trusted Mr. Hirsch.¹⁰⁹ Ms. Herbranson
 15 testified that at the May 2008 meeting Mr. Hirsch said not to worry because he had Scott Coles’
 16 personal guarantee.¹¹⁰

17 **Nunzio Schiliro**

18 Mr. Schiliro met Mr. Hirsch through a friend who was a tax client of Mr. Hirsch¹¹¹ and Mr.
 19 Schiliro also became a tax client of Mr. Hirsch.¹¹² Mr. Schiliro became an investor in Horizon
 20 Partners in 2001 and then invested in Radical Bunny. He testified that Mr. Hirsch did not discuss
 21 risks, and that “Tom guaranteed us that wouldn’t be any problem; we only loan 60 percent on the
 22 dollar so there is no way we can lose any money. Besides, we be on a deed of trust, which we were
 23

24 ¹⁰³ Tr. at 467.

¹⁰⁴ Tr. at 472.

25 ¹⁰⁵ Tr. at 468.

¹⁰⁶ Tr. at 475-476.

26 ¹⁰⁷ Tr. at 483.

¹⁰⁸ Tr. at 476, 484.

27 ¹⁰⁹ Tr. at 481-482.

¹¹⁰ Tr. at 492.

28 ¹¹¹ Tr. at 533; 512.

¹¹² Tr. at 512; 533.

1 in the beginning. That is why we never expect to end up the way we did.”¹¹³ Mr. Schiliro testified
 2 that his investment experience consisted of buying some property and reselling it, construction, and
 3 remodeling houses and selling them. He did not receive any type of documentation describing his
 4 investment prior to the time that he initially invested.¹¹⁴ He did not receive any paperwork that
 5 would describe a change to his investment or the risks associated with his investment.¹¹⁵ Mr. Schiliro
 6 testified that he lost his life savings – total of \$563,000 and that he currently lived on \$1,173 in social
 7 security a month. He said that Mr. Hirsch said “it was secure; it was guaranteed; don’t worry about
 8 it; we can never lose it.”¹¹⁶

9 Mr. Schiliro testified that at the Orange Tree Resort meeting, Mr. Hirsch said to not worry
 10 about the rumors about Scott Coles, that the building is almost finished, and our money is secured,
 11 we are first on the deed of trust;¹¹⁷ “as a matter of fact if you have any other money, minimum
 12 \$50,000 you can invest it” in a building in Tempe – the Center Pointe.¹¹⁸ Mr. Schiliro testified,
 13 “[a]nd as it turned out, a month later he did himself in. So they weren’t rumors. There was some
 14 boiling on his brain that he knew he was in trouble...You don’t kill yourself just for pleasure.”¹¹⁹

15 **Steven Friedberg**

16 Steven Friedberg is Richard Friedberg’s brother and in approximately 2003, he became aware
 17 of Radical Bunny as a result of his mother’s investment. During the week of April 6-13, 2007, he
 18 met with Mrs. Walder in the Radical Bunny offices to determine whether he wanted to invest.¹²⁰ He
 19 recorded the conversation in digital format using an MP3 recording device.¹²¹

20 During the conversation with Mr. Friedberg, Mrs. Walder says:

- 21 • “Well let me tell you how this all came to be; I’m a retired school superintendent, and my
 22 husband a retired pharmacist, and my husband and Tom Hirsch (he’s a CPA who Richard and
 23 your Mom have dealt with) graduated from high school; and for evermore they were always

24 ¹¹³ Tr. at 511.

25 ¹¹⁴ Tr. at 514.

¹¹⁵ Tr. at 516-517.

26 ¹¹⁶ Tr. at 518.

¹¹⁷ Tr. at 520.

27 ¹¹⁸ Tr. at 519-520.

¹¹⁹ Tr. at 524.

28 ¹²⁰ Tr. at 1448.

¹²¹ Tr. at 1448-1450.

1 looking for another way to make a nice living. So Tom went into the CPA trade, Howard went
2 into pharmacy, I went into education. And we did a variety of things, we opened up a little
3 restaurant, we had a Maco Autobody, things that weren't really unconventional; that's alright,
4 but nothing like you would think, wow, we're going to be written about, you know; so
5 meanwhile I'm continuing on my career path...."

- 6
- 7 • "Tom had a client who every year would come to do his taxes and would make more money
8 on interest income than the year previous, every year it was like incredible, so Tom, not being
9 a shy type of person, says OK how are you doing this? I'm interested because every year it
10 gets better than the year before. And the guy says, come on, I am going to introduce you to
11 Mortgages Limited. And Mortgages Limited has been in business since 1963 doing exactly
12 same thing; commercial, bridge loans, they're the hard money loan that some people will
13 think of it as a construction loan, or a purchase loan for commercial - always commercial -
14 and so when Tom and Howard went in they found out you had to be accredited which they
15 weren't, each on their own, and they had to have \$100,000 and they didn't have a \$100,000,
16 but they pooled their monies and they brought in the 3rd partner, who is Harish Shah, the other
17 CPA who has been in business with Tom for 18 years. Tom and Harish opened up a CPA
18 firm, Howard has his restaurant and I'm now retired. So we made this Radical Bunny, never
19 thinking that someday this is will be a company where people will come from all over...[we
20 did it] just to make some extra money, so we went to Mortgages Limited and we presented
21 ourselves as one person, Radical Bunny, and they said alright. We put that \$100,000 together,
22 we started getting checks - wow - this was kind of interesting - we didn't have to go work,
23 worry about employees, wash dishes, fix cars, it was like - this was interesting and it beat
24 collecting rents because we've had rentals, oh my gosh the stories I could tell you...."[7:54]
 - 25 • "Well this was going very well and we were all very satisfied, and as Tom & Harish were
26 doing tax returns, people were inheriting money, selling businesses, just monies would come
27 into play, and they would say to Tom and Harish, I just came into \$100,000, \$200,000 what
28 do you think should I do?...Well, we've all been opposed to the stock market... it's just a

1 gamble, we all know you put money in, yes, maybe you'll make money more than likely
 2 won't make money, you either stay the same or you're just going to do this all the time. So
 3 they [Hirsch and Shah] would go, oh we don't know what you should do but we'll tell you
 4 what we do if you want you can be part of us. Of course they do, at the time was paying a
 5 nine and a quarter, 10 percent; today we are at 11. So, boy this thing started to kinda just
 6 mushroom – mushroom - neighbors, friends, referrals of referrals of referrals; we are to date
 7 770 investors; \$151 million in our portfolio. So, now I retire from education and Howard
 8 retires from the pharmacy. Then Tom & Harish say hey this is getting wild you guys should
 9 come in a couple days a week now that you're retired; we said sure, it's never been a couple
 10 days a week, its Monday through Friday, I love this; Monday through Friday from 9-4:30,
 11 every week, every week. We make a lot of money, now how do we make money? OK, well,
 12 when you invest with us, and I don't know if Richard told you this have \$50,000, initial
 13 investment....We, meaning Radical Bunny, pools monies from investors. Mortgages Limited,
 14 here in town, is meeting with borrowers, they review the applications, they go out to the site,
 15 they have a team of people they take with, the appraiser, the title company, legal, title,
 16 research, title search, all this – they will tell the borrower in 2 weeks time yes or no. If you're
 17 a first time builder it's automatically 'No;' if you have had problems with paying back your
 18 creditors, absolutely not; they "take the cream of the cream." [11:13]

- 19 • "This is a very serious - everybody is on the same page type of business; you're making a
 20 commitment, we're making a commitment. We're not shy about foreclosing...We're always
 21 in first position. Here's the – there's 4 non-negotiables: 1) Arizona only - never go out of
 22 Arizona...; 2) commercial only, no residential; 3) no higher than 65 percent loan-to-value;
 23 typically it's less, but that's the ceiling - 65 percent; 4) and always in first position. With those
 24 four – you stay pretty safe, pretty safe, not guaranteed, but pretty safe." [13:12]
- 25 • "Mortgages Limited charges 16, they sell us the paper at 13, and I take 2 percent for us; you
 26 get 11 percent the whole year...you're in it for one year at a time, and during that year you get
 27 monthly payments, every month, every month. At the end of the loan, everything is very
 28

1 mathematical...always one year. Now if you want to go in for less than a year, you want to
2 park some money...it's 9 percent rate of return, you can do that so long as you leave it in for
3 90 days; what if you have to break it, an emergency occurs and it's less than 90 days, you get
4 the money, you get the money, we're not going to say sorry, we hope that you keep it in for
5 90 days; we try to make this very family style, very family oriented...things happen, you
6 know you need the money back, you need the money back, or a part of it. So, that's how we
7 can sell it to you and guarantee that it's going to be for the full year." [14:18]

- 8
- 9 • "Now 60 days before the end of the term, you're gonna get a letter from us – to remind you
10 your loan is ready to mature in 60 days; you're gonna get something that looks like this"
11 [shows him documents] "here are your choices, you can roll it over to the next loan, it should
12 be seamless you should have no downtime because once you have downtime you are starting
13 to lose money, so you can roll it over; you can partially liquidate meaning that of the monies
14 you deposited you get some back, however once you go over 50 percent, we give it all back to
15 you because we don't want you in the loan; you can include additional monies if you want to
16 roll it over with additional you don't have to; or you can just liquidate. You have choices and
17 we give you 60 days to think about it take it out...you give us instructions, otherwise we will
18 return the monies...
- 19 • "Things you want to know about us...we've never lost a single penny. Mortgages Limited has
20 never lost a single penny." [15:34] When Mr. Friedberg asked "so no one ever defaulted on
21 the loan?" Mrs. Walder replied "oh sure, here's what happens, here is the latest one – this is
22 RCS Chandler, a beautiful 10 acre parcel in Chandler, this was 71 days in foreclosure...."
23 Mrs. Walder explained that she would call and say there is a default and see if the investor
24 wants to continue or get into a different loan. She explained how there are "people who are on
25 a waiting list to get into foreclosures, they love it they love it....these are people who are not
26 living off the income...there are people who just don't need the money every month, so they
27 are willing to wait until we resolve this and then they collect the principal plus 18 percent."
28 She said "I can reduce the note 40 percent of the appraisal value because I'm only into it 60 –

1 65....” Mrs. Walder said that this has happened about 10 times in 12 years and the shortest
2 one was 4 hours; the longest one was 1 ½ years.... “It’s a wonderful thing if you don’t need
3 payments every month, if you can say, yeah, this is just another side of Radical Bunny there’s
4 ways to make 18 percent. It’s a wonderful thing – people call me all the time, do you have
5 any? I have some extra money, I just came into money.” [19:23]

- 6
- 7 • Mr. Friedberg asked what would happen with the “worst case scenario - the whole economy is
8 crashing down people won’t even buy the land that is going into foreclosure?” Mrs. Walder
9 answered “won’t bother us, no, that’s not going to happen, here’s why: unlike residential, you
10 know, residential if the market is bad it affects you right away; you know you can’t sell or
11 sometimes it’s a buyers market sometimes it’s a sellers market; commercial people think in 10
12 year cycles – they don’t think about, oh my gosh, look at what’s happening to the market.
13 They’re saying 10 years from today where will they need a shopping center, where will they
14 need a hospital; where are they going to need a 7-11...[22:32] “so the chance of something
15 not being purchased at auction - is the people who buy at these auctions are not affected by
16 Wall Street, right now or how the dollar is compared to euro, they’re not into that, they are
17 into the futures market, this kind of futures market, not the stock market. So in the worst
18 economies we do fine. We’ve gone through these bad, bad cycles, you know the 80s, horrible
19 – didn’t bother us, didn’t bother us.” [23:23].
 - 20 • When Mr. Friedberg asked “So, why wouldn’t I go directly to Mortgages Limited?” Mrs.
21 Walder answered “sure, you could...these are good questions and please ask lots of questions.
22 First of all, I don’t know if you are accredited, you may be, you need your net worth is a
23 million dollars. Right now there is a possible change in the definition of accredited - it could
24 be that they will change to a \$1 million over and above your principal residence, that’s
25 number one, it makes it much tougher to be accredited. There was just an article in the Wall
26 Street about 3 weeks ago that there was another school of thought that maybe it should be 2.5
27 million over and above your principal residence, that would narrow who can be accredited.
28 Does it matter? Oh yes, it does because there’s many, many different funds that you would

1 not be privy to, it's only for the top portion of the world... Because they say that if you're not
2 worth at least a million dollars, you need a lot of protection from unscrupulous people...So
3 that if you were to go there, the first thing is you would have to say, or at least be accredited –
4 that's #1; #2 believe it or not, you get a better rate here, why? We are their single largest
5 investor. Their portfolio hovers at around 700 million; but Radical Bunny has 151 of that
6 portfolio, so we are to them their single largest – we were able to go and negotiate a better
7 rate than the average person, so if you went today, unless you're walking in with at least 10-
8 15 million, the rate is better here. You're gonna be offered probably about 9.5. You're going
9 to be put in a pool and you have to be there for 5 years. If you liquidate, they have a 5%
10 penalty, once they got you, they want you there; here you're in it for a year and if you have to
11 liquidate, you lose 2% of your interest....So the worst case scenario is you have to liquidate,
12 we roll you back 2 percent to the inception of the loan. Now we take it out of your next
13 interest check if you want or you can just write us a check, but we never touch the principal,
14 there is no mistaking that – never; it's your money, we don't fool with it, we don't do
15 anything like we're going to strong arm you...So, we make the money on the spread there are
16 no other charges...." [26:38]

- 17
- 18 • "So like on \$50,000, you get a check for \$468 per month....month one is always prorated and
19 then you get a 13th check...now we're like clock work...we pay out \$1.5 million every month
20 in interest....I'm not kidding when I tell you this has been the most enjoyable, marvelous,
21 very lucrative for me to make a million dollars a year on the spread." [29:04] "People ask how
22 do I know you'll be here tomorrow, are you kidding - are you serious?...I know we have
23 literally changed the lives of people - people have retired, they're traveling...." [29:31]
 - 24 • When Mr. Friedberg says, "you've already sold me on the fact there is no benefit to going
25 directly to them, but I am curious that they accepted 3 people combining to add the net assets
26 together to become accredited?" Mrs. Walder said "we were a company, we were a company
27 with assets, a company can invest, they didn't say you are a person whose name is Radical,
28 last name Bunny. We're a company, Radical Bunny, yes, and we have \$100,000....One thing

1 you should know is they have a banking license, they [Mortgages Limited] have a SEC
2 license, Securities and Exchange Commission and they are members of NASD, the National
3 Association of Securities Dealers – they have to be very, very strict. I think if I did that today,
4 it would be a different story because they will review you as an investor; but we came in as a
5 company we kinda went around the, the, here's a boulder in the road and I'm driving a jeep,
6 well how do we do it, well lets go around the boulder – so we formed a company and
7 presented ourselves as we were a company wanting to invest in Mortgages Limited and they
8 said fine.” When Mr. Friedberg asked if the company did not have to be accredited just as
9 long as you have the money, Mrs. Walder answered “It is interesting, there they did not have
10 the SEC license at that time; they were a small mortgage company...we started with the
11 original founder Chuck Coles, he's since passed away, and his son, Scott, took it over and this
12 thing, just went through the roof.” [31:39]

- 13 • When Mr. Friedberg says that he is glad he spoke with her, she says she is not handing him –
14 he said a prospectus – “we're just investors, now you could and you may feel better by going
15 right to Mortgages Limited because then you're going right to the waters edge...[with us] you
16 get a better return. I think that dealing with us you get a friendlier staff, because there you're
17 basically just a file...here, you're part of a family of investors, and we really do all we can to
18 service your account. We're happy that you called, we're thrilled, a lot of people don't call
19 because everything just goes like clockwork so...but there when you call, you know you're
20 going to get the next available representative, it's a large company.” [32:47]
- 21 • When Mr. Friedberg asked, “is there ever such a thing where they don't need more money,
22 like you're filled up?” Mrs. Walder answered “No, because Arizona is growing – I've
23 thought about where else could this exist - I couldn't imagine, I certainly wouldn't try this on
24 the East coast, I wouldn't try it on the West coast; a lot of the weather; weather has a lot to do
25 with where people pick to retire, we don't have the tornados, the hurricanes, the earthquakes,
26 the flooding, and the snow storms, the rains – this is like a little haven of a place where it's
27 really exciting – but not so exciting that we are in the news all the time because of what's
28

1 happening. We are expanding, I don't know if you noticed ...opening up another building for
2 the university, ASU's doing some huge expansions; all these scientifically oriented companies
3 coming here. The US Navy, the Army, the desert, these are huge training grounds, where they
4 take airplanes and they fly them, they have hidden areas, no fly zones. It is growing, they
5 predicted, there is a little town called Maricopa, that is targeted to be larger than all Phoenix
6 in about 2020 ...these little towns have mushroomed. And what do they each need? Well,
7 shopping centers, and supermarkets, and clinics, and everything imaginable...All those
8 services...Mortgages Limited provides the monies to get these things off the ground." [35:17]

- 9
- 10 • "Every day they [Mortgages Limited] have more applications than there is money. Now we
11 never recruit, I would never call you and say, hey, we are putting a loan together, do you have
12 extra couple bucks, never, we do not ever call you, recruit, the only time there would be a call
13 from us is there is a foreclosure, a possibility, because by the time I hang up the phone, things
14 may have changed – they may have paid it off...." [35:44]
 - 15 • "I stockpile the check; Mortgages Limited calls, and they say, look next Monday we're going
16 to be funding loans. Now, 3 days prior, I'll deposit all the checks cause they'll take as much
17 money as I have. My checks are now deposited and clear, I then write one check to Mortgages
18 Limited, they're going to deposit that same day to clear my check so they can write the check
19 to the borrower or borrowers... the best part about what we do is you're spread amongst loans
20 – you're not in just one, it's rare. We used to do it that way where we have one deed of trust
21 and you'd go out there and you'd kick the tires and say I am in this loan; and you know after a
22 while I realized I don't really care which loan it is – so long as it's Arizona, commercial and
23 60%, 65 and has first position. I don't care, I don't care what it is. Cause they're going
24 through all these applications and they only pick the top of the top. I don't care if it's on this
25 side of the street or that side...Who cares? It's not my problem, because if I had to foreclose,
26 I'm gonna get commercial land or commercial property...you would hope nobody would buy
27 it and you end up with it. [38:19] Now what they do for us is they split the monies amongst
28 wherever they need it." [38:32]

- 1 • “Originally when we first started this and we were in one deed at a time, well the borrower
2 has the right to pay off the loan any time they want, early, that’s up to the borrower.
3 Mortgages Limited would collect the prepayment penalty; we didn’t get a penny, we would
4 get our payment back...and now we have to give it back to you... the bookkeeping was...so
5 we had to get this enormous \$10,000 piece of software...keeps track of everything per
6 investor per payment to the penny...I can tell at a glance who’s coming up for maturity, what
7 amount,...what paid off; this made life reasonable...but it was still a nightmare - checks back
8 and forth, so we went back to Mortgages Limited and said ‘we are your #1 investor, your
9 largest investor – we want interest-only, interest only - I can’t stand the principal coming
10 back, it’s, it’s nuts.’ So they said OK, here’s what we’ll do ‘we’ll use the monies as a money
11 source and we’ll apply it towards the loan; as loans pay off, we’ll put it into a cash position
12 we’ll give you a promissory note saying that we are responsible for making the payments for
13 the whole year.’ I like that, that works; that works. So now when you give me a check you
14 don’t expect to get the principal back the whole year, or until you say you do...So you can go
15 buy the car, the house, take a vacation because you know they’re getting these payments on
16 time, every single month, there’s never a question, and when you want it back you got a 30
17 days liquidation...and we always liquidate way, way quicker ...we say 30 days - but within 2
18 weeks. Now, this makes sense, you learn all this as you go along...Mortgages Limited makes
19 the payment, regardless... You do it as you see fit and when the borrower comes and signs, I
20 don’t even want to know about it, I get a promissory note, I get my payments, regardless.”

21 [42:45]

- 22 • “Now the best part, the 2 CPAs?...they do the taxes on the pools – they can’t do the tax work
23 for the company because that would be a conflictbut they know what the pools are like,
24 the strength of the pools, the strength of the portfolio; I sleep very well at night.” [43:06]
- 25
- 26 • Mrs. Walder told Mr. Friedberg that a prospective participant who was an engineer once
27 asked her “what’s the one question I haven’t asked?” She told Mr. Friedberg “So this is what I
28 came up with, so now I make it a point to share with a prospective investor: None of this is

1 guaranteed, you know we have a history, you have people involved that at one time or another
2 like myself were licensed, have careers that showed the integrity, the way they dealt with
3 people in their own professions. You have the two CPAs that are still licensed, still actively
4 involved in taxes and working actively involved reviewing the pools. But there's no
5 guarantees...even if you put your money in mattress, there's no guarantee... so I guess what
6 he was looking for was the one thing that could possibly destroy this entire thing, and I said
7 well, if we were suddenly the target of a dirty bomb – and since all of this is real estate
8 related, and if you were to get contaminated soil, then it's all over folks...That's the only
9 thing I can come up with. The market conditions don't affect us, interest rates don't affect us;
10 supply/demand factor don't affect us, and I think like I've mentioned, Arizona is the likely
11 place where people would say, well if we want to invest in commercial real estate, this place
12 is growing...." 46:55

- 13
- 14 • "This is what the Direction to Purchase looks like, when you give us a check....I just found
15 this the other day....they [Mortgages Limited] advertise because they have their securities
16 license, they have a mortgage banker's license, we don't; so they advertise - we don't
17 advertise, you have to find us through a referral." When Mr. Friedberg asks "Does that mean
18 you're not allowed to advertise for some reason?" Mrs. Walder answered, "No, we shouldn't,
19 we shouldn't because then we get into regulation Z; and you get into a host of...you're out
20 there recruiting funds; we aren't, we don't recruit...now could we? Probably not, I think once
21 you start advertising, you start dealing with people who possibly wouldn't even understand
22 what we do; you'd have to explain it and they still don't understand...We have mortgage
23 brokers who send us people that they know...We end up getting referrals from people that are
24 3, and 4 and 5 places removed from the original investor...It's amazing, so that's how we get
25 new people." [48:41]
 - 26 • "This is the Direction to Purchase which comes to you after the fact...because you're already
27 invested...so when you give me a check, I can give you a receipt, but I'm not going to cash it
28 until I have a loan so I can't produce a loan document, I have nothing to give you, so now

1 when I finally do cash it, now I can give you a receipt that relates to something...This says
2 basically you're asking us to invest your money.... [49:46] There's probably about a million
3 per week that comes in – walk in, mail, wire transfer...We won't do them [loans to Mortgages
4 Limited] for less than \$1 million; we did one exception, they needed cash and we had
5 \$468,000.... Usually I don't like to go in for less than a million, but everyday I get an update
6 on their timeline....they're preparing my promissory note with the figure I'm giving them, so
7 I drive how much...I am a part of their loan...But even if they [Mortgages Limited] don't get
8 paid, I get paid...that is what you call 'leverage.' Cause I didn't want to be sitting here going,
9 oh my god...How do I know the strength of their portfolios? Because of the CPAs – they see
10 what's coming in, they see the flow of the monies coming in; they prepare all the K-1s, they
11 prepare - they answer the questions on those pools... you will get a 1099 from us, it is
12 taxable money.” [54:06]

- 13 • “Here's the liquidation portion, we keep it very, very simple, here's the liquidation. If you
14 need to liquidate part or the entire thing, we will do so, we just ask for a 30 day letter...[the
15 2% penalty is based upon] the amount liquidated, all the way back to the inception of that
16 loan, its on the interest rate, not the monies...you also get a quarterly update...you will get a
17 loan number.” [57:00]
- 18 • [Mortgage Limited] “gets a cash flow update every 10 minutes... They're good at what they
19 do...they have this little niche in the marketplace... Banks don't like to work with bridge
20 loans...We don't care if it's a parking lot or if they are going to do a revamping of the
21 exterior...I used to get so into these details... it's going to be an adobe front?”I used to
22 really care...I would be worried...Today I'd be laughing at myself...what do I care what they
23 serve in this restaurant – [if] they don't make the payments, I take over, the next person will
24 make it a bank. I don't have to worry about the menu...It's just money, this is just how money
25 flows...I am helping someone get their dream realized and they're going to make a lot of
26 money and I am happy for them, all I want is the payment, thank you. Mortgages Limited
27 will do a cross check not only on this building that you're building, they want to know
28

1 everything you built...a whole background on you and they'll lien everything that you
 2 have...the cross collateral more than likely won't be in first position, that's ok, but the project
 3 will be in first position – 60-65 percent. Here's 2 things they won't do anymore - no
 4 condominium conversions, we're glutted just like everybody else – now if you're building a
 5 condominium as opposed to a conversion from an apartment and if it's between Central,
 6 Camelback, Scottsdale Road north, we want to talk to you, we call it infill, that's yes, other
 7 thing won't do – acreage out in the boonies....”[1:03:30]

- 8 • “It's been a very successful thing to do.... I would not be sitting here encouraging someone
 9 to hand money over” [1:05:50] When Mr. Friedberg said that he felt comfortable “because
 10 my mother's been doing it for at least a couple of years now I feel comfortable, otherwise it
 11 could easily be one of those things on 60 Minutes where you hear people investing and the
 12 next thing the person ran off with the money...” Mrs. Walder said that “the whole thing is the
 13 collateral is property... I could run away...but the property cannot run....you don't know me
 14 and I could be just telling you stuff...but the collateral speaks for itself” 1:06:34
- 15 • [Mortgages Limited] “has been in business since 1963, and the licensing they have is very
 16 rigorous, you try to open up yourself as a bank or get a Securities and Exchange Commission
 17 license as a broker/dealer, they're a broker/dealer; and its rigorous, they inspect everything;
 18 and they're audited all the time.....so if we're inspected in terms of how the files are kept,
 19 how the monies are being applied, how the notes are being recorded; they're being audited
 20 over and over and over because they're supposed to; I'm the beneficiary of that. If they
 21 weren't licensed, I'd feel, kinda, oh I don't know... They're not fun people...it's a whole
 22 different atmosphere and we've had a lot of people who have left there, and come here not
 23 only because they found out they can make more, but they know when they call, they're
 24 definitely listened to and taken care of right away, none of this, well, let us research it and get
 25 back to you; no, you need answers...” [1:08:15]¹²²

26
 27
 28 ¹²² These excerpts from the digital recording were transcribed by the presiding officer.

1 Mr. Friedberg testified that he understood Mrs. Walder's story about the dirty bomb situation
 2 meant that "basically it was sure-fired, - very - if there was no dirty bomb, that my investment was
 3 safe."¹²³ He was not informed that Radical Bunny had engaged legal counsel to determine whether
 4 there were any problems with their purported collateral interest in Mortgages Limited's assets, and
 5 would not have invested had he known, because he refinanced his personal home and took out
 6 \$300,000 to invest in Radical Bunny.¹²⁴

7 He did not receive a Radical Bunny financial statement, and did not receive a Private Offering
 8 Memorandum.¹²⁵ Mr. Friedberg had sent a letter to Radical Bunny to take his money out before Scott
 9 Coles killed himself, but that request was not honored.¹²⁶

10 After listening to his recording of his conversation with Mrs. Walder, he testified that "the
 11 funny thing is, is that this is the first time that I listened to the tape beginning to end since that
 12 meeting. And after listening to it, I understand why I invested in it. It was very convincing. It made
 13 me feel very warm and fuzzy, like nothing could go wrong. And I really think that's the biggest gist
 14 of what I have to say about the whole thing."¹²⁷

15 **Alfred Ferry**

16 Mr. Ferry is retired from developing small hospitals and surgery centers¹²⁸ and Mr. Hirsch
 17 was his CPA for over 20 years. He testified that he had some money from a real estate transaction
 18 and heard about Radical Bunny from his son. Mr. Ferry said that Mr. Hirsch had never tried to get
 19 him to invest in Radical Bunny or told him about the returns. He became a participant in Radical
 20 Bunny in the latter part of 2004 or early 2005¹²⁹ and he had invested \$560,000 by the time of Scott
 21 Coles' suicide.¹³⁰ Mr. Ferry testified that he didn't think he was "ever told anything by anybody at
 22 Radical Bunny that wasn't true"¹³¹ and that no one ever told him there was no risk.¹³²

24 ¹²³ Tr. at 1653.

25 ¹²⁴ Tr. at 1655.

26 ¹²⁵ *Id.*

27 ¹²⁶ Tr. at 1657.

28 ¹²⁷ Tr. at 1658-1659.

¹²⁸ Tr. at 1708.

¹²⁹ Tr. at 1709.

¹³⁰ Tr. at 1710.

¹³¹ *Id.*

¹³² *Id.*

1 Mr. Ferry testified that he was “investing my money into specific properties. Early
2 documentation would list the location of those properties and assign a number to them....I had a
3 fractional interest in that property...that particular loan on that property... There was a later period
4 where the money was pooled and loaned at the discretion of the managers with authorization of the
5 participants. I was a participant. I authorized the investments. And it wasn’t in any one particular
6 loan. It was in all of the loans that were funded by Radical Bunny to Mortgages Limited.”¹³³ Mr.
7 Ferry testified that he “was relying on the credibility and professionalism of the managers” and he
8 would “do it again” and that he continues to rely on Mr. Hirsch.¹³⁴

9 **Pramod Patel**

10 Mr. Patel testified that he is an electrical engineer, born in India, educated in Britain and
11 working in Phoenix as a telecommunications and aerospace engineer since 1984.¹³⁵ In about 2003,
12 Mr. Patel met Mr. Shah through their children’s school, and their families became friends. Mr. Patel
13 invested \$250,000 with Mortgages Limited.¹³⁶

14 Mr. Patel testified that his wife spoke with Mrs. Shah about investments, and Mr. Patel then
15 went to Hirsch and Shah to learn more about Radical Bunny and Horizon Partners.¹³⁷ Mr. Hirsch
16 explained “how the investment strategy worked.”¹³⁸ Mr. Patel testified that he was never solicited.¹³⁹

17 Mr. Patel started with a \$20,000 investment and because of the performance, gradually put in
18 more money. He told acquaintances and family about Radical Bunny, including some in Britain.¹⁴⁰
19 Mr. Patel was also a direct investor with Mortgages Limited.¹⁴¹ Mr. Patel testified that he was aware
20 that Radical Bunny was making loans with notes directly to Mortgages Limited.¹⁴² Mr. Patel testified
21 that he did not feel like a “victim of fraud or any sort of misconduct by Shah and Hirsch.”¹⁴³

22
23

¹³³ Tr. at 1712.

24 ¹³⁴ Tr. at 1713.

25 ¹³⁵ Tr. at 1924.

26 ¹³⁶ Tr. at 1944.

27 ¹³⁷ Tr. at 1925-1926.

28 ¹³⁸ Tr. at 1926.

¹³⁹ Tr. at 1927.

¹⁴⁰ Tr. at 1927-1928.

¹⁴¹ Tr. at 1928.

¹⁴² Tr. at 1930.

¹⁴³ *Id.*

1 He attended a November 3, 2006 meeting with Chris Olsen from Mortgages Limited and had
 2 prepared a list of questions to ask Mortgages Limited.¹⁴⁴ He testified that at the November 2006
 3 meeting, there were “no indications” that Mortgages Limited was reluctant or there were problems in
 4 providing secured positions on both programs offered by Radical Bunny with Mortgages Limited.¹⁴⁵
 5 Mr. Patel was concerned that Mortgages Limited would be able to manipulate the investments
 6 without the knowledge of Radical Bunny, and the response from Mortgages Limited was that
 7 documentation on all the loans was available for review, but Mr. Patel said that none of the
 8 “participants got around to looking at that.”¹⁴⁶

9 Mr. Patel participated in an advisory committee after Scott Coles’ death, but there were some
 10 disagreements among the investors, and then the bankruptcy occurred.¹⁴⁷ Mr. Patel invested
 11 \$900,000 in a regular account with Radical Bunny, and \$480,000 in IRA.¹⁴⁸ His last investment in
 12 Radical Bunny was in January 2008.¹⁴⁹

13 **Scott Grainger**

14 Scott Grainger is a licensed civil engineer who met Mr. Hirsch at a Radical Bunny biannual
 15 meeting in November 2006.¹⁵⁰ His accountant at the time suggested that he attend the meeting¹⁵¹ and
 16 he wasn’t an invited guest, he “was a guest that just walked in because I had heard about the
 17 meeting.”¹⁵² Mr. Grainger testified that “I found the meeting very interesting. The information was
 18 provided, and I went home and discussed it with my wife. We did some research. My wife went
 19 down to the Radical Bunny office and met the managers that were there at the time.”¹⁵³

20 Their first participation was in February 2007 for \$100,000. At the time of Scott Coles’
 21 suicide, they had invested approximately \$1.7 million. Mr. Grainger testified that he understood that
 22 there were risks involved.¹⁵⁴ He testified that he thought his first investment possibly was

23 ¹⁴⁴ Tr. at 1928; 1931-1932; Exhibit R-9.

24 ¹⁴⁵ Tr. at 1936.

25 ¹⁴⁶ Tr. at 1939-1940.

26 ¹⁴⁷ Tr. at 1941-1942.

27 ¹⁴⁸ Tr. at 1944.

28 ¹⁴⁹ Tr. at 1945.

¹⁵⁰ Tr. at 1947.

¹⁵¹ *Id.*

¹⁵² Tr. at 1947-1948.

¹⁵³ Tr. at 1948-1949.

¹⁵⁴ Tr. at 1950.

1 specifically tied to certain properties, but that he was aware that Mortgages Limited was starting to
 2 take loans directly from Radical Bunny, and it was discussed repeatedly at the annual meetings.¹⁵⁵
 3 Mr. Grainger testified that since the time of Mr. Coles' death, the values of the Mortgages Limited
 4 loan portfolio are maybe half of what they had been. "And now that the economy, the further – the
 5 more poorly that the economy does now, and has been for the past year or so, hitting commercial
 6 properties, which it didn't initially, which is, of course, what most – all the loans were – it was all
 7 commercial-related – it has hit the value of those properties very, very hard."¹⁵⁶

8 Mr. Grainger was on two action committees after Mr. Coles' suicide.¹⁵⁷ The committee
 9 members had invested in different programs and had different interests – they had different secured
 10 interests/collateral.¹⁵⁸ Half of Mr. Grainger's investment was in the Pass-Through Participation
 11 Program with Mortgages Limited.¹⁵⁹

12 **BJ Raval**

13 Mr. B.J. Raval is an architect with his own consulting firm in Arizona. His friend, Mr. Shah,
 14 prepared his personal income taxes and he spoke with Mr. Shah about Horizon Partners in the late
 15 90s.¹⁶⁰ Mr. Raval also knew Scott Coles through their sons' school. He invested in both Horizon
 16 Partners and Mortgages Limited via Scott Coles. Mr. Raval testified that one time Scott Coles had
 17 come to Mr. Raval's home and Mr. Raval said to Mr. Coles "I hope you don't mind if I move it [my
 18 money in Mortgages Limited] over to Radical because you're my friend and so is Tom."¹⁶¹

19 Mr. Raval testified about notes he made during the November 10, 2005 semiannual
 20 meeting.¹⁶² He testified that the following changes were discussed: "a 2 percent management fee, 30
 21 day liquidation, 2 percent early liquidation penalty, updated Direction to Purchase, check distribution
 22 frequency, that there is a member manager and future meetings."¹⁶³ Mr. Raval also read his notes to
 23 say "What can an investor expect....Direction to Purchase; monitor investment; info on investment

24 ¹⁵⁵ Tr. at 1950-1951.

25 ¹⁵⁶ Tr. at 1954.

26 ¹⁵⁷ Tr. at 1951.

27 ¹⁵⁸ Tr. at 1959.

28 ¹⁵⁹ Tr. at 1958-1959.

¹⁶⁰ Tr. at 1985.

¹⁶¹ Tr. at 2008.

¹⁶² Exhibit R-10; Tr. at 1987.

¹⁶³ Tr. at 1993; 2020-2021.

1 variable during normal business hours; monthly checks; detailed status; statements; status or
 2 statements; quarterly statements; liability of – excuse me, liquidation of principal;
 3 communications.”¹⁶⁴ Mr. Raval attended a meeting at Mortgages Limited with Mr. Patel.¹⁶⁵

4 Mr. Raval said that one day Mr. Shah asked whether he knew any attorney, and Mr. Raval
 5 give him the name of his attorney, Ron Logan.¹⁶⁶ He understood that “they were looking at the
 6 reorganization of Radical Bunny and ... wanted to get some advice.”¹⁶⁷ Mr. Raval said Mr. Shah told
 7 him that they met with Mr. Logan but that they didn’t think he could help.¹⁶⁸

8 Mr. Raval testified concerning his conversation with Mr. Shah in the late 90s about Radical
 9 Bunny: “But we socially also meet. And I think there was a, I knew that there was some investments
 10 being made. The, the valley was going through some housing boom and there was an opportunity
 11 and I said can I participate? Do you know anything about it? And he said well, there is something that
 12 you might want to take a look at. So that’s the general nature of the conversation.”¹⁶⁹

13 When asked how he found out that he could participate in Horizon Partners, he said “If I have
 14 to answer that I would say that, that there was a return made, about 10 percent or something like that,
 15 on a, some investment that he had made and I said well, that sounds pretty good, is there anyway I
 16 can participate in it, something like that.”¹⁷⁰ Mr. Raval testified that no one solicited him or sent him
 17 fliers.¹⁷¹

18 Mr. Raval did not know, with respect to his investment in Horizon Partners, what he
 19 individually received in return for his investment funds.¹⁷² He understood that the change explained
 20 at the November 2005 meeting “was going from individual trustee to a revolving line of credit and to
 21 lending to Mortgages Limited as one big loan.”¹⁷³ During his participation in Horizon Partners and
 22 Radical Bunny, Mr. Raval rolled over the principal.¹⁷⁴

23 ¹⁶⁴ Tr. at 2022.

24 ¹⁶⁵ Tr. at 1996.

25 ¹⁶⁶ Tr. at 1999-2000.

26 ¹⁶⁷ Tr. at 2000.

27 ¹⁶⁸ Tr. at 2000-2001.

28 ¹⁶⁹ Tr. at 2003-2004.

¹⁷⁰ Tr. at 2004.

¹⁷¹ Tr. at 2001.

¹⁷² Tr. at 2005-2006.

¹⁷³ Tr. at 2006.

¹⁷⁴ Tr. at 2007-2008.

1 Mr. Raval testified that he did not believe that Radical Bunny was supposed to pay him back
 2 and that "Radical Bunny was more like a conduit to, the money was lent to Mortgages Limited."¹⁷⁵
 3 He testified that he doesn't think that the members of Radical Bunny are responsible for his loss.¹⁷⁶

4 Mr. Raval did not have any investment in Mortgages Limited at the time of Coles' death, but
 5 had \$450,000 (including amounts of other family members) with Radical Bunny.¹⁷⁷

6 **The Advisors**

7 **James Sell**

8 Mr. Sell has been licensed as a CPA since 1972 and was employed by the Pete, Marwick,
 9 Mitchell & Company, the US Defense Contract Audit Agency, the Arizona Auditor General, a local
 10 CPA firm, and then the Securities Division from 1976 to 1981. In 1981, he started his own practice
 11 consulting in forensic accounting, real estate syndication. Mr. Sell considers himself an expert on
 12 securities laws to a certain extent because since 1976 he has "dealt with securities-related issues,
 13 detailed investigation of alleged securities violations, and various aspects that touched on securities
 14 rules, regulations, and the laws governing the issuance of securities, both within the state of Arizona
 15 and outside the state of Arizona."¹⁷⁸ Mr. Sell's experience also includes serving as an arbitrator for
 16 the National Association of Securities Dealers; serving on the board of Century Pacific Securities
 17 where he oversaw and directed the operations of the broker/dealer and served on the audit committee;
 18 and certification from the American Institute of Certified Public Accounts as a Certified Financial
 19 Forensic.¹⁷⁹ Mr. Sell's business does consulting work "related to securities issues, structure of
 20 securities offerings, compliance with regulations"¹⁸⁰ and bookkeeping and services for real estate
 21 syndications where he was a principal. Mr. Sell has been appointed as a receiver in federal actions
 22 filed by the Federal Trade Commission and has been appointed receiver in State of Arizona actions
 23 brought by the Securities Division and the Banking Department; and has been retained by the U.S.
 24 Attorneys' office to assist in a criminal prosecution. He has also taught a section titled "What is a
 25

26 ¹⁷⁵ Tr. at 1996.

¹⁷⁶ Tr. at 1997.

¹⁷⁷ Tr. at 2001-2002.

¹⁷⁸ Tr. at 333.

¹⁷⁹ Tr. at 333-336.

¹⁸⁰ Tr. at 336.

1 security?" for the Department of Public Safety's white collar crime school, and has taught courses for
2 Pima County, Maricopa County, Attorney Generals' Office, and the Certified Fraud Examiner's
3 Group.¹⁸¹

4 Mr. Sell testified that he met Mr. Hirsch and Mr. Shah in August of 2005 at the request of an
5 attorney who was concerned that Mr. Hirsch may not be complying with the Arizona securities
6 laws.¹⁸² Mr. Sell testified that Mr. Hirsch "told me that over the past few years that he had been
7 putting together groups of friends and clients of his to invest in mortgages that Mortgages Limited
8 was originating and that he was thinking of expanding his operations because he was experiencing a
9 lot of requests for those type of investments from his friends and clients and their acquaintances and
10 that for the most part, up to that point he was doing it more as a service to his clients and then he
11 really wasn't making any money at it. But they wanted to change the form of what they were doing
12 and they wanted to make some money off of putting together these groups of investors to buy the
13 Mortgages Limited products."¹⁸³

14 Mr. Sell testified that Mr. Hirsch explained that "the people that he was putting into these
15 deals were passive investors and were essentially relying on Mr. Hirsch and Mortgages Limited."¹⁸⁴
16 Mr. Sell described them as "passive investors" explaining that they "really had no active role in either
17 selecting what they were going into or the day-to-day management of the investments, or
18 maintenance of the books and records, formation of an entity to hold that particular investment.
19 Essentially anything that was needed to deal with the investment they didn't do except for putting
20 their money in."¹⁸⁵

21 Mr. Sell asked Mr. Hirsch what the source of his investors were and Mr. Hirsch told him that
22 they were friends, relatives, friends of relatives, friends of friends, and friends of clients.¹⁸⁶ Mr. Sell
23 testified that he

24
25 ¹⁸¹ Tr. at 339-343; Mr. Sell testified that he is the expert witness against the auditing firm that did the certified audits for
26 Mortgages Limited. Tr. at 385.

27 ¹⁸² Tr. at 344.

28 ¹⁸³ Tr. at 345; 378; 387.

¹⁸⁴ Tr. at 347.

¹⁸⁵ *Id.*

¹⁸⁶ Tr. at 347-348.

1 explained to Mr. Hirsch that I believed that he was selling securities, that he had done
2 a series of securities offerings, that he needed to be registered as at a minimum as a
3 securities dealer, even if he was putting together private placements, because he had
4 done a series of private placements that put him over the limit of a casual syndicator,
5 as I would refer to them, that he ran the risk of not only jeopardizing himself but also
6 jeopardizing Mortgages Limited because of a potential issue with integration, where
7 he was essentially forming subgroups to become investors in Mortgages Limited
8 products, and that the subgroups could affect Mortgages Limited's ability to do a
9 private placement by an agency penetrating his subgroup that was being performed,
10 specifically to invest in the Mortgages Limited product. And the problem was with
11 the 35 non-accredited investors, and if his subgroup was penetrated and it was treated
12 each individually as an individual investor, it would affect Mortgages Limited's ability
13 to comply with their 35 non-accredited investor limit.¹⁸⁷

14 Mr. Sell told Mr. Hirsch that he needed to register as a securities dealer with the Arizona
15 Corporation Commission, and that they should go to the Commission and explain they were unaware
16 of the violations but to agree to register and that they should plan on doing a rescission to all the
17 existing investors.¹⁸⁸ Mr. Sell testified that Mr. Hirsch told him that no one would rescind because
18 they were all making money. Mr. Sell offered to help them and contact the Securities Division and to
19 recommend an attorney to represent them in the securities issues.¹⁸⁹ Mr. Sell testified that based
20 upon Mr. Hirsch's description, he believed that there were violations of Arizona Securities law and
21 he specifically told him they were violating security laws. Mr. Sell said that there was really no
22 response.¹⁹⁰

23 Mr. Sell testified that he told Mr. Hirsch that until he got it resolved, he "was to cease raising
24 any more money for the Mortgages Limited products" and Mr. Sell did not "recall any response from
25

26
27 ¹⁸⁷ Tr. at 348-349.

¹⁸⁸ Tr. at 349.

¹⁸⁹ Tr. at 349-350.

¹⁹⁰ Tr. at 352-353.

1 him on that.”¹⁹¹ Mr. Sell informed Mr. Hirsch that he would prepare a consulting agreement and did,
 2 but never heard back.¹⁹²

3 Mr. Sell testified that he was concerned about how Radical Bunny was raising the money,
 4 and that is where the securities issue arose.¹⁹³ Mr. Sell testified that he did not send Mr. Hirsch “a
 5 letter saying stop your operation” because he “believed that was covered during the conversation that
 6 I had with them when I told them that they would have to cease sales until they complied with the
 7 Securities Act.”¹⁹⁴ Mr. Sell testified that Mr. Hirsch represented that they had raised “around \$20
 8 million” at the time they spoke in August 2005.¹⁹⁵ Mr. Sell testified that “they were concerned more
 9 about just ceasing activities until they got this all straightened out. And it was more of an issue of
 10 time and expense and – but they expressed a desire to do it the right way.”¹⁹⁶

11 **Ronald Logan**

12 Ronald Logan is an attorney licensed in Arizona since 1972 doing transactional and litigation
 13 work in the areas of commercial litigation, business breakup disputes, securities fraud, disputes over
 14 the purchase and sale of businesses, and employment law.¹⁹⁷

15 Mr. Logan testified that Mr. Hirsch contacted him during the last week of January 2007 and
 16 set up a meeting to discuss some questions regarding Radical Bunny’s business. Mr. Logan and a
 17 business associate, Carl Ranno,¹⁹⁸ met with Mr. Hirsh, the Walders, and Mr. Shah in Mr. Logan’s
 18 office around January 29 or 30, 2007. Mr. Logan testified that during the meeting, Mr. Hirsch did 90
 19 percent of the talking and explained Radical Bunny’s business operations. Mr. Logan testified that
 20 Mr. Hirsch said that they were interviewing attorneys and had spoken with the Quarles and Brady law
 21 firm. Mr. Logan said that he and Mr. Shah had a mutual friend and Mr. Shah thought that Radical
 22 Bunny should meet with Mr. Logan.

23
 24 ¹⁹¹ Tr. at 353.

25 ¹⁹² Tr. at 354.

26 ¹⁹³ Tr. at 365-366; 382; 383.

27 ¹⁹⁴ Tr. at 371.

28 ¹⁹⁵ Tr. at 372.

¹⁹⁶ Tr. at 388.

¹⁹⁷ Tr. at 187.

¹⁹⁸ Mr. Ranno is a Michigan-licensed attorney with a background in federal securities law who occasionally consults in federal securities law issues in addition to being the CEO of a public company. Tr. at 194.

After hearing the description of Radical Bunny from Mr. Hirsch, Mr. Logan asked whether they had any kind of license. According to Mr. Logan, Mr. Hirsch said “they had been doing business for many years, that they did not require a license, that they never had any issues with respect to the fact that they were not licensed.”¹⁹⁹ Mr. Logan said that he told them that he thought “there was a significant risk that any thorough audit of the Mortgages Limited’s books could lead to a path to them regarding how they came to have that much money,”²⁰⁰ giving an example of if they made a presentation to an investor who questioned whether they had the appropriate licenses, a state or federal investigation could be started. Mr. Hirsch then repeated that they had been in business for many years with no problems and “that other attorneys had told them that they were doing business in a proper way.”²⁰¹ Mr. Logan testified that Hirsch’s demeanor was “very, very confident and very, very determined that they were doing nothing wrong.”²⁰² Mr. Logan believed that Hirsch had at least a conversation with Quarles and Brady and that another meeting was going to be held to obtain a lot of detail regarding their circumstances.²⁰³

Mr. Logan was concerned that since Radical Bunny had investors in other states and countries, there were requirements of those regulatory schemes, and he told them that in his opinion some kind of “license was needed, perhaps a mortgage broker’s or banker’s license, possibly one or more Federal securities licenses.”²⁰⁴

Mr. Logan testified:

they had described approximately \$113 million that Radical Bunny had invested in Mortgages Limited deals, and my concern was that when an audit was done of Mortgages Limited for any number of reasons, that there would be a question raised about who is this investor, who is Radical Bunny, LLC, and where did that \$113 million come from, and that could lead to a determination that this is somewhat acting as a mortgage broker for them, and they may not have a license. And I was looking at

¹⁹⁹ Tr. at 200.

²⁰⁰ Tr. at 200; Mr. Logan said that Hirsch described approximately \$113 million that Radical Bunny had invested in Mortgages Limited deals.

²⁰¹ Tr. at 201.

²⁰² Tr. at 201.

²⁰³ *Id.*

1 it more in terms of the mortgage industry, which I have greater familiarity with. And
 2 if they were bringing deals to Mortgages Limited and receiving compensation for
 3 doing that and bringing other people's money to Mortgages Limited, that would, based
 4 upon my experience, require a mortgage broker's license in any state which they were
 5 doing business. And I was concerned that that is what would lead to some type of
 enforcement action against them.²⁰⁵

6 Mr. Logan testified that even after Mr. Ranno told Hirsch that it was very, very, likely that the
 7 promissory notes were securities and it was important to understand what regulatory schemes applied
 8 and how to comply, Hirsch remained "convinced that they needed no licenses, that they were
 9 operating properly and legally, and that he had advice from others that confirmed his belief."²⁰⁶ Mr.
 10 Logan testified that he

11
 12 advised them to have some attorney, some law firm thoroughly investigate the scope
 13 of what they were doing, the structure of their deals, and to give them advice regarding
 14 what licenses that they should obtain, and that I thought that since no one had lost any
 15 money, that there had been no damages, that they could be in a situation of having to
 16 offer to the investors the opportunity to get their money back...and that was a risk that
 17 they would have to, you know, have the money on hand and offer to them and give
 18 them the opportunity to rescind those agreements. And that I wasn't at all sure that
 they would be able to walk away from past conduct and behavior.²⁰⁷

19 When Mr. Hirsch told Mr. Logan that they were going to Quarles & Brady, Mr. Logan said
 20 that was a very good thing, because "if he was determined to do this he [should] go to a very large
 21 law firm because if they told them that he could do this without a license of any kind, that he would
 22 need to look at a very large malpractice policy and it would be far larger than any I would have."²⁰⁸
 23 Mr. Logan testified that he made the statement because he "didn't believe that any lawyer who was
 24
 25

26 ²⁰⁴ Tr. at 204.

27 ²⁰⁵ Tr. at 229-230.

28 ²⁰⁶ Tr. at 205.

²⁰⁷ Tr. at 207-208; 232-233.

²⁰⁸ Tr. at 205-206.

1 knowledgeable and experienced would tell them they could continue to do this without a license of
2 any kind.”²⁰⁹

3 Mr. Logan also informed them that “they were in violation of some federal and/or state law in
4 operating without a license” and that he would have to conduct research and consult with other
5 attorneys to determine what licenses were needed.²¹⁰ Mr. Logan testified that he told Radical Bunny
6 that they could not do business in the future without violating some state or federal regulatory
7 scheme, but did not use the words “stop doing business.”²¹¹

8 Mr. Logan sent an email with a retention letter after the meeting, but was not hired by Radical
9 Bunny.²¹²

10 **Robert Kant**

11 Mr. Kant is an attorney licensed to practice law in Arizona since 1978; he previously
12 practiced in Pennsylvania. He was with O’Connor Cavanagh for approximately 20 years and has
13 been with Greenberg Traurig as a principal shareholder for approximately 13 years.²¹³ Mr. Kant has
14 been a corporate and securities lawyer since 1970 and his primary area of practice with securities law
15 is in corporate finance.²¹⁴

16 Mr. Kant’s first introduction to Radical Bunny was at a meeting held in December 2006 or
17 January 2007 at the office of his client, Mortgages Limited.²¹⁵ Attending the meeting were Scott
18 Coles, Mike Denning, and Todd Brown from Mortgages Limited, and Mr. Hirsch and the Radical
19 Bunny managers. Mr. Kant testified that at the meeting they discussed the relationship between
20 Mortgages Limited and the manner in which Radical Bunny was soliciting investors.²¹⁶ Mr. Kant
21 does not recall collateralization being discussed at the meeting.²¹⁷

22 Mr. Kant testified that at the meeting he indicated to Mr. Hirsch that he had “serious concerns
23 about the way money was being raised...[including an] absence, to my knowledge, of a private

24 ²⁰⁹ Tr. at 206; 226-227.

25 ²¹⁰ Tr. at 208.

26 ²¹¹ Tr. at 212.

27 ²¹² Tr. at 210-212.

28 ²¹³ Tr. at 1215.

²¹⁴ Tr. at 1216-1217.

²¹⁵ Tr. at 1224.

²¹⁶ Tr. at 1225.

²¹⁷ Tr. at 1226.

1 offering memorandum, an absence of subscription agreements to ascertain the qualification of
 2 investors, and the absence of a registered broker/dealer.”²¹⁸

3 Mr. Kant testified that he told Mr. Hirsch that

4
 5 selling securities with – to individuals without a well-done private offering
 6 memorandum, subscription agreements, and a broker/dealer could result in his picture
 7 being on the front page of the *Arizona Republic*, and I was concerned that Mr. Coles’
 8 picture would be next to him...I was concerned about Mortgages Limited’s reputation
 9 in the community.....Because I was concerned about the [manner] in which the
 10 securities were being sold. I was concerned that issues would later be raised by
 11 governmental agencies or by individuals, and that Mr. Hirsch had a business
 12 relationship with Mortgages Limited and that relationship would hurt Mortgages
 Limited’s reputation in the community.”²¹⁹

13 Mr. Kant testified that he “came to the meeting with a view that he [Mr. Hirsch] was raising
 14 money from investors and it seemed pretty clear that, you know, he was selling securities.”²²⁰ Mr.
 15 Kant does not recall anyone disagreeing with his statement to Mr. Hirsch about securities
 16 offerings.²²¹ He testified that at the meeting or shortly thereafter, he recommended that Mr. Hirsch’s
 17 group retain experienced securities counsel to address the concerns he had raised.²²² Mr. Kant
 18 recommended three lawyers, including Bob Moya from Quarles & Brady.”²²³

19 Mr. Kant testified that he participated in a May 3, 2007 conference call with Quarles & Brady
 20 attorneys Bob Moya, Christian Hoffmann, and Bob Bornhoft.”²²⁴ He testified that he had told Mr.
 21 Moya his concerns about Radical Bunny and securities issues prior to Quarles & Brady being
 22 retained by Radical Bunny.”²²⁵ Mr. Kant does not believe that the collateralization of the loan
 23 transactions between Mortgages Limited and Radical Bunny was discussed during the May 3, 2007

24
 25 ²¹⁸ *Id.*

²¹⁹ Tr. at 1227-1228.

²²⁰ Tr. at 1228-1229.

²²¹ Tr. at 1229.

²²² Tr. at 1229; 1263-1264.

²²³ Tr. at 1229-1230.

²²⁴ Exhibit S-42 at Q&B § 000109; Tr. at 1231.

²²⁵ Tr. at 1232.

1 telephone conference call.²²⁶ Mr. Kant confirmed that Mr. Bornhoft sent him communications and
 2 documents that would have made clear that there was a security interest and that Mr. Bornhoft
 3 wanted Mortgages Limited to sign various loan documentation.²²⁷ Mr. Kant testified concerning the
 4 May 10, 2007 email from Mr. Bornhoft to him with documents attached concerning the security
 5 interest: "I wasn't interested in this arrangement...my goal was to address concerns that I raised and
 6 not to enhance Radical Bunny's loan position with Mortgages Limited. Whatever it was, it was." He
 7 testified that it was not in his client's best interest to deal with the formalization of the loan
 8 transaction.²²⁸

9 Mr. Kant testified that he attended an August 2007 meeting with Scott Coles, Mike Denning,
 10 Bob Moya, Bob Bornhoft, a Quarles & Brady associate, Mr. Hirsch and one or more of the Radical
 11 Bunny managers.²²⁹ He said that he approached the meeting in a very frustrated fashion because
 12 resolution of the concerns he had addressed were moving very slowly, and he testified that "I told Mr.
 13 Hirsch and whichever of his partners were there that if they were continuing to offer securities
 14 without addressing the concerns that I raised, people go to jail for that, and he could go to jail....You
 15 could go to jail; they send people to jail for this."²³⁰ Mr. Kant testified that no one at the meeting
 16 disagreed with his statement²³¹ and that he received an email from Mr. Moya after the meeting
 17 thanking him for the comment, saying "something like, 'You have made my job easier.'"²³²

18 Either in or after the meeting, Mr. Kant agreed to draft a private offering memorandum which
 19 he believed would be used by the Quarles & Brady attorneys to come up with a final product for
 20 Radical Bunny.²³³ Mr. Kant testified that he met with Mr. Hirsch and Scott Coles in the October
 21 2007 timeframe to discuss the private offering memorandum.²³⁴

22 Mr. Kant testified that the structure that he used was similar to what Mortgages Limited used
 23 – offered only to accredited investors; sold through a registered broker/dealer; investors would have

24 ²²⁶ Tr. at 1233.

25 ²²⁷ Tr. at 1233.

26 ²²⁸ Tr. at 1234; Exhibit S-43.

27 ²²⁹ Tr. at 1236.

28 ²³⁰ Tr. at 1227-1228.

²³¹ Tr. at 1238.

²³² Tr. at 1268; 1261.

²³³ Tr. at 1238.

²³⁴ Tr. at 1266.

1 been told of all the risks and the backgrounds of the people involved; and that Mortgages Limited
 2 would provide various mortgage origination and servicing services.²³⁵ Kant explained that “a limited
 3 liability company would acquire mortgages and investors would buy membership interests in that
 4 limited liability company, and their return would be based upon the performance of the mortgages
 5 held by the limited liability company.”²³⁶ Kant explained that the Mortgages Limited pools, the
 6 membership interests in those limited liability companies, were securities.²³⁷ Those membership
 7 interests in the “LLCs were sold to accredited investors through a private offering memorandum,
 8 through a registered broker/dealer.” (Mortgages Limited Securities)²³⁸

9 Mr. Kant testified that he “was always concerned about the reputational risk to my client of
 10 doing business with Radical Bunny in the way I was told Radical Bunny was doing business.”²³⁹ He
 11 testified that at the meetings he attended, nothing was said by way of explanation from Radical
 12 Bunny members that resolved his concerns.²⁴⁰ Mr. Kant testified that he did not have extensive or
 13 material conversations with Mr. Hoffmann²⁴¹ and did not recall Mr. Hoffmann telling him that
 14 Radical Bunny had been shut down.²⁴² Mr. Kant testified that there was an implication from Quarles
 15 & Brady that his concern about the security issue would not be addressed until the collateralization
 16 issue was resolved.²⁴³

17 **Christian Hoffmann**

18 Christian Hoffmann is a partner with Quarles & Brady and has been an Arizona licensed
 19 attorney since 1978.²⁴⁴ He testified that his first job out of law school was with the “National
 20 Association of Securities Dealers, which regulates the broker/dealers in their over-the counter
 21 transactions.”²⁴⁵ He has practiced in the area of corporate and securities, primarily oriented toward
 22 federal law, but his involvement in private placement offerings, registered intrastate offerings, public

23 ²³⁵ Tr. at 1239.

24 ²³⁶ Tr. at 1239.

²³⁷ Tr. at 1240.

²³⁸ *Id.*

²³⁹ Tr. at 1249.

²⁴⁰ Tr. at 1269.

²⁴¹ Tr. at 1257.

²⁴² Tr. at 1250-1251.

²⁴³ Tr. at 1268-1269.

²⁴⁴ Tr. at 739.

²⁴⁵ Tr. at 741.

offerings within Arizona, and federal registrations with registration by qualification concern Arizona law as well.²⁴⁶ Mr. Hoffmann testified pursuant to waiver from Radical Bunny and Horizon Partners.²⁴⁷

January 2007

Mr. Hoffmann testified that Bob Moya sent him an email indicating that Todd Brown from Mortgages Limited had called him about possibly representing Radical Bunny.²⁴⁸ Mr. Hoffmann testified his initial conversation with Radical Bunny was via a telephone conference call on January 31, 2007, with Mr. Hirsch, Bunny and Howard Walder, Harish Shah, and Bob Moya.²⁴⁹ The call was an interview to discuss possible representation. Mr. Hoffmann testified that “it was clear that Tom was in charge of the operation. If there was a CEO, he would have been the CEO.”²⁵⁰ Mr. Hirsch explained the history of Horizon Partners and Radical Bunny and their programs, and the attorneys asked questions. Mr. Hoffmann took five pages of notes during the conversation and he testified concerning those notes. Mr. Hoffmann testified that “part of the reason that they were consulting us was they were concerned about their compliance with the federal and state securities law.”²⁵¹

Mr. Hoffmann testified that he was told that the “investors were given the opportunity on a first come, first served basis to purchase a participation in a loan from Radical Bunny to Mortgages Limited, and that the investor purchased that participation by, what Tom Hirsch called, a Direction to Purchase. And that would be a fractionalized interest in the Mortgages Limited/Radical Bunny loan.”²⁵² Mr. Hoffmann testified from his notes that Mr. Hirsch explained that “60 to 65 percent loan-to-value in the underlying loan from – that Mortgages Limited then made from the proceeds of the Radical Bunny loan to its end user or borrowers. And that was the standard, Tom was telling us, that’s the standard under which Mortgages Limited made its loans to its customers.”²⁵³

²⁴⁶ Tr. at 741-742.

²⁴⁷ Exhibits S-18(a) Radical Bunny attorney client waiver; Exhibit S-18(b) Horizon Partners attorney client waiver.

²⁴⁸ Tr. at 745.

²⁴⁹ Tr. at 747; Exhibit S-45(a).

²⁵⁰ Tr. at 911.

²⁵¹ Tr. at 753.

²⁵² Tr. at 754.

²⁵³ Tr. at 755.

1 Mr. Hoffmann's notes state, "Mtgs Ltd, NASD, mtg broker, does all due dilig" meaning Mr.
 2 Hirsch told him that Mortgages Limited was a registered broker/dealer and a mortgage broker and
 3 that Mortgages Limited does all the due diligence with respect to the Mortgage Limited loans."²⁵⁴
 4 Mr. Hoffmann was informed that if an investor wanted to liquidate his/her loan prior to maturity,
 5 there was a 2 percent redemption fee,²⁵⁵ and that investors had a renewal option.

6 Mr. Hoffmann was told that as of January 2007, Radical Bunny had raised \$140 million from
 7 its Participants.²⁵⁶ Mr. Hoffmann's notes indicate that he was told that Mortgages Limited earned an
 8 interest rate of 16 percent if no points; if there was a 1 percent point, then they earned 15 percent
 9 interest – a spread of 3 percent. The note issued to Radical Bunny would be for 13 percent, and
 10 Radical Bunny would take 2 percent for its management fees, and the investors in the participations
 11 got 11 percent.²⁵⁷

12 Mr. Hoffmann's notes say that Radical Bunny is the lender to Mortgages Limited, and
 13 Mortgages Limited is the lender to their borrower; and that Radical Bunny has collateral over
 14 Mortgages Limited against these loans.²⁵⁸ Mr. Hoffmann's notes of the conversation state that Mr.
 15 Hirsch said, "Radical Bunny is in first position of all assets of Mortgages Limited. Have personal
 16 guarantee."²⁵⁹ Mr. Hirsch also told Mr. Hoffmann that Radical Bunny had "first right on
 17 foreclosure;" and gave Mr. Hoffmann the example of the Chandler Mall where they were paid off at a
 18 higher interest rate.²⁶⁰ Mr. Hoffmann's notes indicate that he was told that Radical Bunny charges its
 19 Participants a 2 percent overhead management fee; that they have meetings with Participants twice a
 20 year;²⁶¹ that Radical Bunny gives reports to their investors; that they issue 1099s at the end of the
 21 year;²⁶² that Mortgages Limited pays on the 10th and 25th; that the average loan is 12 million, that

24 ²⁵⁴ Tr. at 756.

25 ²⁵⁵ Tr. at 756, 757.

26 ²⁵⁶ Tr. at 758.

27 ²⁵⁷ *Id.*

28 ²⁵⁸ Tr. at 759.

²⁵⁹ *Id.*

²⁶⁰ Tr. at 760.

²⁶¹ Tr. at 762.

²⁶² *Id.*

1 Participants can roll the dollars; and that Radical Bunny had 80 loans outstanding to Mortgages
2 Limited.²⁶³

3 Mr. Hoffmann's notes say that Mr. Hirsch told them that he does tax work for Mortgages
4 Limited and Scott Coles, the president of Mortgages Limited.²⁶⁴ Mr. Hoffmann testified that "Tom
5 did repeat this at various, on various occasions indicating his close relationship with Scott Coles and
6 Mortgages Limited."²⁶⁵ Mr. Hoffmann's notes say "going forward or the past" and Mr. Hoffmann
7 explained that this meant "going forward in terms of Quarles & Brady's possible representation of
8 Radical Bunny was what could be done going forward."²⁶⁶ Mr. Hoffmann testified that it "was sort
9 of a theme of Tom's and the other principals" that "they would like to have Mortgages Limited buy
10 the Radical Bunny entity out at some point."²⁶⁷ At the end of the January 31, 2007 conference call,
11 the Radical Bunny managers said they would discuss whether to hire Quarles & Brady as their
12 attorneys, and would let them know.²⁶⁸

13 February 2007

14 After the January 2007 conference call, Quarles & Brady received a phone call inviting them
15 to a meeting at Radical Bunny's offices in mid-February.²⁶⁹ Mr. Hoffmann's notes of the February
16 12, 2007 meeting with Mr. Hirsch, Bunny and Harold Walder, and Bob Moya were admitted as
17 Exhibit S-45(b). Mr. Hoffmann testified about his notes of the February 12, 2007, meeting, which he
18 described as a follow-up to the January conversation, but more "in depth" and face-to-face.²⁷⁰ During
19 the February meeting, Mr. Hirsch again provided him information about Radical Bunny, explaining
20 that they originally invested in single deeds of trust and in late 2005 migrated to a letter of credit
21 directly with Mortgages Limited.²⁷¹ Mr. Hirsch told him that in 2005, they had \$20 million with
22
23

24 ²⁶³ Tr. at 766.

25 ²⁶⁴ *Id.*

26 ²⁶⁵ Tr. at 767.

27 ²⁶⁶ Tr. at 769-770.

28 ²⁶⁷ Tr. at 770.

²⁶⁸ Tr. at 772.

²⁶⁹ *Id.*

²⁷⁰ Tr. at 777.

²⁷¹ Tr. at 777-778.

1 Mortgages Limited²⁷² and that they now had \$141 million in loans to Mortgages Limited, which
 2 represented about 25 percent of Mortgages Limited's portfolio.²⁷³

3 Reviewing his notes, Mr. Hoffmann testified the current program was explained to him as:
 4 "Mortgages Limited took the loan proceeds from Radical Bunny and invested those, i.e., made loans
 5 and created notes and deeds of trust to have Mortgages Limited portfolio loans. And then the
 6 collateral was, were the notes and deeds of trust underlying that, plus all the assets of Mortgages
 7 Limited."²⁷⁴ Mr. Hoffmann testified that his notes say the Mortgages Limited portfolio loans were
 8 described as "deeds of trust, get amended from time to time. 60-65 percent loan-to-value.
 9 Commercial loans. One year term."²⁷⁵

10 Mr. Hoffmann's notes indicate that when new money comes in, Radical Bunny may hold the
 11 money 2-3 weeks; that Radical Bunny lets Mortgages Limited know the balance of the money being
 12 held; that Mortgages Limited then lets Radical Bunny know when a funding is necessary and Radical
 13 Bunny deposits the money 3 days prior to funding; and that they are funded in chunks of \$1
 14 million.²⁷⁶ Mr. Hoffmann's notes again say that Mr. Hirsch told him that "Mortgages Limited does
 15 all the due diligence and collections on the loans"²⁷⁷ and that Mortgages Limited has 11 mortgage
 16 pools, \$40 million in each pool.²⁷⁸ Mr. Hoffmann's notes indicate that he was told that Mr. Hirsch
 17 does tax work for Scott Coles and Mortgages Limited;²⁷⁹ that the note is in Radical Bunny's name;
 18 that the security interest is in Radical Bunny; that investors have a percentage interest in the
 19 underlying note, meaning the note from Mortgages Limited to Radical Bunny; that there are semi-
 20 annual meetings where 350 people attend; that no one from Mortgages Limited attends the
 21 meetings;²⁸⁰ that Radical Bunny endeavors to reinvest the money;²⁸¹ that Radical Bunny had
 22 investors in five countries;²⁸² and that there is a trustee for IRA accounts.²⁸³

23 ²⁷² Tr. at 780.

24 ²⁷³ Tr. at 791.

²⁷⁴ Tr. at 779.

25 ²⁷⁵ *Id.*

²⁷⁶ Tr. at 780.

26 ²⁷⁷ Tr. at 782.

²⁷⁸ Tr. at 783.

27 ²⁷⁹ Tr. at 783-784.

²⁸⁰ Tr. at 792.

28 ²⁸¹ Tr. at 793.

²⁸² Tr. at 800.

1 Mr. Hoffmann's notes include questions he asked, and answers he received, such as: "new
 2 investor, how do you come to us?" Mr. Hoffmann testified that "Tom is saying it has to be a
 3 referral...no solicitation or ads, a web page, no public admittance."²⁸⁴ Mr. Hoffmann also asked how
 4 Radical Bunny tells investors about the 2 percent management fee and testified that he was alarmed
 5 when they told him they tell people orally. Mr. Hoffmann testified that for full disclosure, they
 6 would need to tell investors clearly and in writing that there was a spread between the underlying
 7 Radical Bunny/Mortgages Limited note and what Radical Bunny was paying its investors.²⁸⁵ Mr.
 8 Hoffmann's notes say "Investor does not get underlying loan documents but can review them."²⁸⁶
 9 The notes say Mortgages Limited can only use Radical Bunny loan - funds for loans, not for
 10 corporate overhead.²⁸⁷ When asked whether Mr. Hirsch indicated whether there was documentation
 11 in place that would restrict the use of Radical Bunny funds to the portfolio loans rather than just
 12 general business operations, Mr. Hoffmann answered "not at that point."²⁸⁸ Mr. Hoffmann explained
 13 his note "Investor gets rollover notice" to mean that prior to the maturation of a Participant's interest,
 14 Radical Bunny would send a notice asking if they wanted to go into a new Mortgages
 15 Limited/Radical Bunny loan.²⁸⁹

16 Mr. Hoffmann's notes indicate that Mr. Hirsch again tells them that he does tax work for
 17 Scott Coles and Mortgages Limited.²⁹⁰ Near this entry, Mr. Hoffmann's notes say "disclose" and he
 18 testified that as the client was giving him a lot of information, he made the note because "if we're
 19 going forward on this project, this would be certainly a matter that in any investor documents we
 20 would need to disclose this...Because it would color an investor's view of the situation; namely, how
 21 independent would Tom Hirsch and Mr. Shah be as principals of Radical Bunny with respect to the
 22 relationship which is debtor/creditor of Mortgages Limited and Radical Bunny. Be a material
 23 fact."²⁹¹

24 ²⁸³ Tr. at 786.

25 ²⁸⁴ Tr. at 785.

26 ²⁸⁵ Tr. at 787.

27 ²⁸⁶ Tr. at 789.

28 ²⁸⁷ Tr. at 790.

²⁸⁸ *Id.*

²⁸⁹ Tr. at 791.

²⁹⁰ Tr. at 784.

²⁹¹ *Id.*

1 Mr. Hoffmann testified that after hearing from Radical Bunny during the February meeting,
2 he told them:

3
4 ...that this is pretty early, I haven't seen any documents, but it's more likely than not
5 that what you've been selling is a security; that these participations are securities. And
6 the way your program is structured is an investment contract. And if that's the case,
7 then there are a number of areas that you need to be concerned with. First of all,
8 you've been engaged in the unregistered sale of securities without an exemption, that I
9 can see, based upon the facts that you've given me. Further, I'm concerned that
10 because of the nature of your program, the size of it, what you've told me, that you're
11 most likely an unregistered broker/dealer, meaning that you've been selling securities
12 for these past number of years. That mortgage participations are securities, most
13 likely, and that you would also be possibly an investment advisor, and that you
14 possibly are a mortgage broker and/or mortgage banker. And those are all issues that
15 we will look at if you retain us.²⁹²

16
17 Mr. Hoffmann testified that at the February 12, 2007 meeting, he hadn't seen Radical Bunny's
18 documents, but that:

19
20 everything that they were telling me, my antenna went up. That the classic definitions
21 of an investment contract had been met. That is that they had – there was an
22 investment money, and it was in a common enterprise, meaning they were pooling the
23 money to invest in a note, and the note was being issued by Radical Bunny, and it was
24 with the expectation of profits, and the profits in this case was composed of interest
25 payments. And with the significant – and those profits were derived significantly
26 from the efforts of others, not from the investor's efforts. Investors turning his or her
27 money over to Radical Bunny. Radical Bunny was taking a management fee for that,
28 which meant it had duties. Radical Bunny was responsible for the negotiation of the
loan between Mortgages Limited and Radical Bunny. It was responsible for reviewing
the underlying loan documents for the Mortgages Limited portfolio loans, and in effect

²⁹² Tr. at 794; see also Tr. at 853.

1 making the credit decision on behalf of the investor. When you tie all of that together
2 it's an investment contract.²⁹³

3 Mr. Hoffmann testified that he did not think that Mr. Hirsch or the others in the meeting were
4 surprised by his statement that they could have been engaged in the unregistered sale of securities "...
5 they were not surprised, pretty businesslike, and said, you know, that's why we, if that's the case,
6 that's why we're retaining you, we will retain your firm."²⁹⁴ Nor did they argue against his
7 statement.²⁹⁵ They told Mr. Hoffmann that they "would like to become compliant, whatever that
8 takes"²⁹⁶ and that "if we are a security now...we would like to find an exemption or be restructured
9 so that we're not a security."²⁹⁷

10 Although Mr. Hoffmann did not have this judgment confirmed at this point,²⁹⁸ once Radical
11 Bunny became a client, part of the instruction was to see that if there was an exemption or some way
12 that Radical Bunny's participations could not be a security. He testified that he was told that Radical
13 Bunny's objective was "to avoid as much regulation as possible."²⁹⁹

14 Mr. Hoffmann testified, "I said if, if my preliminary judgment is correct, that you've been
15 engaged in the sale of securities in violation of registration provisions, I'm also concerned about your
16 disclosures from what I have heard. I'm also concerned about if you, if these are securities, that you
17 have been operating as an unlicensed entity in a number of areas. And those were the areas that I
18 mentioned: Investment advisor, broker/dealer, mortgage banker, mortgage broker."³⁰⁰ When Mr.
19 Hoffmann asked whether Radical Bunny was concerned about having only one borrower (Mortgages
20 Limited), Mr. Hirsch responded "well, I'm their CPA, and I'm their tax accountant, and you know I
21 feel comfortable."³⁰¹

22 At the meeting, the Radical Bunny managers informed Mr. Hoffmann that Radical Bunny has
23 a May investor meeting "and this is target date that we need to have whatever we are going to do put

24 ²⁹³ Tr. at 795-796.

25 ²⁹⁴ Tr. at 913.

26 ²⁹⁵ Tr. at 798-799.

27 ²⁹⁶ Tr. at 799.

28 ²⁹⁷ Tr. at 854.

²⁹⁸ Tr. at 797.

²⁹⁹ Tr. at 802.

³⁰⁰ Tr. at 798.

³⁰¹ Tr. at 807.

1 together by then.”³⁰² He made a note to himself as to whether the May meeting was a solicitation and
 2 testified that “public solicitation could include this meeting if I sent out invitations and said bring
 3 your friends and neighbors”³⁰³ and so he wanted to look at a private placement exemption.

4 Mr. Hoffmann described a private placement’s requirements to include: the structure of the
 5 offering has to look and feel private; there is a limitation on the number of purchasers; Arizona
 6 allows a specific number of nonaccredited investors; limitations on the resale of the securities;
 7 limitations on the manner of the offering – no public solicitation; and the same type of disclosure that
 8 you would find in a registration statement.³⁰⁴ Mr. Hoffmann testified that the “no solicitation” and
 9 disclosure tenets of private placement have to be observed “right from the outset. In other words, you
 10 can’t midway decide that I’m not going to solicit anymore and now my offering can be rejuvenated
 11 and rehabilitated. That would destroy the private placement exemption for that particular
 12 offering.”³⁰⁵

13 Mr. Hoffmann testified that because Radical Bunny said “that there was no specific deed of
 14 trust, but that there was a blanket lien on the assets securing the note for Mortgages Limited to
 15 Radical Bunny,” he told them “that we should get a balance sheet, income statements, financial
 16 statements from Mortgages Limited.”³⁰⁶

17 **March and April 2007**

18 Although the engagement letter hiring Quarles & Brady was dated March 15 or 16, in reliance
 19 upon Radical Bunny’s representation that they were going to hire the firm, Mr. Hoffmann began
 20 work before the date of that letter.³⁰⁷ He received documents from Radical Bunny during March and
 21 April; he analyzed those, and he had discussions with partners, including Mr. Bornhoft. During this
 22 time, Mr. Hoffmann was “undertaking the task of, on a going forward basis, was there a way in
 23 which this program could be structured to become, to find an exemption under the securities laws, or
 24 maybe not be a security at all.”³⁰⁸

25 ³⁰² Tr. at 801.

26 ³⁰³ Tr. at 804.

³⁰⁴ Tr. at 803-804.

27 ³⁰⁵ Tr. at 804.

³⁰⁶ Tr. at 806-807.

³⁰⁷ Tr. at 838.

28 ³⁰⁸ Tr. at 811.

1 On March 12, 2007, Mr. Hoffmann met with Mr. Bornhoft and Mr. Shullaw and his notes
 2 reflect that they were "issue spotting."³⁰⁹ The first notation was "run on bank by Radical Bunny
 3 investors" which Mr. Hoffmann said would be a concern.³¹⁰ Mr. Hoffman testified that Mr. Bornhoft
 4 had looked into the collateral issue and reported the problems he had found, including that there was
 5 "nothing on record to say assigned beneficial interest;" "no security agreement;" and that the
 6 "financing statement alone is not sufficient."³¹¹ Mr. Hoffmann's notes indicate that they discussed
 7 "is a loan participation a security? Who services the loan on behalf of the participant? Who calls the
 8 shots?"³¹² Mr. Hoffmann's notes also indicate that they brainstormed about a possible "participation
 9 model" that would avoid being classified as a security.³¹³ Mr. Hoffmann testified that under that
 10 model, Radical Bunny might only need a mortgage broker or banker license and as a facilitator,
 11 Radical Bunny would only introduce the parties and would get a fee for it. He testified that the
 12 Radical Bunny managers rejected that structure.³¹⁴

13 On March 22, 2007, Mr. Hoffmann again met with Mr. Bornhoft and Mr. Shullaw and his
 14 notes reflect that they discussed the collateral issue; possible structures for Radical Bunny; how to
 15 avoid integration; the need to use only accredited investors; whether Mortgages Limited ever sent
 16 money back to Radical Bunny and how did Radical Bunny investors re-invest; and a notation "Ponzi
 17 scheme feel?"³¹⁵

18 Mr. Hoffmann testified that Mr. Bornhoft told him that "the UCC-1 that had been filed and
 19 that purportedly granted a security interest in all of the assets of Mortgages Limited was ineffective in
 20 perfecting that security interest because there was, there were defects."³¹⁶ That caused Mr. Hoffmann
 21 concern, because Radical Bunny had been representing to its investors that their investment was
 22 "collateralized by beneficial interest under various deeds of trust issued by Mortgages Limited.
 23 Whatever that means, there wasn't a collateral, a valid perfected security interest, which means they
 24

25 ³⁰⁹ Exhibit S-22(c); Tr. at 917-918.

26 ³¹⁰ Tr. at 917.

27 ³¹¹ Tr. at 917-918.

28 ³¹² Tr. at 919.

³¹³ Tr. at 920.

³¹⁴ *Id.*

³¹⁵ Exhibit S-22(d); Tr. at 921-925.

³¹⁶ Tr. at 815-816.

1 didn't have the collateral that Radical Bunny principals told us, told us that they had, and certainly,
 2 therefore, what they had told the investors."³¹⁷ Mr. Hoffmann testified that under Arizona law, "[i]f
 3 they were selling securities, it would be a material misstatement of the fact underlying the investment
 4 and would influence an investor's decision to buy or not buy the participation, and therefore, that
 5 material misstatement, both federally and under the federal securities laws and Arizona securities
 6 laws, would be a violation."³¹⁸

7 Following the February 12, 2007 meeting with Radical Bunny and during the next couple of
 8 months, Mr. Hoffmann came to a better understanding on the issue of whether Radical Bunny had
 9 engaged in the unregistered sale of securities and he reached a conclusion in late April that Radical
 10 Bunny "had violated the securities laws."³¹⁹ "We looked at the relevant statutes, cases, no action
 11 letters, and reviewed, compared that to the documents that we had been given, and combined that
 12 with the oral information that our clients gave us. And we made our judgment based upon the facts
 13 and the law at that point. I made the judgment."³²⁰

14 **May 2007**

15 Mr. Hoffmann testified that he had a conference call with the Radical Bunny principals, (Mr.
 16 Hirsch, Bunny and Howard Walder) on May 2, 2007, where he informed them of his conclusion that
 17 they had violated securities laws.³²¹ Mr. Hoffman testified that in preparation for the meeting, he had
 18 a typed list of action items for the client, and that he had made handwritten notes on it prior to the
 19 conference call with Radical Bunny.³²² Mr. Hoffmann testified that he also made handwritten notes
 20 on a separate document prior to the meeting and that he used both documents to give his advice to the
 21 Radical Bunny principals.³²³ He testified that he made these notes prior to the telephone call "so that
 22 I could make sure that the message that I delivered was clear and understandable."³²⁴

25 ³¹⁷ Tr. at 816-817.

26 ³¹⁸ Tr. at 816-817; Direction to Purchase Exhibit S-12(l).

27 ³¹⁹ Tr. at 809, 817, 856, 912.

28 ³²⁰ Tr. at 912.

³²¹ Tr. at 818.

³²² Exhibit S-22(g); Tr. at 819-820.

³²³ Tr. at 822; Exhibit S-22(i).

³²⁴ Tr. at 927.

1 Exhibit S-22(g) is the typed "Corporate Action Items for Radical Bunny, LLC" dated May 2,
2 2007. Item No. 1 is "Determination of whether participations offered are securities" with a
3 handwritten "yes" next to it. Subsection a) reads "Create summary of findings" and Subsection b)
4 reads "If yes, determine exemption upon which to rely." Mr. Hoffmann testified "on that is the
5 determination of whether participations offered are securities. And I say, yes, we have determined
6 that...So then my list that I used to give my advice was, stop selling securities in violation of the
7 federal, slash, state securities laws."³²⁵

8 Mr. Hoffmann testified that he told Mr. Hirsch and the Walders what steps needed to be
9 addressed to comply with securities law:

10
11 if you wish to continue selling participations, you have an investment contract, a
12 security, and, as a result, all of the matters that I discussed with you earlier in
13 February, that you had violated the federal and state securities laws and, therefore, you
14 had to stop selling. That you had been engaged in the unregistered sale of securities
15 through these participations. And my second point is you need to restructure your
16 investment program in order to comply with the securities laws. And also that you
17 need to provide appropriate disclosure documents, a private placement memorandum.
18 Next, that you need to correct the status of your liens on the underlying collateral. This
19 was picking up the advice that Bob Bornhoft was well down the road on with the
20 client already. But I wanted to repeat it to them that we deemed your collateral
21 position to be not as you've disclosed it to us or to the investors, and that needed to be
22 corrected right away. Next, that they correct contractual problems with investors. And
23 those amounted to this indication this purchase intent document was woefully
24 inadequate. It didn't specify rights and responsibilities between the parties. It was
25 merely an order form in my view. And so, therefore, we recommended that that
26 become a real contractual document providing rights, responsibilities, obligations of
27 the parties...[a]nd then because they were selling securities, and that they told us that
28 they wanted to continue on a participation program as opposed to another structure,

³²⁵ Tr. at 925- 926.

1 they would have licensing issues to deal with: Broker/dealer licensing, investment
2 advisor licensing, mortgage broker and banker licensing issues.³²⁶

3 Mr. Hoffmann testified that Item No. 5 on the Corporate Action Items says, "If all investors
4 must be accredited, determine transition plan for the current non-accredited investors," and includes a
5 handwritten note "registered rescission offer?" Mr. Hoffmann testified that next to it is "where I
6 mentioned to the Radical Bunny principals in that phone call that one option opened to them was to,
7 because of their violations, I said you can go to the State of Arizona and to the SEC, tell them that
8 you made a mistake. And, which Tom had said, Tom said well, if we had done something we didn't
9 do it intentionally, we did it out of ignorance. I said, well, in that case you can have a registered
10 rescission offer and that would, that would be a way to take care of your past problems. And Tom
11 said we don't want to do that."³²⁷ Hoffmann testified, "[a]nd Tom Hirsch said we understand; we
12 want to be compliant; we want to go forward with a new program."³²⁸

13 Mr. Hoffmann testified about Exhibit S-22(i) which is a two page document that includes both
14 his advice about the new program (including the risks of integration with the old program and the
15 number of non-accredited investors) that he prepared before the May 2, 2007 telephone conference
16 call, and his notes written after giving his advice during that call. "So what I was concerned with
17 there is that we had a problem, they had a problem with respect to their old way of doing business,
18 and I didn't want any taint from that program to carry over and infect what would be a compliant
19 program."³²⁹

20 Mr. Hoffmann testified that he had proposed a two part solution – "one was have a new
21 program in the manner that I discussed. Avoid integration issue, but in the future go the State of
22 Arizona, the ACC, and have a registered program for non-accredited investors."³³⁰ He testified that
23 they also gave Radical Bunny advice about the planned May 24 meeting – told them not to invite
24
25

26 ³²⁶ Tr. at 823-824.

27 ³²⁷ Tr. at 925-926.

28 ³²⁸ Tr. at 927.

³²⁹ Tr. at 928.

³³⁰ *Id.*

1 guests who were not already investors, “you’re in the midst of getting this advice, we don’t have new
2 documents prepared, so you’re going to stop selling.”³³¹

3 Mr. Hoffmann testified that after giving the advice to stop selling on May 2, 2007, the first
4 note that he wrote was the quote: “Scott is borrowing from the ML company,” with a note “nota
5 bene” or “note this well, this is important.”³³²

6 Mr. Hoffmann testified that when he told them to stop selling in violation of federal and state
7 securities law he also told them that “your liability has occurred and you have civil and possible
8 criminal exposure here for these violations. And they said – and I said if you want, I’m not a
9 litigator, if you want I can refer a litigation counsel, including a criminal lawyer, to you to take care
10 of your past problems.”³³³ “I told them that you have liability, and you have exposure, and you, any
11 future sales that you would make will only compound that problem. So you need to stop, not only
12 because of your securities law exposure that you’d be just increasing that, but also because of the
13 fraud considerations apart from that civil fraud, in the sense that they are representing to their
14 investors that they have a valid security interest when we concluded that there wasn’t.”³³⁴

15 Mr. Hoffmann testified that “[w]e were only retained on a going forward basis. In my call of
16 5/2, when I said you have problems, past problems, and do you want to do a rescission offer, do you
17 want to go, federal and state, go in and, and make that right? They said no. And so what would the
18 solution be? Well, the solution is stop selling. And, of course, what would happen, or what was
19 supposed to happen, was that those loans fromRadical Bunny to Mortgages Limited, would be
20 paying down, and those people would be paid off. And so we thought we had stopped that program.
21 Our client told us it had stopped the program.”³³⁵ Mr. Hoffmann testified that Mr. Hirsch told him
22 during the May 2, 2007 conference call that they would stop selling.³³⁶

23 Mr. Hoffmann was told that the program was yielding Radical Bunny principals “over a
24 couple million dollars” in fees.³³⁷ When asked whether any of the Respondents told him that if

25 ³³¹ Tr. at 932, 872; Exhibit S-22(i).

26 ³³² Tr. at 929-930.

27 ³³³ Tr. at 825.

28 ³³⁴ Tr. at 827-828; See also Tr. at 874.

³³⁵ Tr. at 943.

³³⁶ Tr. at 864, 943.

³³⁷ Tr. at 2137.

1 Radical Bunny stopped issuing participations and notes to Mortgages Limited, that Mortgages
 2 Limited would not be able to pay them back, Mr. Hoffmann testified that "No. That would have
 3 really alarmed us."³³⁸

4 Mr. Hoffmann was not in the room with them to see their reaction to being told of past
 5 securities violations, but he testified that "Tom said we understand...but we don't want to deal with
 6 those past issues. We would like to move forward with a new compliant program."³³⁹ He also
 7 testified that "Tom says...we may have to reduce the base. Which means he certainly understands
 8 my advice that that is going to be one of the implications of stopping the sale. And below it, it says
 9 we will have to contract the business. And then Tom says we will be in the process of finding out
 10 how many unaccrediteds there are."³⁴⁰

11 Mr. Hoffmann testified that ordinarily, whether he would put his advice telling a company to
 12 stop business because it was violating the law into a written letter, would depend on the
 13 circumstances.³⁴¹ He testified that no letter was written because he was dealing with a CPA and
 14 someone with a Ph.D., a pharmacist with an advanced degree, "and they understood my advice."³⁴²
 15 Mr. Hoffmann testified that "they didn't tell us on the phone call whether they were continuing to sell
 16 or not."³⁴³

17 Mr. Hoffmann testified that "by May 2nd we had reached the conclusion that the client had
 18 difficulties, both on a federal and state level, regarding their securities law compliance and that
 19 needed to be corrected. From that point on we began to gather information to see if we could develop
 20 a program that, in fact, would be compliant."³⁴⁴ He testified that there were other elements that
 21 needed to be addressed and steps taken in "order to have the program either reorganized or reoriented
 22 or have a new program."³⁴⁵ Besides the securities law compliance, those items included that "their
 23 underlying contractual documents with their participants were inadequate and failed to address in a
 24

25 ³³⁸ Tr. at 944.

26 ³³⁹ Tr. at 826.

27 ³⁴⁰ Tr. at 876.

28 ³⁴¹ Tr. at 877.

³⁴² *Id.*

³⁴³ Tr. at 827.

³⁴⁴ Tr. at 2131.

³⁴⁵ Tr. at 2132.

1 number of areas what the rights, responsibilities, and relationships were between the parties;" and
2 that the "participants did not have a valid, secured, and enforceable security against Mortgages
3 Limited. And those documents needed to be taken care of. Thirdly, we had not addressed at that
4 point how, when, and if the client would become licensed in a number of ways that we were
5 concerned about."³⁴⁶

6 Mr. Hoffmann testified that the firm suggested different structures that might work relative to
7 their program that may allow the program and participation to avoid being a security, but finally at
8 some point, they said "no, we want to stick with our format of selling a participation in a note." Mr.
9 Hoffmann testified that because the client wanted to keep the same contractual format, they were
10 trying to create a more fulsome document that would still be a participation in a Mortgages Limited
11 note.³⁴⁷

12 On May 21, 2007, Mr. Hoffmann sent a fax to Radical Bunny³⁴⁸ with a cover sheet stating
13 that "Attached for your review is a draft of the Participation Agreement we are recommending as an
14 interim step. An investor would execute this each time a new loan is created with Mortgages Ltd to
15 document the investor's participation in a portion of that loan. We might be able to shorten the
16 Accredited Investor questionnaire included in the Agreement a bit. The fax following this one will
17 contain disclosure about the Loan itself." He testified that Exhibit R-11 was "a contractual document.
18 It wasn't meant to address the securities law issues."³⁴⁹

19 Mr. Hoffmann testified that the "interim step" mentioned in the fax was "not to be a step
20 between May 2nd and starting to sell before a new program and all the four or five other steps that I
21 mentioned earlier had been taken and resolved."³⁵⁰ "Again, this was one step among five or six that I
22 had recommended, and they all had to be accomplished. There wasn't one step that was going to be
23 executed ahead of the others, except getting collateral at this point was the highest priority. We
24 needed to obtain a valid and binding security agreement, and that really was the first step, as far as –
25 as far as priorities were concerned. The rest of these, including this participation draft, was one of a

26 ³⁴⁶ Tr. at 2132-2133.

27 ³⁴⁷ Tr. at 2185.

28 ³⁴⁸ Exhibit R-11.

³⁴⁹ Tr. at 2170.

³⁵⁰ Tr. at 2139.

1 number of things that had to be resolved, and they all had to be resolved, more or less, simultaneously
2 in order for a compliant program to go forward.”³⁵¹ “We drafted this in order to start to implement
3 our advice to the client. I didn’t have any idea – May 21st, I didn’t think the client was not listening
4 to our advice.”³⁵²

5 Mr. Hoffmann testified that the next day, May 3, 2007, he had a telephone conference call
6 with Mortgages Limited’s counsel, Bob Kant, and Bob Moya, Gary Shullaw, and Bob Bornhoft. Mr.
7 Hoffmann took notes during the call³⁵³ that indicate that Mr. Kant told them his position about
8 Radical Bunny: “we want Radical Bunny to raise money in a way that we are comfortable with;” “we
9 are not making the offering;” “RB, they not be treated as a conduit, so that our investors;” and
10 “secured vs unsecured notes.” Mr. Hoffmann testified that Mr. Kant was concerned that Radical
11 Bunny was raising money illegally and was worried that Mortgages Limited would have liability for
12 Radical Bunny’s actions.³⁵⁴ Mr. Hoffmann said he told Mr. Kant that “we’re moving down the track
13 toward a new program with a private placement memorandum, and if our client is going to be making
14 a loan to Mortgages Limited, and our clients are relying on the financial stability of Mortgages
15 Limited as a borrower, including the collateral, because we’re talking about a blanket lien on all of
16 our assets, then we need to have disclosures about Mortgages Limited’s business, we need to have
17 disclosures about its management, and the way it operates.”³⁵⁵ Mr. Hoffmann testified that it “got a
18 bit unpleasant” when they discussed whether Radical Bunny had security: “that’s when Kant pushed
19 back and said we never promised Radical Bunny first position on anything, words to that effect. And
20 my response was don’t expect any more of – our client is not going to be supplying any more funds
21 till this is fixed, that until we, until the collateral issue is fixed, and until we get the securities matter
22 straightened out. But first we need the collateral fixed.”³⁵⁶

23 Mr. Hoffmann testified that on May 7, 2007, he had a telephone conference call with Mr.
24 Hirsch and Bunny and Howard Walder and told them that the call with Mr. Kant did not go well –
25

26 ³⁵¹ Tr. at 2143.

³⁵² Tr. at 2144.

³⁵³ Exhibit S-22(j).

³⁵⁴ Tr. at 934-935.

³⁵⁵ Tr. at 935-936.

³⁵⁶ Tr. at 934; 860-861.

1 “that we got considerable push back on the collateral issue. And Tom was upset about it, and said
 2 that ...if they are not going to give us a security interest...or if they are not going to be cooperative –
 3 we can put a cap on the amount of money that we will raise for them...Radical Bunny, gets solicited
 4 by other companies all the time to raise money, to raise money for other companies to loan out.”³⁵⁷
 5 Mr. Hirsch also told Mr. Hoffmann that “I want my loan secured.”³⁵⁸ Mr. Hoffmann also testified
 6 that Mr. Hirsch told him Radical Bunny was “updating our records – we need to know if accredited
 7 or not” and discussed whether Mortgages Limited would buy them out and then they would clean up
 8 the old investor problem.³⁵⁹

9 **June 2007**

10 Mr. Hoffmann testified that after the May 2, 2007 discussion, “we immediately embarked
 11 upon the drafting of various documents to carry out the new program. And we spent those weeks in
 12 going back and forth with receiving detailed comments from Tom Hirsch, and maybe others inside
 13 Radical Bunny, about the various drafts, and we went through a number of versions of those.”³⁶⁰

14 On June 12, 2007, Mr. Hoffman participated in a conference call with Mr. Hirsch, Bunny and
 15 Howard Walder, Mr. Bornhoft, and Mr. Shullaw as a follow up to Radical Bunny’s concern about
 16 what to do about non-accredited investors.³⁶¹ According to Mr. Hoffmann’s notes, when Mr. Hirsch
 17 asked if creating a separate LLC for each loan with a limited number of investors and a deed of trust
 18 securing the loan would “avoid securities laws,”³⁶² Mr. Hoffmann noted a possible “integration
 19 issue?”

20 Mr. Hoffmann testified that “it was impossible to have a securities offering without the
 21 collateral, because their whole pitch to their investors was, ... you’re first position on all of the
 22 Mortgages Limited assets....So without that, nothing could proceed without having the, perfecting
 23 the security interest first in the old ones. And then, going forward, having an understanding with
 24 Mortgages Limited about the collateral issue.”³⁶³ Getting a security interest in the old loans “would

25 ³⁵⁷ Tr. at 938-939.

26 ³⁵⁸ Tr. at 939; Exhibit S-22(k).

27 ³⁵⁹ Tr. at 939-940; Exhibit S-22(k).

28 ³⁶⁰ Tr. at 880.

³⁶¹ Tr. at 940; Exhibit S-22(m).

³⁶² *Id.*

³⁶³ Tr. at 942.

1 not have fixed the violation, but it certainly would have protected those investors. Those investors
2 had already committed their funds.”³⁶⁴

3 Mr. Hoffmann testified that Exhibit S-45(c) was the script he used in a telephone conference
4 call with Mr. Hirsch on June 19, 2007, when discussing revisions to the existing drafts of documents
5 prepared by Quarles & Brady. He testified that “[w]e had reached the point on 6/19 where we were
6 discussing some of those changes as indicated in my time records of 6/19, and so I just wanted to
7 make sure that, even though that draft wasn’t ready to use, that they understood it was still a draft.”³⁶⁵

8 Mr. Hoffmann testified that he knew Quarles & Brady attorneys were having trouble between
9 early May and mid-June of “getting Mortgages Limited to perform and to perfect the security interest
10 that needed to be perfected”³⁶⁶ and his June 19, 2007, notes indicate that he reminded Radical Bunny
11 that “No rollovers of Existing notes; No New Sales; Top priority - collateral must be in place for
12 existing notes; No use of Q&B docs; PPM must be prepared.”³⁶⁷ Mr. Hoffmann testified that Mr.
13 Hirsch said he understood what he was being told at the meeting.³⁶⁸ Mr. Hoffmann testified that he
14 “specifically in a telephone conversation with the client said, you understand that these are just drafts
15 and we are not final? Those drafts had a number of blanks in them yet, and a number of the other
16 items that were referred to in here were not resolved yet. For example, as of mid-June, there was no
17 security agreement in place. As of mid-June, we hadn’t negotiated with Mortgages Limited as to
18 what the form of the note from which participations might be sold at some point would look like. For
19 example, in Exhibit C, we had not determined what all the various disclosure documents might look
20 like. In addition, we didn’t, at that point in mid June, have any idea much how we were going to
21 solve a number of the other steps that I talked about to reach the point at which a compliant offering
22 could even be initiated.”³⁶⁹ Mr. Hoffmann testified that he “specifically said, now, Tom, you
23 understand that these are drafts and you understand that and agreed that you wouldn’t sell anymore,
24 and he said he understood that.”³⁷⁰ Mr. Hoffmann testified that he did not send a letter after June 19,

25 ³⁶⁴ Tr. at 942.

26 ³⁶⁵ Tr. at 880.

26 ³⁶⁶ Tr. at 862.

27 ³⁶⁷ Tr. at 830-831; Exhibit S-45(c).

27 ³⁶⁸ Tr. at 831.

28 ³⁶⁹ Tr. at 2155-2156.

28 ³⁷⁰ Tr. at 829.

1 2007, confirming the advice because he had confirmation from Tom Hirsch that he understood the
2 advice and was following it.³⁷¹

3 Mr. Hoffman knew that his firm was preparing a letter to go to Mortgages Limited regarding
4 the collateral that demanded execution of the Security Agreement that was attached to the June 15,
5 2007 letter from Mr. Bornhoft to Mr. Kant.³⁷² Mr. Hoffmann testified that he did not read the
6 Security Agreement that Mr. Bornhoft had prepared, which includes language “Whereas, the secured
7 party has made and continues to make loans to the Debtor.”³⁷³ Mr. Hoffmann testified that Mr.
8 Bornhoft told him that he was getting assurances from Mr. Hirsch that he was working with Scott
9 Coles and that they would get collateral.³⁷⁴ Mr. Hoffmann testified that his last discussion with any
10 Radical Bunny members concerning the participation agreement was in mid-June, 2007.³⁷⁵ Mr.
11 Hoffmann testified that no Radical Bunny member asked him whether the participation agreement
12 being drafted could be used by them; they never told him that they were going to use it; and none
13 asked him what he meant by “interim step.”³⁷⁶

14 Mr. Hoffmann testified that he did not put his advice in writing because 1) it was “very simple
15 and straight forward;” 2) “the word no is not very hard to understand;” 3) he gave a lot of
16 credence/weight to the people he was talking to; 4) he thought their actions meant that they were
17 following his advice by pursuing the demand letter to obtain collateral; and 5) because he
18 “immediately started to draft documents for a new program, which would be a new compliant
19 program.”³⁷⁷ Mr. Hoffmann had no or very limited contact with Radical Bunny after the summer of
20 2007, but other Quarles and Brady attorneys continued to work on Radical Bunny legal issues.

21 **June 2008**

22 Mr. Hoffmann testified that on June 3, 2008, he had a conference call with Mr. Bornhoft who
23 told Mr. Hoffmann that Mr. Hirsch had called and told him: that he (Mr. Hirsch) was Scott Coles’
24 trustee; that he would have to resign either as Radical Bunny manager or as trustee; that “Tom’s

25 ³⁷¹ Tr. at 880.

26 ³⁷² Exhibit S-44.

27 ³⁷³ Tr. at 863.

28 ³⁷⁴ Tr. at 947.

³⁷⁵ Tr. at 2185.

³⁷⁶ Tr. at 2187-2188.

³⁷⁷ Tr. at 945-946.

1 helping with the funeral;" that if he resigns as manager, he may have a conflict as a member of
 2 Radical Bunny; that Mr. Hirsch thinks this is "more personal than business;" "run on the bank;" and
 3 that Radical Bunny was "up to \$200 million of investors."³⁷⁸ Mr. Hoffman testified that it was a
 4 "surprise and a shock" to him to learn that Radical Bunny had continued to sell because "Tom Hirsch
 5 told me that they were going to stop selling, that they wanted to be compliant with the securities laws,
 6 and that they had – now, I learn, disregarded our advice entirely, as if it had never been given."³⁷⁹
 7 Mr. Hoffmann was also "shocked and surprised that they had never resolved the lien issue."³⁸⁰

8 Mr. Hoffmann and Mr. Bornhoft decided that Quarles & Brady could not continue with the
 9 representation because Radical Bunny had not followed their advice and, and so they met with
 10 Radical Bunny.³⁸¹ Mr. Hoffmann testified that during that meeting on approximately June 9, 2008,
 11 he reminded Radical Bunny of, and repeated the advice he had given them on May 2, 2007, reading
 12 the list of items contained in Exhibit S-22(g).³⁸² Mr. Hoffmann testified that "when I asked Tom why
 13 they hadn't followed our advice, I said, 'Tom, all you had to do – we had a demand letter out there –
 14 all you had to do was request us to file suit. Also, all you had to do was follow our advice and it
 15 would have stopped everything, because there were no new loans coming in, and Mortgages Limited
 16 had to pay off the existing loans from Radical Bunny to Mortgages Limited.'"³⁸³ Mr. Hoffmann said
 17 that Mr. Hirsch "admitted that they hadn't followed our advice and he said 'we've done everything
 18 wrong.'"³⁸⁴ Mr. Hoffmann testified that Mr. Hirsch did not explain why he hadn't followed the
 19 advice, "because the Radical Bunny principals were there. You know, it was a highly emotional
 20 meeting. All the list of horrors that I had told them would happen to them were coming to pass
 21 before our eyes. That's why we're here today."³⁸⁵

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 25 ³⁷⁸ Tr. at 955; Exhibit S-45(d).

26 ³⁷⁹ Tr. 834.

27 ³⁸⁰ Tr. at 907.

28 ³⁸¹ *Id.*

³⁸² Tr. at 950.

³⁸³ Tr. at 944-945.

³⁸⁴ Tr. at 945; 950.

³⁸⁵ Tr. at 945.

Robert Bornhoft

Robert Bornhoft has been an Arizona licensed attorney since 1986, has been a partner at Quarles and Brady for almost 15 years, and was previously employed by Southwest Savings and Loan.³⁸⁶ His focus and specialty is commercial transactional type matters.³⁸⁷ Mr. Bornhoft testified pursuant to waiver from Radical Bunny and Horizon Partners.³⁸⁸

Mr. Bornhoft testified that Radical Bunny was a client of Quarles & Brady from approximately January 31, 2007 through June 10, 2008.³⁸⁹ Mr. Bornhoft testified that Quarles & Brady was retained to look into “both the structure of how Radical Bunny was dealing with its investors, and then also how Radical Bunny was structuring its loan transactions with Mortgages Limited.”³⁹⁰

March 2007

Mr. Bornhoft first became involved in the representation of Radical Bunny in about March 2007 and was looking at the loan structure between Radical Bunny and Mortgages Limited. Mr. Bornhoft met with some of the Quarles & Brady securities partners who were talking with Radical Bunny, and his “understanding was that the goal was to try and restructure the program and part of that would entail how the loans from Radical Bunny to Mortgages Limited would be made, how they would be collateralized, the loan structure basically on a going forward basis. And initially that’s why I was brought into the transaction.”³⁹¹ He had discussions with Mr. Hirsch and Mrs. Walder primarily about how they were setting up the loans between Radical Bunny as the lender and Mortgages Limited as the borrower, so that he “could get an understanding of what they were doing and what would make sense on a going forward basis.”³⁹² Mr. Bornhoft testified that in his initial discussions with Mr. Hirsch, “Tom described that they had loans outstanding, obligations owing from Mortgages Limited that were secured by all of the assets of Mortgages Limited.”³⁹³ He understood

³⁸⁶ Tr. at 547.

³⁸⁷ *Id.*

³⁸⁸ Tr. at 567; Exhibit S-18(a) Radical Bunny attorney client waiver; Exhibit S-18(b) Horizon Partners attorney client waiver.

³⁸⁹ Tr. at 568.

³⁹⁰ Tr. at 570.

³⁹¹ Tr. at 575-576.

³⁹² Tr. at 571.

³⁹³ *Id.*

1 that at the time that Radical Bunny came to Quarles & Brady, there were \$140 million of loans
2 outstanding to Mortgages Limited.³⁹⁴

3 In order to structure new loans on a going forward basis, Mr. Bornhoft had to look at how
4 existing loans were structured, and in that process, "another issue became prominent" and that was
5 his "concern that the existing loans themselves were not properly collateralized."³⁹⁵ Mr. Bornhoft
6 testified that he "concluded that the collateral structure was defective."³⁹⁶ Mr. Hirsch had provided
7 Mr. Bornhoft a financing statement that in Mr. Bornhoft's view, did not meet the requirements for
8 creating the type of interest that Radical Bunny thought it had in Mortgages Limited's assets.³⁹⁷
9 Exhibit S-31 is the financing statement that Mr. Bornhoft reviewed in March 2007 and he testified
10 that the document is a "perfection document that itself does not create the underlying security
11 interest, and the --you would need a security agreement or, or some other written document granting
12 the security interest before this document could have any meaning."³⁹⁸ Mr. Bornhoft testified that he
13 asked whether a security agreement document existed, and his general recollection from the
14 discussions was that there was not, and he was never provided with one.³⁹⁹ His "initial conclusion
15 was there was a huge problem because there was no grant of a security interest to begin with."⁴⁰⁰ Mr.
16 Bornhoft testified that even if there was no problem with the security interest, the document was
17 recorded with the county, not filed with the Secretary of State's office; and another defect was that
18 the way the company was named in the description on the document would not result in complete
19 searches for filings.⁴⁰¹ Mr. Bornhoft testified that he had flagged for the securities partners the issue
20 of Participants thinking they had a security interest when he was not sure that they did have
21 security.⁴⁰²

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23
24 ³⁹⁴ Tr. at 572; 576.

25 ³⁹⁵ Tr. at 577.

26 ³⁹⁶ *Id.*

27 ³⁹⁷ Tr. at 577-578.

28 ³⁹⁸ Tr. at 579.

³⁹⁹ Tr. at 579.

⁴⁰⁰ *Id.*

⁴⁰¹ Tr. at 580.

⁴⁰² Tr. at 650.

1 In the March 2007 timeframe, Mr. Bornhoft saw an email from Todd Brown that led him to
 2 believe that there was in fact an intent to grant Radical Bunny an interest,⁴⁰³ but he did not recall ever
 3 seeing a personal guarantee by Scott Coles.⁴⁰⁴ Mr. Bornhoft testified that in the March 2007
 4 timeframe, after he reviewed the documents provided by Radical Bunny, he told Radical Bunny (Mr.
 5 Hirsch and possibly others) on the telephone that the structure of the collateralization as between
 6 Mortgages Limited and Radical Bunny was defective. He testified that he told Mr. Hirsch "in my
 7 view, Radical Bunny did not have a perfected security interest in any assets of Mortgages
 8 Limited."⁴⁰⁵ Mr. Bornhoft testified that his impression was that Mr. Hirsch "was very surprised by
 9 my statement."⁴⁰⁶ Mr. Bornhoft testified that it would not have been his practice to send out a letter
 10 or some other communication to clients with that information – he testified that "...to me the
 11 documents were clear that I had seen, and the path we were going to start at that point undertaking
 12 was the path to actually get them a security interest. So, I mean, I thought the advice was clear."⁴⁰⁷
 13 Mr. Bornhoft had a number of conversations about how to get collateral for both the existing loans
 14 and what a structure would look like on a going forward basis for loans.

15 April 2007

16 Mr. Bornhoft's time records indicate that he had several conference calls with Radical Bunny
 17 discussing and revising a term sheet. Mr. Bornhoft sent to Mr. Kant the term sheet for his review on
 18 April 25, 2007.⁴⁰⁸ Mr. Hirsch agreed that steps needed to be taken to perfect a security interest.⁴⁰⁹

19 May 2007

20 Mr. Bornhoft had sent a term sheet to Mortgages Limited several weeks earlier but had
 21 received no response.⁴¹⁰ He testified that there was a sense of urgency, because now it was May and
 22 he had told Mr. Hirsch almost two months earlier that there were problems with the collateral, and
 23 Mr. Hirsch had again told him that Mortgages Limited had agreed to provide the collateral.⁴¹¹ Mr.

24 ⁴⁰³ Tr. at 584-585; 710-711; Exhibit S-22(h).

25 ⁴⁰⁴ Tr. at 585.

26 ⁴⁰⁵ Tr. at 586-587.

27 ⁴⁰⁶ Tr. at 587.

28 ⁴⁰⁷ Tr. at 587-588.

⁴⁰⁸ Exhibit S-42.

⁴⁰⁹ Tr. at 703.

⁴¹⁰ Tr. at 598.

⁴¹¹ *Id.*

1 Bornhoft believed that there was no reason to wait to memorialize the grant of the security interest for
 2 existing loans.⁴¹² When no response was received from Mortgages Limited, Mr. Bornhoft had
 3 concerns about third parties making a claim against Mortgages Limited's assets, and also whether
 4 Radical Bunny would have a claim absent the documentation to support its claim.⁴¹³ Mr. Bornhoft
 5 prepared a security agreement for his clients to review and give input prior to sending it to Mr.
 6 Kant.⁴¹⁴

7 On May 10, 2007, Mr. Bornhoft emailed Mr. Kant and included a "short form, blanket
 8 security agreement, and a copy of the proposed UCC-1 filing." He included his legal opinion that
 9 "presently, the documentation to create and/or perfect the necessary liens and security interests is
 10 either nonexistent or defective in numerous respects."⁴¹⁵ The Security Agreement says that the
 11 "Secured Party has made and continues to make loans to the Debtor,...and with such loans in the
 12 aggregate presently totaling approximately \$152,000,000."⁴¹⁶ The email also stated that "Our intent
 13 is for the attached documentation to be an interim approach to the dealing with this issue while the
 14 parties finalize their agreements and documentation for other aspects of the transaction. We
 15 anticipate that more detailed and broader security documentation (e.g., loan and security agreement,
 16 control agreements, deeds of trust, etc.) will be put in place in connection with the completion of the
 17 larger transaction. Please let us know your client's position with respect to the completion of the
 18 attached documentation as soon as possible."⁴¹⁷

19 On May 11, 2007, Mr. Bornhoft sent a fax to Mr. Hirsch, and Mr. and Mrs. Walder attaching
 20 his email to Mr. Kant, a copy of the Security Agreement creating a security interest in all of
 21 Mortgages Limited assets, and a financing statement that would perfect the security interest.⁴¹⁸

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 25 ⁴¹² Tr. at 598.

26 ⁴¹³ Tr. at 599-600.

27 ⁴¹⁴ Tr. at 660.

28 ⁴¹⁵ Tr. at 601, quoting Exhibit S-43 email and Security Agreement drafted by Mr. Bornhoft and sent to Mr. Kant; Mr. Hoffmann, Mr. Shullaw, Mr. Moya and Radical Bunny on May 10, 2007.

⁴¹⁶ Tr. at 601-602; Exhibit S-43.

⁴¹⁷ Tr. at 663; Exhibit S-43.

⁴¹⁸ Tr. at 595-596; Exhibit S-43.

June 2007

Mr. Bornhoft testified that Mr. Kant did not respond to his May 10, 2007 email and so Mr. Bornhoft called Mr. Kant and left voicemail messages.⁴¹⁹ On June 15, 2007, Mr. Bornhoft sent a more formal letter to Mr. Kant giving a June 25, 2007 deadline for Mortgages Limited to sign the Security Agreement or provide comments. He also sent a fax that day to Mr. Hirsch and Mr. and Mrs. Walder, and included the letter to Mr. Kant as well as the Financing Statement and Security Agreement.⁴²⁰ Mr. Bornhoft testified that he intended for loans made after the date of the Security Agreement to come within that Security Agreement – and when asked whether it would be necessary to include that language if he thought they were no longer making loan, he said “that may technically be correct....but the same way for any lender that I would draft a security agreement for, if the intent is that it’s to be broad, I may have no knowledge that they’re ever going to make an additional loan, and I’m certainly going to put language in there that says the security agreement covers both existing loans and future loans.”⁴²¹

Mr. Bornhoft testified that he did not recall hearing that Radical Bunny had been told not to take any more money from Participants.⁴²² He testified that he was present at a couple of meetings where Quarles & Brady attorneys may have advised Radical Bunny as to securities laws, but he doesn’t “have any recollection of the specific discussions on the securities law side....My focus, and I think part of the reason I can’t remember that is because I was always focused on the other side of the transaction.”⁴²³

August 2007

Mr. Bornhoft testified that in August 2007, he attended a meeting that was held at Mortgages Limited’s offices with Mr. Moya, Mr. Hirsch, Mr. Coles, Mr. Kant, and other principals from Mortgages Limited.⁴²⁴ He testified that he thought that the August meeting was due to the June 15 letter and the demands that they had made for collateral, but the meeting’s focus was more to try and

⁴¹⁹ Tr. at 604.

⁴²⁰ Tr. at 605; Exhibit S-44.

⁴²¹ Tr. at 662.

⁴²² Tr. at 664.

⁴²³ Tr. at 714.

⁴²⁴ Tr. at 607-608.

1 discuss putting in place some sort of new structure “that would be securities law compliant, that
 2 would work on a going forward basis.”⁴²⁵ Mr. Bornhoft’s “recollection is we really didn’t have a
 3 good airing of the collateral issues at that meeting...I remember, I guess I’d call it a little bit of a
 4 sense of frustration because I think the, the things that were discussed at the meeting were kind of
 5 more the areas that Kant wanted to focus on, and by the time we got to the things that I wanted to
 6 focus on, everybody was kind of scattering and leaving. And so my recollection is we really didn’t
 7 have a good airing of the collateral issues at that meeting.”⁴²⁶ Mr. Bornhoft testified that Mr. Kant’s
 8 “focus was on the investor side of the transaction and ...kind of making sure that the structure was
 9 compliant with securities laws.”⁴²⁷ He testified that he remembered very little about the meeting and
 10 he did not remember Mr. Kant making any statements that Radical Bunny was engaging in illegal
 11 conduct.⁴²⁸

12 After the meeting, Mr. Kant or Mortgages Limited sent a Private Offering Memorandum that
 13 they thought should be a starting point in trying to put together a structure. Mr. Bornhoft testified
 14 that he believed the reason that a POM was sent “was because Kant was pushing to deal with the
 15 investor side of the transaction. And I can’t remember the specifics about kind of the structural
 16 issues; that was more for the securities guys to deal with...making sure it was securities law
 17 compliant first, and maybe worrying about the collateral second.”⁴²⁹ Mr. Bornhoft testified that he
 18 “wasn’t involved in the analysis or any advice that was given on the securities side of the
 19 transaction.”⁴³⁰ He took away from the meeting that whatever the structure moving forward would
 20 be, it would still be a loan from Radical Bunny to Mortgages Limited secured by some type of
 21 collateral.⁴³¹ He described a lack of meeting of minds, because the structure described by Mr. Kant
 22 was not a loan.⁴³² Mr. Bornhoft testified that he didn’t think Mr. Hirsch “agreed with the structure
 23 that Mr. Kant was telling us was going to be the structure moving forward.”⁴³³ Mr. Bornhoft

24 ⁴²⁵ Tr. at 706.

25 ⁴²⁶ Tr. at 608.

26 ⁴²⁷ Tr. at 609.

27 ⁴²⁸ Tr. at 677.

28 ⁴²⁹ Tr. at 610-611.

⁴³⁰ Tr. at 611.

⁴³¹ Tr. at 612.

⁴³² *Id.*

⁴³³ Tr. at 613.

1 believed that Radical Bunny would have been better served with the structure initially started with as
2 opposed to the Kant/Mortgages Limited proposed structure.⁴³⁴ When asked whether he had heard
3 from anyone by August 13, 2007, "that Radical Bunny should not solicit any more participants" he
4 responded "I don't recall having those discussions."⁴³⁵

5 **October 2007**

6 Mr. Bornhoft testified that during the October 2007 timeframe, they were having difficulty
7 making progress and getting a meeting of the minds.⁴³⁶ He thought Mortgages Limited was stringing
8 them along.⁴³⁷ On October 5, 2007, Mrs. Walder sent Mr. Bornhoft an email saying "put all legal
9 review on hold due to Mr. Kant's refusal to produce a servicing agreement as well as the receipt of an
10 inaccurate POM sent by Mr. Kant."⁴³⁸

11 Mr. Bornhoft said that Mr. Hirsch would call from time to time with specific questions. He
12 received a telephone call on October 31, 2007, from either Mr. Hirsch or Mrs. Walder about whether
13 Radical Bunny could be an insurance company.⁴³⁹

14 **December 2007**

15 Mr. Bornhoft testified that he sent an email to Mr. Hirsch (copied to Moya and "b radical") on
16 December 12, 2007, where he says that after discussions last and this week, "it is clear to me that
17 there is still a great deal of confusion regarding the deal structure between Bunny and ML. The way
18 that the relationship between Bunny and ML is described in the POM and the servicing documents
19 from GT is vastly different from the structure that you described to me. In order to proceed, I think
20 the parties have to reach an agreement on several basic questions, and then they must convey their
21 agreement in clear and unequivocal terms to the attorneys so that the transaction can be drafted
22 properly."⁴⁴⁰

23 The first question Mr. Bornhoft addressed in the email is "Will collateral be provided for
24 existing loans (not new loans) from Bunny to ML? The current loans from Bunny to ML are not

25 ⁴³⁴ Tr. at 615-616.

26 ⁴³⁵ Tr. at 676.

26 ⁴³⁶ Tr. at 629.

27 ⁴³⁷ Tr. at 705.

27 ⁴³⁸ Tr. 682; Exhibit R-2 at RAD00056.

27 ⁴³⁹ Tr. at 644-645; Exhibit S-22(n).

28 ⁴⁴⁰ Tr. at 626-627; Exhibit S-22(o).

1 collateralized. You may recall that a financing statement was provided by ML, but the financing
 2 statement is not sufficient to create or perfect the security interest that presumably was intended when
 3 it was provided. If the current loans are to be collateralized, the parties need to agree on the security
 4 and enter into suitable security documents. If the current loans are not to be collateralized, then the
 5 parties can simply continue the loans as presently structured and roll them in to the investment
 6 structure for new money once each current loan is paid off.”⁴⁴¹ Mr. Bornhoft testified that this
 7 December 2007 email was about the end of the contact with Radical Bunny⁴⁴² and that to his
 8 knowledge, there never was a security agreement.⁴⁴³

9 Mr. Bornhoft understood that Radical Bunny had a number of short term notes that just rolled
 10 over.⁴⁴⁴ Bornhoft testified that “there is some correspondence in the September time frame,
 11 indicating that the notes themselves contained provisions that allow for the notes to be paid in kind.
 12 So in some cases, yes, maybe a refusal to allow a rollover would at some point trigger a default or
 13 force Mortgages Limited to default, but I’m not sure that would be the case across the board.”⁴⁴⁵ Mr.
 14 Bornhoft testified that Exhibit S-38(b) contains “language that says it can be paid by the assignment
 15 of deeds of trust or by cash.”⁴⁴⁶

16 June 2008

17 Mr. Bornhoft testified that Mr. Hirsch contacted him relatively quickly after Scott Coles’
 18 death; he thinks they discussed that Radical Bunny was likely in financial trouble.⁴⁴⁷ He testified that
 19 at a June 9, 2008 meeting at Quarles and Brady offices with the Radical Bunny principals, in addition
 20 to talking about the termination of representation:

21
 22 Chris [Mr. Hoffmann] sat down and basically went through item by item the advice that
 23 he had given in a very specific manner to all of the principals, and essentially went
 24 through and said we had told you to do this and you didn’t do this, or we had told you to

25 ⁴⁴¹ Exhibit S-22(o).

26 ⁴⁴² Tr. at 629-630.

27 ⁴⁴³ Tr. at 627.

28 ⁴⁴⁴ Tr. at 648.

⁴⁴⁵ *Id.*

⁴⁴⁶ Tr. at 649.

⁴⁴⁷ Tr. at 687.

do that and you didn't do that, with respect to the securities advice that he had provided...I don't recall the, the specific details. It would have dealt with the securities advice. What, what I remember and the thing that does stick with me is, is how stunned, I guess for want of a better word, because, you know, again, this was a very emotional time, and this is a situation that was very – it's not a situation I see very often. And he was just stunningly blunt in his statements, and the clients were, I mean, very emotional. And I, again, at the end, I think Tom made the statement that essentially we did everything wrong.⁴⁴⁸

Mr. Bornhoft testified that Mr. Hoffmann's statement listing what his advice had been and what actions were taken by Radical Bunny, was not disputed by Radical Bunny's members.⁴⁴⁹

Mr. Bornhoft testified that the Quarles and Brady termination letter sent the next day acknowledged "the inevitable claims which will follow will address the previous advice Quarles & Brady provided to Radical Bunny."⁴⁵⁰

The Respondents

Harish P. Shah

Mr. Shah obtained a bachelor's degree in commerce and a one year diploma in taxation from a college in India. He came to the United States in 1976, and became a licensed certified public accountant in Arizona in 1993.⁴⁵¹ Mr. Shah worked as an accountant and CPA with Mr. Hirsh's firm from 1988 until 2001, when Mr. Shah purchased "99.99 percent" of Mr. Hirsch's interest in the firm, Hirsch & Shah CPAs.⁴⁵² Mr. Shah estimates that he brought in 40 percent of the clients of Hirsch & Shah CPAs.⁴⁵³ Mr. Shah was not a member of Horizon Partners but was a Participant in Radical Bunny, and he became a manager of Radical Bunny in 2005.⁴⁵⁴ He had invested approximately \$4.6 million as a Radical Bunny Participant when Mortgages Limited filed for bankruptcy.⁴⁵⁵ Mr. Shah

⁴⁴⁸ Tr. at 689-691.

⁴⁴⁹ Tr. at 714-715.

⁴⁵⁰ Tr. at 692, 685; Exhibit S-22(p).

⁴⁵¹ Tr. at 1100.

⁴⁵² Tr. at 1101.

⁴⁵³ Tr. at 1102.

⁴⁵⁴ Tr. at 1104-1105; 1112; 1114; 1116; 1188.

⁴⁵⁵ Tr. at 1178.

1 also invested directly with Mortgages Limited in one or two loans where he was “directly on the deed
2 of trust.”⁴⁵⁶

3 Mr. Shah testified that he became a Participant in Radical Bunny loans in 1998, and that until
4 the timeframe of 2005, Radical Bunny, the entity, would get the assignment of the beneficial interest
5 in deeds of trust from Mortgages Limited in Radical Bunny’s name.⁴⁵⁷ He confirmed that prior to
6 2005, documents were recorded in Maricopa County that said “For value received, the undersigned,
7 its Beneficiary or successor thereto, hereby grants, conveys and transfers to: Radical Bunny, LLC, an
8 Arizona limited liability company as to an undivided [amount] percent interest.”⁴⁵⁸ These documents
9 were an “assignment of the beneficial interest under the deed of trust.”⁴⁵⁹ Mr. Shah testified that
10 these “Mortgage Limited portfolio loans” were relative to a particular project or loan, and that they
11 were created by individuals giving Radical Bunny money, Radical Bunny pooling that money and
12 acquiring an interest in a Mortgages Limited loan, Mortgages Limited then giving Radical Bunny an
13 assignment of beneficial interest under a deed of trust that represents Radical Bunny’s ownership
14 interest, and then recording the deed.⁴⁶⁰ Mr. Shah testified that it was important to have the
15 assignment in Radical Bunny’s name recorded because it shows that “we have a direct interest in that
16 property.”⁴⁶¹

17 Mr. Shah testified that he became a manager of Radical Bunny in the later part of 2005.⁴⁶² As
18 a manager of Radical Bunny, he understood that his “main goal was to talk to my – if any of my
19 friends or relatives would inquire about the program I have, I would give them information about the
20 loan participation that we had.”⁴⁶³ Mr. Shah testified that his family and friends asked him what he
21 did for investments and he would tell them that he was a Participant in Radical Bunny and with
22 Mortgages Limited.⁴⁶⁴ “We have a large Indian community here, and we have a lot of friends here.
23 And when they come to know that I was doing it as a part of my investment, they would inquire

24 ⁴⁵⁶ Tr. at 1201.

25 ⁴⁵⁷ Tr. at 1108.

26 ⁴⁵⁸ Exhibit S-39(b); Tr. at 1109.

27 ⁴⁵⁹ Tr. at 1108.

28 ⁴⁶⁰ Tr. at 1109-1110.

⁴⁶¹ Tr. at 1110.

⁴⁶² Tr. at 1114.

⁴⁶³ *Id.*

⁴⁶⁴ Tr. at 1186-1187.

1 about it, and then I will give them information of what I have been doing.”⁴⁶⁵ He testified that he did
 2 not know all of them personally and that about 150 families invested approximately \$40 million.⁴⁶⁶

3 Mr. Shah told prospective Participants that because there was a minimum amount needed to
 4 invest with Mortgages Limited, Radical Bunny would pool the money together until it had the
 5 minimum amount, then loan the money to Mortgages Limited.⁴⁶⁷ He told the Participants that the
 6 loan was secured by “all of the assets” of Mortgages Limited.⁴⁶⁸ Mr. Shah testified that he did not
 7 discuss any risks (such as Mortgages Limited defaulting on the payment of the notes) with the
 8 potential Participants.⁴⁶⁹

9 Mr. Shah testified that he “was not involved in the day-to-day operation of the Radical Bunny
 10 because I was busy at accounting office of Hirsch & Shah” but would have discussions with the
 11 Radical Bunny managers regarding the business activities of Radical Bunny about once a week.⁴⁷⁰
 12 He was a signatory on bank accounts for Radical Bunny from at least October 8, 2004, through and
 13 including June of 2008, but did not make any deposits or write any checks.⁴⁷¹ Mr. Shah testified that
 14 he did not make decisions for the operation of Radical Bunny; he did not “decide what interest rate
 15 Mr. Coles or Mortgages Limited was going to have to pay for money;” he did not decide how Radical
 16 Bunny was structured; he did not give directions to the Walders concerning their jobs; and that he did
 17 not have any day-to-day operational responsibilities for Radical Bunny.⁴⁷² Mr. Shah attended all the
 18 Orange Tree Resort meetings and his role was to be there and meet the Participants.⁴⁷³ He said that at
 19 the meetings, Mr. Hirsch answered all questions from Participants.⁴⁷⁴ Mr. Shah attended a Mortgages
 20 Limited investor meeting in February 2008.⁴⁷⁵

23 ⁴⁶⁵ Tr. at 1114 -1115.

24 ⁴⁶⁶ Tr. at 1115-1116.

⁴⁶⁷ Tr. at 1117.

25 ⁴⁶⁸ Tr. at 1110.

⁴⁶⁹ Tr. at 1130.

26 ⁴⁷⁰ Tr. at 1146-1147.

⁴⁷¹ Tr. at 1149.

27 ⁴⁷² Tr. at 1183.

⁴⁷³ Tr. at 1176.

⁴⁷⁴ Tr. at 1177.

28 ⁴⁷⁵ Tr. at 1146.

1 Mr. Shah testified that there were several reasons why the Radical Bunny program changed,
 2 with the main one being because Participants "wanted more flexibility. They wanted constant flow
 3 of interest, and they wanted the ability to come in and out of the program any time they wish."⁴⁷⁶

4 Mr. Shah testified about the December 1, 2005 letter from Mr. Hirsch to Participants that
 5 explained changes to the program.⁴⁷⁷ He testified that with the new program, there was not an
 6 assignment of beneficial interest under a deed of trust in the name of Radical Bunny as it had prior to
 7 2005, but he believed that there was a UCC-1 that showed "that we are the secured party with them,
 8 Mortgages Limited, with all their assets."⁴⁷⁸ Mr. Shah testified that the December 1, 2005 letter does
 9 not explain that the collateral structure had changed between Radical Bunny and Mortgages Limited
 10 and that as far as he knew, there was no document sent to the Participants in 2005 that explained in
 11 specific detail that Radical Bunny was no longer going to be getting an assignment of beneficial
 12 interest in Radical Bunny's name.⁴⁷⁹ Mr. Shah testified that Radical Bunny did not have an opinion
 13 from an attorney that they had a secured interest.⁴⁸⁰

14 Mr. Shah testified that the two percent management fee was assessed on loans initiated or
 15 rolled over from Horizon Partners to Radical Bunny after December 1, 2005, and was a "spread, a
 16 difference between the loan rate and the rate that was given to the participants."⁴⁸¹ The letter sent by
 17 Mr. Hirsch also stated that "beginning December 1, 2005, all new investments will be subject to a
 18 reduction of 2 percent from the stated interest rate if redeemed prior to the maturity date. The
 19 reduction of the stated interest rate will be retroactive to the funding date of the investment."⁴⁸²

20 Mr. Shah testified that Radical Bunny performed due diligence with respect to the financial
 21 wherewithal of Mortgages Limited by getting "interim financial statements – monthly statement from
 22 the Mortgages Limited. We have looked many, many times at the audited statements from the third-
 23 party auditors. We had spoken with the borrowers of Mortgages Limited. And I have personally
 24

25 ⁴⁷⁶ Tr. at 1121; 1191.

26 ⁴⁷⁷ Exhibit S-12(i).

27 ⁴⁷⁸ Tr. at 1118-1119.

28 ⁴⁷⁹ Tr. at 1128; Exhibit S-12(i).

⁴⁸⁰ Tr. at 1195.

⁴⁸¹ Tr. at 1126-1127.

⁴⁸² Tr. at 1125; Exhibit S-12(i).

1 taken some of my friends and family to the different projects around town here.”⁴⁸³ In addition to
 2 receiving financial statements and audited statements, Hirsch & Shah did the tax returns for
 3 Mortgages Limited’s investment pools from 2005 to June 2008; for Mortgages Limited; and for Scott
 4 Coles and entities that he owned.⁴⁸⁴ Mr. Shah was not aware of any documents that limited
 5 Mortgages Limited’s use of the funds provided by Radical Bunny.⁴⁸⁵

6 Mr. Shah testified that Mr. Hirsch told him to attend a meeting with James Sell, a CPA, in the
 7 fall of 2005.⁴⁸⁶ Mr. Shah’s recollection of the meeting was that “around 2005, transition was taking
 8 place in Radical Bunny, and Tom was concerned about how to put – we wanted to make sure that all
 9 of the paperwork and any logistics that needs to be done is done properly. That was my
 10 understanding....As I was told that Mr. James Sell has experience in this matter, and he could be
 11 consulted to do the...for any transition matters that we may have.”⁴⁸⁷ Mr. Shah testified that “to the
 12 best of my knowledge” there was no discussion with respect to the Arizona securities law.⁴⁸⁸ He
 13 testified that he doesn’t know why attorney Wilk was at the meeting with Mr. Sell.⁴⁸⁹ Mr. Shah also
 14 testified that he disagrees with Mr. Sell’s testimony that Mr. Sell told Radical Bunny that he believed
 15 there were violations of securities laws.⁴⁹⁰

16 Mr. Shah testified that in the fall of 2006, Mr. Hirsch told him that Mortgages Limited had
 17 indicated that Radical Bunny should seek legal advice with respect to its business operations. He
 18 testified that “we were told by Tom Hirsch that Mortgages Limited, since they were changing their
 19 part of the business, they had asked us to seek the counsel to make sure there aren’t any licensing or
 20 compliance issues.”⁴⁹¹ Mr. Shah testified that Radical Bunny had two meetings with Ronald Logan
 21 in the fall of 2006, and that the purpose of the meeting was “to seek a counsel who can look at all of
 22 our paperwork, our structure of the company, and the way we were doing business.”⁴⁹² He testified

24 ⁴⁸³ Tr. at 1134-1135.

24 ⁴⁸⁴ Tr. at 1137-1142.

25 ⁴⁸⁵ Tr. at 1176.

25 ⁴⁸⁶ Tr. at 1150.

26 ⁴⁸⁷ Tr. at 1150-1151.

26 ⁴⁸⁸ Tr. at 1152.

27 ⁴⁸⁹ Tr. at 1186.

27 ⁴⁹⁰ Tr. at 1185.

28 ⁴⁹¹ Tr. at 1160.

28 ⁴⁹² Tr. at 1156.

1 that Mr. Hirsch spoke on behalf of Radical Bunny and gave “a good overview of the way” Radical
 2 Bunny was doing business; however, Mr. Shah did not recall advice given by Mr. Logan during the
 3 2006 meeting or any issues that Mr. Logan thought Radical Bunny should look into.⁴⁹³ He
 4 remembered that Mr. Logan told Radical Bunny that he was not a securities attorney and that Mr.
 5 Ranno was from “out of state.”⁴⁹⁴

6 Mr. Shah testified that his understanding of why they hired Quarles & Brady was “since there
 7 was a concern by the Mortgages Limited, which was conveyed to Tom Hirsch, and we were just
 8 following up on that” and he wasn’t sure that Quarles & Brady were retained to determine whether or
 9 not Radical Bunny’s business operations were in compliance with securities laws.⁴⁹⁵ However, he
 10 also testified that during his deposition under oath for the Securities and Exchange Commission, he
 11 testified that Quarles & Brady was hired “to look into securities concerns, if there were any legal
 12 issues involved....My recollection, that was the prime reason to retain Quarles & Brady.”⁴⁹⁶

13 Mr. Shah also testified that none of Radical Bunny’s other managers told him of Quarles &
 14 Brady’s opinion that the collateral between Radical Bunny and Mortgages Limited may not have
 15 been perfected.⁴⁹⁷ He testified that he never heard from Quarles & Brady that there were problems
 16 with what Radical Bunny was doing, but when asked whether anyone from Radical Bunny told him,
 17 he testified, “[t]here were some discussions about the security issue down the road, and I was told
 18 that we were going to do the POM, private offer memorandum, and that will – if there are any
 19 concerns about that, that that will take care of that.”⁴⁹⁸ Mr. Shah testified that it was Mr. Hirsch who
 20 gave him that information.⁴⁹⁹

21 Mr. Shah testified that he did not give any Participants a Loan Participation and Disclosure
 22 Statements and Acknowledgement and his understanding was this was a Quarles & Brady
 23
 24

25 ⁴⁹³ Tr. at 1157; 1166; 1194.

26 ⁴⁹⁴ Tr. at 1159-1161; 1194.

27 ⁴⁹⁵ Tr. at 1168.

⁴⁹⁶ Tr. at 1199-2000.

⁴⁹⁷ Tr. at 1169.

⁴⁹⁸ Tr. at 1196-1197.

28 ⁴⁹⁹ Tr. at 1197.

document.⁵⁰⁰ He invested about \$1 million after May 2007, and testified that he would not have invested if he had been told that the “operation was illegal and could get shut down immediately.”⁵⁰¹

Mr. Shah attended only two meetings with Quarles & Brady – the one at Radical Bunny’s offices where they were interviewing the firm, and the one after Scott Coles’ death, and he testified that he does not recall anyone telling him “you should have stopped selling these participations or stop allowing rollovers.”⁵⁰²

Mr. Shah testified that as a CPA, he was aware of securities law and when asked: “at the time you became a manager of Radical Bunny, how did you know whether what Radical Bunny was doing complied with securities laws?” Mr. Shah answered: “I wouldn’t know, ma’am. I would not have any idea whether we were selling anything.”⁵⁰³

Berta (“Bunny”) Walder

Berta Walder is married to Respondent Howard Walder and she also goes by the name “Bunny.”⁵⁰⁴ Mrs. Walder has bachelor’s and master’s degrees, and obtained a doctorate degree in educational leadership/administration in 2000.⁵⁰⁵ She has been a teacher, principal, and a superintendent in schools in Phoenix. Mrs. Walder also studied real estate and received a real estate license and a broker’s license in the early 1980s as well as a Series 63 securities license.⁵⁰⁶ Mrs. Walder associated herself with a SEC registered broker/dealer and did in-house mutual funds for about one year.⁵⁰⁷ Mrs. Walder testified that with her Series 63 license, she learned about tax shelters, mutual funds, and securities.⁵⁰⁸

Mrs. Walder retired from her superintendent position in June 2005 and started doing “office work” for Hirsch and Shah CPA, including opening IRA accounts in conjunction with Radical Bunny.⁵⁰⁹ Mrs. Walder testified that the name “Radical Bunny” came from her nickname “Bunny”

⁵⁰⁰ Tr. at 1173, 1175; Exhibit S-17.

⁵⁰¹ Tr. at 1178.

⁵⁰² Tr. at 1184.

⁵⁰³ Tr. at 1189-1190.

⁵⁰⁴ Tr. at 1283.

⁵⁰⁵ *Id.*

⁵⁰⁶ Tr. at 1286-1289.

⁵⁰⁷ Tr. at 1289.

⁵⁰⁸ *Id.*

⁵⁰⁹ Tr. at 1293-1296.

1 and Tom Hirsch, who “was always called Mr. Radical, and we just put it together, Radical Bunny.”
 2 She testified that her husband went to high school with Mr. Hirsch in the 1960s and she has known
 3 Mr. Hirsch since she was about 17 years old. Mrs. Walder explained that “Mr. Radical” means
 4 “thinking outside the box. Someone who is a person who looks at the world through just different
 5 lenses perhaps.”⁵¹⁰ Mrs. Walder testified that typically decisions were made by Mr. Hirsch.⁵¹¹ Mrs.
 6 Walder was a manager of Radical Bunny⁵¹² from approximately June 2005 to June 2008, and in
 7 February 2006, Mrs. Walder became a signatory on Radical Bunny’s bank account.⁵¹³

8 Mrs. Walder testified that she ran the office by doing general office work as well as the
 9 following: being at the office every day; paying bills; making deposits and writing checks from both
 10 the general account and the trust account;⁵¹⁴ meeting with lawyers; answering the telephone and
 11 greeting people who arrived; signing and mailing the Directions to Purchase, Instructions for
 12 Maturing Funds, Participation Questionnaire or intake form; talking to Participants about
 13 participating in the Radical Bunny program; backing up Radical Bunny’s computer every morning
 14 and making sure records were stored off-site; attending meetings concerning the business operations
 15 of Radical Bunny; attending the weekly meetings at Mortgages Limited during 2008; meeting
 16 Mortgages Limited borrowers; ordering supplies; setting the menu for the semiannual dinners; and
 17 contacting the Orange Tree Resort to arrange for the room for the semi-annual participant
 18 meetings.⁵¹⁵

19 Mrs. Walder testified that she knew very few of the people prior to them coming to Radical
 20 Bunny as Participants, and that if they called the office inquiring, she would ask them to come in, but
 21 if they were not able, then she would speak to them on the telephone.⁵¹⁶ She testified that some
 22 Participants lived out of state and recalled that one participant was living in England.⁵¹⁷ Mrs. Walder

24 ⁵¹⁰ Tr. at 1464-1465.

⁵¹¹ Tr. at 1467.

25 ⁵¹² Radical Bunny managers signed an operating agreement. Tr. at 1301-1302.

⁵¹³ Tr. at 1290; 1297-1298; Exhibit S-25.

26 ⁵¹⁴ Using the trust account, Mrs. Walder wrote and signed checks to Mortgages Limited and to Participants for
 redemptions, but she did not sign checks to Participants for interest payments. She testified that Tom Hirsch signed those
 checks. Tr. at 1299.

27 ⁵¹⁵ Tr. at 1300-1302; 1482-1491.

⁵¹⁶ Tr. at 1306.

28 ⁵¹⁷ Tr. at 1306.

1 testified that when speaking with a new, potential participant, she would ask them what they already
 2 knew about the program and whether they had questions, and then she would answer their
 3 questions.⁵¹⁸ Mrs. Walder agreed that she would tell Participants something like “Radical Bunny
 4 paid like clockwork,” meaning that they are “time-aware” and that the Participant would not have to
 5 worry about getting his/her payments.⁵¹⁹ She said that up until Scott Coles’ death, she had
 6 represented to investors that they would be getting their monthly interest payments for certain
 7 because of her past experience with Mortgages Limited and based upon her opinion that Mortgages
 8 Limited’s reputation was “stellar.”⁵²⁰

9 Mrs. Walder testified that she met Scott Coles’ father, Chuck Coles, in the early 1990s in the
 10 “upside-down pyramid” building on Central Avenue.⁵²¹ She understood that Mortgages Limited had
 11 been a “hard-money lender” giving builders short-term loans since 1963.⁵²² Mrs. Walder said that
 12 she and her husband invested in and had their own accounts with Mortgages Limited.⁵²³ Mrs. Walder
 13 testified that she felt that “Radical Bunny was the beneficiary of the rigorous audits and inspection of
 14 securities regulator’s conduct of the Mortgages Limited” but could not confirm that she said that to a
 15 prospective participant in April 2007.⁵²⁴

16 Mrs. Walder testified that if Mortgages Limited defaulted, Radical Bunny would sue to get
 17 the collateral. She testified that she believed that Radical Bunny had collateral “based upon several
 18 things: First, we had a UCC-1; second, we had a personal guarantee from Scott Coles; we had a list
 19 of collateral that was published by Mortgages Limited for Radical Bunny to review.”⁵²⁵ She testified
 20 that she “came to know from Quarles & Brady that it was not perfected, but we had the collateral.”⁵²⁶
 21 She testified that she learned that the collateral was not perfected in the middle of 2007 but did not
 22 disclose it to investors.⁵²⁷

23
 24 ⁵¹⁸ Tr. at 1307.

⁵¹⁹ Tr. at 1308-1309.

⁵²⁰ Tr. at 1309-1310.

⁵²¹ Tr. at 1310.

⁵²² Tr. at 1311.

⁵²³ Tr. at 1304.

⁵²⁴ Tr. at 1313.

⁵²⁵ Tr. at 1322.

⁵²⁶ Tr. at 1323.

⁵²⁷ *Id.*

1 Mrs. Walder testified that she might have represented to a Participant that part of her duties
 2 was to perform due diligence with respect to the Mortgages Limited loans.⁵²⁸ Mrs. Walder testified
 3 that she represented to investors that Radical Bunny looked at the loan portfolio of Mortgages
 4 Limited.⁵²⁹ She testified that there were four criteria for the funding of Radical Bunny/Mortgages
 5 Limited loans: “the collateral was in Arizona, that the loan-to-value ratio was no higher than 60 to 65
 6 percent, that the collateral was in first position,⁵³⁰ and the collateral was commercial.”⁵³¹ Mrs.
 7 Walder testified that she told Participants that there were “no exceptions” to these four criteria.⁵³²
 8 When asked why she told investors about the loan transaction between Mortgages Limited and its
 9 borrowers, Mrs. Walder said she was “just giving them information on collateral” but acknowledged
 10 that Radical Bunny did not get an assignment of the deed of trust for loans from 2006 to 2008.⁵³³
 11 Mrs. Walder testified that she described the investment as “secured” and meant that the Participants
 12 were collateralized “through their participation” in the Radical Bunny promissory note which she
 13 believed was memorialized in the Direction to Purchase.⁵³⁴

14 Mrs. Walder testified that when asked by Participants if Radical Bunny needed to be licensed,
 15 she would say that “we are not licensed, and depending upon when, that we have attorneys that are
 16 researching to see what we are. And I would say we are somewhat of a platypus, so we don’t know.
 17 We are researching it.”⁵³⁵

18 Mrs. Walder testified that she was not sure whether she described the participation interest as
 19 an investment when speaking to a Participant.⁵³⁶ When explaining to a Participant that there are no
 20 guarantees, Mrs. Walder used an example of a dirty bomb to show that even something tangible
 21 could become worthless.⁵³⁷

24 ⁵²⁸ Tr. at 1336.

25 ⁵²⁹ Tr. at 1338.

26 ⁵³⁰ Meaning that the loan is collateralized by a deed of trust in first lien position. (Tr. at 1326)

27 ⁵³¹ Tr. at 1325-1326.

28 ⁵³² Tr. at 1327.

⁵³³ Tr. at 1328-1330.

⁵³⁴ Tr. at 1339.

⁵³⁵ Tr. at 1473.

⁵³⁶ Tr. at 1482.

⁵³⁷ Tr. at 1493-1496.

1 Mrs. Walder testified that she never told Participants that Quarles & Brady were working on
 2 outstanding securities issues or the ongoing issue with collateral.⁵³⁸ Mrs. Walder testified that she did
 3 not "represent to an investor that at the point that Radical Bunny had \$200 million they would have to
 4 have a private offering memorandum."⁵³⁹

5 Mrs. Walder testified that she showed Participants a copy of Scott Coles' personal guarantee
 6 and told them that Hirsch & Shah CPA did the tax returns for Mr. Coles and Mortgages Limited
 7 investor pools.⁵⁴⁰ She believed Scott Coles "was a very substantially wealthy individual just from the
 8 way he would talk about his life and what he had, his possessions" and from talking to the CPAs in
 9 Hirsch and Shah who did tax work for Mr. Coles.⁵⁴¹ Mrs. Walder was unaware of Mr. Coles'
 10 liabilities and did not make inquiries to ascertain his liabilities.⁵⁴²

11 Mrs. Walder never provided audited financial statements for Radical Bunny to a Participant,
 12 because there were no audited financial statements for Radical Bunny.⁵⁴³

13 Mrs. Walder testified that a notice dated December 1, 2005, was sent to Participants that
 14 "Horizon Partners is coming to an end and there are changes that the RB participants would want to
 15 know about."⁵⁴⁴ The notice read:

16
 17 Effective December 1, 2005, the member managers have adopted the
 18 following changes and reaffirmation of several existing policies:

- 19 • Horizon Partners, LLC, will cease operating on December 31, 2005.
 20 Any and all remaining investments with Horizon Partners, LLC will
 21 be rolled over to the Radical Bunny LLC.
- 22 • Investor request for partial or complete redemption of their
 23 investment must be in writing. A thirty (30) day notice of the
 24 investor's intention is required.

25 ⁵³⁸ Tr. at 1409; 1411.

26 ⁵³⁹ Tr. at 1401.

27 ⁵⁴⁰ Tr. at 1331-1334.

28 ⁵⁴¹ Tr. at 1332-1333.

⁵⁴² Tr. at 1332-1335.

⁵⁴³ Tr. at 1482.

⁵⁴⁴ Tr. at 1340-1341; Exhibit S-12(i).

- Beginning December 1, 2005, all NEW investments will be subject to a reduction of 2% from the stated interest rate if redeemed prior to the maturity date. The reduction of the stated interest rate will be retroactive to the funding date of the investment.
- A management fee of 2% per annum was negotiated with Mortgages LTD, and paid to the member managers. The aforementioned payment is over and above the stated interest rate earned by the investor.
- A minimum investment of \$25,000 will apply to all NEW investors.
- Interest earned on the investment commences one (1) day after the funding date.
- Payments of interest and/or principal will be distributed at the end of each month.
- Interest earned is not static. Be sure to consult the member manager for the rate in effect.

Mrs. Walder testified that the Radical Bunny loans to Mortgages Limited were one year loans and that if an investor wanted to redeem early, there was a 2 percent redemption fee.⁵⁴⁵ She testified that Radical Bunny got the funds to pay such an investor from several sources, including: "One could be a loan is paying off, just coincidentally, if a loan is paying off. Another is the manager may choose to go into a loan, and we could replace the participant with our own monies. You may have a new person coming in and that person wants to get into the program as soon as possible so they may replace."⁵⁴⁶ Mrs. Walder explained that when a new Participant replaced an existing Participant, Mortgages Limited did not return the funds, but Radical Bunny used the new Participant's funds to pay the existing participant.⁵⁴⁷ The new Participant was not advised in writing that their funds did not go to Mortgages Limited.⁵⁴⁸

Mrs. Walder testified that the 2 percent management fees "went to cover expenses, salaries, such as we had an administrative assistant....Supplies, mailing – the software was expensive –

⁵⁴⁵ Tr. at 1342-1343.

⁵⁴⁶ Tr. at 1344.

⁵⁴⁷ Tr. at 1480.

⁵⁴⁸ Tr. at 1481.

1 computers, the rent, insurance.”⁵⁴⁹ Mrs. Walder also testified that between January 2006 and June
 2 2008, she, her husband and their family trust received \$1,245,217 as their share from the 2% spread
 3 collected from the Radical Bunny loans to Mortgages Limited.⁵⁵⁰

4 Mrs. Walder met Mr. Sell in the fall of 2005 and knew that he was a CPA, but she believes
 5 that she did not stay for the meeting and she testified that she could not recall anything said by the
 6 other managers of Radical Bunny about what was said at the meeting.⁵⁵¹

7 Mrs. Walder testified that Mr. Hirsch told her in late 2006 or the beginning of 2007 that Todd
 8 Brown of Mortgages Limited had suggested that Radical Bunny have a “review of our model, what
 9 we are doing, to make sure that we are within State and Federal laws” and her understanding was that
 10 “in case Mortgages Limited wanted to purchase us, and to make sure that we are operating
 11 correctly.”⁵⁵² Mrs. Walder testified that she understood the “model” to be reviewed meant Radical
 12 Bunny “pooling monies and lending it to Mortgages Limited.”⁵⁵³

13 She also testified that at one time Scott Coles was interested in possibly acquiring Radical
 14 Bunny and he needed to know information about whether Radical Bunny investors were accredited,
 15 so Radical Bunny sent out a survey document to Participants asking them to describe their net worth
 16 to determine whether they fit into the accredited investor category or not.⁵⁵⁴ Mrs. Walder testified
 17 that Todd Brown suggested that they see attorney Robert Kant, who had an office across the street
 18 from Radical Bunny. She said that the other three managers went to see Mr. Kant, but she did not
 19 attend the meeting.⁵⁵⁵ Mr. Kant told them that he could not talk to them because he was counsel for
 20 Mortgages Limited and had a conflict.⁵⁵⁶

21 Mrs. Walder testified that she attended two meetings with attorney Ron Logan in the fall of
 22 2006 to “see if he could describe what our relationship was to Mortgages Limited and whether or not
 23 we needed any licensing or were there any things, any details about our model that we needed to
 24

25 ⁵⁴⁹ Tr. at 1335.

⁵⁵⁰ Tr. at 1356.

⁵⁵¹ Tr. at 1374-1375.

⁵⁵² Tr. at 1376-1377; 1379; 1380.

⁵⁵³ Tr. at 1378.

⁵⁵⁴ Tr. at 1357; Exhibit S-15(a).

⁵⁵⁵ Tr. at 1377; 1303.

⁵⁵⁶ Tr. at 1376.

1 change or do differently.”⁵⁵⁷ Mrs. Walder said that her impression was that Mr. Logan “didn’t quite
 2 understand what Radical Bunny was” and that he wanted to meet again with another attorney
 3 present.⁵⁵⁸ Mrs. Walder testified that at the second meeting, all four Radical Bunny managers were
 4 present and attorney Carl Ranno was there with Mr. Logan. She said that Mr. Hirsch explained the
 5 transactions, and that she understood that Mr. Ranno was a securities attorney, but was not licensed in
 6 Arizona. She could not recall any advice given by Mr. Logan or Mr. Ranno concerning Radical
 7 Bunny’s need for a license of some sort to continue its current business operations.⁵⁵⁹ When asked
 8 why they did not retain him, Mrs. Walder responded: “Mr. Logan was a one-person firm. I recall he
 9 was moving...He didn’t have office help that I could see...not only did he have to ask another
 10 attorney for advice and he was moving, he wasn’t very impressive.”⁵⁶⁰

11 Mrs. Walder testified that she attended the meeting in Radical Bunny’s offices with Quarles &
 12 Brady and that all Radical Bunny managers attended, and attorneys Mr. Moya, Mr. Bornhoft, Mr.
 13 Shullaw, and Mr. Hoffmann from Quarles & Brady were present.⁵⁶¹ She said that Mr. Hirsch gave an
 14 overview and then there were questions from the attorneys and requests for copies of Radical Bunny
 15 documentation.⁵⁶²

16 Mrs. Walder testified that Quarles & Brady “were going to review us, Radical Bunny, the
 17 entity and to make sure that we were within any law, State or Federal, to make sure that we were
 18 running according to whatever laws would apply,” including securities laws.⁵⁶³ Mrs. Walder testified
 19 she “recalled distinctly asking [Mr. Hoffmann] why we needed a POM...what he said in response
 20 was you are closest to or you most likely resemble a security.”⁵⁶⁴

21 Mrs. Walder testified about Exhibit S-20(a) which is her “journal” or notes she made on June
 22 12, 2007, of a telephone conference call that was held earlier in June 2007 with Quarles & Brady
 23 attorneys.⁵⁶⁵ Mrs. Walder’s notes say “Tom Hirsch’s contention is that if there are security

24 ⁵⁵⁷ Tr. at 1303; 1383.

25 ⁵⁵⁸ Tr. at 1384.

⁵⁵⁹ Tr. at 1386.

⁵⁶⁰ Tr. at 1387.

26 ⁵⁶¹ Tr. at 1387-1388.

⁵⁶² Tr. at 1388.

27 ⁵⁶³ Tr. at 1389-1390.

⁵⁶⁴ Tr. at 1390.

28 ⁵⁶⁵ Tr. at 1427.

1 violations, then that is an issue to clear up but only to protect the lenders. In that the member
 2 managers of Radical Bunny are each accredited investors and have declared to be on original
 3 application with Mortgages Limited, then there should be no issue between the two.”⁵⁶⁶

4 Mrs. Walder testified that her note “We requested this licensing be identified ASAP as we are
 5 eager to be licensed” meant mortgage brokering license, securities license, or whatever licensing they
 6 needed.⁵⁶⁷ She said that no one had told her what kind of license was needed and no one told her she
 7 was “so deficient in licensing that the whole thing had to stop.”⁵⁶⁸

8 Mrs. Walder testified that “it was Chris Hoffmann at Quarles & Brady who felt or expressed
 9 that our participant record, our demographic record was not substantial because it needed what I
 10 always refer to as risk language. And so this was a document that was produced by Quarles & Brady
 11 that we needed to do, what I understood, attach to our demographic information.”⁵⁶⁹ Mrs. Walder
 12 said that “something like” this document was received from Quarles & Brady and it went through a
 13 couple of drafts, but Mrs. Walder did not confirm that the document that Radical Bunny began to
 14 send to new Participants beginning in the middle of 2007 was the document in the same form that
 15 was sent to them by Quarles & Brady.⁵⁷⁰

16 Mrs. Walder testified that the last two pages of Exhibit S-17 “Loan Participation Disclosure
 17 Statement and Acknowledgements” is an accreditation form for investors. She testified that Radical
 18 Bunny would still take Participant money during the time frame when this document was used, even
 19 if the Participant did not qualify as an accredited investor. When she was asked why it was necessary
 20 to have an accreditation document if it didn’t make any difference as far as making an investment,
 21 Mrs. Walder said that it was information that was needed for the private offering memorandum they
 22 were working on for the future.⁵⁷¹

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 25 ⁵⁶⁶ Tr. at 1428; Exhibit S-20(a).

26 ⁵⁶⁷ Tr. at 1462.

27 ⁵⁶⁸ Tr. at 1462-1463.

28 ⁵⁶⁹ Tr. at 1358-1359; Exhibit S-17, “Loan Participation Disclosure Statement and Acknowledgements” signed by participant Roberta Henises on January 28, 2008; compare with Exhibit R-13 “Loan Participation Disclosure Statement and Acknowledgements” faxed by Quarles & Brady to Radical Bunny on May 21, 2007.

⁵⁷⁰ Tr. at 1360-1362.

⁵⁷¹ Tr. at 1362.

1 When Mrs. Walder was asked why Participants in the existing Radical Bunny program were
 2 signing the "Loan Participation Disclosure Statement and Acknowledgements" when it was meant to
 3 be used in conjunction with a future private offering memorandum, Mrs. Walder testified that "those
 4 were my instructions," and that it was Mr. Shullaw's "instructions to begin using this document."⁵⁷²
 5 Mrs. Walder then testified that the "Loan Participation Disclosure Statement and
 6 Acknowledgements" was to be used for the program in existence, but could not explain or identify
 7 the documents referenced therein, including the "Security Agreement" and "Term Notes;" she did not
 8 understand "Revolving Line of Credit;" and could not explain how the "Restriction on Transfer"
 9 provision would have allowed the redemption of participations that she had testified was part of the
 10 existing program.⁵⁷³ Mrs. Walder testified that she did not inform any Participant that the documents
 11 referenced in the "Loan Participation Disclosure Statement and Acknowledgements" did not exist.⁵⁷⁴

12 In her testimony offered upon reopening of the hearing, Mrs. Walder testified concerning
 13 Exhibit R-11, a May 21, 2007 fax from Mr. Hoffmann to "Tom, Bunny & Howard" which has a
 14 cover sheet with a message that says:

15
 16 Attached for your review is a draft of a Participation Agreement we are recommending
 17 as an interim step. An investor would execute this each time a new loan is created with
 18 Mortgages Ltd to document the investor's participation in a portion of that loan. We
 19 might be able to shorten the Accredited Investor questionnaire included in the
 20 Agreement a bit. The fax following this one will contain disclosures about the Loan
 21 itself;" a three page document titled "Participation Agreement" that references attached
 22 Exhibits A, B, and C; a document with only the words "EXHIBIT A Promissory Note"
 23 on it; a document with only the words "EXHIBIT B Security Agreement" on it; and a
 24 document with only the words "EXHIBIT C Loan Participation Disclosure Statement
 25 and Acknowledgments on it."⁵⁷⁵

26
 27 ⁵⁷² Tr. at 1363-1364.

⁵⁷³ Tr. at 1365-1372.

⁵⁷⁴ Tr. at 1372.

28 ⁵⁷⁵ Exhibit R-11; Tr. at 2189.

1 Mrs. Walder testified that the handwriting on the fax cover sheet that says “New for
 2 Accredited Investors Only” is familiar and she recalled that she told her secretary that she should not
 3 bother typing this document [Exhibit R-11].⁵⁷⁶ Mrs. Walder indicated that she wrote that note on the
 4 first document to “just make a difference between this exhibit [R-13] and the first one, so the
 5 secretary wouldn’t bother working on the first one. That was my purpose.”⁵⁷⁷ Mrs. Walder could not
 6 confirm that the handwriting is hers.⁵⁷⁸

7 Mrs. Walder testified that Exhibit R-12 is the same document as Exhibit R-11, but with her
 8 handwritten notes.⁵⁷⁹ She testified that her handwritten comments were in relation to how the
 9 program was working at the time, not to how the program might work in the future.⁵⁸⁰ She testified
 10 that she understood that the “document was to be made part of the application or the investor
 11 record.”⁵⁸¹ Mrs. Walder testified that she looked at the comments on Mr. Hirsch’s copy and she
 12 faxed either hers or Mr. Hirsch’s copy to Quarles & Brady.⁵⁸² She testified that “this document was
 13 being formulated to replace the direction to purchase” and she never heard that “the securities
 14 offering, or whatever was going to be done, had to be completed before” using the document.⁵⁸³ Mrs.
 15 Walder testified that the “Loan Participation Disclosure Statement and Acknowledgments” [Exhibit
 16 R-13] was “something we needed to review so that we could start to use it....I was not given a
 17 timeline. I thought, we are working on this so we can use it.”⁵⁸⁴

18 Mrs. Walder testified that the Participation Agreement was never finalized; a new form of
 19 Promissory Note was not finalized; and that the Security Agreement form that Quarles & Brady
 20 wanted Mortgages Limited to sign never came to fruition.⁵⁸⁵

21 Mrs. Walder testified Mr. Hoffmann told her that “EXHIBIT C Loan Participation Disclosure
 22 Statement and Acknowledgments” to the Participation Agreement was to be used immediately, but
 23

24 ⁵⁷⁶ Tr. at 2189.

⁵⁷⁷ Tr. at 2190.

⁵⁷⁸ Tr. at 2190-2191.

⁵⁷⁹ Tr. at 2191.

⁵⁸⁰ Tr. at 2192-2193; 2195.

⁵⁸¹ Tr. at 2194.

⁵⁸² Tr. at 2196; 2211.

⁵⁸³ Tr. at 2198-2199.

⁵⁸⁴ Tr. at 2199.

⁵⁸⁵ Tr. at 2200-2201.

1 that the Participation Agreement itself was not to be used.⁵⁸⁶ Mrs. Walder testified that “EXHIBIT C
 2 Loan Participation Disclosure Statement and Acknowledgments” was never finalized by Quarles &
 3 Brady and was not used in the form provided by Quarles & Brady, but that Mr. Hirsch made
 4 modifications to it and Radical Bunny used that version with new Participants. She testified that she
 5 does not independently know whether Quarles & Brady authorized the modifications made by Mr.
 6 Hirsch.⁵⁸⁷ Mrs. Walder testified that she handed it to Mr. Shullaw, but she was unable to provide a
 7 copy of what she says she gave to Mr. Shullaw.⁵⁸⁸ Mrs. Walder testified that Mr. Shullaw had the
 8 “final finished copy and he said fine. I let him know we were using it, and he said fine.”⁵⁸⁹

9 The differences between Exhibit R-13 (document prepared by Quarles & Brady) and Exhibit
 10 S-17 (document used by Radical Bunny) include:

11 • R-13 has a section number 1 that reads: Acknowledgment of Documents
 12 Received. I acknowledge that I have received, read and understood the Note and Security
 13 Agreement that are the subject of the Participation Agreement (the “Agreement”) to which
 14 this document is attached as Exhibit C.”

15 • S-17 has no section for acknowledging documents received.

16 • S-17 has typos, including omitting a comma after “if any;” not capitalizing the
 17 term “Loan” and using the word “Furthermore” instead of “Further” in the paragraph
 18 “*Exclusion from Decision Respecting Participations*,” and using the word “representation”
 19 instead of “representations” in the statement immediately preceding the Participant’s
 20 signature.

21 • S-17 in the Certification of Accredited Investor Status section asks the
 22 Participant to “Please Circle Appropriate Category” and then adds “Yes” and “No” boxes to
 23 be checked.

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 26
 27 ⁵⁸⁶ Tr. at 2205.

⁵⁸⁷ Tr. at 2206.

⁵⁸⁸ Tr. at 2202-2204.

⁵⁸⁹ Tr. at 2207.

1 Mrs. Walder testified that she learned from Quarles & Brady that the security interest in
 2 Mortgages Limited's assets might not be perfected which might be a problem for all Participants,
 3 including herself.⁵⁹⁰ She said that she understood that there was an outstanding issue or problem with
 4 collateral but that she "knew we had collateral. We had other documentation saying we had
 5 collateral. And this was Mr. Bornhoft's opinion, but we had collateral, and we had
 6 documentation."⁵⁹¹ Mrs. Walder testified that she gave the Quarles & Brady attorneys all of the
 7 documentation that she believed showed that Radical Bunny was collateralized.⁵⁹²

8 Mrs. Walder testified that she could not recall discussing the June 15, 2007 fax Radical
 9 Bunny received from Mr. Bornhoft with correspondence to Mr. Kant about the lack of cooperation in
 10 obtaining collateral security. She did recall "Mr. Kant and Mr. Bornhoft not getting along very well,
 11 and I understand that Mr. Bornhoft was not getting a lot of response from Mr. Kant."⁵⁹³

12 Mrs. Walder testified that "Scott Coles or Todd Brown, but I'm not positive who, made the
 13 offer to get the POM done. And literally it was said Bob Kant could push a button because it was
 14 already in his word processor and get this done, because nothing got done.....He was willing to do
 15 the POM...The offer was for \$20,000 he could do the POM."⁵⁹⁴

16 Mrs. Walder testified that there were many revisions to the POM and she believed "it got
 17 stuck, in my estimation, because of words, concepts."⁵⁹⁵ She said that Mr. Kant made two or three
 18 different versions that would go to Mr. Bornhoft, and that it was frustrating because it didn't seem to
 19 be an urgent matter.⁵⁹⁶ She testified that the POM "would need Quarles & Brady's final approval
 20 before it could be published and sent out to the participants."⁵⁹⁷

21 Mrs. Walder was copied on and received a December 12, 2007 email from Mr. Bornhoft to
 22 Mr. Hirsch⁵⁹⁸ that details all the outstanding issues, including the statement that "the current loans

23 ⁵⁹⁰ At hearing, Mrs. Walder initially testified that she "did not have that impression," but when showed a copy of her
 24 deposition, she agreed that she had testified previously under oath that she did have such an understanding. Tr. at 1491-
 1493.

25 ⁵⁹¹ Tr. at 1395-1396.

⁵⁹² Tr. at 1470-1471; 1491.

26 ⁵⁹³ Tr. at 1397-1398.

⁵⁹⁴ Tr. at 1400.

27 ⁵⁹⁵ Tr. at 1475.

⁵⁹⁶ Tr. at 1475.

⁵⁹⁷ Tr. at 1476.

28 ⁵⁹⁸ Exhibit S-22(o).

1 from Bunny to ML are not collateralized. You may recall that a financing statement was provided by
 2 ML, but the financing statement is not sufficient to create or perfect the security interest that
 3 presumably was intended when it was provided.” She testified that it was “very confusing to me”
 4 and “that was an opinion, and I knew that we had collateral because I had other documentation that
 5 said I am collateralized. Perfected, I believe, was what his entire complaint was, as perfected and he
 6 needed a list and we kept sending him a list.”⁵⁹⁹ Mrs. Walder thought that “all of this would be taken
 7 care of in the POM.”⁶⁰⁰

8 Mrs. Walder testified that between January and end of April, 2008, Radical Bunny received
 9 almost \$29 million in participant funds, and she does not recall whether or not at the May 2008
 10 Orange Tree Resort meeting it was disclosed to investors that Quarles & Brady had been retained to
 11 resolve securities issues or that there was a problem with the collateral for outstanding loans between
 12 Mortgages Limited and Radical Bunny.⁶⁰¹

13 The May 2008 Orange Tree Resort meeting’s power point presentation was prepared by Mrs.
 14 Walder and Mr. Hirsch and included four slides concerning POMs.⁶⁰² Mrs. Walder testified that she
 15 included the definition of an “investment contract” from a book she borrowed from Mortgages
 16 Limited.⁶⁰³ One agenda item at the May 2008 Orange Tree Resort meeting was “The Future:
 17 Compliance with securities laws, formation of the new company, changes in company policies,
 18 market conditions and expectation, inflation/stagnation/recession.” Mrs. Walder is not sure whether
 19 the slides concerning the POM or the “future” were included in the presentation.⁶⁰⁴

20 Mrs. Walder testified that upon Mr. Cole’s death, Radical Bunny returned the uncashed
 21 checks being held for the next Mortgages Limited loan because even though Mortgages Limited had
 22 told them that their check would be on time, “until we could see that things were in place, we didn’t
 23 know who would take over at that time, for Mr. Coles, and he was the driving force of Mortgages
 24 Limited. We just wanted to make sure that there would be no interruptions. Even though we were
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26 ⁵⁹⁹ Tr. at 1406-1407.

26 ⁶⁰⁰ Tr. at 1407.

27 ⁶⁰¹ Tr. at 1417-1418; Exhibit S-24.

27 ⁶⁰² Tr. at 1416-1417; 1421-1423; Exhibit S-24.

28 ⁶⁰³ Tr. at 1420-1421.

28 ⁶⁰⁴ Tr. at 1423-1424.

1 assured that the interest checks would be coming to us on time from Mortgages Limited, it was a very
 2 – it was scary, very scary for us that Mr. Coles had committed suicide. It didn't make any sense. So
 3 we just wanted to make sure that things would make sense. In the meantime we returned
 4 everybody's checks."⁶⁰⁵

5 When asked whether it was a problem to misrepresent to investors that the loans are
 6 collateralized when her attorneys were telling her they are not collateralized, Mrs. Walder responded
 7 that "They never said anything about saying anything to our participants. They were working on this,
 8 and the POM is still ongoing. And we did have collateral."⁶⁰⁶ "What I recall, and what I still believe,
 9 is that we had collateral. We had a UCC-1. I had seen at some point a filing in the State and the
 10 County, what I recall as State and County. We had documentation saying we are secured, we are
 11 collateralized. Mr. Bornhoft suddenly wants a new UCC to be filed. We had a UCC filed. I don't
 12 recall my reaction, but I always believed that we were secured and we had collateral."⁶⁰⁷ Mrs.
 13 Walder testified that it wasn't her background in securities or as a real estate broker that led her to
 14 think she knew the law better than her attorney, but she did not explain why she disregarded Mr.
 15 Bornhoft's opinion.⁶⁰⁸

16 Mrs. Walder testified that she never heard "from Mr. Hoffmann, Shullaw, Bornhoft, or
 17 anyone at Quarles & Brady, that your organization should stop taking money from participants."⁶⁰⁹
 18 When asked whether it was her testimony that Mr. Hoffmann told her that they were violating the
 19 securities laws but he didn't tell them to stop, Mrs. Walder testified: "No, ma'am. He never told us
 20 anything of the sort. He never said we were violating anything. He basically said, I'm going to send
 21 you documents. We are going to work on it and get things going for you. And the Exhibit C that was
 22 attached to the application was at least something, because I had expressed my frustration that
 23 nothing had been done."⁶¹⁰

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 26 ⁶⁰⁵ Tr. at 1469.

⁶⁰⁶ Tr. at 1408.

⁶⁰⁷ Tr. at 1396.

⁶⁰⁸ Tr. at 1471-1472.

⁶⁰⁹ Tr. at 2197.

⁶¹⁰ Tr. at 2212.

1 When asked if Mr. Hoffmann didn't tell Radical Bunny that they were violating the securities
 2 laws, then why was he continuing to do work for Radical Bunny, Mrs. Walder testified: "That's the
 3 point. He never did say that, and he was continuing to work for us. That's the whole point. He
 4 never said anything close to, you're in trouble or you have to stop. That is exactly the point. Why
 5 would he produce these documents?"⁶¹¹

6 Mrs. Walder testified that it did not occur to her to stop accepting money until the securities
 7 and collateral issues were resolved.⁶¹² Mrs. Walder testified that she does not recall disclosing to
 8 Quarles & Brady that Radical Bunny was continuing to obtain funds from Participants, but she
 9 believes that they knew because Radical Bunny was "there and we are open."⁶¹³

10 Mrs. Walder testified that she was not certain whether Mortgages Limited gave Radical
 11 Bunny a check for the principal at the end of a loan.⁶¹⁴ Mrs. Walder testified that Radical Bunny
 12 never operated as a Ponzi scheme and that she "would try to match someone that wanted to get into
 13 the program as soon as possible with someone that needed to get out."⁶¹⁵ Mrs. Walder believes that
 14 she is a respondent in a securities case because the POM never got finalized; because of the economy
 15 and the real estate meltdown in Arizona; and "that Mr. Coles committing suicide doesn't help."⁶¹⁶

16 Mrs. Walder testified concerning Mr. Hoffmann's testimony: "Shame on Mr. Hoffmann. He
 17 – I feel very, very, very sorry for him because he has no choice now but to continue lying, because he
 18 lied. Now he has nowhere to go. I feel bad for him, but he lied. He lied to you, Ma'am. There was
 19 never any instructions to stop anything. And I have to say that I am disappointed in him as a
 20 professional person who was eager to help us and now turned against us in this way. And, Ma'am,
 21 you need to know that he has lied to you and this court. And it pains me to have to hear my only
 22 attorney just lie. It's unconscionable."⁶¹⁷

23
 24
 25 ⁶¹¹ *Id.*

26 ⁶¹² Tr. at 1430-1431.

27 ⁶¹³ Tr. at 1391; 1392; 1393.

28 ⁶¹⁴ Tr. at 1465.

⁶¹⁵ Tr. at 1458; 1460.

⁶¹⁶ Tr. at 1477-1478.

⁶¹⁷ Tr. at 2210.

1 In June 2008, Radical Bunny had 900⁶¹⁸ accounts and was still a participant in two Mortgages
2 Limited pass-through loans, the Tempe Land Company and Panwebster.⁶¹⁹

3 Mrs. Walder testified that between January 2006 and June 2008, she, her husband and their
4 family trust received \$1,245,217 as their share from the 2% spread collected from the Radical Bunny
5 loans to Mortgages Limited, and they reinvested \$1,258,000 during the same time period into the
6 Radical Bunny program.⁶²⁰

7 **Tom Hirsch**

8 Background

9 Mr. Hirsch testified that he was born in Czechoslovakia and that after the war, his parents
10 migrated to Israel where he lived until age 13.⁶²¹ In 1960, he moved to the United States⁶²² and he
11 graduated from Aurora University in 1970. Mr. Hirsch has been a licensed certified public
12 accountant in Arizona since 1978, with a primary expertise in taxation.⁶²³ In 1983, he started his own
13 firm and hired Mr. Shah as a staff accountant in about 1985 or 1986.⁶²⁴ Mr. Shah purchased the CPA
14 firm from Mr. Hirsch, who still works for the firm as a tax preparer, tax consultant, on a partnership
15 basis.⁶²⁵

16 Mr. Hirsch testified that after his divorce, he was left with very little funds and “was seeking a
17 way to dig out whatever I had, and one of our tax clients introduced me to Chuck Coles and Scott
18 Coles.”⁶²⁶ He invested \$25,000 with Mortgages Limited in 1995 in the Mortgages Limited Pass-
19 Through Participation Program.⁶²⁷

20 Horizon Partners (Horizon Partners or HP LLC Program)

21 Mr. Hirsch testified that on August 19, 1997, he formed Horizon Partners with David Hansen,
22 Fred Hagel, Howard Walder, and himself as members and managers.⁶²⁸ According to Mr. Hirsch,

23 ⁶¹⁸ Tr. at 1307.

24 ⁶¹⁹ Tr. at 1499.

⁶²⁰ Tr. at 1356.

25 ⁶²¹ Mr. Hirsch testified that he also goes by “Quinton, Zorro, the son of Zero.” Tr. at 1506.

⁶²² Tr. at 1717-1718.

26 ⁶²³ Tr. at 1507-1508.

⁶²⁴ Tr. at 1719.

27 ⁶²⁵ Tr. at 1636; 1640.

⁶²⁶ Tr. at 1614; 1631.

28 ⁶²⁷ Tr. at 1631-1632.

⁶²⁸ Tr. at 1512.

1 Horizon Partners was created because Mortgages Limited would no longer take an individual as an
 2 investor and it also had raised its minimum investment amount to \$100,000.⁶²⁹ The four member-
 3 managers pooled their money and made investments in the Mortgages Limited Pass-Through
 4 Participation Program, also sometimes known as a “fractionalized note and deed of trust program.”⁶³⁰
 5 The Mortgages Limited Pass-Through Participation Program involved an investor acquiring a
 6 participation in the loan selected and signing an agency agreement with Mortgages Limited
 7 appointing Mortgages Limited as the investor’s agent; the investor was assigned an interest in the
 8 promissory notes from Mortgages Limited to its borrower (“portfolio loans”) and a corresponding
 9 beneficial interest in a first lien position deed of trust; and then an assignment was recorded in the
 10 name of the investor.⁶³¹ Mr. Hirsch testified that these were “first lien position deeds of trust”
 11 meaning that “if you have to foreclose or collect on a debt, you are first in line to receive the
 12 proceeds.”⁶³² Horizon Partners loans were 3-5 years and Mr. Hirsch talked to Mortgages Limited
 13 about the loans that would be made.⁶³³

14 Subsequent investors in Horizon Partners executed a document to be attached to the Operating
 15 Agreement as “members” of Horizon Partners.⁶³⁴ The minimum investment in Horizon Partners was
 16 \$25,000.⁶³⁵ Mr. Hirsch estimated that between 1997 and December 31, 2005, Horizon Partners
 17 received about \$60 million from Participants.⁶³⁶

18 Initially with Horizon Partners, Mr. Hirsch absorbed the overhead costs, but once the number
 19 of loans and Participants grew, Mr. Hirsch retained one quarter of one percent of the interest paid by
 20 Mortgages Limited to a Participant.⁶³⁷ Mr. Hirsch testified that he issued K-1s to Participants, which
 21 he said was an error on his part and he blamed the use of tax software. Mr. Hirsch testified that he
 22
 23

24 ⁶²⁹ Tr. at 1510; 1633.

⁶³⁰ Tr. at 1511.

25 ⁶³¹ Tr. at 1511-1512; Exhibit S-39(a) Assignment of Beneficial Interest Under Deed of Trust received from Mortgages
 Limited in name of investor and recorded with Maricopa County Recorder.

26 ⁶³² Tr. at 1518.

⁶³³ Tr. at 1612; 1614.

27 ⁶³⁴ Tr. at 1513; Exhibit S-10.

⁶³⁵ Tr. at 1516.

28 ⁶³⁶ Tr. at 1518.

⁶³⁷ Tr. at 1611-1612; 1730-1731.

1 never filed papers with the Corporation Commission's Corporation Division showing the new
2 members, and he did not treat them as partners or members.⁶³⁸

3 Radical Bunny (Radical Bunny or RB LLC Program)

4 Radical Bunny was formed on June 24, 1999, and its Articles of Incorporation list Mr. Hirsch
5 as the sole manager, with Howard Walder, Tom Hirsch, David Hansen, and Fred Hagel listed as
6 members of the entity.⁶³⁹ Mr. Hagel resigned as a manager in early 2006, and Mrs. Walder became
7 manager in June 2005, and a signatory on Radical Bunny's bank accounts as of February 23, 2006.⁶⁴⁰
8 New Participants in Radical Bunny also signed documents to be attached to the Operating Agreement
9 adding them as members.⁶⁴¹ Radical Bunny also invested in the Mortgages Limited Pass-Through
10 Participation Program, but the minimum investment in Radical Bunny was \$50,000.⁶⁴²

11 Between 1999 and the end of December 2005, Radical Bunny received approximately \$55
12 million.⁶⁴³ Mr. Hirsch testified that until the end of December 2005, the Radical Bunny Participants
13 were all members of Radical Bunny and received K-1s, but after that, the only members of Radical
14 Bunny were the four member-managers, and the Participants received 1099-INTs.⁶⁴⁴

15 Horizon Partners and Radical Bunny used the same Direction to Purchase form.⁶⁴⁵ Mr.
16 Hirsch was the only signatory on the bank accounts of Horizon Partners and Radical Bunny until
17 October 8, 2004. During the timeframe from 1999 to September 2005, Mr. Hirsch testified that he
18 was "pretty much it;" he did all the bookkeeping, processing of checks, and the Directions to
19 Purchase.⁶⁴⁶ Mr. Hirsch testified that with Horizon Partners and in the early stages of Radical Bunny,
20 he "pooled the money that came in from participants, deposited the money when a loan became
21 available in a separate trust account," and with the fractional interests in deeds of trust, sent out the
22
23

24 ⁶³⁸ Tr. at 1732-1733.

25 ⁶³⁹ Tr. at 1533-1534; Exhibit S-3(a).

26 ⁶⁴⁰ Tr. at 1535-1536.

27 ⁶⁴¹ Tr. at 1538; Exhibit S-9(b).

28 ⁶⁴² Tr. at 1516.

⁶⁴³ Tr. at 1560; \$120 or \$110 minus \$65 for Horizon Partners.

⁶⁴⁴ Tr. at 1546-1547; The four member/managers received both a K-1 and a 1099.

⁶⁴⁵ Tr. at 1516-1517.

⁶⁴⁶ Tr. at 1540.

1 paperwork, and would send out all the Directions to Purchase and supporting documents to
2 Participants.⁶⁴⁷

3 Mr. Hirsch described how he saw the role of each of the Radical Bunny managers: “Bunny
4 Walder, she came in, I think, in March or April of ’05. She was bored, so she helped me do some of
5 the manual paperwork that you have seen that I referred to. She was learning what we do. Howard
6 Walder is more of a computer guy. And I’m going to apologize. I’m very anal. I’m not into that
7 stuff. I just want to turn it on and see if it works. So Howie was running the software. Harish was
8 limited in scope. He was more involved in the tax accounting firm that we have. And I was trying to
9 kind of retire into the sunset somewhere.”⁶⁴⁸

10 Radical Bunny-Mortgages Limited Loan Program

11 Mr. Hirsch testified that in August 2005, Mortgages Limited introduced a new program called
12 Revenue Opportunity or “Rev Op” which allowed individuals to act as a bank issuing a line of credit,
13 becoming “lenders to Mortgages Limited as opposed to pass-through investors.”⁶⁴⁹ The program
14 required a minimum of \$1 million committed for one year. The loans were 90-day loans between
15 Mortgages Limited and the investor with one point being paid upon loan execution/renewal, and
16 paying 12 percent interest. According to Mr. Hirsch, if the loan was renewed four times during the
17 year, an investor could earn up to 20 percent.⁶⁵⁰ Mr. Hirsch explained that Mortgages Limited was
18 not obligated to make the loans, so potentially an investor could earn only 8 percent but have the \$1
19 million committed for a year.⁶⁵¹ Mr. Hirsch testified that “greed and fear are the demons of every
20 person, and that is what happened. Everybody wanted that high 20 percent~ the potential 20 percent.
21 In their mind’s eye they visualized earning 20 percent. Nobody thought about money sitting there not
22 being utilized.”⁶⁵²

23 Mr. Hirsch testified that he did not like the new Mortgages Limited Rev Op program, because
24 of the 90 day term and the possibility that Mortgages Limited would not renew the loans, so he

25
26 ⁶⁴⁷ Tr. at 1640-1641.

⁶⁴⁸ Tr. at 1540-1541.

⁶⁴⁹ Tr. at 1520; 1891.

⁶⁵⁰ Tr. at 1645.

⁶⁵¹ Tr. at 1647.

⁶⁵² *Id.*

1 approached Scott Coles and negotiated a different program that required the same \$1 million
 2 minimum, but had a one year term at a lower (13) percent interest rate (Radical Bunny-Mortgages
 3 Limited Loan Program).⁶⁵³ According to Mr. Hirsch, Horizon Partners “stopped pooling money for
 4 participants” and the Participants were combined into one entity (Radical Bunny) “to share in the
 5 same benefits that the entity provided.”⁶⁵⁴ He testified that the new Mortgages Limited Rev Op
 6 program had a “significant influence” over his decision to combine Radical Bunny and Horizon
 7 Partners.⁶⁵⁵

8 Concerning the new Radical Bunny program, Mr. Hirsch testified that Participants wanted
 9 shorter terms,⁶⁵⁶ they had to make a decision as to what to do if their note went into default and there
 10 was an interruption in their income stream;⁶⁵⁷ they wanted more flexibility and a variety of
 11 collateral;⁶⁵⁸ they wanted a higher interest rate;⁶⁵⁹ and they were confused by the return of
 12 principal.⁶⁶⁰ Mr. Hirsch testified that the new Radical Bunny program gave the Participant the choice
 13 of the loan “instead of going directly to the end user, the borrower, the loan would go between
 14 Radical Bunny to Mortgages Limited.”⁶⁶¹ Mr. Hirsch testified that Radical Bunny did not continue to
 15 own a portion or all of the note; that every loan that Radical Bunny made to Mortgages Limited was
 16 wholly participated out.⁶⁶²

17 Mr. Hirsch testified that under the old programs, the Participants had a percentage of a
 18 portfolio loan, which had a specific deed of trust tied to it, and under the new program, Scott Coles
 19 “offered all of the assets of Mortgages Limited as collateral.”⁶⁶³ Mr. Hirsch said that Mortgages
 20 Limited prepared a “blanket UCC,” a promissory note, a “list of the assets or internal financial
 21 statements reflecting the collateral that Radical Bunny had,” and a balance sheet.⁶⁶⁴

23 ⁶⁵³ Tr. at 1544-1545; 1904.

24 ⁶⁵⁴ Tr. at 1519.

25 ⁶⁵⁵ Tr. at 1737.

26 ⁶⁵⁶ Tr. at 1734

27 ⁶⁵⁷ Tr. at 1734-1735.

28 ⁶⁵⁸ Tr. at 1735.

⁶⁵⁹ Tr. at 1736.

⁶⁶⁰ *Id.*

⁶⁶¹ Tr. at 1743.

⁶⁶² Tr. at 1757.

⁶⁶³ Tr. at 1746.

⁶⁶⁴ *Id.*

1 Mr. Hirsch testified that he thought it was more beneficial for investors to have collateral in
 2 Mortgages Limited's assets versus having an assignment of a beneficial interest in a deed of trust that
 3 is recorded against the property because with the deed of trust, if the borrower fails to make the
 4 payment or defaults, then there is an interruption in the income stream, whereas with the loan to
 5 Mortgages Limited, there is no concern unless Mortgages Limited does not have enough cash flow
 6 and assets.⁶⁶⁵

7 He testified that there were several layers of collateral, including that Mortgages Limited had
 8 the "cross-collateral" and the personal guarantees of their borrowers. Mr. Hirsch also testified that
 9 Mortgages Limited had the option at their discretion to transfer the underlying notes and deed of trust
 10 to Radical Bunny to satisfy the loan obligation between Mortgages Limited and Radical Bunny.⁶⁶⁶
 11 Mortgages Limited prepared the promissory notes, and Radical Bunny did not have an attorney
 12 review them.⁶⁶⁷

13 Mr. Hirsch testified that he met with Participants to explain the new Radical Bunny
 14 program.⁶⁶⁸ He told Participants that "we have a secured interest in all of the assets of Mortgages
 15 Limited" and may have used the adjective "safe" on occasion.⁶⁶⁹ Mr. Hirsch testified that with some
 16 of the Participants who were moving into the new Radical Bunny program he would sit down and
 17 explain how the program was changing, but the majority of the discussion was presented at the
 18 semiannual meetings.⁶⁷⁰ He testified that other than the December 1, 2005 letter,⁶⁷¹ Radical Bunny
 19 sent out no documents describing the changes in the program from the Radical Bunny participation in
 20 the Mortgages Limited Pass-Through Participation Program as opposed to the new program, the
 21 Radical Bunny-Mortgages Limited Loan Program.⁶⁷²

22 Mr. Hirsch testified that he, as a CPA, made the determination that he should no longer be
 23 issuing K-1s, and he did not send a letter to Participants indicating that their capital accounts were
 24

25 ⁶⁶⁵ Tr. at 1522.

26 ⁶⁶⁶ Tr. at 1568-1569.

27 ⁶⁶⁷ Tr. at 1569-1570.

28 ⁶⁶⁸ Tr. at 1541;1566.

⁶⁶⁹ Tr. at 1568.

⁶⁷⁰ Tr. at 1574.

⁶⁷¹ Exhibit S-12(i).

⁶⁷² Tr. at 1577.

1 going to be liquidated at the end of 2005 or that they may need to file amended tax returns.⁶⁷³ Mr.
 2 Hirsch testified that Participants were never an owner of Radical Bunny, but that according to the
 3 IRS, the use of K-1s meant that they were owners.⁶⁷⁴ Mr. Hirsch did not notify the IRS that he
 4 considered the issuance of K-1s to Participants to be an error.⁶⁷⁵ He made an independent decision to
 5 not inform the IRS or the Participants with respect to what he called inappropriate issuances of K-
 6 1s.⁶⁷⁶

7 Mr. Hirsch said that in early October 2005, "in a two-week time, 15 to 20 million of
 8 participant money came in...people called us wanting to exit or terminate the existing loans that they
 9 had so they could roll into the new program."⁶⁷⁷ Mr. Hirsch testified that he had "one client who had
 10 \$10 million who liquidated us, and we said 'We can't do it for you.' He went directly to Mortgages
 11 Limited. That is what happened."⁶⁷⁸

12 Radical Bunny initially had a management fee of a quarter of one percent but with the new
 13 Radical Bunny-Mortgages Limited Loan Program starting in September or October 2005, the
 14 management fee increased to a 2 percent interest spread. Mr. Hirsch testified that "we told them
 15 blatantly, just repeatedly. [about the new management fee] People used to get very upset and say
 16 'Shut up. Just move on already. I'm tired of hearing it.'"⁶⁷⁹

17 Mr. Hirsch testified that he or some of the managers may have stated that they performed due
 18 diligence, which he defined as verifying that the money Radical Bunny loaned to Mortgages Limited
 19 went where it was supposed to, and that they have confirmation that a project exists. It also involved
 20 financial reports prepared by third parties.⁶⁸⁰ Mr. Hirsch testified that in the fall of 2006, several
 21 Participants in Radical Bunny met with Mortgages Limited because they wanted to review loan
 22 documentation and see how Mortgages Limited worked. Mr. Hirsch said that a couple of Participants
 23
 24

25 ⁶⁷³ Tr. at 1862-1864.

26 ⁶⁷⁴ Tr. at 1865.

27 ⁶⁷⁵ Tr. at 1889.

28 ⁶⁷⁶ Tr. at 1890.

⁶⁷⁷ Tr. at 1648.

⁶⁷⁸ Tr. at 1546; 1648.

⁶⁷⁹ Tr. at 1740-1741.

⁶⁸⁰ Tr. at 1571.

1 asked about whether Radical Bunny was in a secured position and that Mortgages Limited's response
2 was "very positive" saying Radical Bunny "was collateralized."⁶⁸¹

3 Mr. Hirsch testified that the Direction to Purchase used with the old Radical Bunny program
4 showed the Participant the loan property information and indicated the percentage interest in the deed
5 of trust. However, it was not sent to Participants prior to a Participant giving Radical Bunny money,
6 but after "to show proof of where their money went."⁶⁸² Mr. Hirsch testified that the form was one he
7 "copied" and "plagiarized" from Mortgages Limited's Pass-Through Participation Program "years
8 ago."⁶⁸³

9 The Direction to Purchase used with Radical Bunny's new program (Radical Bunny-
10 Mortgages Limited Loan Program) included language written by Mr. Hirsch: "Your investment is
11 collateralized by beneficial interest under various deeds of trust held by Mortgages Limited."⁶⁸⁴ The
12 Direction to Purchase was sent out after the promissory note had been received from Mortgages
13 Limited.⁶⁸⁵

14 Mr. Hirsch explained that if a Participant wanted an early redemption, "when new money was
15 available, we offered that to the participant – the other participant to replace the existing one."
16 According to Mr. Hirsch, "if we had a redemption request and there is no new money available from
17 participants, either existing or new participants, we would request that Mortgages Limited redeem the
18 money, and then we would pay off that particular individual."⁶⁸⁶ Mr. Hirsch testified that Mortgages
19 Limited never had to redeem the money, because Radical Bunny "always had more money coming in
20 [than] people wanted to liquidate."⁶⁸⁷

21 Mr. Hirsch testified that the first investor meeting was held at the Orange Tree Resort in
22 November 2005, and that there were a total of six meetings.⁶⁸⁸ Mr. Hirsch made the presentations at
23 the semi-annual meetings held in November and May of each year at the Orange Tree Resort.⁶⁸⁹ He

24 ⁶⁸¹ Tr. at 1630.

25 ⁶⁸² Tr. at 1561-1562.

26 ⁶⁸³ Tr. at 1564.

27 ⁶⁸⁴ Tr. at 1565.

28 ⁶⁸⁵ Tr. at 1889.

⁶⁸⁶ Tr. at 1674.

⁶⁸⁷ *Id.*

⁶⁸⁸ Tr. at 1575.

⁶⁸⁹ Tr. at 1741-1742.

1 testified that the purpose of the Orange Tree Resort meetings was to provide information to the
 2 Participants in a forum where they could ask questions, and that they allowed Participants to bring
 3 others so that family members or financial advisors could ask questions.⁶⁹⁰

4 Mr. Hirsch testified that most of the Participants “came through referrals, family and friends”
 5 and that he did not know them all personally.⁶⁹¹ The Participants resided in 24 states and five foreign
 6 countries.⁶⁹² Mr. Hirsch testified that he did not have any telephone solicitations to get Participants,
 7 and did not pay any commissions, referral fees to anyone, and did not “solicit, allure, entice, induce,
 8 coerce anyone to participate.”⁶⁹³ Mr. Hirsch testified that he never personally solicited anyone to get
 9 involved in Horizon Partners or Radical Bunny; he was not aware of any other members doing so;
 10 and that they “went beyond the normal” and “made sure” that no one was soliciting.⁶⁹⁴ He testified
 11 that “[w]ell, for one thing it was very important to us that there would be no advertising, marketing,
 12 via radio, Internet, television, to publication, no conversations, no meetings with general public. We
 13 did not ask for any name referrals. We did not pay any commissions. We did not pay any finder’s
 14 fees. We did not pay any, what do you do call it, barter, if you will, or any referral.”⁶⁹⁵ When asked
 15 why he thought it was important that he not solicit, Mr. Hirsch testified that “[o]ver my professional
 16 life, I believe that if you solicit anything or sell something, you have to be licensed. The type of
 17 license, I don’t know, depending on the type of practice or business you are in.”⁶⁹⁶

18 Mr. Hirsch testified that “Radical Bunny really does not or did not operate as a business.
 19 There was no profit motive, a plan, a marketing strategy, a budget of any type. The essence of
 20 Radical Bunny was to help people who sought us as managers to pool their money to acquire an
 21 interest in either a deed of trust and subsequent to that a share or an ownership percentage in the notes
 22 between Mortgages Limited and Radical Bunny.”⁶⁹⁷ Mr. Hirsch testified that Radical Bunny acted as
 23
 24

25 ⁶⁹⁰ Tr. at 1808-1809.

26 ⁶⁹¹ Tr. at 1558.

27 ⁶⁹² Tr. at 1559.

28 ⁶⁹³ Tr. at 1609-1610.

⁶⁹⁴ Tr. at 1807.

⁶⁹⁵ Tr. at 1807-1808.

⁶⁹⁶ Tr. at 1639.

⁶⁹⁷ Tr. at 1817-1818.

1 a “servicer.”⁶⁹⁸ Mr. Hirsch also stated that “Radical Bunny was more of a facilitator, a servicer. That
2 is all we did.”⁶⁹⁹

3 Mr. Hirsch testified that “Radical Bunny was never compensated for services rendered.”⁷⁰⁰
4 Although the letter sent to Participants describing changes in the Radical Bunny program stated that
5 “a management fee of 2 percent per annum was negotiated with Mortgages Limited and paid to the
6 member managers,” Mr. Hirsch testified that the two percent was not really a management fee, “[i]t
7 was just a poor choice of words on my part....there was no specific service that the managers of
8 Radical Bunny provided to earn this, quote, 2 percent.”⁷⁰¹ He claimed that Radical Bunny managers
9 did not get compensated for all the paperwork and check cutting they did on behalf of Participants.⁷⁰²
10 However, Mr. Hirsch testified that between January 1, 2006 and June 2008, Radical Bunny received
11 between 3 and 3.5 half million dollars from the 2 percent spread, with Mr. Hirsch receiving about
12 \$1,250,000.⁷⁰³ The managers got a 2 percent spread even on loans in which they did not
13 participate.⁷⁰⁴

14 Mr. Hirsch initially did tax work for Mortgages Limited, and later did tax work for Scott
15 Coles, “his children, his wife, his ex-wife” and for a company he owned called Realty Limited. The
16 firm did tax returns for Mortgages Limited pools, including Mortgages Limited Securities.⁷⁰⁵ Mr.
17 Hirsch testified that he did not do the income tax returns for the SMC Revocable Trust for the tax
18 periods 2006 and 2007 because Scott Coles was being audited by the Internal Revenue Service for
19 tax year 2006.⁷⁰⁶ Mr. Hirsch did not disclose to Participants that Mr. Coles was being audited by the
20 IRS.⁷⁰⁷ Mr. Hirsch testified that the audits did not threaten Mr. Coles’ financial viability in any
21 way.⁷⁰⁸

23 ⁶⁹⁸ Tr. at 1818.

24 ⁶⁹⁹ Tr. at 1671.

25 ⁷⁰⁰ Tr. at 1578.

26 ⁷⁰¹ Tr. at 1578-1579.

27 ⁷⁰² Tr. at 1579.

28 ⁷⁰³ Tr. at 1580.

⁷⁰⁴ Tr. at 1891.

⁷⁰⁵ Tr. at 1634; 1614; 1820.

⁷⁰⁶ Tr. at 1880.

⁷⁰⁷ Tr. at 1881.

⁷⁰⁸ Tr. at 1911.

1 Meetings with Advisors/Attorneys

2 Mr. Hirsch testified that while waiting in the hall at Mortgages Limited to have a meeting
3 with Scott Coles, he and Mortgages Limited's attorney Gary Zwillinger, had a discussion about Mr.
4 Hirsch not filing amended articles of organization with the Commission when a new Participant was
5 added.⁷⁰⁹ Mr. Hirsch concluded that he had violated the limited liability company statutes in
6 Arizona, even though Mr. Zwillinger had not told him a legal basis for such a conclusion.⁷¹⁰

7 Mr. Hirsch said that he "just happened to mention that conversation to another attorney by the
8 name of....Larry Wilk. I mentioned it to him because he was also a corporate attorney. He was a
9 former attorney representing Mortgages Limited."⁷¹¹ Mr. Hirsch testified that as "a result of a
10 conversation that I had with Larry Wilk in the halls of Mortgages Limited about the sins that I have
11 committed about not filing these amended articles for the entities that we have and the potential tax
12 consequences,"⁷¹² Mr. Wilk set up a meeting to introduce Mr. Hirsch to CPA Jim Sell.⁷¹³

13 Mr. Hirsch testified that he met with Mr. Sell prior to the Rev Op program, and that Mr. Shah
14 was there, as was Larry Wilk, and Mrs. Walder, who was there for a short period of time.⁷¹⁴ He
15 testified that the subject was the incorrect use of the K-1 form and the possible large penalty that the
16 firm would have to pay to the "US Treasury."⁷¹⁵ He said that they "discussed a little bit about
17 Radical Bunny and Horizon Partners, because he [Sell] wanted to know what we were doing. And he
18 didn't quite understand what we were doing. He actually – I couldn't say believe – I could see it in
19 his eyes and his face when he couldn't believe that that kind of money was in the two entities at that
20 time...there was a quizzical look in his eye, and I had to use my whiteboard in the office" to draw a
21 representation of what was happening with Radical Bunny and Horizon Partners.⁷¹⁶ Mr. Hirsch said
22 that Mr. Sell was going to do research on whether Hirsch & Shah had liability for the tax reporting

23 _____
24 ⁷⁰⁹ Tr. at 1860.

⁷¹⁰ Tr. at 1860-1861.

⁷¹¹ Tr. at 1581.

⁷¹² Tr. at 1767.

⁷¹³ Tr. at 1581.

⁷¹⁴ Tr. at 1765.

⁷¹⁵ Tr. at 1767; Mr. Hirsch testified that he had made investors members in Horizon Partners and Radical Bunny, but hadn't filed with the Corporation Commission every time a new member was added, saying "it was never really intended for them to become, quote, a member." (Tr. at 1766)

⁷¹⁶ Tr. at 1767.

1 issue, and due to his experience as a trustee, Mr. Sell had “knowledge about articles of organization
2 and whatnot that we had filed or did not file correctly with the Corporation Commission.”⁷¹⁷

3 Mr. Hirsch testified that he did not recall Mr. Sell telling him that Radical Bunny’s business
4 operations may be running afoul of the Arizona securities laws, and he believes that the meeting
5 concerned how to avoid paying “any enormous penalty” to the treasury department for not preparing
6 1099s. Mr. Hirsch testified that Mr. Sell suggested an attorney “look at the whole process”⁷¹⁸ but that
7 it did not occur to him to stop taking money from Participants after speaking with Mr. Sell.⁷¹⁹

8 Mr. Hirsch testified that he did not recall “anyone saying a word about securities regulation in
9 that meeting”⁷²⁰ and when asked whether he recalled Mr. Sell talking about any kind of licensing, Mr.
10 Hirsch testified “I don’t even recall if that conversation would come up.”⁷²¹ Mr. Hirsch testified that
11 after the meeting, Mr. Sell sent an engagement letter, but there was no further communication
12 between them.

13 Mr. Hirsch testified that one of the Participants, Mr. B. J. Raval, referred him to attorney Ron
14 Logan, and that he met with Mr. Logan twice.⁷²² The first meeting was in December 2006 and was
15 attended by Mr. Hirsch, Mr. Walder, and Mr. Shah. They told Mr. Logan that they “were looking for
16 a securities attorney to advise us whether we have any securities issue.”⁷²³ Mr. Hirsch testified that
17 he did not understand the “intellectual distinction between collateral security and securities” at that
18 time.⁷²⁴ Mr. Hirsch testified that Mr. Logan said that “most of his experience was in writing for the
19 initial public offering” and that he would like to associate another attorney more experienced in what
20 they needed, at a later meeting. The second meeting was held during the second week of January
21 2007.

22 Mr. Hirsch testified that in December 2006, Scott Coles recommended that they should
23 inquire about the securities issue and referred them to Bob Kant at Greenberg Traurig. After Mr.

24
25 ⁷¹⁷ Tr. at 1769.

26 ⁷¹⁸ Tr. at 1582.

27 ⁷¹⁹ Tr. at 1580.

28 ⁷²⁰ Tr. at 1765.

⁷²¹ Tr. at 1770.

⁷²² Tr. at 1881.

⁷²³ Tr. at 1772.

⁷²⁴ *Id.*

1 Kant told them he had a conflict due to his representation of Mortgages Limited, Todd Brown from
2 Mortgages Limited suggested they contact Bob Moya from Quarles & Brady.⁷²⁵

3 The second meeting with Mr. Logan occurred during the second week of January 2007, and
4 Mr. Hirsch testified that Mr. Logan knew that they were looking for help with the securities issue and
5 that he told Mr. Logan that they were looking at other law firms, too.⁷²⁶ Mr. Hirsch could not
6 remember whether he had a telephone conference with Mr. Moya before or after his second meeting
7 with Mr. Logan.⁷²⁷ Mr. Hirsch testified that at the second meeting, Mr. Logan was more silent and
8 Mr. Ranno "was more inquisitive as to what was going on."⁷²⁸ Mr. Hirsch said that he asked the
9 attorneys "'Do we need a license?' I had no clue as to what type of license applies. We just said
10 'license.'"⁷²⁹ Mr. Hirsch said that Mr. Ranno said that he would research that question.⁷³⁰ Mr.
11 Hirsch testified that no one in that second meeting suggested that he might have to stop the
12 participation program.⁷³¹ Mr. Hirsch testified that after meeting with Mr. Logan and Mr. Ranno, it
13 never crossed his mind to stop accepting participation money until Radical Bunny retained an
14 attorney to look at the licensing issues.⁷³²

15 Mr. Hirsch testified that the first in-person meeting with Quarles & Brady was February 10 or
16 12, 2007 and was held at the Radical Bunny office. Present were Mr. Hirsch, Mr. and Mrs. Walder,
17 Mr. Shah, and attorneys Bob Moya, Chris Hoffmann, and Gary Shullaw from Quarles & Brady.⁷³³
18 Mr. Hirsch testified that he explained what Radical Bunny was doing, but no one said "categorically
19 you have to have this license or that license" and no one offered any "determination as to whether or
20 not you were a security."⁷³⁴ Mr. Hirsch testified that Quarles & Brady was hired to deal with
21 compliance, past, present, and future.⁷³⁵

22
23 ⁷²⁵ Tr. at 1774-1776.

24 ⁷²⁶ Tr. at 1776.

25 ⁷²⁷ Tr. at 1777.

26 ⁷²⁸ *Id.*

27 ⁷²⁹ Tr. at 1778.

28 ⁷³⁰ *Id.*

⁷³¹ Tr. at 1785.

⁷³² Tr. at 1584.

⁷³³ Tr. at 1786-1787.

⁷³⁴ Tr. at 1788.

⁷³⁵ Tr. at 1593.

1 Mr. Hirsch testified that the second meeting with Quarles & Brady was in March of 2007,
 2 with Gary Shullaw and Bob Bornhoft. They met to “obtain some additional documentation and
 3 clarification on some various points.”⁷³⁶ Mr. Hirsch said that at that meeting, no one told them that
 4 they needed a type of a particular license and no one told them that they had determined whether or
 5 not the program required securities licensing of some kind.⁷³⁷ Mr. Hirsch testified that they had
 6 several subsequent visits from Mr. Shullaw and a couple of visits from Mr. Bornhoft.⁷³⁸

7 Mr. Hirsch testified that there was a meeting with Mr. Hoffmann in the April or May
 8 timeframe. He said that a telephone conversation with Mr. Hoffmann took place, but then stated: “I
 9 categorically deny that any such statement [to shut down the program] was made...I know for a fact
 10 that it was not made.”⁷³⁹

11 Mr. Hirsch testified that although Quarles & Brady did not tell Radical Bunny to stop selling
 12 securities in the Spring of 2007, it would have been an extremely important message. He said that
 13 with a meeting coming on May 24th they would have to let 500 people know that something must be
 14 done, including stop accepting money, and address the issue of the loans as they matured, to redeem
 15 those loans and refund the money to everyone else, and they would not focus on the POM anymore.
 16 “I mean, you are talking about a very difficult, toxic situation....Imagine all of a sudden being told
 17 that we have a serious problem here. I don’t mean just a casual issue with licensing. We are talking
 18 about a situation that can tumble into utter disaster. You can’t ignore that. I have a – we had a pool
 19 of \$150 million. Forget the managers’ money. Think about the participants. How do you ignore
 20 that?”⁷⁴⁰ When asked how a Participant would be harmed by Radical Bunny stopping entering into
 21 loans with Mortgages Limited, when the Participant would get the return of principal when the
 22 Mortgages Limited loan matured and they would be free to invest somewhere else, Mr. Hirsch
 23 responded that “the consequences – the potential consequences to Mortgages Limited would tumble
 24 down to each and every one of our participants...Well, if you consider a \$150 million pool of money
 25 that Mortgages Limited would have to return to Radical Bunny, and they’re – in the latter part of the

26 ⁷³⁶ Tr. at 1789.

27 ⁷³⁷ *Id.*

28 ⁷³⁸ Tr. at Tr. at 1789-1790.

⁷³⁹ Tr. at 1790-1791.

⁷⁴⁰ Tr. at 1900-1901.

1 year they were having some difficulties, as I believe Ms. Coleman alluded to, raising money. That
 2 could create a situation where Mortgages Limited would have to file for bankruptcy or not be able to
 3 meet its obligation to Radical Bunny....It's not that I knew that [that Mortgages Limited couldn't
 4 return the principal at loan maturity] for a fact. It's just the potential that affected me."⁷⁴¹

5 Mr. Hirsch testified that he "absolutely" did not consider doing that [stop loaning money and
 6 start redeeming loans as they mature] in the May 2007 timeframe, nor did he "consult with
 7 Mortgages Limited about maybe sort of stopping."⁷⁴²

8 Mr. Hirsch testified that he never received in writing anything that said Radical Bunny's
 9 program is violating the US securities laws, or violating the Arizona state securities laws and that he
 10 never received any notice, in writing or otherwise, that he "should stop either rolling over
 11 investments or taking new money."⁷⁴³ Mr. Hirsch also testified that Quarles & Brady never told him
 12 that he was in compliance with securities laws.⁷⁴⁴

13 Radical Bunny did not provide anything in writing to Quarles & Brady that advised them that
 14 Radical Bunny continued to raise money from Participants during the time period May 2007 to June
 15 2008.⁷⁴⁵ When asked whether he "specifically advise[d] Mr. Hoffmann orally that you continued to
 16 raise money between May 2nd and June 2008" Mr. Hirsch said "I may have. I don't recall
 17 specifically, no."⁷⁴⁶

18 Mr. Hirsch testified that Quarles & Brady never made a final determination as to whether or
 19 not Radical Bunny was engaged in conduct in violation of securities laws, but he was aware that in
 20 the early part of 2007, Quarles & Brady had raised concerns with respect to whether he was in
 21 compliance with securities laws.⁷⁴⁷ Mr. Hirsch said that there was no conversation with "Quarles &
 22 Brady on what to tell these people, how do we get them to stop, and what do we do with money that
 23 is in the pipeline."⁷⁴⁸

24
 25 ⁷⁴¹ Tr. at 1901-1902.

26 ⁷⁴² Tr. at 1791-1792.

27 ⁷⁴³ Tr. at 1793; 2220.

28 ⁷⁴⁴ Tr. at 1883.

⁷⁴⁵ Tr. at 2227.

⁷⁴⁶ Tr. at 2229.

⁷⁴⁷ Tr. at 1882-1883.

⁷⁴⁸ Tr. at 2221.

1 Mr. Hirsch testified that the May 2008 Orange Tree Resort meeting agenda included a
 2 statement that "POM equals peace of mind" but that he had not "categorically been told beyond a
 3 doubt that this was a security."⁷⁴⁹ He said that he thought that a POM would resolve questions about
 4 whether there was a security.

5 Mr. Hirsch testified that Mr. Bornhoft first raised concerns about the collateral relevant to the
 6 Radical Bunny/Mortgages Limited loans in April or May of 2007.⁷⁵⁰ Mr. Hirsch testified that Mr.
 7 Bornhoft "did not make any reference to tell us to stop" and does not recall him or Mr. Shullaw
 8 telling them not to use documents provided by Quarles & Brady.⁷⁵¹

9 Mr. Hirsch was also aware, from a May 11, 2007 fax/email from Bob Bornhoft, that there
 10 were concerns about whether the collateral existed or was defective, but he did not share that
 11 information with new Participants or Participants who were rolling over their funds, and he did not
 12 discuss the issue at the May 2007 Orange Tree Resort meeting.⁷⁵² He said that his primary concern
 13 was the security issue and that "in regard to the secured status, I felt that there was enough evidence
 14 and documents to support the position that Radical Bunny is a secured creditor. And if I had to
 15 choose, I chose to go the securities route, get that resolved, believing that taking care of the securities
 16 issue will self-correct the secured status."⁷⁵³

17 Mr. Hirsch testified that he received an email from Quarles & Brady on December 12, 2007,
 18 reminding him that the collateralization issues had not been resolved and he did not share that
 19 information with any Radical Bunny Participants.⁷⁵⁴ He testified that Mortgages Limited "provided
 20 documents that substantiated the collateral, loan documents" and that is partly why he was not
 21 concerned that the documents Mr. Bornhoft wanted signed were never finalized.⁷⁵⁵ Mr. Hirsch
 22 testified that Scott Coles never told him that Radical Bunny had no security or that it was limited, and
 23
 24

25 ⁷⁴⁹ Tr. at 1794.

26 ⁷⁵⁰ Tr. at 1883.

27 ⁷⁵¹ Tr. at 1792.

28 ⁷⁵² Tr. at 1586-1587; 1922; 2243.

⁷⁵³ Tr. at 1587.

⁷⁵⁴ Tr. at 1588.

⁷⁵⁵ Tr. at 1817.

1 that it was Mortgages Limited's new management team after Scott Coles' death who claimed that
2 Radical Bunny was unsecured.⁷⁵⁶

3 Mr. Hirsch testified that after retaining Quarles & Brady it never crossed his mind that
4 Radical Bunny should stop accepting Participant money until the lawyers could address the securities
5 laws issues and/or the issues regarding collateralization of the Radical Bunny/Mortgages Limited
6 loans.⁷⁵⁷

7 Mr. Hirsch testified that he did not try to conceal anything from any Participant and that he
8 didn't talk about the collateral security issues with Participants because he believed that they had
9 "adequate competent information documents that supports our position that were are secured
10 creditors" and that when the time came, he would not have any trouble getting Scott Coles to sign
11 whatever documents were needed.⁷⁵⁸

12 Mr. Hirsch testified that Radical Bunny disclosed at the May 2007 Orange Tree Resort
13 meeting that they had hired Quarles & Brady to assist with issues about securities and licenses but did
14 not disclose that what they were currently doing may be in violation of securities laws.⁷⁵⁹ Radical
15 Bunny never disclosed at a meeting or via a written document that they had issues as to whether they
16 had violated securities laws.⁷⁶⁰

17 When asked how he recognized Participant Barbara Mathis' November 2, 2007 Loan
18 Participation Disclosure Statement and Acknowledgements,⁷⁶¹ Mr. Hirsch said "Well, does
19 plagiarism count? This was some information, I think, that was provided to us by, I believe, it was
20 Gary Shullaw from Quarles & Brady. And this came in a conversation with Chris Hoffmann who
21 said that all our documents had no risk language whatsoever. So as we are going through, I felt it
22 was important for us to at least put something in our record of account and let people know there is
23 some risk, at least make it official, if you will."⁷⁶² Mr. Hirsch testified that he used parts of the

25 ⁷⁵⁶ Tr. at 1747.

26 ⁷⁵⁷ Tr. at 1584.

27 ⁷⁵⁸ Tr. at 1809-1810.

28 ⁷⁵⁹ Tr. at 1594-1595.

⁷⁶⁰ Tr. at 1596.

⁷⁶¹ Exhibit S-16(b).

⁷⁶² Tr. at 1598-1599.

1 Quarles & Brady draft document concerning risk, and he created the form.⁷⁶³ He believes that it was
 2 provided to new and rollover Participants.⁷⁶⁴ Mr. Hirsch testified that Gary Shullaw knew “that we
 3 were using, or I was using certain risk language. Whether it was his or not, I don’t think he knew.”
 4 He testified that Mr. Shullaw did not instruct him to use the language.⁷⁶⁵

5 During the re-opened hearing, Mr. Hirsch testified that Radical Bunny used a version of a
 6 document provided by Quarles & Brady titled “Loan Participation Disclosure Statement and
 7 Acknowledgment”⁷⁶⁶ that he “corrected” and then forwarded to Quarles & Brady. He testified that
 8 “we told them we were using it, because they told us to use it immediately.”⁷⁶⁷ Although Mr. Hirsch
 9 testified during the re-opened hearing that Mr. Shullaw told him personally to use the document,⁷⁶⁸
 10 that testimony was contradicted by his earlier testimony that he did not “hear that from Gary Shullaw
 11 directly” and that Mrs. Walder mentioned to him that Mr. Shullaw had “told us to use it right
 12 away.”⁷⁶⁹

13 At the re-opened hearing, Mr. Hirsch testified that he and Mrs. Walder compared notes on the
 14 May 21, 2007 Fax from Mr. Hoffmann and that he communicated to Mr. Hoffmann that the draft of
 15 the Participation Agreement document did not reflect “the reality of what is going on.”⁷⁷⁰ Mr. Hirsch
 16 testified that there was no doubt in his mind that Mr. Hoffmann understood that Radical Bunny was
 17 still operating and still collecting money.⁷⁷¹

18 Radical Bunny Due Diligence

19 Mr. Hirsch testified that the audits he saw of Mortgages Limited when he did its taxes did not
 20 show that Mortgages Limited had liabilities in excess of its assets.⁷⁷² Mr. Hirsch testified that
 21 Mortgages Limited’s in-house CPA, Chris Olson, provided information to Mr. Hirsch and did not
 22

23 ⁷⁶³ Tr. at 1599-1600.

24 ⁷⁶⁴ Tr. at 1600.

25 ⁷⁶⁵ Tr. at 1603.

26 ⁷⁶⁶ Exhibit R-13.

27 ⁷⁶⁷ Tr. at 2232.

28 ⁷⁶⁸ “Q. Who told you to use it? A. Mr. Shullaw. Q. Did he tell you personally? A. Yes, he did. Q. You personally? A. Yes, he did. Q. And when did that occur? A. I would say sometime in July of 2007. Q. In fact, Mr. Hirsch, Mr. Shullaw never told you personally, did he? A. In a discussion, yes, he did.” Tr. at 2232-2233.

⁷⁶⁹ Tr. at 2235-2236.

⁷⁷⁰ Tr. at 2218.

⁷⁷¹ Tr. at 2218-2219.

⁷⁷² Tr. at 1724.

1 indicate that there was any trouble at Mortgages Limited.⁷⁷³ Mr. Hirsch testified that he saw
 2 Mortgages Limited's internal financial statements prepared by an in-house controller at least every
 3 quarter, and that the equity fluctuated between \$2 million to \$8 million.⁷⁷⁴ Mr. Hirsch also had the
 4 audited financial statements for Mortgages Limited, and he testified that at the end of 2007, it
 5 identified a transaction between Scott Coles and Mortgages Limited where Scott Coles owed
 6 Mortgages Limited approximately \$6 million. Mr. Hirsch said the audit did not indicate that the debt
 7 was in danger of not being paid.⁷⁷⁵ Mr. Hirsch was aware that in 2007, Mortgages Limited was
 8 extending some significantly high loans.⁷⁷⁶

9 Mr. Hirsch testified that Scott Coles had a computer program "that would give him a 10-
 10 minute update as to the availability of cash in his possession."⁷⁷⁷ Mr. Hirsch testified that the
 11 program was important to Mortgages Limited because it was used to make sure that there were funds
 12 to actually fund prior or current loan commitments, and that Scott Coles "was very proud of that
 13 program."⁷⁷⁸

14 Mr. Hirsch testified that he could review Mortgages Limited's loan document file, including
 15 the appraisals.⁷⁷⁹ He said that there were two evaluations, including a Mortgages Limited valuation
 16 and an appraised value that Mr. Hirsch does not know whether was an independent appraisal.⁷⁸⁰ Mr.
 17 Hirsch testified that when Mortgages Limited made loans to borrowers, they recorded the mortgages
 18 at the County recorder.⁷⁸¹

19 Mr. Hirsch testified that the personal guaranty that he received from Scott Coles dated
 20 January 10, 2008, did not include Coles' other entities or his trust, and that neither Radical Bunny nor
 21 Mr. Hirsch conducted any independent due diligence with respect to what Mr. Coles owned in his
 22
 23

24 ⁷⁷³ Tr. at 1725.

25 ⁷⁷⁴ Tr. at 1795.

26 ⁷⁷⁵ Tr. at 1797.

27 ⁷⁷⁶ Tr. at 1522-1523.

28 ⁷⁷⁷ Tr. at 1643.

⁷⁷⁸ Tr. at 1761.

⁷⁷⁹ Tr. at 1908.

⁷⁸⁰ Tr. at 1917-1918.

⁷⁸¹ Tr. at 1912.

1 individual capacity.⁷⁸² Mr. Hirsch said he believed that he had a claim on the assets of Mr. Coles'
2 revocable trust.⁷⁸³

3 Mr. Hirsch testified that he had a verbal agreement with Scott Coles that "the use of money
4 that Radical Bunny loans to Mortgages Limited, we restricted. So they could not use it for their
5 overhead or acquiring any assets that would violate the lending criteria, that they would not – for
6 example, Mortgages Limited had an underwriting criteria, and we wanted to make sure that the
7 underwriting criteria is adhered to as relates to the money received from Radical Bunny."⁷⁸⁴ Mr.
8 Hirsch testified that the verbal agreement was important to him because "we wanted to be consistent
9 with what we are telling our participants. We wanted to make sure that the money loaned to
10 Mortgages Limited is going to where it's intended to be, essentially loaned out to the developers of
11 borrowers, not used for other purposes."⁷⁸⁵ However, Mr. Hirsch had no explanation as to why this
12 important alleged verbal agreement was not in writing.⁷⁸⁶

13 Mr. Hirsch testified that lawsuits were brought by borrowers claiming that loans made by
14 Mortgages Limited were underfunded.⁷⁸⁷ He testified that he did not make any inquiry about the
15 status of whether Mortgages Limited was being sued by its borrowers during late 2007 or early
16 2008.⁷⁸⁸

17 Mr. Hirsch testified that in December 2007, Scott Coles told him that Mortgages Limited had
18 stopped making loans and was advised by someone at Mortgages Limited that one of Mortgages
19 Limited's loans was in default.⁷⁸⁹ Mr. Hirsch testified that he was not concerned about Mortgages
20 Limited no longer originating loans because Mortgages Limited "had a couple hundred million
21 dollars of committed loans. So they were trying to fulfill the loans in progress before they take on
22 new loans."⁷⁹⁰ Mr. Hirsch was aware that in the first quarter of 2008, Mortgages Limited's fund-
23 raising from its own investors had slowed and that Mortgages Limited had instituted a new program

24 ⁷⁸² Tr. at 1830-1831.

25 ⁷⁸³ Tr. at 1910.

26 ⁷⁸⁴ Tr. at 1701; 1911.

27 ⁷⁸⁵ Tr. at 1702.

28 ⁷⁸⁶ *Id.*

⁷⁸⁷ Tr. at 1762.

⁷⁸⁸ Tr. at 1849.

⁷⁸⁹ Tr. at 1851.

⁷⁹⁰ Tr. at 1852.

1 and hired broker/dealers to try to raise money in the open market.⁷⁹¹ During the first quarter of
 2 January 2008, Radical Bunny had received over \$30 million from its investors, and Mortgages
 3 Limited was only able to raise \$8 million through its new program.⁷⁹² Mr. Hirsch testified that
 4 beginning in 2008, Mortgages Limited began calling Radical Bunny on at least a twice-weekly basis,
 5 instead of the usual pattern of Radical Bunny calling Mortgages Limited to let it know when Radical
 6 Bunny had money available to loan.⁷⁹³ He said that it did not concern him.⁷⁹⁴ Mr. Hirsch was aware
 7 that there was a borrower in default of paying off a loan to Mortgages Limited, but he was “not at all”
 8 concerned because no Radical Bunny participant had a percentage interest in the note itself, but
 9 “collateral of everything.”⁷⁹⁵

10 Mr. Hirsch testified that in May 2007, Radical Bunny was making almost 100 percent of the
 11 loans to Mortgages Limited, but he was uncertain whether Mortgages Limited still had a revolving
 12 line of credit with the bank.⁷⁹⁶ In May of 2007, Radical Bunny had about \$140 million in short-term
 13 notes outstanding with Mortgages Limited and “the new loans [to Mortgages Limited from Radical
 14 Bunny] were averaging about 5 million a month, but the maturity of the existing loans – and there
 15 were about 72 loans altogether – so he [Scott Coles] could have an average of six or seven loans that
 16 mature each month, and they could range anywhere from 1 million to 10 million.”⁷⁹⁷

17 Mr. Hirsch testified that going into the summer of 2008, his understanding of Mortgages
 18 Limited’s financial characteristics was that “the company is a viable entity, profitable company. I
 19 believe in ’07 the company had a profit around \$10 million. The Company had a lot of work in
 20 progress. I refer to it as a work in progress or borrowers lining up to transact with Mortgages
 21 Limited. The pipeline was full. Mortgages Limited had to curtail its lending because of the
 22 commitments that it had in place.”⁷⁹⁸ Mr. Hirsch said that 80 percent of the dollar amount of loans
 23 was loaned to about 9 or so borrowers, as a lot of borrowers had multiple projects.⁷⁹⁹

24 ⁷⁹¹ Tr. at 1854-1855.

25 ⁷⁹² Tr. at 1856.

26 ⁷⁹³ Tr. at 1857-1858.

27 ⁷⁹⁴ Tr. at 1858.

28 ⁷⁹⁵ Tr. at 1798-1799.

⁷⁹⁶ Tr. at 2223-2225.

⁷⁹⁷ Tr. at 2215.

⁷⁹⁸ Tr. at 1799-1800.

⁷⁹⁹ Tr. at 1800.

1 Mr. Hirsch testified that Radical Bunny did not hire its own independent auditor to audit the
 2 financial affairs of Mortgages Limited because he and his partner are certified public accounts,
 3 several Participants are professional attorneys and accountants, and they are all able to read a
 4 financial statement.⁸⁰⁰

5 Mr. Hirsch testified that he was unaware that Mortgages Limited had terminated its defined
 6 pension plan in February 2007; he was unaware that Mortgages Limited stopped making redemptions
 7 to its own investors in early 2007; that Mortgages Limited had a verbal agreement with one of its
 8 borrowers to reduce the monthly construction fundings for the project for an undetermined period of
 9 time; and he was aware that Scott Coles' trust borrowed \$6 million from Mortgages Limited but not
 10 that it was unsecured.⁸⁰¹ Mr. Hirsch testified that he knew in 2008 that Mortgages Limited had a
 11 state banking audit pending or in process, but nothing about the audits indicated that he should not
 12 put his money into a program that loaned money to Mortgages Limited.⁸⁰² Mr. Hirsch testified that
 13 Mortgages Limited and Radical Bunny never entered into a written document that limited Mortgages
 14 Limited's use of the Radical Bunny loan proceeds.⁸⁰³ Mr. Hirsch could not remember the last time
 15 Mortgages Limited returned principal to either Radical Bunny or Horizon Partners.⁸⁰⁴

16 Scott Coles' Suicide

17 Scott Coles committed suicide on June 2, 2008, and the next Mortgages Limited to Radical
 18 Bunny payment was due June 10, 2008, but no payment was made.⁸⁰⁵

19 Once Scott Coles died, Radical Bunny "made a decision to stop everything until things got
 20 sorted out."⁸⁰⁶ Mr. Hirsch testified that he became aware that he was the trustee of the Scott Coles
 21 Family Trust that held the assets of Mortgages Limited a day or two after Mr. Coles' death, and that
 22 he had several meetings, including one with Bob Kant.⁸⁰⁷ He served one or two days before
 23 determining that he had a conflict.⁸⁰⁸ Mr. Hirsch then resigned as trustee.⁸⁰⁹

24 ⁸⁰⁰ Tr. at 1858-1859.

25 ⁸⁰¹ Tr. at 1838-1841.

⁸⁰² Tr. at 1615; 1617; 1799.

26 ⁸⁰³ Tr. at 1566.

⁸⁰⁴ Tr. at 1639-1640.

27 ⁸⁰⁵ Tr. at 1801-1802. A couple of payments were made on the Panwebster notes.

⁸⁰⁶ Tr. at 1805.

⁸⁰⁷ *Id.*

28 ⁸⁰⁸ Tr. at 1806-1807.

1 Mr. Hirsch testified that "Scott Coles was a – I have to be careful. I have to be polite here
 2 because he is dead. He was a tyrant. He was a very closed individual. He did not share authority,
 3 responsibility, power with too many people. So all the decisions ran through him. So he would take,
 4 I would say, significant time to find out what was going on. And in addition to that I think two --- I
 5 believe it was Mike Denning and Todd Brown were terminated. I don't know if it was the beginning
 6 of 2008 or not. They were terminated. So he has a staff that I don't think was knowledgeable
 7 enough of what was going on, what commitments Scott Coles made on behalf of the company."⁸¹⁰

8 Mr. Hirsch testified that Radical Bunny was still in two Mortgages Limited Pass-Through
 9 Participation Program loans in June 2008, in the amount of \$3,748,000.⁸¹¹

10 Mr. Hirsch testified that Radical Bunny did not honor Mr. Friedberg's May 20, 2008 request
 11 for liquidation because "everything stopped" on June 2, 2008, because Mortgages Limited suspended
 12 all activity and no funds were coming into Radical Bunny from Mortgages Limited.⁸¹² Mr. Hirsch
 13 testified that no Participant had lost money because of a lack of security, at least until June 2, 2008.⁸¹³
 14 Mr. Hirsch testified that he believes that at the date of Mr. Coles' death, the value of the properties
 15 supporting the loans to be at 100 percent of Radical Bunny's loans to Mortgages Limited.⁸¹⁴

16 Mr. Hirsch testified that he believed that Scott Coles' death had an effect on Mortgages
 17 Limited's business, saying that, "Scott Coles was almost like a one-man dictator, if you will. That is
 18 perhaps a poor choice of words. He made all the final decisions. He was a visionary, a dreamer. I
 19 think he overextended himself, of course, in retrospect by making some large commitments....Well,
 20 first blush was that he committed suicide because his, I refer to her as his widow now, left him that
 21 weekend. He left a note blaming the taking of his life for her leaving him. They were scheduled to
 22 go on a trip to the Bahamas or something that weekend, and she decided not to go. But that was the
 23 first bit of information that became available to us. Afterwards, the business community started to
 24
 25

26 ⁸⁰⁹ Tr. at 1528.

⁸¹⁰ Tr. at 1529.

⁸¹¹ Tr. at 1551; 1554.

⁸¹² Tr. at 1669.

⁸¹³ Tr. at 1607; 1679.

⁸¹⁴ Tr. at 1609.

1 question the validity of that, and they did some, I wouldn't call it investigative, but questioned some
2 of his business decisions."⁸¹⁵

3 Mr. Hirsch testified that at the time of Scott Coles' death, the four Respondents and their
4 immediate families had about \$20 million in Radical Bunny, and that they had been treated no
5 differently than other Participants.⁸¹⁶ According to Mr. Hirsch, the Respondents continued to put
6 money into Radical Bunny up until the time of Mr. Coles' death, and he had no concerns that the
7 Radical Bunny notes were unsecured.⁸¹⁷

8 Mr. Hirsch testified that the first guarantee from Scott Coles expired in November 2007, but
9 was reinstated by extending the "maturity date to June 30, 2008 to coincide with a POM or a private
10 offering memorandum."⁸¹⁸ According to Mr. Hirsch, after Mr. Coles' death, his estate was the
11 guarantor on the obligations of Mortgages Limited to Radical Bunny.

12 Mr. Hirsch testified that both the securities compliance issue and the collateral issue remained
13 unresolved at the time of Mr. Coles' death.⁸¹⁹

14 Mr. Hirsch testified that between May 2, 2007 and June 2008, Radical Bunny took in
15 approximately \$51 million from Participants.⁸²⁰ Mr. Hirsch testified that during that time period, he
16 was continuing to earn money from the 2 percent spread as a result of his efforts.⁸²¹

17 **Howard Walder**

18 Howard Walder testified that he obtained a bachelor's of pharmacy from Ohio Northern
19 University in 1972 and then practiced retail pharmacy in Chicago, Illinois until he moved to Arizona
20 in 1978 and began practicing retail pharmacy in Arizona.⁸²² Mr. Walder was a member and manager
21 of Horizon Partners and a member and manager of Radical Bunny from the time of its inception in
22 1999.⁸²³ He testified that decisions concerning Radical Bunny were basically made by Mr. Hirsch.⁸²⁴

24 ⁸¹⁵ Tr. at 1801.

⁸¹⁶ Tr. at 1626.

25 ⁸¹⁷ Tr. at 1627.

⁸¹⁸ Tr. at 1628.

26 ⁸¹⁹ Tr. at 1883-1884.

⁸²⁰ Tr. at 2227.

27 ⁸²¹ Tr. at 2228-2229.

⁸²² Tr. at 969-970.

28 ⁸²³ Tr. at 971; 1081.

⁸²⁴ Tr. at 1082.

1 Mr. Walder described his role at Radical Bunny as the “IT individual” concerned with the computer
 2 program that held the names and information about the Participants. He also was a signatory on both
 3 the Radical Bunny “general” and “trust” banking accounts and posted and sent out checks; he
 4 handled the Directions to Purchase with new Participants and with rollovers for existing Participants;
 5 he did not determine what the interest rate paid to Participants would be; he did not determine what
 6 the interest rate from Mortgages Limited would be; and he did not determine what documents would
 7 be used or what documents Participants would receive.⁸²⁵

8 Mr. Walder testified about the software he used to maintain information about Participants
 9 and the loans⁸²⁶ and how he also created and used an Excel spreadsheet to compare it to the computer
 10 software program to make sure the calculations were correct.⁸²⁷ He testified that Mr. Hirsch
 11 reviewed and signed Radical Bunny’s interest checks to Participants and that Mr. Hirsch also
 12 reviewed and reconciled Radical Bunny’s monthly bank account statements.⁸²⁸

13 Mr. Walder testified that Participants came to know of Radical Bunny “by word of mouth”
 14 from other Participants; some were clients of Hirsch and Shah; and some were relatives of relatives
 15 or friends of relatives. He testified that the only thing Radical Bunny would know about an
 16 individual before they came in to give Radical Bunny their money was the name of the Participant
 17 who referred them.⁸²⁹

18 Mr. Walder explained that when an individual gave Radical Bunny a check, he would make
 19 sure that all the account information was in the computer and Radical Bunny “would wait until the
 20 next Mortgages Limited mortgage would come up, because they didn’t always come up on a day-to-
 21 day basis.”⁸³⁰ He testified that when Radical Bunny found out that Mortgages Limited was ready to
 22 fund and “want whatever monies we have at that moment, we would add up the total of the checks
 23 that we were holding and not cashed, and we would give that total to the Mortgages Limited, at
 24 which time they would tell us to go ahead and they will fund it on such and such date, which is the

25 ⁸²⁵ Tr. at 976; 984; 1078.

26 ⁸²⁶ Tr. at 980.

27 ⁸²⁷ Tr. at 981-983.

28 ⁸²⁸ Tr. at 994; 987-988.

⁸²⁹ Tr. at 1055-1057.

⁸³⁰ Tr. at 1000-1002.

1 date, and then we would go ahead and deposit that money in the Chase trust account. And the day of
 2 the funding we would bring over a check and receive on that particular date a promissory note.”⁸³¹
 3 He testified that at the time Radical Bunny sent the letter, check, and Direction to Purchase to the
 4 Participants, Mortgages Limited already had the money.⁸³²

5 Mr. Walder signed the promissory notes between Mortgages Limited and Radical Bunny as
 6 “holder” on behalf of Radical Bunny.⁸³³ He testified that the note was the only documentation he
 7 received for funding the loan, but that Mortgages Limited provided monthly summaries of their
 8 loans.⁸³⁴ Mr. Walder testified that the Mortgages Limited checks to Radical Bunny were never
 9 mailed, so that they could clear and Radical Bunny could write checks to Participants.⁸³⁵

10 Mr. Walder testified concerning the forms and letters that Radical Bunny used in its business
 11 operations. He said that Mr. Hirsch created several documents, including the “Direction to Purchase”
 12 letter which was used from September 2005 to June 2008.⁸³⁶ Mr. Walder explained that the Direction
 13 to Purchase “simply means that the participant is participating in the next new loan.”⁸³⁷ Mr. Walder
 14 said that Mr. Hirsch also created the “Participant Record, which was a document containing
 15 information that was put in the computer regarding a participant’s demographic.”⁸³⁸ He testified that
 16 Mr. Hirsch also created the “Instructions for Maturing Funds” form that included options for what to
 17 do when a loan was ending and the principal is to be paid off “that they could either rollover, add
 18 additional funds, get a partial liquidation and rollover, or liquidate the total amount of the
 19 principal.”⁸³⁹ According to Mr. Walder, usually Mrs. Walder signed the letters to Participants, but if
 20 she was unavailable, he would sign.⁸⁴⁰

21 Mr. Walder testified concerning the “Loan Participation and Disclosure Statement and
 22 Acknowledgements,” explaining that in 2007, “Tom handed it to me, and we went ahead and put it in
 23

24 ⁸³¹ Tr. at 1001.

⁸³² Tr. at 1002.

25 ⁸³³ Tr. at 1020-1022; 1024.

⁸³⁴ Tr. at 1023.

26 ⁸³⁵ Tr. at 1026.

⁸³⁶ Tr. at 980; 1000; Exhibit S-13(f).

⁸³⁷ Tr. at 1000.

27 ⁸³⁸ Tr. at 1003-1004; Exhibit S-16(b).

⁸³⁹ Tr. at 1009-1010.

28 ⁸⁴⁰ Tr. at 1034-1035.

the computer” and sent it out at the request of Mr. Hirsch.⁸⁴¹ Mr. Walder testified that he believed that “the original document was created by a lawyer at Quarles & Brady, but I’m not exactly positive.”⁸⁴² The Radical Bunny “Loan Participation and Disclosure Statement and Acknowledgements” was used during parts of 2007 through the middle of 2008 with new Participants, but Mr. Walder did not think he sent existing Participants the document, but was unsure.⁸⁴³ Mr. Walder understood that it was “an acknowledgment of risk” for loaning money “to Mortgages Limited for a participation in their loans.”⁸⁴⁴ He testified that he did not tell Participants that the documents (“Security Agreement,” “Term Note,” “Participant Note”) referred to in the Radical Bunny “Loan Participation and Disclosure Statement and Acknowledgements” did not exist.⁸⁴⁵ He believes that Mr. Hirsch wrote the Accredited Investor question document (Exhibit S-15(a)) that was sent to existing and new Participants.⁸⁴⁶

Mr. Walder testified that the Orange Tree Resort meetings began in 2005 and were held in November and May each year. The meetings were “for the benefit of the participants, to allow – get an opportunity to speak with the participants about – of Radical Bunny, and early on Horizon Partners, to give them information about where we are, and to help them read their statements, to understand what we are doing and answer any questions they have regarding their participations.”⁸⁴⁷ Mr. Walder testified that he set up the AV equipment, projector, computer, microphones, and at one meeting, explained how to read the summaries and the checks.⁸⁴⁸ Although he could speak to Participants if he wanted to say something, he testified that he was uncomfortable speaking in front of crowds and would let Participants with questions speak with Mrs. Walder, Mr. Hirsch, or Mr. Shah.⁸⁴⁹ He testified that Mrs. Walder and Mr. Hirsch would collaborate to create the power point presentations.⁸⁵⁰

⁸⁴¹ Tr. at 1006; 1066-1068; 1091; Exhibit S-17.

⁸⁴² Tr. at 1067.

⁸⁴³ Tr. at 1007; 1068-1069; 1091.

⁸⁴⁴ Tr. at 1008; 1066.

⁸⁴⁵ Tr. at 1069-1073.

⁸⁴⁶ Tr. at 1065-1066.

⁸⁴⁷ Tr. at 1035.

⁸⁴⁸ Tr. at 1037.

⁸⁴⁹ Tr. at 1044-1045.

⁸⁵⁰ Tr. at 1039.

1 Mr. Walder testified that in the winter of 2006, he and Mr. Hirsch went to Mortgages
 2 Limited's office for a meeting with Scott Coles. He testified that Scott Coles wanted Radical Bunny
 3 to obtain legal counsel and make sure it was "following all the rules and regulations that he was."⁸⁵¹
 4 Mr. Walder testified that they knew Mr. Kant was a securities attorney and had an office across the
 5 street, so they met with him to see if he would represent Radical Bunny. According to Mr. Walder,
 6 Mr. Kant declined to represent Radical Bunny because he had a conflict of interest due to his
 7 representation of Mortgages Limited.⁸⁵² Mr. Walder testified that Radical Bunny was concerned
 8 there was some issue with their business operations related to compliance with securities laws,
 9 because Mr. Coles was concerned and wanted to make sure that Radical Bunny was in compliance.⁸⁵³

10 Mr. Walder does not recall meeting with Mr. Sell in 2005, but does recall two meetings with
 11 Mr. Logan after the meeting with Mr. Kant in the winter of 2006.⁸⁵⁴ "We wanted to have counsel for
 12 a company that was growing substantially, and we needed to have answers as to whether or not we
 13 were complying with all rules, regulation of the State."⁸⁵⁵ Mr. Walder testified that he didn't think
 14 Mr. Logan was "the type of person we needed. We needed a bigger firm."⁸⁵⁶ He thought that Mr.
 15 Logan "had little knowledge of securities, little knowledge of – he was basically an average-type
 16 lawyer that – he just didn't have the qualifications that we needed. We needed all kind of little things
 17 that Tom wanted the company to have....I think we needed a firm that had different parts to it, like
 18 securities, someone that would help with the partnership, someone that would help with filings, you
 19 know, everything that we need as a big company that we are growing into."⁸⁵⁷ He testified that they
 20 needed help with making sure things like promissory notes were filed correctly, and they "needed
 21 somebody to look over all our paperwork and discover if there is something missing."⁸⁵⁸ Mr. Walder
 22 is not sure whether Mrs. Walder or Mr. Shah were present for the second meeting with Mr. Logan,
 23 where attorney Mr. Ranno also was present.⁸⁵⁹

24 ⁸⁵¹ Tr. at 1050-1052.

25 ⁸⁵² Tr. at 1053-1054.

26 ⁸⁵³ Tr. at 1054.

27 ⁸⁵⁴ Tr. at 1045-1047.

28 ⁸⁵⁵ Tr. at 1047.

⁸⁵⁶ Tr. at 1048.

⁸⁵⁷ *Id.*

⁸⁵⁸ Tr. at 1048-1049.

⁸⁵⁹ Tr. at 1050.

1 Mr. Walder testified that Radical Bunny did not think they should stop accepting Participants
 2 until they had retained a lawyer to look at the securities issues because “we didn’t think that we were
 3 in – having any problem with any rules or regulations...We were not soliciting. We were not looking
 4 for new customers. They were coming to us by reference only...We were not advertising...we didn’t
 5 have a computer site.”⁸⁶⁰

6 Mr. Walder testified that Quarles & Brady was retained to give advice and resolve issues
 7 related to both collateral and securities laws.⁸⁶¹ He said that although Quarles & Brady believed that
 8 the collateral for Radical Bunny’s loans to Mortgages “might not be totally perfected” he did not
 9 believe that opinion because of Mr. Coles’ assurance,⁸⁶² the UCC-1, the promissory notes, and the
 10 “proof of ownership from the accounting company” that did Mortgages Limited’s accounting.⁸⁶³ Mr.
 11 Walder testified that Radical Bunny had given Quarles & Brady the documents they believed showed
 12 that the collateral was perfected. Mr. Walder could not explain why he didn’t believe his lawyers’
 13 opinion.⁸⁶⁴ Mr. Walder also could not explain how Mr. Coles’ concerns about Radical Bunny’s
 14 operations were resolved when, after Radical Bunny received its lawyers’ opinion that the security
 15 was not perfected, Mr. Walder continued to believe Radical Bunny’s loans were perfected.⁸⁶⁵ He
 16 testified that he did not know whether Radical Bunny managers ever informed Participants of the
 17 lawyers’ ongoing concern about whether or not the security was perfected.⁸⁶⁶

18 Mr. Walder testified that in spring 2007, Mr. Coles asked Radical Bunny to find out how
 19 many accredited investors it had.⁸⁶⁷ Mr. Walder testified that Mr. Coles “just had a concern that we
 20 would be following the same rules and regulations that he would be following, and he wanted to
 21 make sure that we had counsel also....Because he followed certain bank rules and certain securities
 22

23 ⁸⁶⁰ Tr. at 1055.

24 ⁸⁶¹ Tr. at 1057.

25 ⁸⁶² Mr. Walder testified that he was in a meeting with Mr. Coles where Mr. Coles “stated unequivocally that we are
 26 perfected and that we have no problem with the security of our loans. And I heard this from the owner of the company,
 27 and I believed him. And he also said to his counsel, which was Mr. Kant, that he should resolve any questions we have
 28 on this.” (Tr. at 1061)

⁸⁶³ Tr. at 1058-1060.

⁸⁶⁴ Tr. at 1061.

⁸⁶⁵ Tr. at 1086-1087.

⁸⁶⁶ Tr. at 1063.

⁸⁶⁷ Tr. at 1064.

1 rules and certain financial rules that we needed to make sure that we were doing the same.”⁸⁶⁸ Mr.
 2 Walder testified that “the counsel was working on trying to find a resolution towards these problems,
 3 and I was eager to make sure that they were finally resolved. And the – it was up to the lawyers to
 4 handle the problems that – with the – that we would have.”⁸⁶⁹

5 Mr. Walder testified that in the beginning of 2008, Mortgages Limited started calling Radical
 6 Bunny more frequently – “anywhere from every day to every other day.”⁸⁷⁰ He testified that it did
 7 not concern him “because we were a very large account.”⁸⁷¹ Mr. Walder testified that the due
 8 diligence done by the Radical Bunny managers included relying on Mortgage Limited’s accounting
 9 service, visiting some of the sites, and attending most of Mortgages Limited’s meetings.⁸⁷² Mr.
 10 Walder testified that “Tom would attend special meetings with Mr. Coles, and it usually would occur
 11 from time to time, and that could be anywhere from one to three or four months apart. And he would
 12 talk about the financial things going on between Mortgages Limited and Radical Bunny.”⁸⁷³ Mr.
 13 Walder testified that he relied on Mr. Hirsch with regard to the financial wherewithal of Mortgages
 14 Limited.⁸⁷⁴

15 Mr. Walder testified concerning Exhibit S-24, the Radical Bunny power point presentation
 16 given during the May 2008 Orange Tree meeting. He had provided some of the information in the
 17 presentation, including the “Portfolio Value as of May 2008” dollar amount of \$197 million as being
 18 the amount of loans that Radical Bunny had with Mortgages Limited; the “Retirement Accounts”
 19 showing 235 active accounts totaling \$28,923,871 as the value of IRAs; the “2008 New Funds Jan -
 20 May 2008” showing “Amount Received” as \$28,933,491; “Liquidation” of \$8,326,491; and the
 21 resulting “Net Growth” amount of \$20,107,000 during January to May of 2008.⁸⁷⁵ Mr. Walder
 22 testified that funds used to pay for a liquidation to a participant came from “new participants, old
 23 participants, and the member participants.”⁸⁷⁶

24 ⁸⁶⁸ Tr. at 1084-1085.

25 ⁸⁶⁹ Tr. at 1086.

26 ⁸⁷⁰ Tr. at 1011.

27 ⁸⁷¹ Tr. at 1012.

28 ⁸⁷² Tr. at 1013.

⁸⁷³ Tr. at 1015.

⁸⁷⁴ Tr. at 1018.

⁸⁷⁵ Tr. at 1040-1043; Exhibit S-24.

⁸⁷⁶ Tr. at 1043; 1089.

1 Mr. Walder also prepared a Portfolio Report dated June 11, 2008, which he testified
2 accurately reflects the amount of principal balance due to Radical Bunny from Mortgages Limited.⁸⁷⁷

3 **Other Witnesses**

4 **Jordan Kroop**

5 Jordan Kroop is a partner with the law firm Squire, Sanders & Dempsey and practices in the
6 area of bankruptcy restructuring, primarily representing larger corporate business debtors in Chapter
7 11 proceedings.⁸⁷⁸ Mr. Kroop testified that it is rare for a trustee to be appointed in a Chapter 11
8 bankruptcy because generally the debtor remains in control with Chapter 11 proceedings.⁸⁷⁹ Mr.
9 Kroop testified that the Chapter 11 Trustee's job was to resolve the Radical Bunny bankruptcy case
10 by liquidating and maximizing the value of that asset - the claim against Mortgages Limited.⁸⁸⁰ Mr.
11 Kroop was hired as attorney for the Trustee.⁸⁸¹ He testified that "all of the individuals that had
12 contributed money to Radical Bunny were creditors of Radical Bunny on an unsecured basis."⁸⁸² The
13 Radical Bunny bankruptcy was resolved by the bankruptcy court's confirmation of the plan of
14 reorganization. Mr. Kroop testified that "all that will ever be distributed to the creditors of Radical
15 Bunny will be cash."⁸⁸³

16 Mr. Kroop also identified Exhibits S-37(a) and (b) which are proofs of claims in the
17 Mortgages Limited Bankruptcy. He testified that there were two legal issues concerning the nature of
18 the loans made by Radical Bunny to Mortgages Limited - whether they were for specific uses by
19 Mortgages Limited and whether Radical Bunny received a security interest in Mortgages Limited
20 assets.⁸⁸⁴ These were significant legal issues because of the way the bankruptcy code treats secured
21 and unsecured claims.⁸⁸⁵ The proofs of claim filed by Radical Bunny in the Mortgages Limited
22
23

24 ⁸⁷⁷ Tr. at 1033; Exhibit S-33.

25 ⁸⁷⁸ Tr. at 2032.

26 ⁸⁷⁹ Tr. at 2040-204; Exhibit S-36 (stipulated order directing the appointment of a Chapter 11 trustee); Tr. at 2042.

27 ⁸⁸⁰ Tr. at 2043.

28 ⁸⁸¹ Tr. at 2064.

⁸⁸² Tr. at 2044.

⁸⁸³ Tr. at 2045.

⁸⁸⁴ Tr. at 2050.

⁸⁸⁵ *Id.*

1 bankruptcy proceeding alleged that Radical Bunny had a secured interest in essentially all of
 2 Mortgages Limited's assets and were signed by Mr. Hirsch as manager for Radical Bunny.⁸⁸⁶

3 Mr. Kroop testified that "when a bankruptcy court inquires into the nature of a claim that is
 4 being administered in a bankruptcy case it will look to the effect of state law as to whether or not the
 5 claim is secured or unsecured."⁸⁸⁷ He testified that:

6
 7 the reason it was important for Radical Bunny to have its claim acknowledged, if it
 8 was possible to have it acknowledged as a secured claim, was because in any
 9 bankruptcy case if you have a security interest that is perfected and therefore protected
 10 in a bankruptcy context, then that creditor's rights to the proceeds of that asset, its
 11 collateral, is, has primacy over any other creditor's claims. Other unsecured creditors,
 12 for example, cannot recover from the proceeds of a secured creditor's collateral unless
 13 and until the secured creditor has received all of its debt paid from the proceeds of that
 14 piece of collateral. So stated in a practical context in this case, if Radical Bunny had a
 15 security interest in all of Mortgages Limited assets, then Radical Bunny would recover
 16 first, up to the amount of its claim, all of the proceeds of the liquidation of Mortgages
 17 Limited.⁸⁸⁸

18 Mr. Kroop explained that "the documentation that was used as between Mortgages Limited
 19 and Radical Bunny when these loans were made, and again there were 99 separate loan transactions,
 20 the documentation to substantiate or create a security interest in Mortgages Limited assets did not do
 21 everything that Article 9 under Arizona law would require the parties to do to substantiate in an
 22 incontrovertible way a security interest in identifiable collateral. One of the ways it didn't was it
 23 didn't identify any assets of Mortgages Limited in any identifiable way."⁸⁸⁹

24 Mr. Kroop explained that with the pass-through investment program, "Mortgages Limited
 25 acted simply as a conduit so that the creditor/debtor relationship...was between ABC Company as the
 26 borrower, and John Smith and all of his colleagues who were the investors. Mortgages Limited

27 ⁸⁸⁶ Tr. at 2048.

⁸⁸⁷ Tr. at 2051.

⁸⁸⁸ Tr. at 2052-2053.

28 ⁸⁸⁹ Tr. at 2053.

1 oftentimes did not retain any interest in that loan transaction once it was done. Mortgages Limited
 2 would get substantial fees associated with it, and that was one of the main reasons and ways that
 3 Mortgages Limited made money.”⁸⁹⁰

4 All other creditors in the Mortgages Limited bankruptcy alleged that Radical Bunny was not a
 5 secured creditor.⁸⁹¹ At first, Mortgages Limited took no position on whether Radical Bunny was
 6 secured, but after the pass-through investment committee objected to treating Radical Bunny as
 7 secured, Mortgages Limited also argued Radical Bunny was not a secured creditor.⁸⁹² The basis for
 8 the argument was legal noncompliance with the requirements of Article 9, and the recording, timing
 9 and documentation.⁸⁹³ Both the investment committee and the debtor had plans and wanted Radical
 10 Bunny to accept theirs. Radical Bunny agreed with the investment committee’s plan.⁸⁹⁴ There was a
 11 trial in the Mortgages Limited bankruptcy and the contested issue of whether Radical Bunny was
 12 secured had been briefed and was set to be heard by the court, but the issue was settled and not
 13 decided by the court.⁸⁹⁵ Therefore, Radical Bunny’s claim as a secured creditor was not
 14 adjudicated.⁸⁹⁶ The settlement treated Radical Bunny as secured to the extent of \$162 million, and as
 15 unsecured as to the remaining \$35 million.⁸⁹⁷ Mr. Kroop explained that the \$162 million was directly
 16 linked to “the face amount of the loans that Mortgages Limited had retained interests in to its own
 17 borrowers.”⁸⁹⁸

18 Mortgages Limited was not able to find investors for all of its loans, so it remained the named
 19 party on the deed of trust and was the lender (Portfolio loans).⁸⁹⁹ Mr. Kroop testified that:

20
 21 The total amount of loans that Radical Bunny made to Mortgages Limited was the
 22 \$197 million number that is shown on the proofs of claim, the Exhibit 37(a) and 37(b).
 23 That number, which again is down to the penny, is the full total amount of all 99 loans

24 ⁸⁹⁰ Tr. at 2057-2058.

⁸⁹¹ Tr. at 2055, 2061.

25 ⁸⁹² Tr. at 2062.

⁸⁹³ Tr. at 2063-2064.

26 ⁸⁹⁴ Tr. at 2074.

⁸⁹⁵ Tr. at 2078.

27 ⁸⁹⁶ Tr. at 2091.

⁸⁹⁷ Tr. at 2079.

28 ⁸⁹⁸ *Id.*

⁸⁹⁹ Tr. at 2080.

1 Radical Bunny made to Mortgages Limited. But because none of those loans were
 2 earmarked or specifically designated to go into a specific loan that Mortgages Limited
 3 would make, in stark contrast to the way pass through investors would give them
 4 money, Radical Bunny believed that it had a lien just on, generally a blanket lien, on all
 5 of Mortgages Limited assets which, as I said before, is really just these portfolio
 loans.”⁹⁰⁰

6 Mr. Kroop explained that the \$35 million unsecured claim amount will go into a liquidating
 7 trust, which he doubts will pay out any cash.⁹⁰¹ The Mortgages Limited Plan of Reorganization
 8 includes a structure where the outstanding Mortgages Limited loans were each placed in newly
 9 created LLCs whose members are the investors in that loan, and as a result of the settlement, Radical
 10 Bunny is also included as a ratable member of each LLC that has one of those portfolio loans.⁹⁰²
 11 Radical Bunny’s percentage interest in each LLC is whatever interest Mortgages Limited had in that
 12 loan prior to bankruptcy.⁹⁰³

13 **Ronald Clark**

14 Ronald Clark, formerly the Chief Investigator for the Securities Division, testified that the
 15 Division’s investigation began after they were contacted by another state agency, the Department of
 16 Financial Institutions.⁹⁰⁴ Mr. Clark testified that he served Mr. Hirsh and Mr. Shah with the Notice
 17 of Opportunity for Hearing at their office and that Mr. Hirsch said words to the effect of “we have
 18 already established that we sold unregistered securities; everybody knows that.”⁹⁰⁵ Mr. Clark
 19 memorialized that conversation and Mr. Hirsch’s statement in writing.⁹⁰⁶

20 **II. Legal Arguments**

21 Respondents argue that the facts do not support a finding that they violated A.R.S. §44-1841
 22 (Sale of unregistered securities), §44-1842 (Sale of securities by unregistered dealers) and §44-
 23 1991(A) (Fraud in the purchase or sale of securities), because they were not involved with the sale of
 24

25 ⁹⁰⁰ Tr. at 2080-2081.

26 ⁹⁰¹ Tr. at 2104.

27 ⁹⁰² Tr. at 2086.

28 ⁹⁰³ Tr. at 2102.

⁹⁰⁴ Tr. at 244; 254.

⁹⁰⁵ Tr. at 246-247; 255.

⁹⁰⁶ Tr. at 248; 251-252.

1 securities; and they did not violate the anti-fraud provision of the Arizona Securities Act because the
 2 Radical Bunny-Mortgages Limited Loans were “secured.” The Division argues that the
 3 Respondents’ conclusions are incorrect because they ignore well-established law as to when an
 4 investment is a security under the Arizona Securities Act; and because they rely on affirmative
 5 defenses to fraud that are either not supported by the evidence or not available under the Arizona
 6 Securities Act.

7 **i. Sale of Securities – Were Horizon Partners, Radical Bunny, Mr. Hirsch, Mrs. Walder,**
 8 **Mr. Walder, and Mr. Shah involved in the offer and sale of securities?**

9 The Division alleges that the Respondents were involved in the offer and sale of securities in
 10 the form of investment contracts. The Respondents argue that the analysis should focus on whether
 11 the notes were securities, but believes that “[w]hether the Participants had an investment contract or
 12 an interest in a note is a distinction of form over substance.”⁹⁰⁷

13 Courts employ different tests when determining whether a security exists. Arizona courts use
 14 the test set forth in *SEC v. W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946) (the
 15 “Howey test”) to analyze investment contracts, and have found that membership interests in an LLC
 16 may constitute investment contracts and therefore be securities.⁹⁰⁸ A review of court decisions
 17 suggests that the analysis of whether a security exists with an investment contract can vary when a
 18 note is involved as a part of the program or investment.⁹⁰⁹ In Arizona, whether a note is a security
 19 depends upon whether a registration or antifraud violation is involved.⁹¹⁰ However, it appears no
 20 Arizona court has determined which analysis should apply when the alleged investment contract
 21 involves membership interests in a limited liability company that invests in notes issued by a third
 22 party, or when the alleged investment contract involves an investment program that pools borrowed
 23

24 ⁹⁰⁷ Respondents’ Reply on Motion for Summary Judgment, May 20, 2010 at 2.

25 ⁹⁰⁸ *Nutek Info. Sys., Inc. v. Arizona Corp. Comm’n*, 194 Ariz. 104, 113, 977 P.2d 826, 835 (Ct. App. 1998).

26 ⁹⁰⁹ See, *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808 (2nd Cir. 1994) (Mortgage participations alleged to be both
 27 investment contracts and notes were analyzed only as notes under the test in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.
 28 Ct. 945, 108 L.Ed.2d 47 (1990); *In re Calozza Litigation*, 1995 WL 370991 (W.D.Wash 1995) (Notes and investment
 contract (high yield investment account) alleged to be securities; notes analyzed and found to be securities so court did
 not analyze alternative argument concerning investment contract); *S.E.C. v. Smart*, 2011, WL 2297659 (D.Utah 2011)
 (Promissory notes were securities under both an investment contract and note analysis); *S.E.C. v. Global Telecom
 Services, LLC*, 325 F.Supp.2d 94, (2004) (Investment contract and notes).

⁹¹⁰ *MacCollum*, 185 Ariz. 179, 913 P.2d 1097.

1 funds to invest in notes issued by a third party. Accordingly, we will examine the issue whether a
 2 security exists based upon an analysis of an investment contract, and an analysis of a note, for
 3 purposes of the registration provisions and for purposes of the antifraud provisions.

4 i. **“Securities” as defined for purposes of the registration provisions of the Arizona**
 5 **Securities Act**

6 The Arizona Securities Act § 44-1841 provides that a security may not be sold in Arizona
 7 unless it has been registered with the Commission.

8 The Division argues that the testimony and evidence show that Horizon Partners, Radical
 9 Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah were involved in the offer and sale of
 10 securities in the form of investment contracts. According to the Division, the offer and sale of
 11 securities were in the form of three different investment contracts:

12 1) Limited liability company membership interests in Horizon Partners from approximately
 13 1998 until September 2005 (Horizon Partners LLC Program);

14 2) Limited liability company membership interests in Radical Bunny from approximately
 15 1999 until September 2005 (Radical Bunny LLC Program); and

16 3) The Radical Bunny-Mortgages Limited Loan Program⁹¹¹ from approximately September
 17 2005 until June 2008 (Radical Bunny-Mortgages Limited Loan Program).

18 In its Reply to Respondents’ Post-Hearing Memorandum, the Division also argues that the
 19 Mortgages Limited Loan secured notes and the Radical Bunny-Mortgages Limited notes are
 20 securities for purposes of the registration provisions of the Arizona Securities Act.

21 The Respondents’ legal analysis of whether a security exists does not make a distinction
 22 between the Horizon Partners and Radical Bunny limited liability company membership interests and
 23 the Radical Bunny-Mortgages Limited Loan Program.⁹¹² Respondents’ legal argument is that
 24 “fractionalized commercial notes” are not securities, and that therefore, the Commission has no
 25 jurisdiction over their actions.⁹¹³ According to Respondents, “[a]ll the money raised was for
 26

27 ⁹¹¹ Sometimes also called the “Radical Bunny-Participant Loan Program” or the “Radical Bunny-Mortgages Limited
 Loan Program.”

28 ⁹¹² Respondents’ Post-Hearing Memorandum at 2.

⁹¹³ Respondents’ Post-Hearing Memorandum at 14-15.

1 construction, not for financing a business. The notes were commercial notes for a short-term, fixed
 2 percentage amount, were guaranteed and not premised on someone else's profit. The participations
 3 did not result from an organized marketing or solicitation program."⁹¹⁴ The Respondents characterize
 4 their actions as that of "a buyer's agent to buy fractional interests in notes" and argue that "such
 5 fractionalized commercial notes" are not securities.⁹¹⁵

6 **a) Investment Contracts**

7 **i) Are the limited liability company membership interests in Horizon**
 8 **Partners and Radical Bunny investment contracts and therefore**
 9 **securities under the Securities Act?**

10 **Division**

11 The definition of a "security" in the Arizona Securities Act at §44-1801(26) includes
 12 "investment contract."⁹¹⁶ According to the Division, although membership interests in limited
 13 liability companies or partnerships are not specifically defined as "securities" under federal or state
 14 laws, a "'member-managed' limited liability company becomes a security if the character of the
 15 membership interest falls within the statutory phrase 'investment contract.'"⁹¹⁷

16 The definition of an investment contract is set forth in the United States Supreme Court
 17 decision in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946). Under the "*Howey* test" an investment
 18 contract exists if there is 1) an investment of money or other consideration; 2) in a common
 19 enterprise; 3) with the expectation of profits earned solely from the efforts of the promoter or a third
 20 party. Arizona courts have adopted the *Howey* test and use it to determine whether an investment
 21 contract is a security.⁹¹⁸

22
 23
 24 ⁹¹⁴ Respondents' Post-Hearing Memorandum at 2.

⁹¹⁵ *Id.*

25 ⁹¹⁶ The Arizona Securities Act definition of "security" is virtually identical to the federal definition, and Arizona courts
 26 look to federal interpretations of "investment contract" but "will not defer to federal case law when, by doing so, we
 27 would be taking a position inconsistent with the policies embraced by our own legislature. We will depart from those
 federal decisions that do not advance the Arizona policy of protecting the public from unscrupulous investment
 promoters." *Siporin v. Carrington*, 200 Ariz. 97, 101, 23 P.3d 92, 96 (Ct. App. 2001).

⁹¹⁷ Division Post-Hearing Memorandum at 39-40, citing *Nutek*, 194 Ariz. at 113, 977 P.2d at 835; *See SEC v. Murphy*,
 626 F.2d 633, 640-641 (9th Cir. 1980), citing *McGreghar Land Co v. Meguiar*, 521 F.2d 822, 824 (9th Cir. 1975).

⁹¹⁸ *See Rose v. Dobras*, 128 Ariz. 209, 211, 624 P.2d 887, 889 (Ct. App. 1981).

1 The Division relies on the following uncontested facts during the timeframe of at least 1999
2 through 2005 as support for its conclusion that the membership interests in Horizon Partners and
3 Radical Bunny were investment contracts and therefore, securities:

- 4
5 1) Horizon Partners and Radical Bunny were both manager-operated entities in
6 which their non-manager members were unable to actively participate in the
7 day-to-day business operations of the entities (i.e. 'passive');
- 8
9 2) Horizon Partners and Radical Bunny conducted business pursuant to the terms
10 of their respective Operating Agreements;
- 11
12 3) Radical Bunny Participants and Radical Bunny Participants provided their
13 funds to Horizon Partners and/or Radical Bunny;
- 14
15 4) In exchange for their investment funds, Radical Bunny Participants and
16 Radical Bunny Participants became members of either Horizon Partners or
17 Radical Bunny and were required to endorse the respective entity's Operating
18 Agreement member signature page;
- 19
20 5) Horizon Partners and Radical Bunny participated in the MLtd Pass-Through
21 Participation Program with the use of the entities' members' pooled accounts;
- 22
23 6) All interests in the MLtd Pass-Through Participation Program were issued by
24 MLtd to Horizon Partners and Radical Bunny in the name of the respective
25 entity;
- 26
27 7) Participants were each issued a Schedule K-1 from Horizon Partners and/or
28 Radical Bunny at the end of each tax year;
- 8) Horizon Partners and Radical Bunny, by and through their managers, did all
due diligence with regard to the MLtd Pass-Through Participation Program
(including the decisions as to which interests in the Mortgages Ltd loans to its
borrowers that would be acquired) on behalf of the Radical Bunny Participants
and the Radical Bunny Participants;
- 9) Horizon Partners and Radical Bunny made all distributions of interest and
principal to the Radical Bunny Participants and Radical Bunny Participants,
maintained accounts and provided regular account statements for each of the

Radical Bunny Participants and Radical Bunny Participants, and communicated directly with the investors with regard to their investments;

- 10) Radical Bunny Participants and Radical Bunny Participants were promised a guaranteed rate of return on their principal investments by Horizon Partners and Radical Bunny which would result substantially from the investment and managerial activities of Horizon Partners and Radical Bunny, by and through their managers, and/or MLtd and/or its borrowers on behalf of the Radical Bunny Participants and Radical Bunny Participants.⁹¹⁹

The Division argues that these facts demonstrate that the three prongs of the *Howey* test are met. According to the Division, the first prong of the *Howey* test is met because Participants paid their money to Horizon Partners and Radical Bunny. The second prong of the *Howey* test is met because horizontal commonality occurred when investors' funds were pooled in a common account and then used by Horizon Partners and/or Radical Bunny to invest in the Mortgages Limited Pass-Through Participation Program. The third prong is satisfied "because it was the investment and managerial efforts of Horizon Partners and Radical Bunny, by and through their managers, Mortgages Ltd, and/or its borrowers, not the investors, which affected the failure or success of the enterprise. Participants had no managerial role whatsoever. The Horizon Partners Participants and Radical Bunny Participants simply surrendered their money to one or both limited liability companies."⁹²⁰

Respondents

The Respondents argue that there is no investment contract under a *Howey* analysis because "participants did not invest in Radical Bunny."⁹²¹ They compare Radical Bunny to the employees in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979) who did not invest in, but were part of a pension plan in conjunction with their employment.

The Respondents primarily rely on *AMFAC Mortgage Corporation v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426 (9th Cir. 1978) to support their position that there is no security, but it is not clear whether they believe that decision requires a *Howey* test analysis of the investment contract, or

⁹¹⁹ Division Post-Hearing Memorandum at 41-42.

⁹²⁰ Division Post-Hearing Memorandum at 42.

⁹²¹ Respondents' Post-Hearing Memorandum at 16.

whether their argument is that because a note is involved, the test should be whether the commercial paper bears a strong family resemblance to a non-security note under the analysis of *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990). Accordingly, we will address both arguments.⁹²²

Analysis and Conclusion

The Preamble to the Arizona Securities Act states:

The intent and purpose of this Act is for the protection of the public, the preservation of fair and equitable business practices, the suppression of fraudulent or deceptive practices in the sale and purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive practices in the sale or purchase of securities. *This Act shall not be given a narrow or restricted interpretation or construction, but shall be liberally construed as a remedial measure in order not to defeat the purpose thereof.* (1951 Ariz. Sess. Laws ch. 18, § 20)(emphasis added)

Arizona courts have consistently held that the purpose of the Arizona Securities Act is broad public protection.⁹²³

The U.S. Supreme Court in *Howey* noted that the definition of a security “embodies a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.”⁹²⁴ This flexible approach has been adopted by Arizona courts, and recognizes the investors’ economic reality, while maximizing the protections afforded by the Arizona Securities Act.⁹²⁵

The first prong of the *Howey* test is whether there is an investment of money or other consideration. Although the Respondents argue that Participants did not invest in Horizon Partners or Radical Bunny,⁹²⁶ the evidence clearly shows that Participants did in fact invest in those entities. The Respondents’ own testimony was that Participants wrote checks or wired money to Horizon Partners

⁹²² See discussion in “Notes” section.

⁹²³ *State v. Bauman*, 125 Ariz. 404, 610 P.2d 38 (1980); *Eastern Vanguard Forex Ltd. v Arizona Corp. Comm’n*, 206 Ariz. 399, 79 P.3d 86 (Ct. App. 2003).

⁹²⁴ *Nutek*, 194 Ariz. 104, 108, 977 P.2d 826, 830, (Ct. App. 1998) citing *Howey*, 328 U.S. at 299.

⁹²⁵ See *Rose*, 128 Ariz. at 212, 624 P.2d at 890.

⁹²⁶ Tr. at 1903, 1671-72; Respondents’ Post-Hearing Memorandum at 5.

1 and/or Radical Bunny;⁹²⁷ the Respondents endorsed and cashed those checks/wires and deposited the
 2 funds into Horizon Partners and Radical Bunny bank accounts;⁹²⁸ Respondents used the pooled funds
 3 to write checks to Mortgages Limited;⁹²⁹ Respondents received principal and interest checks from
 4 Mortgages Limited and deposited the funds into Horizon Partners and Radical Bunny bank
 5 accounts;⁹³⁰ Respondents then wrote, signed, and issued checks to Participants with the funds coming
 6 from the Horizon Partners and Radical Bunny bank accounts.⁹³¹ The evidence also shows that some
 7 Participants also invested in Mortgages Limited, but that those investments did not go through
 8 Horizon Partners or Radical Bunny or the managers.⁹³² In fact, Mr. Hirsch testified that Horizon
 9 Partners was created when he was unable to invest in Mortgages Limited due to the high minimum
 10 investment amount, and that only by creating Horizon Partners and pooling funds from several
 11 investors were he and others able to invest in Mortgages Limited.⁹³³

12 Radical Bunny and Horizon Partners were formed as limited liability companies.⁹³⁴ New
 13 Participants were required to execute the Operating Agreement as “Members” and return it to Mr.
 14 Hirsch.⁹³⁵ The Operating Agreements of Radical Bunny and Horizon Partners state that “the purpose
 15 of the Company is to acquire, lease, operate, hold for investment and sell or otherwise dispose of real
 16 and personal property of every kind and so engage in any and all activities related or incidental
 17 thereto, including investment in deeds of trust....”⁹³⁶ The Operating Agreement’s section “Nature of
 18 Members’ Interests,” provides that “[a]ll property owned by the Company, whether real or personal,
 19 tangible or intangible, shall be owned by the Company as an entity, and no Member shall have any
 20
 21

22 ⁹²⁷ Exhibit S-14; See also checks written by Participants to Horizon Partners and Radical Bunny, i.e. Exhibit S-12(b)
 23 October 22, 2002 check to Radical Bunny from a Participant; Exhibit S-12(e) October 5, 2005 checks to Radical Bunny
 24 from Participants.

⁹²⁸ Tr. at 987, 1001.

⁹²⁹ Tr. at 1001, 1025, 1022, 1299; Exhibit S-14.

⁹³⁰ Tr. at 986-87, 1026.

⁹³¹ Tr. at 994, 1540; See, i.e. Exhibit S-12(g) October 31, 2005 check from Radical Bunny to a Participant.

⁹³² Tr. at 1928, 1986, 2008-2009.

⁹³³ Tr. at 1509-1511, 1632-1633.

⁹³⁴ Exhibit S-3(a) Articles of Organization of Radical Bunny, LLC; Exhibit S-4 Articles of Organization of Horizon
 27 Partners, LLC.

⁹³⁵ See, i.e., Exhibit S-12(a).

⁹³⁶ Exhibit S-9(a); Tr. at 1530-31.

1 direct ownership of such property or any right to use such property for any purpose other than a
2 purpose of the Company.”⁹³⁷

3 Horizon Partners’ and Radical Bunny’s business records referred to Participants as
4 “investors” and their funds as “investments.”⁹³⁸ Participants were each issued an IRS Form 1065
5 (Schedule K-1) from Horizon Partners and/or Radical Bunny at the end of each tax year.⁹³⁹ The
6 function of a Schedule K-1 is to “disseminate tax income and losses to individuals through their
7 ownership in a partnership or limited liability company.”⁹⁴⁰

8 Mr. Hirsch’s testimony that it was an “error” for Radical Bunny and Horizon Partners to issue
9 Schedule K-1s to Participants is not credible. Mr. Hirsch has been a licensed certified public
10 accountant in Arizona since 1978, with a primary expertise in taxation. His explanation that the
11 ongoing, more than five year “error” was due to tax software⁹⁴¹ is not believable, given his level of
12 tax expertise and the responsibilities of a licensed CPA. Based upon the testimony and evidence, we
13 find that Mr. Hirsch and the other Respondents became aware of legal issues concerning Radical
14 Bunny and Horizon Partners and securities by the fall of 2005, and after discussions with two
15 attorneys Mr. Hirsch believed were associated in some manner with Mortgages Limited⁹⁴² and a
16 meeting with CPA James Sell,⁹⁴³ Mr. Hirsch realized that Participants being member/owners of the
17 limited liability companies was a problem.⁹⁴⁴ With that knowledge, Mr. Hirsch decided to stop using

18 ⁹³⁷ Exhibit S-9(a).

19 ⁹³⁸ See, i.e., Exhibit S-11 and Exhibit 12(d) “Investor Master Ledger,” Exhibit S-12(s) and Exhibit S-13(j) “Investment
20 Portfolio,” Exhibit S-12(c) and Exhibit S-26, December 31, 2002 and April 30, 2000, Radical Bunny Balance Sheets
21 prepared by Mr. Hirsch as CPA for Radical Bunny showing the amount of the “partners” contributions, capital account
22 balances, principal and interest distributions, and the balance of Radical Bunny’s “investments,” and Exhibit S-12(i)
23 December 1, 2005 letter to Participants from Mr. Hirsch on behalf of Radical Bunny reference to “Investors” and
24 “investments.”

25 ⁹³⁹ Verified Answer ¶36; Tr. at 1110-11.

26 ⁹⁴⁰ Tr. at 263, see also Tr. at 338.

27 ⁹⁴¹ Tr. at 1732.

28 ⁹⁴² Tr. at 1860. Mr. Hirsch testified that while waiting in the hall at Mortgages Limited to have a meeting with Scott
29 Coles, he and Mortgages Limited’s attorney Gary Zwillinger had a discussion about Mr. Hirsch’s failure to file amended
30 articles of organization with the Commission when a new Participant was added, and that he “just happened to mention
31 that conversation to another attorney by the name of...Larry Wilk. I mentioned it to him because he was also a corporate
32 attorney. He was a former attorney representing Mortgages Limited.” Tr. at 1581. Mr. Hirsch testified that as “a result of
33 a conversation that I had with Larry Wilk in the halls of Mortgages Limited about the sins that I have committed about
34 not filing these amended articles for the entities that we have and the potential tax consequences,” Mr. Wilk set up a
35 meeting to introduce Mr. Hirsch to CPA Jim Sell. Tr. at 1767, 1581.

36 ⁹⁴³ Tr. at 1767.

37 ⁹⁴⁴ Although Mr. Hirsch attempted to characterize the discussions as relating to his “failure” to file with the Commission
38 when new members joined Radical Bunny or Horizon Partners, the Respondents cited no such statutory requirement. Mr.

1 K-1s and begin issuing 1099-INTs to Radical Bunny Participants, and also to cease Horizon Partners
 2 operations.⁹⁴⁵ This explains why Mr. Hirsch decided not to tell the Participants or the IRS that the
 3 Schedule K-1s had been provided or filed in “error”⁹⁴⁶ – because they were not provided or filed in
 4 error. The Respondents’ attempt to re-characterize Horizon Partners’ and Radical Bunny’s
 5 operations to avoid application of the Arizona Securities Act fails based upon the testimony and
 6 evidence adduced at hearing.

7 Accordingly, based upon the overwhelming evidence that in exchange for their investment
 8 funds, Participants became members of Horizon Partners and/or Radical Bunny, both limited liability
 9 companies, we find that that the first prong of the *Howey* test has been met. The Respondents’
 10 citation to *International Brotherhood of Teamsters v. Daniel* is not persuasive because the
 11 Participants’ investment in Horizon Partners and Radical Bunny is in no way similar to an
 12 employee’s noncontributory, compulsory pension plan.⁹⁴⁷ Horizon Partners and Radical Bunny
 13 Participants *chose to and did invest* in Horizon Partners and Radical Bunny, and there is no other
 14 comprehensive legislation such as ERISA involved here.

15 Meeting the “common enterprise” second element of the *Howey* test requires a finding of
 16 commonality, either horizontal or vertical.⁹⁴⁸ “Horizontal commonality requires a pooling of investor
 17 funds collectively managed by a promoter or third party...Vertical commonality requires a positive
 18 correlation between the success of the investor and the success of the promoter, without requiring a
 19 pooling of funds.”⁹⁴⁹ The court in *Daggett* found that satisfaction of either test should suffice to meet
 20 the requirements of the common enterprise prong of the *Howey* test.⁹⁵⁰

21
 22 Sell’s testimony was clear that the discussion concerned securities violations, not corporate filing requirements or tax
 23 issues. Tr. at 348-353; 365-366; 371; 382; 383.

24 ⁹⁴⁵ Until December 2005, all Participants were members. Tr. at 1546.

⁹⁴⁶ Tr. at 1865, 1889-90.

25 ⁹⁴⁷ We also note that the Supreme Court in *Teamsters* found that “the pension plan at issue in this case bears no
 26 resemblance to the kind of financial interests the Securities Acts were designed to regulate” and that “[t]he existence of
 27 this comprehensive legislation [Employee Retirement Income Security Act “ERISA”] governing the use and terms of
 28 employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory,
 compulsory pension plans.” *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566-70, 99 S. Ct. 790, 800-
 802 (1979).

⁹⁴⁸ *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148.

⁹⁴⁹ *Daggett* at 152 Ariz. 559, 565, 733 P.2d 1142, 1148.

⁹⁵⁰ *Daggett* at 566, 733 P.2d at 1149.

1 The Respondents do not deny that they pooled the Participants' funds.⁹⁵¹ The Respondents
 2 told Participants that their funds would be pooled.⁹⁵² The Disclosure Statement Regarding Amended
 3 Plan of Reorganization Dated March 9, 2010, that was filed in Radical Bunny's bankruptcy
 4 proceeding and agreed to by the Radical Bunny managers, described Radical Bunny as "an Arizona
 5 limited liability company created to pool investments from individuals and personal trusts, combine
 6 those investments, and make loans to Mortgages Ltd...."⁹⁵³

7 The evidence is also clear that the Horizon Partners and Radical Bunny managers
 8 "managed" the pooled funds.⁹⁵⁴ The Radical Bunny LLC Financial Statements prepared by Mr.
 9 Hirsch as CPA show the "management fee" collected by the Radical Bunny managers.⁹⁵⁵ Radical
 10 Bunny sent out congratulatory letters to new Participants for "joining" Radical Bunny. In a
 11 November 5, 2002 letter from Mr. Hirsch to a new Participant, he said "Congratulations for joining
 12 Radical Bunny, L.L.C. I'm sure that you will find the experience financially rewarding" and
 13 included a copy of the "Partnership's Operating Agreement" for the Participant to sign and return to
 14 Mr. Hirsch.⁹⁵⁶

15 We find that commonality under the second prong of the *Howey* test has been established by
 16 the evidence. Respondents cashed Participants' checks and deposited them in the Horizon Partners
 17 and Radical Bunny bank account, thereby pooling investor funds, and those pooled funds were
 18 managed by Respondents, who also collected a management fee.

19 The third prong of the *Howey* test "expectation of profits earned solely from the efforts" of
 20 others has evolved, and the court in *Nutek* stated: "We note first that *Howey's* use of the term
 21 'solely' should not be taken literally. Rather, the third prong is satisfied if 'the efforts made by those
 22
 23

24 ⁹⁵¹ Respondents' Post-Hearing Memorandum at 5.

⁹⁵² Tr. at 405.

⁹⁵³ Exhibit S-40.

⁹⁵⁴ Exhibit S-12(i) December 1, 2005, letter written by Mr. Hirsch on behalf of Radical Bunny, where he told a Participant
 26 that "[t]he exponential growth in the number of members and the size of our portfolio has made it necessary to adopt
 27 certain changes in the way we manage and operate the fund;" Exhibit S-14 Mrs. Walder's description of Horizon Partners
 and Radical Bunny; Tr. at 403-406, 795-796, 1109-1110, 1117, 1378, 1512, 1519, 1640-1641, 1712, 1817-1818, 1900-01.

⁹⁵⁵ Exhibit S-12(c) December 31, 2002, Radical Bunny Balance Sheet; Exhibit S-26 April 30, 2000, Radical Bunny
 28 Balance Sheet.

⁹⁵⁶ Exhibit S-12(a).

1 other than the investor are the undeniably significant ones, those essential managerial efforts which
2 affect the failure or success of the enterprise.”⁹⁵⁷

3 The evidence is undisputed that the Respondents, as member-managers of Horizon Partners
4 and Radical Bunny, made all decisions and conducted all the operations of Horizon Partners and
5 Radical Bunny. The Operating Agreement’s section “Delegation of Management Powers” states that
6 the “business and affairs of the Company shall be managed exclusively by its designated Manager(s).
7 The Manager(s), pursuant to their delegated powers, shall direct, manage and control the business of
8 the Company to the best of their/its ability and shall have full and complete authority, power and
9 discretion to make any and all decisions and to do any and all things which the Manager shall deem
10 to be reasonable required to accomplish the business and objectives of the Company pursuant to
11 its/their delegated powers. No Member other than a Manager shall have the authority to act for or
12 bind the Company.”⁹⁵⁸ Radical Bunny’s Articles of Organization and Horizon Partners’ Articles of
13 Organization state that “management of the Company is vested in a Manager or Managers of the
14 Company.”⁹⁵⁹

15 The evidence is clear that Participants, as investors, did nothing but give Respondents their
16 money. Mr. Friedberg testified that his mother had no input as to which loans were invested in and
17 that “she left all that up to Tom.”⁹⁶⁰ Ms. Mathis testified that she was a “passive” investor and Ms.
18 Herbranson testified that her role was to simply send them money.⁹⁶¹ While there was testimony that
19 on one occasion, a few Radical Bunny Participants met as a group with representatives from
20 Mortgages Limited, there is no evidence that their efforts affected Respondents’ efforts, activities or
21 decisions, as managers.

22 The Respondents were responsible for all decisions about what to do with the pooled funds
23 from Participants. The Respondents, as managers, were the only LLC members to participate in the

24 ⁹⁵⁷ *Nutek*, 194 Ariz. at 108, 977 P.2d at 830, citing *S.E.C. v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir.
25 1973) In *S.E.C. v. Glenn W. Turner Enterprises, Inc.*, “the court interpreted the third prong of the *Howey* test in a flexible
26 and remedial fashion,” adopting a test looking at “whether the efforts made by those other than the investor are the
undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.” *Rose*
at 128 Ariz. 212.

27 ⁹⁵⁸ Exhibit S-9(a); Exhibit S-12(a).

⁹⁵⁹ Exhibit S-3(a); Exhibit S-4.

⁹⁶⁰ Tr. at 69.

⁹⁶¹ Tr. at 270; 468.

1 day-to-day business operations of Horizon Partners and Radical Bunny. Their activities included
 2 meeting and corresponding with Participants, record keeping/documentation, handling payments, and
 3 conducting due diligence with Mortgages Limited loans.⁹⁶² It was their efforts to negotiate with
 4 Mortgages Limited that determined the interest rate that Horizon Partners and Radical Bunny would
 5 earn and the payments that Participants would receive.

6 Respondents' communications with Participants included statements that Horizon Partners
 7 and Radical Bunny benefitted from and relied on the efforts of Mortgages Limited to review
 8 applications, visit prospective property sites, and use the services of an appraiser and title researcher
 9 to make sure that they "take the cream of the cream."⁹⁶³ Respondents told Participants that "we're
 10 always in first position" and that there are "four non-negotiables" and that using those criteria would
 11 make the investment "pretty safe."⁹⁶⁴ The Respondents also informed prospective Participants that
 12 because Radical Bunny pooled funds and was Mortgages Limited's largest investor, Radical Bunny
 13 was able to negotiate a better rate than the "average person," so that Radical Bunny Participants were
 14 able to obtain better returns with Radical Bunny than if they went to Mortgages Limited as
 15 individuals. Participants were also told that the two Respondents who were CPAs were monitoring
 16 Mortgages Limited's financial condition by being actively involved in the taxes and reviewing the
 17 Mortgages Limited pools.⁹⁶⁵

18 These significant efforts of Horizon Partners' and Radical Bunny's managers and their close
 19 association with Mortgages Limited, together with the efforts of Mortgages Limited and its
 20 borrowers, determined the success of Radical Bunny and Horizon Partners and Participants' profits.
 21 Accordingly, we find that the third prong of the *Howey* test has been met.⁹⁶⁶

22 Based upon the testimony, evidence, and the uncontested facts as set forth above, we find that
 23 Horizon Partners and Radical Bunny were member-owned limited liability companies managed

24 ⁹⁶² Mrs. Walder told Participants that Radical Bunny went to meetings at Mortgages Limited weekly to "look over all the
 25 loans that were presented to them so they could pick the very best loans for Radical Bunny participants." Tr. at 403.

⁹⁶³ Exhibit S-14; Tr. at 2022.

⁹⁶⁴ Exhibit S-14.

⁹⁶⁵ *Id.*

27 ⁹⁶⁶ See, *Nutek* 194 Ariz. 104, 977 P.2d 826, for discussion of the third prong of the *Howey* test, and the use of the factors
 28 in *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981). We find that, to the extent necessary or appropriate, the discussion
 above demonstrates that the three *Williamson* factors are met with the membership interests in Horizon Partners and
 Radical Bunny, limited liability companies.

1 solely by Respondents as common enterprises whose purposes were to collect sufficient monies in
2 pools that would meet the minimum amount required by Mortgages Limited for high returns on the
3 investments selected by Respondents and Mortgages Limited.

4 Accordingly, we find that the limited liability company membership interests in Horizon
5 Partners and Radical Bunny are investment contracts and securities under the Arizona Securities Act.

6 **ii) Are the interests in the RB-ML Loan Program investment contracts and**
7 **therefore securities under the Securities Act?**

8 Division

9 The Division contends that the RB-ML Loan Program is an investment contract and therefore
10 a security. In September 2005, Mortgages Limited began a new investment program under which it
11 issued million dollar notes. Radical Bunny participated in the new program and loaned
12 approximately \$197,232,000 to Mortgages Limited as of June 2008, as memorialized by a series of
13 promissory notes. The RB-ML Loans were to be collateralized by a personal guarantee of Scott
14 Coles and a secured interest in all of the assets of Mortgages Limited. The primary asset of
15 Mortgages Limited was the Mortgages Limited Loan Portfolio. The structure of the new RB-ML
16 Loan Program was different from the earlier RB LLC Program with the Mortgages Limited Pass-
17 Through Participation Program, in that Radical Bunny no longer received a duly recorded beneficial
18 interest in a deed of trust in its own name for a specific parcel of real estate. In order for Radical
19 Bunny to fund the RB-ML Loans, Radical Bunny needed to raise enough money to fund the million
20 dollar loans to Mortgages Limited, so Radical Bunny started its own new program whereby Radical
21 Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah raised money by offering and selling to
22 investors "participations" in the RB-ML loans. The participations purported to assign fractionalized
23 interests in the RB-ML Loans to the Participants.

24 The Division relies on the following uncontested facts concerning the RB-ML Loan Program:

- 25
- 26 1). Participants became lenders to Radical Bunny;
 - 27 2). Participants provided their funds to Radical Bunny;
- 28

- 3) Radical Bunny funded the RB/MLtd Loans from the use of the Participants' pooled investment funds;
- 4) all notes evidencing the RB/MLtd Loans were issued by MLtd directly to Radical Bunny;
- 5) as evidence of their participation, Participants received a direction to Purchase from Radical Bunny *after* Radical Bunny had used their money to fund the RB/MLtd Loan;
- 6) the Direction to Purchase was the sole document evidencing their investment;
- 7) Participants were each issued an IRS form 1099-INT from Radical Bunny at the end of each tax year;
- 8) Radical Bunny invested the Participants' funds in the RB/MLtd Loans, made all distributions of interest and principal to the Participants, maintained accounts for Participants, provided regular account statements for each of the Participants, and communicated directly with the Participants with regard to their investments;
- 9) Participants had no managerial roles in Radical Bunny whatsoever; and
- 10) Participants were promised guaranteed rates of return on their principal investments by Respondents, which would result substantially from the investment and management activities of Radical Bunny, by and through their managers, and/or MLtd and/or its borrowers on behalf of the Participants.⁹⁶⁷

The Division argues that these facts demonstrate that the three prongs of the *Howey* test are met. The Division believes that the first prong of the *Howey* test is met because Participants "entered into an agreement under which they would passively invest their funds with Radical Bunny in order to earn a profit in the form of interest;"⁹⁶⁸ the second prong is met because the Participants' funds were pooled, purportedly to allow Radical Bunny to make loans to Mortgages Limited; and the third prong of the *Howey* test is met because the investors were "dependent on the substantial efforts" of Radical Bunny, by and through its managers, and/or Mortgages Limited, to succeed or fail and they had no way to control or influence Radical Bunny's decisions regarding the investments being made.⁹⁶⁹

⁹⁶⁷ Division Post-Hearing Memorandum at 43-44.

⁹⁶⁸ Division Post-Hearing Memorandum at 44.

⁹⁶⁹ *Id.*

1 According to the Division, the Participants “bought a package, an investment contract,
2 pursuant to which Radical Bunny took the purchase money and invested it and agreed to perform a
3 number of services for the Participants. Nothing was required of the Participants in order to receive a
4 profit other than to provide their investment funds to Radical Bunny. That *entire* package, all of the
5 components of the agreement with Radical Bunny constituting the RB-Participant Loan Program,
6 constitutes an investment contract and therefore a security under the Securities Act.”⁹⁷⁰

7 The Division believes that the Respondents’ legal analysis focuses on the “notes” (the
8 Mortgages Limited Loan secured notes involved in the Mortgages Limited Pass-Through
9 Participation Program, and the Radical Bunny-Mortgages Limited notes involved in the later Radical
10 Bunny-Mortgages Limited Loan Program) and ignores the “*entire package* of services that were
11 included as part of these investment programs (i.e. investment contract)....”⁹⁷¹

12 Respondents

13 The Respondents acknowledge the requirement in the *Howey* case that an investment contract
14 is an investment of money in a common enterprise with profits to come solely from the efforts of
15 others, but attempt to distinguish the *Howey* case by arguing that the Participants did not invest in
16 Radical Bunny.⁹⁷² The Respondents also argue that the fractionalized interests in the Radical Bunny-
17 Mortgages Limited notes do not change the commercial nature of the notes.

18 Analysis and Conclusion

19 The RB-ML Loan Program was different from the earlier HP and RB LLC Programs.
20 Participants were no longer “members” of Radical Bunny and they started receiving IRS form 1099-
21 INTs.⁹⁷³ The nature of their secured interest also changed as they no longer received deeds of trust,
22 and their “participations” were in unrestricted loans from Radical Bunny to Mortgages Limited as
23 opposed to specific loans Mortgages Limited made to real estate developers/commercial builders.

24 The first prong of the *Howey* test is whether there is an investment of money or other
25 consideration. Although the Respondents argue that Participants did not invest in Radical Bunny,⁹⁷⁴

26 ⁹⁷⁰ Division Post-Hearing Memorandum at 44 (emphasis original).

27 ⁹⁷¹ Division’s Reply to Respondents’ Post-Hearing Memorandum at 4 (emphasis original).

28 ⁹⁷² Respondents’ Post-Hearing Memorandum at 16.

⁹⁷³ Verified Answer ¶36; Tr. at 762.

⁹⁷⁴ Tr. at 1903, 1671-72; Respondents’ Post-Hearing Memorandum at 5.

1 the evidence clearly shows that Participants did in fact invest in that entity. The Respondents' own
 2 testimony was that Participants wrote checks or wired money to Radical Bunny;⁹⁷⁵ the Respondents
 3 endorsed and cashed those checks/wires and deposited the funds into the Radical Bunny bank
 4 account;⁹⁷⁶ Respondents used the pooled funds to write checks to Mortgages Limited;⁹⁷⁷ Respondents
 5 received interest checks from Mortgages Limited and deposited the funds into the Radical Bunny
 6 bank account;⁹⁷⁸ Respondents then wrote, signed, and issued checks to Participants with the funds
 7 coming from the Radical Bunny bank account.⁹⁷⁹

8 Radical Bunny's business records referred to Participants as "investors" and their funds as
 9 "investments."⁹⁸⁰

10 Public documents, including the UCC Financing Statements filed with Maricopa County
 11 Recorder's Office and the Arizona Secretary of State which were signed by Mr. Hirsch as manager
 12 on behalf of Radical Bunny, described Radical Bunny (not individual Participants) as the legal entity
 13 that invested in Mortgages Limited.⁹⁸¹

14 In response to requests from Mortgages Limited's auditors, Mr. Hirsch on behalf of Radical
 15 Bunny agreed in writing that the promissory notes from Mortgages Limited were payable to Radical
 16 Bunny.⁹⁸² Mr. Hirsch, under penalty of perjury in Radical Bunny's bankruptcy, caused Schedule B to
 17 be filed with the court, which consists of a list of Radical Bunny's personal property including

18
 19 ⁹⁷⁵ Exhibit S-14; See also checks written by Participants to Radical Bunny, i.e. Exhibit S-12(e) October 5, 2005 checks to Radical Bunny from Participants.

20 ⁹⁷⁶ Tr. at 987, 1001.

21 ⁹⁷⁷ Exhibit S-38(f); Tr. at 1001, 1025, 1022, 1299; Exhibit S-14.

22 ⁹⁷⁸ Tr. at 986-87, 1026.

23 ⁹⁷⁹ Tr. at 994, 1540; See, i.e. Exhibit S-12(g) October 31, 2005 check from Radical Bunny to a Participant; Exhibit S-12(k) November 6, 2006 check from Radical Bunny to a Participant; Exhibit S-12(l) November 17, 2006 check from Radical Bunny to a Participant; Exhibit S-12(m) March 30, 2007 check from Radical Bunny to a Participant; Exhibit S-12(n) June 21, 2007 check from Radical Bunny to a Participant; Exhibit S-13(f) January 27, 2006 check from Radical Bunny to a Participant; Exhibit S-13(g) January 16, 2007 check from Radical Bunny to a Participant; and Exhibit S-13(h) January 2, 2008 check from Radical Bunny to a Participant.

24 ⁹⁸⁰ Exhibit S-52 "Investor Record;" Exhibit S-15(b) and Exhibit S-16(c) "Investment Portfolio;" Exhibit S-12(i) December 1, 2005 letter to Participants from Mr. Hirsch on behalf of Radical Bunny referred to "Investors" and "investments;" Exhibit S-12(t) June 17, 2008 letter from Radical Bunny to a Participant "Rest assured that the Managers of Radical Bunny, LLC's only focus is to protect your investment;" Exhibit S-12(u) "Radical Bunny, LLC will host a special meeting for all member investors" and "To the Investors at Radical Bunny, LLC, MEETING CANCELLED;" Exhibit S-15(a) "Accredited Investor" certification form; Exhibit S-23(a) November 26, 2006 Orange Tree meeting announcement "Radical Bunny, LLC Annual Investor Seminar," "Our Investment Philosophy," "Status Reports of Current Investments;" and Exhibit S-23(b) "Semi-Annual Investor Meeting."

27 ⁹⁸¹ Exhibit S-31.

28 ⁹⁸² Exhibit S-32(a); Exhibit S-32(b).

1 “secured notes payable by Mortgages Ltd.”⁹⁸³ Radical Bunny also listed its Participants as its
 2 “Creditors Holding Unsecured Nonpriority Claims” in the amount of \$201,058,264.32 in Schedule F
 3 filed on November 10, 2008, in its own bankruptcy case.⁹⁸⁴ Mr. Hirsch, as manager for Radical
 4 Bunny, L.L.C., filed a proof of claim in Mortgages Limited’s bankruptcy on July 17, 2008, listing
 5 Radical Bunny, LLC as a secured creditor in the amount of \$196,617,758.05.⁹⁸⁵ The proof of claim
 6 filed with the bankruptcy court included copies of the promissory notes issued by Mortgages Limited
 7 as “Maker” and Radical Bunny as “Holder” that show Mortgages Limited was borrowing funds from,
 8 and was obligated to repay, Radical Bunny, LLC, not Radical Bunny’s Participants.⁹⁸⁶ The proof of
 9 claim was filed under penalty of fine up to \$500,000 or imprisonment for up to 5 years, or both, for
 10 presenting a fraudulent claim pursuant to 18 U.S.C. §§ 152 and 3571. Also, Radical Bunny issued
 11 IRS form 1099-INTs to Participants at the end of each tax year.⁹⁸⁷

12 Respondents submitted no credible evidence to support their argument that Participants did
 13 not invest in Radical Bunny and that Radical Bunny was just a “servicer” or “agent.” Although the
 14 “Direction to Purchase” documents used by Radical Bunny contain the language “instructs and
 15 authorizes the member manager, as the purchaser’s agent, to transact the purchase of the following
 16 loan,”⁹⁸⁸ they were not provided to Participants until “after the fact” - Radical Bunny did not send the
 17 “Direction to Purchase” to Participants to sign until after Participants’ checks had been cashed,
 18 deposited in Radical Bunny’s bank account, Radical Bunny had written its check to Mortgages
 19 Limited, and Mortgages Limited had provided the promissory note to Radical Bunny.⁹⁸⁹ The
 20 “Direction to Purchase” was actually the only document evidencing a Participant’s investment in
 21 Radical Bunny, and both Radical Bunny and Participants treated them as such.

22 Accordingly, based upon the evidence, we find that Participants invested their money in
 23 Radical Bunny, and that the first prong of the *Howey* test has been met.

24
 25 ⁹⁸³ Exhibit S-48; Exhibit S-49.

26 ⁹⁸⁴ Exhibit S-35.

27 ⁹⁸⁵ Exhibit S-37(a); Tr. at 1835.

28 ⁹⁸⁶ Exhibit S-37(a); Exhibits S-38(a)–(f) Promissory Notes and check from Radical Bunny to Mortgages Limited; Tr. at 1020-1024. Some promissory notes were signed by Mr. Hirsch and others were signed by Mr. Walder.

⁹⁸⁷ Verified Answer ¶36; Tr. at 762.

⁹⁸⁸ See, i.e. Exhibit S-12(j); Exhibit S-13(g); Exhibit S-13(h).

⁹⁸⁹ Exhibit S-14; Tr. at 1002, 1889; Respondents’ Post-Hearing Memorandum at 8-9.

1 Regarding the second prong of the *Howey* test, (“common enterprise”), the Respondents do
 2 not deny that they pooled the Participants’ monies in order to fund loans to Mortgages Limited.⁹⁹⁰
 3 The Disclosure Statement Regarding Amended Plan of Reorganization Dated March 9, 2010, that
 4 was filed in Radical Bunny’s bankruptcy proceeding and agreed to by the Radical Bunny managers,
 5 described Radical Bunny as “an Arizona limited liability company created to pool investments from
 6 individuals and personal trusts, combine those investments, and make loans to Mortgages Ltd....”⁹⁹¹

7 The evidence is also clear that the Horizon Partners and Radical Bunny managers “managed”
 8 the pooled funds. In a December 1, 2005, letter written by Mr. Hirsch on behalf of Radical Bunny, he
 9 told a Participant that “[t]he exponential growth in the number of members and the size of our
 10 portfolio has made it necessary to adopt certain changes in the way we manage and operate the
 11 fund.”⁹⁹² The recording of Mrs. Walder’s description of Horizon Partners and Radical Bunny
 12 confirms testimony by investors and others about Horizon Partners’ and Radical Bunny’s
 13 management of the pooled funds.⁹⁹³

14 Radical Bunny sent out “welcoming letters” to new Participants discussing “investments,” the
 15 “management fee,” and the “exciting world of the Radical Bunny family.” In a May 24, 2007 letter,
 16 Mrs. Walder wrote to a new Participant: “I am certain that you will find the experience to be very
 17 inspirational and financially rewarding,” “A management fee of 2% per annum will be paid to the
 18 member managers,” “Partial or complete redemption of your investment must be in writing.”⁹⁹⁴

19 We find that commonality under the second prong of the *Howey* test has been established by
 20 the evidence. Respondents cashed Participants’ checks and deposited them in the Radical Bunny
 21 bank account, thereby pooling investor funds and those pooled funds were managed by Respondents,
 22 who also collected a management fee.

23
 24
 25
 26 ⁹⁹⁰ Respondents’ Post-Hearing Memorandum at 5.

27 ⁹⁹¹ Exhibit S-40.

28 ⁹⁹² Exhibit S-12(i).

⁹⁹³ Exhibit S-14; See also, Tr. at 403-406, 795-796, 1109-1110, 1117, 1378, 1512, 1519, 1640-1641, 1712, 1817-1818, 1900-01.

⁹⁹⁴ Exhibit S-52.

1 As discussed above, the third prong of the *Howey* test is satisfied if ‘the efforts made by those
2 other than the investor are the undeniably significant ones, those essential managerial efforts which
3 affect the failure or success of the enterprise.’”⁹⁹⁵

4 The evidence is undisputed that the Respondents, as member-managers of Radical Bunny,
5 made all decisions and conducted all of its operations. The Operating Agreement’s section
6 “Delegation of Management Powers” states that the “business and affairs of the Company shall be
7 managed exclusively by its designated Manager(s). The Manager(s), pursuant to their delegated
8 powers, shall direct, manage and control the business of the Company to the best of their/its ability
9 and shall have full and complete authority, power and discretion to make any and all decisions and to
10 do any and all things which the Manager shall deem to be reasonable [sic] required to accomplish the
11 business and objectives of the Company pursuant to its/their delegated powers. No Member other
12 than a Manager shall have the authority to act for or bind the Company.”⁹⁹⁶

13 Radical Bunny’s Articles of Organization state that “management of the Company is vested in
14 a Manager or Managers of the Company,”⁹⁹⁷ and on July 15, 2008, Mr. Hirsch filed Articles of
15 Amendment on behalf of Radical Bunny that amended the Articles of Organization to reflect Howard
16 and Berta Walder and Harish Shah as members of the limited liability company owning a 20 percent
17 or greater interest.⁹⁹⁸

18 The evidence is clear that Participants, as investors, did nothing but give Respondents their
19 money.⁹⁹⁹ While there was testimony that on one occasion, a few Radical Bunny Participants met as
20 a group with representatives from Mortgages Limited, there is no evidence that their efforts affected
21 Respondents’ efforts, activities or decisions, as managers.

22 The Respondents were responsible for all decisions about what to do with the pooled funds
23 from Participants. The Radical Bunny managers conducted the day-to-day activities of Radical
24 Bunny. Their activities included meeting and corresponding with Participants, record

25 ⁹⁹⁵ *Nutek*, 194 Ariz. at 108.

26 ⁹⁹⁶ Exhibit S-9(a).

27 ⁹⁹⁷ Exhibit S-3(a).

28 ⁹⁹⁸ Attached to the filing as Exhibit A is a document dated February 18, 2006, Amendment to the Articles of Organization, that included the new members (“Intended Amendment”). According to the July 15, 2008 filing, the Intended Amendment was rejected due to Radical Bunny’s failure to publish the initial Articles of Organization in 1999.

⁹⁹⁹ See discussion above.

1 keeping/documentation, handling payments, and conducting due diligence with Mortgages Limited
2 loans. They organized and invited Participants and their guests to semi-annual meetings at a resort to
3 hear news and answer questions about the RB-ML Loan Program. It was their efforts to negotiate
4 with Mortgages Limited that determined the interest rate that Radical Bunny would earn and the
5 payments that Participants would receive, and the “spread” or management fee that Respondents
6 would collect.

7 Respondents’ communications with Participants included statements that Radical Bunny
8 benefitted from and relied on the efforts of Mortgages Limited to review applications, visit the site,
9 and use the services of an appraiser and title researcher to make sure that they “take the cream of the
10 cream.”⁹⁹⁹ Respondents told Participants that “we’re always in first position” and that there are “four
11 non-negotiables” and that using those criteria would make the investment “pretty safe.”¹⁰⁰⁰ The
12 Respondents also informed prospective Participants that because Radical Bunny pooled funds and
13 was Mortgages Limited’s largest investor, Radical Bunny was able to negotiate a better rate than the
14 “average person,” so that Radical Bunny Participants were able to obtain better returns with Radical
15 Bunny than if they went to Mortgages Limited as individuals. Participants were also told that the two
16 Respondents who were CPAs were monitoring Mortgages Limited’s financial condition by being
17 actively involved in the taxes and reviewing the Mortgages Limited pools.¹⁰⁰¹

18 These significant efforts of Radical Bunny’s managers and Radical Bunny’s close association
19 with Mortgages Limited, together with the efforts of Mortgages Limited and its borrowers,
20 determined the success of Radical Bunny and the Participants’ profits. Accordingly, we find that the
21 third prong of the *Howey* test has been met.

22 To the extent that the Respondents argue that *AMFAC*, which found a commercial note not to
23 be a security, requires a finding that the membership interests in Horizon Partners and Radical Bunny
24 are not investment contracts, we disagree. The facts in *AMFAC* are different from the facts involved
25 here in several ways: *AMFAC* involved transactions undertaken to finance the construction of a
26 shopping center where *AMFAC* (the lender) sued Arizona Mall (the borrower), the construction

27 ⁹⁹⁹ Exhibit S-14.

28 ¹⁰⁰⁰ *Id.*

¹⁰⁰¹ *Id.*

1 contractor, and the insurance company who was the surety on the construction bond which protected
2 both the lender and borrower against the contractor's default. The Ninth Circuit determined that the
3 note was not a security, using the "risk capital" analysis. However, the court found that the facts
4 surrounding separate transactions (involving the sale of interests in the note) were not before it, but
5 recognized that "while the underlying note may not be a security, the participation interest may fall
6 within the definition of security" quoting *United California Bank v. THC Financial Corp.*, 557 F2d
7 1351, 1357, fn. 8 (9th Cir. 1977). Because the facts here more closely resemble the facts that the
8 *AMFAC* court said were not before it, we do not find the *AMFAC* decision to be controlling or
9 persuasive in our evaluation of investment contracts as securities.

10 In the *Marine Bank* case cited by Respondents, the Supreme Court said that "the coverage of
11 the anti-fraud provisions of the securities laws is not limited to instruments traded at securities
12 exchanges and over-the-counter markets, but extends to uncommon and irregular instruments" and
13 found that neither the certificate of deposit ("CD") nor the agreement between the two parties was a
14 security.¹⁰⁰² The Supreme Court found "important differences between a certificate of deposit
15 purchased from a federally regulated bank and other long-term debt obligations."¹⁰⁰³ Those
16 important differences included the fact that the CD was issued by a federally regulated bank which is
17 subject to a comprehensive set of regulations governing the banking industry and the fact that the
18 deposits are insured by the Federal Deposit Insurance Corporation ("FDIC"). The Supreme Court
19 also held that "the unique agreement, negotiated one-on-one by the parties" was not an investment
20 contract within the meaning of the *Howey* test, because the "unusual instruments found to be
21 securities in prior cases involved offers to a number of potential investors, not a private transaction
22 as in this case."¹⁰⁰⁴

23 We disagree with Respondents that *Marine Bank* supports a finding that no security was
24 involved here. Radical Bunny was not licensed as a federally regulated bank and its participations
25 were not insured by the FDIC. Also, this was not a "private transaction" between two parties – there
26 were at least 900 separate transactions between Radical Bunny and different Participants and at the

27 ¹⁰⁰² *Marine Bank*, 455 U.S. 551, 556.

28 ¹⁰⁰³ *Marine Bank*, 455 U.S. 551, 558.

¹⁰⁰⁴ *Marine Bank*, 455 U.S. 551, 559.

1 time of Mortgages Limited's bankruptcy, there were at least 98 separate promissory notes
2 outstanding between Mortgages Limited as maker and Radical Bunny as holder.

3 Another case cited by the Respondents, *Dubach v. Weitzel*, 135 F.3d 590 (8th Cir. 1998) also
4 concerned the issue of whether a CD was a security. The court found the Supreme Court's decision
5 in *Marine Bank* to be instructive, and held that both the CD and the pledge of the CD were not
6 securities. The court placed great weight on the private nature of the transaction and noted that the
7 Credit Union that issued the CD was regulated by law and to apply the securities laws would "double
8 coat" the transaction.

9 The cases relied upon by Respondents to support their position that these were "ordinary
10 commercial loan transactions" and exempt from Securities laws are informative of how the law has
11 developed, but are distinguishable from the matter before us. In *United American Bank v. Gunter*,
12 620 F.2d 1008, 1118 (5th Cir. 1981), the court found that a bank's participation in another bank's
13 fully collateralized loan to a wealthy couple was not a security, but a "routine commercial loan
14 transaction" between two banks. In *The Kansas State Bank in Holton v. The Citizens Bank of*
15 *Windsor*, 737 F.2d 1490, 1495 (8th Cir. 1984), the court used the *Howey* test and found that a bank's
16 purchase of a loan participation certificate from another bank was not a security, noting that "the
17 circumstances of the transaction indicate nothing more than a bank loan turned sour." And in
18 *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2nd Cir. 1984), the court found that the
19 notes evidencing loans made by commercial banks for current operations were not securities, but that
20 the pledge of stock as security for loans was a sale of security within the meaning of the antifraud
21 provisions. We note that these cases primarily involve transactions between two commercial banks -
22 not the case here.

23 Although the Respondents quote *Landreth Timber Co. v Landreth*, 471 U.S. 681 (1985), to
24 say the "characteristics usually associated with *securities* are the right to receive dividends contingent
25 upon a portion of the profits, negotiability, the ability to be pledged or hypothecated, the conferring
26 of voting rights in proportion to the number of shares owned and finally the capacity to depreciate in
27 value," the Court in *Landreth* actually listed these characteristics as being associated with *common*
28 *stock* and held that "[w]hen an instrument is labeled 'stock' and possesses all of the traditional

1 characteristics of stock, a court is not required to look to the economic substance of the transaction to
 2 determine whether the stock is a 'security' within the meaning of the Acts."¹⁰⁰⁵ The Supreme Court
 3 said that it was "important to understand the contexts within which these cases were decided" in
 4 order to understand why securities laws applied to a particular instrument. When "unusual
 5 instruments not easily characterized as 'securities'" were involved, application of securities laws
 6 would have been because "the economic reality underlying the transactions indicated that the
 7 instruments were actually of a type that falls within the usual concept of a security."¹⁰⁰⁶ The
 8 Supreme Court also noted that the "*Howey* economic test was designed to determine whether a
 9 particular instrument is an 'investment contract,' not whether it fits within any of the examples listed
 10 in the statutory definition of 'security.'"¹⁰⁰⁷ Arizona courts have not always followed federal case
 11 law when determining whether an investment contract exists. In *Siporin*, the Arizona Court of
 12 Appeals declined to follow a federal decision that found viatical settlements are not investment
 13 contracts and instead used the *Howey* test to conclude that viatical settlements are investment
 14 contracts in Arizona.¹⁰⁰⁸ The Commission's decision finding that membership interests in LLCs that
 15 were organized to construct and operate a dispatch radio communications network were investment
 16 contracts and therefore securities, was upheld by the Arizona Court of Appeals in *Nutek*. The *Nutek*
 17 decision did not hold that all membership interests were securities, but said that "that question must
 18 be answered on a case-by-case basis."¹⁰⁰⁹

19 Based upon the testimony and evidence, we find that Participants did receive a "package" - an
 20 investment contract, when Radical Bunny took their purchase money, pooled it, invested it, and
 21 agreed to perform a number of services for them. Participants did nothing in order to receive a profit,
 22 other than to provide their investment funds to Radical Bunny. We agree that the entire package, all
 23 of the components of the agreements with Radical Bunny and Participants constituting the RB-ML
 24 Loan Program, constitutes an investment contract and therefore a security under the Securities Act.
 25

26 ¹⁰⁰⁵ *Landreth Timber Co. v Landreth*, 471 U.S. at 682 (1985).

27 ¹⁰⁰⁶ *Landreth Timber Co. v Landreth*, 471 U.S. at 690.

¹⁰⁰⁷ *Landreth Timber Co. v Landreth*, 471 U.S. at 690 (emphasis original).

¹⁰⁰⁸ *Siporin v. Carrington*, 200 Ariz. 97, 101, 23 P.3d 92, 96 (Ct. App. 2001).

28 ¹⁰⁰⁹ *Nutek*, 194 Ariz. at 114.

1 **b) Notes**

2 **i) Are the Mortgages Limited secured notes¹⁰¹⁰ and the RB-ML Notes¹⁰¹¹**
 3 **securities for purposes of the registration provisions of the Arizona**
 4 **Securities Act?**

5
 6 There are several kinds of notes involved in the Horizon Partners/Radical Bunny/Mortgages
 7 Limited transactions. As background to understanding the notes involved, a distinction must be made
 8 based upon the timeframe involved. (Pre-September 2005 and post-September 2005). Between 1998
 9 and 2005, developers and others borrowed funds from Mortgages Limited for real estate/construction
 10 projects. Those loans were subject to sale by Mortgages Limited Securities, a Mortgages Limited
 11 affiliate that was a registered broker/dealer. Mortgages Limited Securities relied on exceptions with
 12 regard to the registration provisions for those sales. Horizon Partners and Radical Bunny participated
 13 in this "Pass-Through Participation Program" and its investors got endorsements to the notes as well
 14 as an assignment of the collateral interest in the deeds of trust.

15 Beginning in September 2005, Radical Bunny instituted a new program where Radical Bunny
 16 would advance funds to Mortgages Limited who would use the proceeds, in part, to fund Mortgages
 17 Limited loans to the Mortgages Limited borrowers. In order to raise the funds to advance to
 18 Mortgages Limited, Radical Bunny sold "participations" or fractional interests in the RB-ML Loans
 19 to investors (Participants) (RB-ML Loan Program)

20 Both types of programs involved "participations" in notes; in the early program, Horizon
 21 Partners and Radical Bunny received participations in notes issued by developers/builders to
 22 Mortgages Limited for specific properties/projects¹⁰¹² and in the later program, Radical Bunny
 23 Participants received participations in notes issued by Mortgages Limited to Radical Bunny for
 24 unspecified purposes.

25
 26 ¹⁰¹⁰ The notes issued by Mortgages Limited in its Pass-Through Participation Program where Participants received an
 assigned interest in the promissory note and a corresponding assignment of beneficial interest in the real estate collateral
 (i.e., first lien position deed of trust that is recorded).

27 ¹⁰¹¹ Promissory notes issued to Radical Bunny by Mortgages Limited collateralized by a personal guarantee of Scott Coles
 and a secured interest in all assets of Mortgages Limited.

28 ¹⁰¹² Or by Mortgages Limited to obtain funds for construction projects. Respondents' Post-Hearing Memorandum at 2.

1 Respondents

2 The Respondents argue that “the notes” are not subject to the registration provisions of the
3 Arizona Securities Act because they constitute “commercial notes” or “commercial paper.” They
4 believe that the Commission’s regulation of “participations in commercial notes” would ignore what
5 they call “well settled principals of State and Federal Securities Law.”¹⁰¹³ According to Respondents,
6 “all the money raised was for construction, not financing for a business...[t]he notes were
7 commercial notes for a short-term, fixed percentage amount, were guaranteed and not premised on
8 someone else’s profit [and] the participations did not result from an organized marketing or
9 solicitation program.”¹⁰¹⁴ The Respondents believe the legal issue to be decided is whether “such
10 fractionalized commercial notes are securities.”¹⁰¹⁵

11 Division

12 According to the Division, the Respondents’ argument that, as a matter of law, because the
13 proceeds from the notes were used in part by Mortgages Limited to finance construction, the notes
14 are not securities, fails to recognize Arizona law and relies solely on federal decisions.

15 In its Reply to Respondents’ Post-Hearing Memorandum, the Division argues that Arizona
16 Courts have developed two approaches to determining whether a note is a security and the
17 appropriate analysis to use depends upon whether the note is analyzed for purposes of the registration
18 or the antifraud provisions of the Arizona Securities Act. For registration purposes, the Arizona
19 Supreme Court in *State v. Tober*, 173 Ariz. 211, 841 P.2d 206 (1992) held that all notes are securities
20 that must be registered unless an exemption applies.

21 According to the Division, *Tober* applies to all cases – administrative, civil, and criminal,
22 involving *registration violations* of the Arizona Securities Act and therefore, the Mortgages Limited
23

24 _____
25 ¹⁰¹³ The Respondents’ position on the issuance of notes is not precise, and their arguments contain contradictory
26 statements. (i.e. compare “As shown by the accompanying materials, Defendants [Respondents] did issue the notes in
27 question.” Respondents’ Post-Hearing Memorandum at 2, with “The participations were in commercial notes issued by
28 Mortgages Ltd., not Radical Bunny,” Respondents’ Post-Hearing Memorandum at 4, and “What Radical Bunny conveyed
was participations in notes not issued by Radical Bunny” (emphasis original) Respondents’ Post-Hearing Memorandum at
15).

¹⁰¹⁴ Respondents’ Post-Hearing Memorandum at 2.

¹⁰¹⁵ *Id.*

1 Loan secured notes and the Radical Bunny-Mortgages Limited notes *are securities for purposes of*
2 *the registration provisions.*

3 In response to the Respondents' position that the notes are not subject to the registration
4 provisions because they constitute "commercial notes" or "commercial paper," the Division argues
5 that the Respondents did not meet their burden of establishing that the notes qualified for an
6 exemption under the Arizona Securities Act. The Division states that federal law, specifically
7 Section 18(b)(4)(C) of the Securities Act of 1933, preempts state securities registration provisions
8 with respect to certain securities, including any note that "arises out of a current transaction or the
9 proceeds of which have been or are to be used for current transactions, and which has a maturity at
10 the time of issuance of not exceeding *nine months*, exclusive of days of grace, or any renewal thereof
11 the maturity of which is likewise limited."¹⁰¹⁶ The Division noted that Arizona law is consistent with
12 this federal preemption and cited A.R.S. §44-1843(A)(8), which exempts securities, dealers, and
13 salesmen from the registration requirements found in A.R.S. §§ 44-1841 and 44-1842 when the
14 securities are:

15
16 Commercial paper that arises out of a current transaction or the proceeds of which
17 have been or are to be used for current transactions, that evidences an obligation to
18 pay cash within *nine months* of the date of issuance or sale, exclusive of grace, or any
19 renewal of such paper that is likewise limited, or any guarantee of such paper or of any
20 such renewal. (emphasis added)

21 The Division believes that this exemption does not apply because the facts are undisputed that
22 the RB-ML Notes had maturity dates in excess of nine months, and although the Mortgages Limited
23 Loan secured notes had maturity dates ranging between 6 and 18 months, the Respondents failed to
24 present any evidence that any of their fractionalized participation interests were in secured notes with
25 a maturity date of less than nine months.

26
27
28 ¹⁰¹⁶ Division Reply to Respondents' Post-Hearing Memorandum at 8, citing 15 U.S.C. §77r(b)(4)(C); §77c(a)(3)
(emphasis added).

Further, the Division noted that the Respondents failed to provide evidence as to which, if any, of the Horizon Partners or Radical Bunny participants were “highly sophisticated” investors under the “commercial paper” test as defined by the Supreme Court.¹⁰¹⁷

Analysis and Conclusion

In Arizona, the analysis of whether a note is a security depends upon whether the purpose is to determine whether there is a violation of the registration provisions, or of the antifraud provisions of the Arizona Securities Act. With registration violations, the Arizona Supreme Court in *State v. Tober*, 173 Ariz. 211, 841 P.2d 206 (1992) held that all notes are securities that must be registered unless an exemption applies.

The court said:

In our view, *neither* the ‘risk capital’ test of *Amfac*, the ‘family test of *Reves v. Ernst & Young*, *** nor any variant applies to charges under A.R.S. § 44-1841 and § 44-1842. These two sections are part of a comprehensive statutory scheme that defines the universe of securities, exempt securities, and exempt transactions. The statutory scheme leaves no room for judicial gloss, and thus there is no uncertainty in its application. *State v. Tober*, 173 Ariz. 211, 212-213, 841 P.2d 206, 207-208 (1992).

Therefore, for registration purposes, the notes are securities that must be registered unless they fit an exemption. The burden of proving the existence of an exemption is upon the party raising the defense.¹⁰¹⁸ Respondents did not cite to any statutory authority for an exemption from the registration provisions of the Arizona Securities Act, but argued that “commercial paper” was exempt.¹⁰¹⁹ Although A.R.S. §44-1843(A)(8) exempts securities, dealers, and salesmen from the registration requirements found in A.R.S. §§ 44-1841 and 44-1842 when the securities are “commercial paper” meeting specific requirements, the Respondents failed to provide any evidence that any of the notes met the statutory exemption’s requirement that the notes be short-term notes

¹⁰¹⁷ *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990); *S.E.C. v Wallenbrock*, 313 F3d 532 (9th Cir. 2002).

¹⁰¹⁸ *Bauman*, 125 Ariz. 404, 610 P.2d 38 (1980); A.R.S. §44-2033.

¹⁰¹⁹ If Respondents were to argue that the notes were exempt securities pursuant to A.R.S. §44-1843(A)(8), they would be agreeing that the notes are securities, and we note that the definition of securities for antifraud purposes does not contain the statutory exemptions. See A.R.S. § 44-1991.

1 with an obligation to pay cash within nine months of issuance. Nor did the Respondents provide
 2 evidence that the notes met the U.S. Supreme Court's definition of commercial paper, including
 3 which, if any, of the Participants were "highly sophisticated investors."¹⁰²⁰ Accordingly, we find that
 4 the notes are securities for purposes of the registration provisions, and are not qualified for an
 5 exemption under the Arizona Securities Act.

6 **2. "Securities" as defined for purposes of the antifraud provisions of the Arizona**
 7 **Securities Act**

8 The Division is not alleging that Radical Bunny and the Radical Bunny Managers violated the
 9 antifraud provisions of the Arizona Securities Act prior to beginning the RB-ML Loan Program in
 10 2005, but is alleging that the RB-ML Loan Program (investment contract) and the RB-ML Notes are
 11 securities for purposes of the antifraud provisions.

12 **a) Investment Contract**

13 As discussed herein, the RB-ML Loan Program is an investment contract, and therefore a
 14 security for purposes of A.R.S. §§44-1841 and 1842. Neither the Division nor the Respondents have
 15 argued that there is a different or additional test for whether an investment contract is considered a
 16 security for purposes of the antifraud provisions. Given the analysis we have undertaken for
 17 determining that an investment contract exists, and considering that the purpose of the Arizona
 18 Securities Act is broad public protection,¹⁰²¹ we find that the RB-ML Loan Program is an investment
 19 contract that is a security for purposes of both the registration and antifraud provisions.¹⁰²² We
 20 believe our conclusion is consistent with state and federal securities case law and with the purpose of
 21 the Arizona Securities Act.

22
 23
 24
 25 ¹⁰²⁰ *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990); *S.E.C. v. Wallenbrock and Assoc.*, 313
 26 F.3d 532 (9th Cir. 2002) ("commercial paper" defined as "short-term, high quality instruments issued to fund current
 operations and sold only to highly sophisticated investors").

27 ¹⁰²¹ *See, State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980) and *Eastern Vanguard Forex Ltd. v. Arizona Corp.*
Comm'n, 206 Ariz. 399, 411-412, 79 P.3d 86, 98-99 (Ct. App. 2003).

28 ¹⁰²² We recognize that in *Reves*, the Supreme Court held that application of the *Howey* test to notes is not appropriate, but
 the investment contract in our analysis here is not RB-ML notes, but the RB-ML Loan Program.

1 **b) Notes**

2 **Respondents**

3 The Respondents agree that the State and Federal Securities Statutes define a security to
4 include “any...note” but believe that is only the start of the inquiry. The Respondents cite *United*
5 *American Bank v. Gunter*, 620 F.2d 1008 (5th Cir. 1981), *Dubach v. Weitzel*, 135 F.3d 590 (8th Cir.
6 1998) and *LaBrun v. Kuswa*, 24 F.Supp. 2d 641 (E.D. La. 1998) to support their position that these
7 were “ordinary commercial loan transactions” and exempt from Securities laws. They also cite to
8 several court decisions to support their position that “notes may not be notes for securities purposes,”
9 including *The Kansas State Bank in Holton, v. The Citizens Bank of Windsor*, 737 F.2d 1490 (8th Cir.
10 1984) and *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2nd Cir. 1984).

11 However, the Respondents rely primarily upon *AMFAC Mortgage Corporation V. Arizona*
12 *Mall of Tempe, Inc.*, 583 F.2d 426 (9th Cir. 1978), to support their claim that “under either test for
13 regulation or civil fraud provisions, commercial paper and commercial notes are exempt.”¹⁰²³

14 The Respondents argue that:

15
16 It does not matter which ‘test’ is applied, commercial paper is a long existing, time
17 honored inception (*sic*) to both State and Federal Securities laws. *AMFAC* did not just
18 apply the Federal law test much discussed. It reviewed the Arizona securities laws
19 and found that the Arizona Statutes did not apply to fractionated commercial notes.
20 Nothing has overruled that decision and the Commission has taken no action up to
21 now to regulate the historical trade in commercial paper, its discounting, its
22 fractionalization, or the retention of a portion of the interest paid by parties in the
23 sometimes lengthy stream of ownership. It is unfortunate that participants may have
24 sustained losses (the final results in the Bankruptcies are not in) but the Commission is
25 not authorized to address every financial loss or venture into the vast field of
26 commercial paper.¹⁰²⁴

27 The Respondents argue that under the decision in *AMFAC*, “when the notes left Mortgages
28 Ltd. they were not securities. Nothing happened after that – no marketing, no management of

¹⁰²³ Respondents’ Post-Hearing Memorandum at 19.

¹⁰²⁴ *Id.*

1 Mortgages Ltd. by Defendants, no change from an interest only instrument – to change the status of
 2 these notes from commercial notes. Just dividing them up does not make each fractional interest a
 3 security beyond all questions of fact.”¹⁰²⁵ According to the Respondents, in *AMFAC*, the Ninth
 4 Circuit said that six factors must be “considered to determine whether an obligation is a security: (1)
 5 time; (2) collateralization; (3) form of the obligation; (4) circumstances of issuance; (5) relationship
 6 between the amount borrowed and the size of the borrower’s business; and (6) the contemplated use
 7 of the funds.”¹⁰²⁶

8 The Respondents contend that the “test is whether the participants ‘contributed risk capital’
 9 subject to the ‘entrepreneurial or managerial efforts’ of others,” citing to *AMFAC*, *United California*
 10 *Bank v. THC Financial Corp.*, 557 F.2d 1351, 1358 (9th Cir. 1977), and *Great Western Bank & Trust*
 11 *v. Kotz*, 532 F.2d 1252 (9th Cir. 1976). They argue that because the notes issued by Mortgages
 12 Limited were for a fixed percentage interest rate, and the “holder of a fractional interest in these notes
 13 is entitled to payment regardless of the success of the venture and is not entitled to share in the
 14 profits,” they were “not premised on profit” and therefore, there is no “risk capital” involved.¹⁰²⁷

15 The Respondents also argue that there was no solicitation, and that “[t]here is no government
 16 interest in regulating non-marketed fractional commercial notes....”¹⁰²⁸ Respondents cite two
 17 decisions in support of their argument about marketing. In *International Brotherhood of Teamsters*
 18 *v. Daniel*, 439 U.S. 551, 99 S. Ct. 790 (1979), the Supreme Court held that the federal Securities Acts
 19 do not apply to a noncontributory, compulsory pension plan. The Respondents compare the
 20 employees in that case who accepted employment which required participation in the pension fund
 21 with the participants in Radical Bunny. In *Marine Bank v. Weaver*, 455 U.S. 551 (1982), the
 22 Supreme Court found that a certificate of deposit was not a security, nor was the private agreement an
 23 investment contract. The Respondents claim that these cases show that courts find no security
 24 existed when there was no marketing of the investment.¹⁰²⁹ The Respondents also cite to *De Luz*
 25 *Ranchos Investment, Ltd. v. Coldwell Banker & Company*, 608 F.2d 1297 (9th Cir. 1979), as support

26 ¹⁰²⁵ Respondents’ Post-Hearing Memorandum at 20; See also discussion at 3-4.

27 ¹⁰²⁶ Respondents’ Post-Hearing Memorandum at 18, citing *AMFAC* at 431.

28 ¹⁰²⁷ Respondents’ Post-Hearing Memorandum at 16.

¹⁰²⁸ Respondents’ Post Hearing Memorandum at 20.

¹⁰²⁹ Respondents’ Post-Hearing Memorandum at 19-20.

1 for their argument that interests in notes “can be divided and distributed without solicitation” without
2 creating a security.¹⁰³⁰

3 Although the Respondents mention the *Reves* case, their legal argument appears to rely on the
4 earlier *AMFAC* decision and implies that no test applies to commercial paper and commercial notes
5 because they believe they are “exempt” from both Arizona and Federal securities laws.¹⁰³¹

6 Division

7 As far as the law concerning when notes are securities for purposes of the antifraud provisions
8 of the Arizona Securities Act, the Division cites the Arizona appellate court decision in *MacCollum v.*
9 *Perkinson*, 185 Ariz. 179, 913 P.2d 1097. There the court found that the *Reves* test should be used to
10 analyze whether a note is a security for antifraud purposes.

11 The *Reves* case involved an agricultural cooperative that raised money to support its general
12 business operations by issuing promissory notes that were uninsured and uncollateralized. Upon the
13 cooperative’s bankruptcy, the note holders sued the cooperative’s auditors for federal antifraud and
14 Arkansas state securities law violations. The United State Supreme Court said that the purpose of the
15 federal securities laws “was to regulate *investments*, in whatever form they are made and by whatever
16 name they are called.”¹⁰³² Because the court found that not all notes involve investments, it adopted
17 the “family resemblance” test to determine whether an instrument denominated a “note” is a security.
18 The Supreme Court rejected the *Howey* economic reality test with notes because that test was
19 designed to determine whether a particular instrument is an investment contract – not whether it fit
20 within any of the examples listed in the statutory definition of “security.”¹⁰³³ The Supreme Court
21 found the notes in the *Reves* case to be securities, and concluded that in determining whether an
22 instrument denominated a “note” is a security, courts should apply the “family resemblance” test: “A
23 note is presumed to be a ‘security,’ and that presumption may be rebutted only by a showing that the
24 note bears a strong resemblance (in terms of the four factors we have identified) to one of the
25 enumerated categories of instruments” or by convincing the court that although the note represents a

26
27 ¹⁰³⁰ Respondents’ Post-Hearing Brief at 18-19.

¹⁰³¹ Respondents’ Post-Hearing Memorandum at 16-19.

¹⁰³² *Reves*, 494 U.S. 55, 61, 110 S.Ct. 945, 949.

¹⁰³³ *Reves*, 494 U.S. 55, 64, 110 S.Ct. 945, 951.

category that does not resemble an existing exception, a new category should be added to create a new kind of non-security note.¹⁰³⁴

The *Reves* “family resemblance” test balances four factors: an assessment of the motivations of the buyer and seller to enter the transaction; the plan of distribution; the reasonable expectations of the investing public; and whether another regulatory scheme exists that significantly reduces the risk of the instrument such that application of the securities laws would be unnecessary.

The Division states that Respondents’ reliance on *AMFAC* is misplaced because *AMFAC* was decided prior to the court’s adoption of the *Reves* test, so the “risk capital test” used in *AMFAC* is no longer controlling precedent when determining whether notes are securities under federal securities law.¹⁰³⁵ The Division also asserts that the Respondents failed to provide any evidence to rebut the *Reves* presumption that the RB-ML notes are securities,¹⁰³⁶ and that the Respondents did not specify any judicially-created category of non-security note that the RB-ML notes resembled. The Division claims that an application of the *Reves* test to the evidence would support a finding that the notes are securities because:

1) **The participants entered into the investment to make money.** It is clear that the motivation of the Participants was investment. Radical Bunny was raising funds to finance a substantial investment in the RB-MLtd Notes in which Radical Bunny was to be repaid a 2 % greater interest rate than what these entities were repaying to their investors. The Radical Bunny and the RB Managers represented to investors in the ‘welcome letter’ that the experience would be ‘financially rewarding.’ See Division Memorandum at ¶¶ 108 and 113; Division Reply Memorandum at ¶ 251;

2) **Participations in the RB-MLtd Loans were widely distributed to a broad segment of the public.** Radical Bunny and the RB Managers sold

¹⁰³⁴ *Reves*, 494 U.S. 55, 67, 110 S.Ct. 945, 952.

¹⁰³⁵ The “risk capital” test asks whether there was “risk capital” contributed that is “subject to the ‘entrepreneurial or managerial efforts’ of others.” *AMFAC*, 583 E.2d at 432.

¹⁰³⁶ The Division is not contending that Radical Bunny and the Radical Bunny Managers violated the antifraud provisions of the Arizona Securities Act prior to the institution of the RB-ML Loan Program in September 2005.

1 participations in the RB-MLtd Notes...to at least 900 account holders from
2 Arizona and at least 24 states and five foreign countries primarily through
3 word of mouth and referrals to individuals who had no pre-existing
4 relationship with Radical Bunny or the RB Managers. [fnt omitted] See
5 Division Memorandum at ¶¶ 58-59, 93, and 103;

6 **3) The investors reasonably expected to make money from their**
7 **participations in the RB-MLtd Notes.** In describing the RB-MLtd Loan
8 Program to offerees and investors, Radical Bunny and the RB Managers used
9 the term 'investment' in their communications; contrasted the investment to
10 investing in stock; represented that their investments [were] 'safe,' 'secured'
11 by real estate, interest was paid to investors 'like clockwork,' 'MLtd has to be
12 very strict because it is subject to inspections and audits all the time,' and their
13 investment was safe except in a doomsday scenario. See Division
14 Memorandum at ¶¶ 113-114 and 156-165; and

15 **4) There was no regulatory scheme that would significantly reduce the**
16 **risk of the investment and thereby render the application of the securities**
17 **laws unnecessary.** The Participants were not given deeds of trust securing
18 their individual investments because the RB Managers believed that MLtd
19 would repay its obligations. Hirsch and Shah were employed as CPAs, B.
20 Walder was employed as an educator, and H. Walder was employed as a
21 pharmacist. None of these professions are subject to a regulatory scheme that
22 could have significantly reduced the risk of the investment and hereby
23 rendered application of the securities laws unnecessary. See Division
24 Memorandum at ¶¶ 24, 28, 32, and 36.¹⁰³⁷

25 The Division concludes that the RB-ML Limited notes are securities for purposes of the
26 antifraud provisions of the Arizona Securities Act, and no exceptions or defenses have been presented
27 to overcome that conclusion.

28 ¹⁰³⁷ Division's Reply to Respondents' Post-Hearing Memorandum at 12-14 (emphasis added).

1 **Analysis and Conclusion**

2 The federal Securities Act of 1933, the federal Securities Act of 1934, and the Arizona
3 Securities Act all define “security” as “any note.” The definitions are qualified by the phrase “unless
4 the context otherwise requires.” The definition of a security for antifraud purposes is broader than
5 the definition for registration purposes, as the fraud statute includes the sale of even those securities
6 exempted from the registration requirements. This broad definition exists because Congress
7 “recognized the virtually limitless scope of human ingenuity, especially in the creation of ‘countless
8 and variable schemes devised by those who seek the use of the money of others on the promise of
9 profits.’”¹⁰³⁹ However, courts have found that even with such a broad definition, Congress “did not
10 intend to provide a broad federal remedy for all fraud,”¹⁰⁴⁰ but wanted it broad enough to “encompass
11 virtually any instrument that might be sold as an investment.”¹⁰⁴¹

12 The Respondents quote the U.S. Supreme Court’s opinion in *United Housing Foundation,*
13 *Inc. v. Forman*, 421 U.S. 837, 95 S. Ct. 2051 (1975), to say that a “thing may be within the letter of
14 the statute and yet not within the statute....” The complete quotation continues “...because not
15 within its spirit, nor within the intentions of its makers.”¹⁰⁴² This means that the purpose and intent
16 of the statute help define and explain the activities it was created to address.

17 Arizona courts have looked to federal court decisions for guidance when interpreting state
18 securities statutes, but do not defer to federal case law when it would be inconsistent with the policies
19 embraced by the Arizona legislature, including the “Arizona policy of protecting the public from
20 unscrupulous investment promoters.”¹⁰⁴³ The Preamble to Arizona Securities Act makes it clear that
21 the Act is “not to be given a narrow or restricted interpretation or construction, but shall be liberally
22 construed as a remedial measure in order not to defeat the purpose thereof.”

23 We agree with the Division that pursuant to the Arizona Court of Appeal’s *MacCollum*
24 decision, the appropriate analysis to determine when a note is a non-security for purposes of the
25

26 ¹⁰³⁹ *Reves* at 60-61, 949, citing *Howey* at 293.

27 ¹⁰⁴⁰ *Marine* at 556, 1223, *Reves* at 61, 949.

¹⁰⁴¹ *Reves* at 61, 949.

¹⁰⁴² Quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L.Ed. 226 (1892).

28 ¹⁰⁴³ *Siporin v. Carrington*, 200 Ariz. 97, 23 P.3d 92 (Ct. App. 2001).

1 antifraud provisions of the Arizona Securities Act is the *Reves* test.¹⁰⁴³ The United States Supreme
 2 Court in *Reves* said that the *Howey* test is not to be applied when the instrument involved is a note,
 3 and the Arizona Supreme Court in *Tober* left open whether *Reves* should apply to the antifraud
 4 provisions. The *MacCollum* decision answered that question and found that *Reves* should be applied
 5 to determine the meaning of “security” under A.R.S. § 44-1991.¹⁰⁴⁴ Accordingly, we will analyze
 6 whether the notes are securities for antifraud purposes using the *Reves* test.

7 The *Reves* test begins with the presumption that a note is a security and can only be rebutted
 8 by a demonstration (balancing four factors) that the note bears a strong resemblance (“family
 9 resemblance”) to one of the instruments on the judicially-determined list of instruments that were not
 10 intended to be regulated as a security.¹⁰⁴⁵ If the instrument is not on the list or sufficiently similar to
 11 one on the list, then the *Reves* four factors are again applied to the facts to determine whether a new
 12 category of instrument should be added to the non-security note list.

13 Because under the *Reves* test the notes are presumed to be securities, we will use the four
 14 factors to analyze whether the Respondents have demonstrated that the notes bear a strong
 15 resemblance to one of the recognized non-security notes.

16 The *Reves* test’s first factor is “motivation for transaction.” In explaining this factor, the *Reves*
 17 court said if the “seller’s purpose is to raise money for the general use of a business enterprise or to
 18 finance substantial investment and the buyer is interested primarily in the profit the note is expected
 19 to generate, the instrument is likely to be a ‘security.’” *Reves*, 494 U.S. 56, 66. The evidence
 20 demonstrates that the Participants’ motivation to give money to Radical Bunny was to make an
 21 investment that earned the high interest rate promised by Radical Bunny. Mr. Friedberg testified that
 22 his mother’s first investment was in 2002 when she liquidated her stock portfolio and put all her
 23 money with Horizon Partners, and that she continued to invest with Radical Bunny.¹⁰⁴⁶ Ms. Mathis
 24 testified that “a friend of mine identified that her family had been involved in the investment with

25 ¹⁰⁴³ *MacCollum*, 185 Ariz. at 186.

26 ¹⁰⁴⁴ *Id.*

27 ¹⁰⁴⁵ *MacCollum*, 185 Ariz. at 187. “Included in this family of non-security notes are ‘consumer financing notes, notes
 secured by a home mortgage, notes secured by a lien on a business or its assets, notes reflecting a loan to a bank
 customer, short term notes secured by an assignment of accounts receivable, and notes which formalize a debt on an open
 account in a business.’” Citing *Tober*, 173 Ariz. at 212 n. 3, 841 P.2d at 201, n.3.

28 ¹⁰⁴⁶ Tr. at 47-48.

1 Radical Bunny for many years. They had earned a lot of money, and as far as she was concerned it
 2 was a very good investment, very good way for me to take my money from my 401(k) and increase
 3 it, because she knew I was living on some very tight means.”¹⁰⁴⁷ Ms. Mathis pulled \$226,881.94
 4 from her IRA with the Internal Revenue Service and invested it with Radical Bunny in December
 5 2007. The testimony from Participants demonstrates that their motivations are characterized more
 6 accurately as investment, and not “commercial.”¹⁰⁴⁸

7 The evidence also demonstrates that the Respondents’ motivation to enter into transactions
 8 with Participants and Mortgages Limited was to collect and pool Participant funds so that Radical
 9 Bunny could invest in Mortgages Limited and the Respondents could make money by collecting the 2
 10 percent management fee or “spread” on every loan as managers, and by earning the high interest rates
 11 on their own individual investments.¹⁰⁴⁹ Mr. Hirsch testified that after his divorce, he was left with
 12 very little funds and “was seeking a way to dig out whatever I had” when one of his tax clients
 13 introduced him to Chuck Coles and Scott Coles.¹⁰⁵⁰ He explained that with Radical Bunny, he “was
 14 trying to kind of retire into the sunset somewhere.”¹⁰⁵¹ Mrs. Walder told a potential Participant that
 15 “I’m not kidding when I tell you this has been the most enjoyable, marvelous, very lucrative for me
 16 to make a million dollars a year on the spread” and that “we make a lot of money.”¹⁰⁵²

17 The Respondents argue that because the notes had a fixed percentage rate, they “were not
 18 premised on profit.”¹⁰⁵³ However, in *MacCollum*, the Arizona Court of Appeals found that a
 19 “purpose...to profit from the investment through the interest on the note” showed that the transaction
 20 was ‘most naturally conceived as an investment in a business enterprise rather than as a purely
 21 commercial or consumer transaction,’” citing to *Reves*.¹⁰⁵⁴ Also, in *S.E.C. v. Wallenbrock and*
 22 *Assoc.*, 313 F3d 532, 538 (9th Cir. 2002), the court found that the notes were securities even though
 23 the interest rate on the notes was stable. (“Indeed, the promise of a high, stable 20% interest rate

24 ¹⁰⁴⁷ Tr. at 265.

25 ¹⁰⁴⁸ See, *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808 (2nd Cir. 1994) (Motivations of parties involved in mortgage participations were more accurately characterized as investment rather than commercial.)

26 ¹⁰⁴⁹ Tr. at 345, 378, 387.

27 ¹⁰⁵⁰ Tr. at 1614; 1631.

28 ¹⁰⁵¹ Tr. at 1540-154.

¹⁰⁵² Exhibit S-14.

¹⁰⁵³ Respondents’ Post-Hearing Memorandum at 16.

¹⁰⁵⁴ *MacCollum v. Perkinson*, 185 Ariz. 179, 187, 913 P.2d 1097, 1105 (1996).

likely attracted investors looking for significant profits.”) Similar to the facts here, in *Wallenbrock*, the court noted that investors were encouraged to view their commitment as a long-term investment; they were required to request distribution of interest and principal prior to the maturity date; and the automatic rollover of the notes and the strategy of encouraging putting the notes into Individual Retirement Accounts suggested that the intent was to use investors’ money for long-term financing. The court concluded that the nature of the transaction suggested that a reasonable buyer and seller would view the transactions as investments and the notes as securities.

Under the *Reves* test’s first factor, we find that a reasonable buyer and seller would view the RB-ML Loan program as transactions involving investments and notes as securities.

The *Reves* test’s second factor is plan of distribution or “Offer and Sale to a Broad Segment of the Public.” The Respondents place great weight upon their contention that they did not “market” the participations or “solicit” Participants, and therefore, they were not involved in the sale of securities.

In *Wallenbrock*, although there were claims of no marketing, the 9th Circuit found that there were notes held by over 1,000 investors in at least twenty-five states and no limits were put on who could purchase the notes - “offering them to any member of the general public who would make the investment and provide his name, address, and social security number.”¹⁰⁵⁵ The court concluded that the broad availability of the notes and the promoter’s “evident interest in widening the scope of distribution” tipped this factor strongly in favor of classifying the notes as a security.

In *Pollack v. Laidlaw Holdings, Inc.*, the 2nd Circuit said that “the broad-based, unrestricted sales to the general investing public” supported a finding that the mortgage participations were within the scope of the federal securities laws.¹⁰⁵⁶

The Respondents testified that they did not turn away any potential Participant. Although the Respondents did not “advertise” via commercial media, they did advertise by word of mouth and referral, encouraging “friends and family” to “join the Radical Bunny family” and make a lot of money.¹⁰⁵⁷ Radical Bunny and the Radical Bunny managers sold participations to over 900 account holders in Arizona and at least 24 states, and five foreign countries. Participants testified that at the

¹⁰⁵⁵ *S.E.C. v. Wallenbrock and Assoc.*, 313 F3d 532, 539.

¹⁰⁵⁶ *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808, 814;

¹⁰⁵⁷ Exhibit S-14.

1 final Orange Tree Resort meeting, Mr. Hirsch and Mrs. Walder were making solicitations by offering
2 very high interest rates if Participants would invest in a new condo project.¹⁰⁵⁸ To agree with the
3 Respondents' argument that by keeping their investment scheme out of the public eye, they could
4 avoid the definition of a "security" and the securities laws, would defeat the Arizona legislature's
5 intent in providing protection to the investing public through the Arizona Securities Act. We find
6 that Respondents' participations were broadly available to anyone who had the funds available to
7 invest, and Respondents had a clear financial interest in expanding the number of Participants and
8 maintaining the level of investment in Radical Bunny and Mortgages Limited. We find that
9 Respondents offered and sold to a broad segment of the public.

10 The *Reves* test's third factor is "Reasonable Investor Inquiry." The court in *Wallenbrock*
11 explained that the inquiry under the third *Reves* factor is whether a reasonable member of the
12 investing public (not the specific individuals who invested) would consider the notes as investments.
13 The court concluded that a "reasonable investor sending funds...for a guaranteed return of 20% with
14 an automatic rollover every three months would expect that the funds were an investment, not a
15 short-term loan."¹⁰⁵⁹ In *MacCollum*, the Arizona Court of Appeals said that "the essence of a
16 security is its character as an investment."¹⁰⁶⁰

17 This factor is related to the first factor, and our discussion of that factor also comes into play
18 here. It is clear from the evidence that the Participants thought that they were making investments
19 when they gave their money to Radical Bunny. Participants used their IRAs, funds from divorce
20 settlements and sales of business, life savings, and liquidation of their stock holdings to invest with
21 Radical Bunny. The Respondents and their documents referred to Participants' "investment" with
22 Radical Bunny and it is reasonable for Participants to take them at their word. It is also clear that
23 Radical Bunny considered its loans to Mortgages Limited as an investment. The RB-ML Program
24 continued the practice of rolling over funds, and Mortgages Limited's notes were modified so that
25 monthly payments included only interest and not principal. The notes were no longer secured by a
26 deed of trust in the name of the lender, and the notes did not contain any language limiting the use of

27 ¹⁰⁵⁸ Tr. at 79, 420.

28 ¹⁰⁵⁹ *Wallenbrock*, 313 F3d 532, 539.

¹⁰⁶⁰ *MacCollum*, 185 Ariz. 179, 187, 913 P.2d 1097, 1105.

1 the loan proceeds to funding the Mortgages Limited loans,¹⁰⁶¹ so that a significant amount of money
2 was used for non-construction purposes.

3 We find that a reasonable investor would consider that the notes in the RB-ML Loan Program
4 and the Participants' interests in those notes to be investments and securities.

5 The *Reves* test's fourth factor is "Risk-Reducing Factors" and courts look to see whether there
6 is a regulatory scheme that would significantly reduce the risk of the investment and thereby make
7 application of securities laws unnecessary.¹⁰⁶² The Division noted that none of the Respondents'
8 professions were subject to a regulatory scheme that would reduce the risk, and the Respondents did
9 not suggest or argue that any regulatory scheme applied to their activities. In fact, Respondents'
10 operations were designed to avoid the application of securities laws.¹⁰⁶³

11 The court in *Wallenbrock* rejected claims that collateralization of the notes, a fixed interest
12 rate, the short length of the loan term, and the availability of other regulation reduced the risks such
13 that the notes were not securities. The court found that the "so-called collateralization" appeared to
14 be a fiction, the interest paid was coming from other investors' money, labeling the notes as short-
15 term but requiring automatic rollovers unless strict early request deadlines were met under penalty,
16 and "the fact that a company is subject to regulation by a single state is not nearly enough to remove
17 the company from the umbrella of the federal securities laws."¹⁰⁶⁴

18 The Arizona Court of Appeals in *MacCollum* analyzed the fourth prong of the *Reves* test and
19 found the note in that case was "not subject to substantial regulation under other Arizona laws."¹⁰⁶⁵

21 ¹⁰⁶¹ Verified answer, ¶74; Tr. at 838-840 Mr. Hirsch testified that he had a verbal agreement with Scott Coles to restrict
the use of the proceeds, and that it was an important agreement, but he had no explanation as to why it was not in writing.

22 ¹⁰⁶² *Marine Bank, Teamsters v. Daniels*.

23 ¹⁰⁶³ See Exhibit S-14, Mrs. Walder's description to a prospective Participant who asked how Horizon Partners/Radical
Bunny was able to invest with Mortgages Limited ...but I am curious that they accepted 3 people combining to add the
net assets together to become accredited? Mrs. Walder said ...we were a company, we were a company with assets, a
company can invest, they didn't say you are a person whose name is Radical, last name Bunny. We're a company,
Radical Bunny, yes, and we have \$100,000.... One thing you should know is they have a banking license, they have a
SEC license, Securities and Exchange Commission and they are members of NASD, the National Association of
Securities Dealers – they have to be very, very strict. I think if I did that today, it would be a different story because they
will review you as an investor; but we came in as a company we kinda went around the, the, here's a boulder in the road
and I'm driving a jeep, well how do we do it, well lets go around the boulder – so we formed a company and presented
ourselves as we were a company wanting to invest in Mortgages Limited and they said fine.

27 ¹⁰⁶⁴ *Wallenbrock*, 313 F3d 532, 540.

28 ¹⁰⁶⁵ See *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S.Ct. 1220, 1223, 71 L.Ed.2d 409 (1982) (certificates of deposit
insured by FDIC and subject to regulation under banking laws were not securities); *Teamsters v. Daniel*, 439 U.S. 551, 99

1 The *Wallenbrock* court concluded that the notes did not have the characteristics of non-
 2 security instruments, and because “the indicia of an investment is so strong” it declined to add them
 3 to the list of instruments that are exempted from federal securities laws.¹⁰⁶⁶

4 We find that the facts here are similar to the facts in *Wallenbrock*. Participants in the RB-ML
 5 Loan Program were not given deeds of trust securing their individual investments; the RB-ML notes
 6 were fixed rate but not short-term instruments and they were not insured; the investments rolled over
 7 unless Participants gave timely notice;¹⁰⁶⁷ there is no evidence that Participants were “highly
 8 sophisticated” investors; and there is no alternative regulatory scheme that renders application of
 9 securities laws unnecessary. We find that there is no risk-reducing factor to suggest that the notes are
 10 not securities.

11 According to Arizona law, there is a presumption that the notes are securities. Having
 12 examined and weighed the *Reves* four factors, we conclude that the Respondents have failed to rebut
 13 the presumption that the notes are securities. The evidence does not demonstrate that the notes bear a
 14 sufficiently strong family resemblance to any of the judicially-created list of non-securities.

15 The second part of the *Reves* test is to determine whether the notes should be added as a new
 16 category of non-security notes. The Respondents have cited to decisions that they claim support the
 17 conclusion that the notes should be a non-security, and we will examine whether they have identified
 18 any factors that would lead us to add these notes as a category of non-security.

19 In *LaBrun v. Kuswa*, 24 F.Supp. 2d 641 (E.D. La. 1998), the court applied the *Reves* “four-
 20 factor test” to Loan Agreements and determined that two factors weighed in favor of finding they
 21 were securities and two factors weighed against finding they were securities.¹⁰⁶⁸ The court employed
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25 S.Ct 790, 58 L.Ed.2d 808 (1979) (pension plan comprehensively regulated under retirement act, not a security).”
 26 *MacCollum*, 185 Ariz. 179, 188, 913 P.2d 1097, 1106.

¹⁰⁶⁶ *Wallenbrock*, 313 F3d 532, 540.

¹⁰⁶⁷ Exhibit S-52.

¹⁰⁶⁸ The court found that the notes were investments in a business venture rather than purely commercial or consumer transactions; the plan of distribution did not include a “broad segment of the public;” and the reasonable expectations were initially only in terms of interest payments on notes; and there was no federal regulatory scheme to protect against risk.

1 a balancing test, weighing the “plan of distribution” as the most essential factor, and concluded that
2 the Loan Agreements were not securities.¹⁰⁶⁹

3 The decisions in *AMFAC*, *United California Bank*, and *Great Western Bank* applied the “risk
4 capital” test that was used by the Ninth Circuit prior to the Supreme Court’s decision in *Reves*. In
5 *United California Bank*, the put letter agreement and notes between two banks and a developer were
6 found not to be a security using the “risk capital” analysis and in *Great Western Bank*, a promissory
7 note given by a corporation to a bank was found not to be a security.

8 In the *AMFAC* case, in addition to a promissory note, there was a deed of trust, and a building
9 loan agreement that included loan protections such as periodic advances of principal depending upon
10 degree of construction completion and whether lease commitments had been obtained, restrictions on
11 changes to the square footage of the project or cost without prior written approval, and preapprovals
12 required before conditional sales contracts or security agreements could be used to purchase anything
13 for the shopping center. *AMFAC* loaned money to Arizona Mall, who was the owner of the project.
14 There was a surety on the construction bond that protected *AMFAC* in the event of default by the
15 construction company. A provision protected *AMFAC*’s interest from any lien claims. These facts
16 are significant and distinguish *AMFAC* from the facts in this case, where there were no similar
17 protections for Participants. Radical Bunny loaned the money to Mortgages Limited, who was not
18 the owner or builder of the projects. Finally, the funds from the RB-ML notes were not all used for
19 construction purposes.¹⁰⁷⁰

20 Respondents’ characterization of Radical Bunny as being similar to Coldwell Banker’s role as
21 a sales agent in a transaction involving the sale of land parcels in *DeLuz Ranchos Investment, Ltd. v*
22 *Coldwell Banker & Co.*, 608 F.2d 1297 (9th Cir. 1979), is not well taken. In *De Luz Ranchos*, the

23 ¹⁰⁶⁹ The court appeared to weigh heavily the fact that the plaintiffs initially did not consider the promissory notes to be
24 investments, and said that “[a]fter the fact recharacterizations cannot affect this prong [of the *Reves* test]” *LaBrun v.*
Kuswa, 24 F.Supp. 2d 641, 648 (E.D. La. 1998).

25 ¹⁰⁷⁰ Division Post-Hearing Memorandum at 47; Tr. at 2082; Exhibit S-40 Disclosure Statement Regarding Amended Plan
26 of Reorganization Dated March 9, 2010 at 8 showing Radical Bunny’s \$197 million claim against Mortgages Limited,
27 with \$162 million treated as secured and \$35 million as treated as unsecured; Exhibit S-56 Amended Disclosure
28 Statement in Support of the Official Committee of Investors’ First Amended Plan or Reorganization Dated March 12,
2009 at 26; and Exhibit R-5 The Official Committee of Investors’ First Amended Plan or Reorganization Dated March
12, 2009 at 21. We also note that in the more recent case, *McNabb v. S.E.C.*, 298 F.3d 1126, 1131 (9th Cir. 2002), the
Ninth Circuit did not discuss *AMFAC* when determining whether the promissory notes were commercial loans, and
instead used the *Reves* test. “Thus, we look to whether the notes in question resemble an investment.”

1 court found that the land sale agreement posed a “close question of law” and lay “near the fringe of
2 those transactions that have been found to be regulated by the Securities Act as investment contracts”
3 before concluding that to apply the Securities Act to the facts would extend its reach too far. The
4 case does not stand for the proposition that dividing notes and distributing them without solicitation
5 does not create a security.

6 As discussed above, a note is considered to be a security for purposes of the antifraud
7 provisions of the Arizona Securities Act unless it closely resembles an instrument determined by a
8 court not to be a security, or unless a court believes it should be added to the list. None of the cases
9 cited by Respondents cause us to conclude that the notes should not be considered securities.

10 Concerning the federal Securities Act’s exception for notes with a maturity period of less than
11 nine months, the *Wallenbrock* court noted that the exception applies only to commercial paper, which
12 has been defined by the Supreme Court as “short-term, high quality instruments issued to fund
13 current operations and sold only to highly sophisticated investors.”¹⁰⁷¹ The court concluded that the
14 notes were not short-term instruments due to the automatic rollover, and they were not sold to highly
15 sophisticated investors, so the exception did not apply.

16 We disagree with Respondents that the notes in the RB-ML Loan Program fall within the
17 “commercial paper” exemption of the Arizona Securities Act or the Federal securities acts. The notes
18 were for a term longer than nine months and the automatic rollover provision shows that the notes
19 were not intended to be short-term. Also, the Respondents failed to show that the Participants were
20 “highly sophisticated” investors.¹⁰⁷²

21 Even if the RB-ML Loan notes were “commercial paper” we find that the participations in
22 those notes would be securities under a *Reves* test as we have set forth above. See *Pollack v.*
23 *Laidlaw*, 27 F.3d 808, 814 (2d Cir. 1994), where the court found mortgage participations were in the
24 scope of securities laws and recognized “that even if an underlying instrument is not a security, the
25 manner in which participations in that instrument are used, pooled, or marketed might establish that

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27 ¹⁰⁷¹ *Wallenbrock*, 313 F.3d 532, 541, quoting *Reves*, 494 U.S. at 70, 110 S.Ct. 945.

28 ¹⁰⁷² Neither can Radical Bunny rely upon its status as a limited liability company to qualify as a highly sophisticated investor, as Radical Bunny was able to invest with Mortgages Limited only because it pooled funds from investors who were not highly sophisticated.

1 such participations are securities,” citing *Banco Espanol de Credito v. Security Pacific National*
 2 *Bank*, 973 F.2d 51, 56 (2nd Cir. 1992) (where the court found that participations in *notes issued by a*
 3 *bank to institutional and corporate entities* were not securities) which was citing to *Gary Plastic*
 4 *Packaging*, 756 F.2d at 240-2.

5 Based upon our analysis of the *Reves* four factors and considering the economic realities of
 6 the notes, we conclude that the notes are securities, and the Respondents have failed to demonstrate
 7 why the notes should not be securities. Because the “indicia of an investment is so strong” we also
 8 will not add them to the list of exempted instruments.

9 The notes and the participations in those notes are within the letter of the Arizona Securities
 10 Act, within its spirit, and within the intentions of its makers. Nothing in the context of the
 11 transactions causes us to find otherwise. Accordingly, we find that the notes and the participations in
 12 those notes involved in RB-ML Loan Program are securities for purposes of the antifraud statutes.

13 **B. Registration - Were the Respondents or their investment opportunities registered with the**
 14 **Commission?**

15 The Division states that there is no evidence to dispute the fact that neither Horizon Partners
 16 nor Radical Bunny were registered as securities dealers, and that there is no evidence to dispute the
 17 fact that the none of the Radical Bunny managers were registered as securities salesmen.¹⁰⁷³ The
 18 Division also noted that there is no evidence to dispute the fact that neither Horizon Partners nor
 19 Radical Bunny registered their investment opportunities with the Commission. The Respondents did
 20 not argue that they were registered as securities salesmen or dealers or that the investment
 21 opportunities were registered with the Commission.

22 **Analysis and Conclusion**

23 We find that because Horizon Partners and Radical Bunny did not register their securities
 24 offerings with the Commission, they and their managers violated A.R.S. § 44-1841¹⁰⁷⁴ and because

25 ¹⁰⁷³ The Division noted that the Mortgages Limited Loan secured notes were sold to the Mortgages Limited Pass-
 26 Through Investors (including Horizon Partners and Radical Bunny) through a registered dealer (Mortgages Limited
 27 Securities) but that the issue of whether the securities or transactions in securities represented by Mortgages Limited
 28 and/or Mortgages Limited Securities of the fractionalized interests in the Mortgages Limited Loan secured notes to the
 Mortgages Limited Pass-Through Investors were exempt from the registration requirements of A.R.S. § 44-1841, is not
 before the Commission.

¹⁰⁷⁴ A.R.S. § 44-1841. Sale of unregistered securities prohibited; classification

the Horizon Partners and Radical Bunny managers were not registered as securities dealers or salesmen at the time of the securities offerings, the Horizon Partners and Radical Bunny managers violated A.R.S. § 44-1842.¹⁰⁷⁵

C. Antifraud Violations - Did Respondents violate the Antifraud Provisions of the Arizona Securities Act?

Division

The Division argues that Radical Bunny and the Radical Bunny Managers engaged in multiple violations of all of the antifraud provisions of the Securities Act found in A.R.S. § 44-1991(A). They argue that the following facts demonstrate those multiple antifraud violations:

- From at least February 2007 through June 2008, Radical Bunny and the RB Managers were repeatedly advised by Q&B that the collateral for the RB-MLtd Loans was in question or outright nonexistent. Nevertheless, Radical Bunny, Hirsch, B. Walder, and Shah continued to: (1) represent to offerees and Participants that the RB-MLtd Loans were adequately collateralized by [all of] the assets of MLtd; and (2) disseminate to each new and re-investing Participant a Direction to Purchase, the single contractual document evidencing their investment in the RB-MLtd Loan Program, which stated that their investment was 'collateralized by the beneficial interest under various deeds of trust held by Mortgages Ltd.'
- From at least December 2005 through June 2008, Hirsch, B. Walder, and Shah represented to offerees and Participants that: (1) the Participants were investing in MLtd Loans when, in fact, the Participants simply provided a pool of money to be used as capital by Radical Bunny; (2) MLtd and/or Coles had sufficient assets to satisfy all sums due to Radical Bunny under the RB-MLtd

A. It is unlawful to sell or offer for sale within or from this state any securities unless the securities have been registered pursuant to article 6 or 7 of this chapter or are federal covered securities if the securities comply with section 44-1843.02 or chapter 13, article 12 of this title.

B. A person violating this section is guilty of a class 4 felony.

¹⁰⁷⁵ **A.R.S. § 44-1842. Transactions by unregistered dealers and salesmen prohibited; classification**

A. It is unlawful for any dealer to sell or purchase or offer to sell or buy any securities, or for any salesman to sell or offer for sale any securities within or from this state unless the dealer or salesman is registered as such pursuant to the provisions of article 9 of this chapter.

B. A person violating this section is guilty of a class 4 felony.

1 Loans, when, in fact, Radical Bunny did not perform due diligence with
2 respect to the financial status of MLtd and never ascertained the true nature
3 and/or value of Coles' personal assets.

- 4 • From at least December 2005 through June 2008, Hirsch, B. Walder, and Shah
5 represented to offerees and Participants that the proceeds of the RB-MLtd
6 Loans were to be used solely to fund the MLtd Loans. However, the RB
7 Managers failed to advise offerees and Participants that: (1) the promissory
8 notes evidencing the RB-MLtd Loans did not contain any language that limited
9 the use of the RB-MLtd Loan proceeds; and (2) \$35 million of Participant
10 funds were, in fact, used by MLtd to fund its general business operations.
11 None of the RB Managers chose to take corrective action.
- 12 • Since the fall of 2005, the RB Managers were repeatedly advised by
13 individuals who had extensive experience in securities and other regulatory
14 matters that they may be engaged in the offer and sale of unregistered
15 securities in violation of the Securities Act, had, in fact, been engaged in the
16 offer and sale of unregistered securities in violation of the Securities Act, or
17 that their activities may be subject to another regulatory scheme (e.g.,
18 mortgage banker). However, Hirsch and B. Walder ignored this advice and
19 represented to offerees and Participants that Radical Bunny and/or its
20 managers either were not subject to the securities laws until they reached \$200
21 million in Participant funds or not subject to the securities laws at all. None of
22 the RB managers chose to take corrective action.
- 23 • As early as the fall of 2005 and, again, in May 2007, Radical Bunny and the
24 RB Managers were advised by individuals who had extensive experience in
25 securities and other regulatory matters to stop selling securities until a [new]
26 program could be instituted that was compliant with applicable Arizona and
27 federal securities laws. They chose, however, to ignore the advice of such
28 experienced securities professions, including Radical Bunny's attorneys.
Instead, they continued to accept in excess of \$80 million additional funds
from new and existing Participants in the RB-MLtd Loan Program; continued
to fund new RB-MLtd Loans in at least \$1 million increments, allowing the
total outstanding principal due to Radical Bunny from MLtd to reach in excess

of \$190 million; and continued to collect their monthly management fee of two percent (2%) per annum, allowing the total to reach approximately \$3.5 million in just over a two-year period.

- Since the fall of 2005, Hirsch and B. Walder, and Shah purposefully minimized the potential risks associated with investing in the RB-Loan Program by representing that: (1) no Participant has ever gone without their monthly interest payment because MLtd paid like ‘clockwork;’ (2) foreclosure against real estate has never resulted in a loss of a Participant’s principal investment and, in fact, benefitted the Participants because they received a higher interest rate as a result of the borrower’s loan default; and (3) the Participants’ investment was safe except in a doomsday scenario.
- Worse yet, H. Walder, B. Walder, and Shah sat idly by during the Orange Tree Meetings in May 2007, November 2007, and, again, in May 2008, and said *nothing* despite knowing that there remained outstanding issues with respect to the existence of the collateral for the RB-MLtd Loans. They were all absolutely complicit by not taking any action to stop the misleading or false representations of the designed speaker, Hirsch. Hirsch did not prevent any other of the RB Managers to speak at the Orange Tree Meetings. H. Walder did nothing simply because he did not like to speak in public. B. Walder and Shah offered no rational explanation as to why they remained silent.¹⁰⁷⁶(emphasis original)

The Division states Radical Bunny Managers’ material representations and omissions to Participants about the RB-MLtd Loan Program were misleading or false and that the conduct of the Radical Bunny Managers with respect to the business operations of Radical Bunny was fraudulent.¹⁰⁷⁷

The Division argues that the Respondents rely on affirmative defenses that are not supported by the evidence or are not available under the Arizona Securities Act. The Division disputes the Respondents’ argument that Radical Bunny had an “equitable lien” in Mortgages Limited’s assets

¹⁰⁷⁶ Division Post-Hearing Memorandum at 46-48.

¹⁰⁷⁷ The Division is not alleging that Radical Bunny and its managers violated the antifraud provisions of the Securities Act prior to the September 2005 introduction of the Radical Bunny-Mortgages Limited Loan Program. Division Post-Hearing Memorandum at 45-48; Division Reply Memorandum at 11, footnote 10.

1 and therefore, there was no misrepresentation about the safety or security of the investment. The
 2 Division notes that there was no testimony or evidence presented that Radical Bunny Managers told
 3 Participants that Radical Bunny had an “equitable lien” in assets, but rather, the testimony was that
 4 Radical Bunny Managers told Participants that Participants’ investment funds were “secured” and
 5 “collateralized” by real estate. The Division also notes that “the subsequent events in the MLtd
 6 Bankruptcy establish that Radical Bunny’s alleged collateral interest in the assets of MLtd was
 7 disputed, litigated, and ultimately settled...[and] Radical Bunny was ‘deemed’ to have an allowed
 8 secured claim in certain, but not all of, the assets of MLtd.”¹⁰⁷⁸

9 In response to the Respondents’ argument that they did not commit fraud by misstating
 10 material facts and misleading investors because Participants were given materials that contained
 11 truthful disclosures and were told that there were no guarantees with respect to their investment, the
 12 Division disagrees that these federal affirmative defenses apply to the Arizona Securities Act.
 13 Although federal courts following common law have read a reliance requirement into a claim under
 14 SEC Rule 10b-5, the Division states that Arizona courts have held that reliance is not an element of
 15 proof in either regulatory enforcement or private actions pursuant to A.R.S. § 44-1991(A).¹⁰⁷⁹

16 Respondents

17 The Respondents dispute the facts relied upon by the Division to show fraud. The
 18 Respondents argue that Participants did not invest in Radical Bunny; that the “loans were made and
 19 notes were given were to finance construction;”¹⁰⁸⁰ that the proceeds could not be used for overhead;
 20 that the loans were secure; that “no lawyer ever told any of the [Respondents] to stop taking
 21 participants’ money, or that they were violating securities laws or that they were operating
 22 illegally.”¹⁰⁸¹

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 24
 25 ¹⁰⁷⁸ Division’s Reply to Respondents’ Post-Hearing Memorandum at 15.

26 ¹⁰⁷⁹ See *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1135-36 (Ct. App. 1986); *Rose v. Dobras*,
 27 128 Ariz. 209, 214, 624 P.2d 887, 892 (Ct. App. 1981); and *Aaron v. Fromkin*, 196 Ariz. 224, 227, 994 P.2d 1039, 1042
 (Ct. App. 2000). [“The legislature made the task of proving securities fraud much simpler than proving common-law
 fraud. The nine elements of common-law fraud...are not essential to establishing statutory securities fraud....The
 elements of securities fraud are articulated within the statute itself.”]

28 ¹⁰⁸⁰ Respondents’ Post-Hearing Memorandum at 6.

¹⁰⁸¹ Respondents’ Post-Hearing Memorandum at 10.

1 The Respondents assert that the Division failed to prove fraud because Radical Bunny “held
 2 an enforceable security interest” and the Respondents did not misrepresent that Radical Bunny was
 3 secured, because they “had no duty to affirmatively disclose activities designed to change their
 4 equitable lien to a statutory lien.”¹⁰⁸² The Respondents cite case law they claim supports their
 5 position that their silence concerning questions about the “adequacy of the documents” demonstrating
 6 a security interest is relevant only if they had a duty to disclose.¹⁰⁸³ Respondents did not explain why
 7 they had no such duty, but seem to rely upon the negotiated and settled result in the Mortgages
 8 Limited bankruptcy to argue that the “basis for the lien did not change the ultimate effect of the lien
 9 Radical Bunny has been determined to hold.”¹⁰⁸⁴

10 Respondents also contend that they are “entitled to protection under the ‘bespeaks caution’
 11 doctrine,”¹⁰⁸⁵ which provides that in federal securities litigation, cautionary language in the offering
 12 document can negate the materiality of an alleged misrepresentation or omission. They cite several
 13 cases, including *In Re Worlds of Wonder Securities Litigation*, 35 F.3d 1407 (9th Cir. 1994), and *In*
 14 *Re Donald J. Trump Casinos Securities Litigation*, 7 F.3d 357 (3rd Cir. 1993),¹⁰⁸⁶ as support for their
 15 argument that “given the cautionary language routinely given, ‘there are no guarantees,’ ... claims of
 16 problems with the documents establishing Radical Bunny’s secured position are not actionable,
 17 particularly where, as here, Radical Bunny was ultimately determined to be secured.”¹⁰⁸⁷

18 Respondents also argue that in Arizona, “a claim for ‘negligent misrepresentation’ or fraud
 19 cannot be predicated on statements regarding future occurrences.”¹⁰⁸⁸

22 ¹⁰⁸² Respondents’ Post-Hearing Memorandum at 21-22.

23 ¹⁰⁸³ Respondents cite *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n. 17, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988) (“Silence,
 24 absent a duty to disclose is not misleading under Rule 10b-5”); *Cent. Bank of Denver, N.A. v. First Interstate Bank of*
 25 *Denver, N.A.*, 511 U.S. 164, 174, 114 S. Ct. 1439, 1447, 128 L. Ed. 2d 119 (1994) (“When an allegation of fraud is based
 upon nondisclosure, there can be no fraud absent a duty to speak”); *Chiarella v. United States*, 445 U.S. 222, 100 S. Ct.
 1108, 63 L. Ed. 2d 348 (1980); *In re GlenFed, Inc. §. Litig.*, 42 F3d 1541 (9th Cir. 1994).

25 ¹⁰⁸⁴ Respondents’ Post-Hearing Memorandum at 22.

26 ¹⁰⁸⁵ *Id.*

26 ¹⁰⁸⁶ Respondents also cite to *Teamsters Local 175, et. al. v. Clorox Co., et. al.*, 353 F.3d 1125, 1131-33 (9th Cir. 2004) and
 27 *In re Copper Mountain Sec. Litig.*, 311 F. Supp.2d 857, 882 (N.D. Cal. 2004).

27 ¹⁰⁸⁷ Respondents’ Post-Hearing Memorandum at 23.

28 ¹⁰⁸⁸ Respondents’ Post-Hearing Memorandum at 23 citing *McAlister v. Citibank*, 171 Ariz. 207, 215, 829 P.2d 1253, 1261
 (Ct. App. 1992).

1 **Analysis and Conclusion**

2 A.R.S. § 44-1991 provides:

3 **Fraud in purchase or sale of securities**

4 A. It is a fraudulent practice and unlawful for a person, in connection
5 with a transaction or transactions within or from this state involving an
6 offer to sell or buy securities, or a sale or purchase of securities, including
7 securities exempted under section 44-1843 or 44-1843.01 and including
8 transactions exempted under section 44-1844, 44-1845 or 44-1850, directly
9 or indirectly to do any of the following:

10 1. Employ any device, scheme or artifice to defraud.

11 2. Make any untrue statement of material fact, or omit to state any
12 material fact necessary in order to make the statements made, in the light of
13 the circumstances under which they were made, not misleading.

14 3. Engage in any transaction, practice or course of business which
15 operates or would operate as a fraud or deceit.

16 The Arizona Court of Appeals has said that “a securities fraud may be proven by *any one of*
17 these three acts.”¹⁰⁸⁹

18 The Division alleges that the Respondents have repeatedly engaged in activities that fit within
19 all three kinds of fraudulent practices. We will address the Respondents’ activities in the context of
20 each, but will begin with A.R.S. § 44-1991(A)(2), whether the Respondents made untrue statements
21 of material fact or omitted to state any material fact necessary in order to make the statements made,
22 in light of the circumstances under which they were made, not misleading. The statements or
23 omissions that the Division believes are material and misleading concern the quality, sufficiency and
24 status of the collateral securing Participants’ investments; the nature and type of investment being
25 made and whether restrictions limited the use of the funds; the applicability of Securities laws; the
26 safety and risks of the investment, including the financial strength and status of the borrower; and
27 ongoing legal and expert advice about problems with Radical Bunny’s operations.

28 ¹⁰⁸⁹ *Hernandez v. Superior Court*, 179 Ariz. 515, 521, 880 P.2d 735, 741 (Ct. App. 1994) (emphasis original).

1 In *Aaron v. Fromkin*, 196 Ariz. 224, 227, 994 P.3d 1039, 1042 (Ct. App. 2000), the Arizona
2 Court of Appeals found that a “material fact” is a statement or omission that “would have assumed
3 actual significance in the deliberations of a reasonable buyer.” The U.S. Supreme Court held that an
4 omitted fact is material if there is a substantial likelihood that its disclosure would have been
5 considered significant by a reasonable investor, stating that “the materiality depends on the
6 significance the reasonable investor would place on the withheld or misrepresented information.”¹⁰⁹⁰

7 The U.S. Supreme Court discussed the nature of the duty to disclose information in *Chiarella*
8 *v. United States*, 445 U.S. 222, 230, 100 S. Ct. 1108, 1115, 63 L. Ed. 2d 348 (1980), and said that
9 “[t]hus, administrative and judicial interpretations have established that silence in connection with the
10 purchase or sale of securities may operate as a fraud actionable under § 10(b) despite the absence of
11 statutory language or legislative history specifically addressing the legality of nondisclosure. But
12 such liability is premised upon a duty to disclose arising from a relationship of trust and confidence
13 between parties to a transaction.”¹⁰⁹¹

14 Arizona courts have held that the issuer of securities has an affirmative duty not to mislead
15 potential investors. In *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131,
16 1136 (Ct. App. 1986), the Arizona Court of Appeals said that the “statutes do not require investors to
17 act with due diligence; nor do we find any judicial authority in Arizona for such a requirement. To
18 the contrary, defendants have an affirmative duty not to mislead potential investors” and in *Aaron v.*
19 *Fromkin*, 196 Ariz. at 227, 994 P.3d 1042, the Arizona Court of Appeals said “[t]he speaker’s
20 knowledge of the falsity of the statements is not a required element to proving fraud under A.R.S. §
21 44-1991(A)(2)... The statute instead imposes only an affirmative duty not to mislead.”

22 The Arizona Supreme Court has held that in civil cases, scienter (i.e. intent to defraud) is not
23 an element of a violation of A.R.S. § 44-1991(A)(2), but left unanswered whether it was an element
24 of violation of A.R.S. § 44-1991(A)(1) or A.R.S. § 44-1991(A)(3).¹⁰⁹² “Proof of scienter need not be
25
26

27 ¹⁰⁹⁰ *Basic Inc. v. Levinson*, 485 U.S. 224, 240, 108 S. Ct. 978, 98899 L. Ed. 2d 194 (1988).

¹⁰⁹¹ *Chiarella*, 445 U.S. at 230, 100 S. Ct. at 1115.

28 ¹⁰⁹² *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 607 (Sup Ct 1980); *See also Rose v. Dobras*, 128 Ariz. 209, 214,
624 P.2d 887, 892 (1981).

1 direct, but may be ‘a matter of inference from the circumstantial evidence.’”¹⁰⁹³ And in *Rose*, the
 2 court held that “unlike common law fraud, reliance upon a misrepresentation is not an element of this
 3 antifraud provision [A.R.S. § 44-1991(A)(2)] of our securities laws.”¹⁰⁹⁴

4 We must resolve the disputed facts to determine whether some of the allegations of fraud are
 5 supported by the evidence. These facts fall into two categories: testimony by witnesses concerning
 6 what statements were made or advice was given to Radical Bunny and its managers; and the legal
 7 effect of certain actions and documents.

8 The Respondents do not deny that their Quarles & Brady attorneys advised them that the
 9 security in the RB-ML Loan Notes was not sufficient. Mrs. Walder testified that she came to know
 10 from Quarles & Brady that the collateral was not perfected in the middle of 2007 but did not disclose
 11 it to investors.¹⁰⁹⁵ She was unable to explain why she maintained her opinion that Radical Bunny was
 12 secured and had collateral in spite of her own attorney’s opposite conclusion, but she testified that it
 13 was not based upon her background in securities or as a real estate broker.¹⁰⁹⁶ Mr. Hirsch testified that
 14 Bob Bornhoft from Quarles & Brady raised concerns about the collateral security interest in the RB–
 15 ML Loans in April or May 2007,¹⁰⁹⁷ and that he [Mr. Hirsch] received an email on December 12,
 16 2007 reminding him that the collateralization issues had not been resolved.¹⁰⁹⁸ He testified that he
 17 did not share that information with any Participants.¹⁰⁹⁹ Mr. Hirsch testified that “in regard to the
 18 secured status, I felt that there was enough evidence and documents to support the position that
 19 Radical Bunny is a secured creditor. And if I had to choose, I chose to go the securities route, get that
 20 resolved, believing that taking care of the securities issue will self-correct the secured status.”¹¹⁰⁰ Mr.
 21 Hirsch testified that he did not try to conceal anything from any Participant and that he didn’t talk
 22

23 ¹⁰⁹³ *S.E.C. v. Global Telecom Services, LLC*, 325 F.Supp.2d 94, 116 (D. Conn. 2004), citing to *Herman & MacLean v.*
 24 *Huddleston*, 459 U.S. 375, 390 n. 30, 103 S.Ct. 683, 692 n. 30, 74 L.Ed.2d 548 (1983); *Rolf v. Blyth, Eastman Dillon &*
Co., 570 F.2d 38, 47 (2d Cir.), *cert. denied*, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 698 (1978).

25 ¹⁰⁹⁴ *Rose*, 128 Ariz. at 214, 624 P.2d at 892; *See also, Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 733 P.2d
 1131(Ct. App. 1986).

26 ¹⁰⁹⁵ Tr. at 1323; *See also* 1395-1396, 1408, 1470-1472, 1491-1493.

¹⁰⁹⁶ Tr. at 1471-1472.

¹⁰⁹⁷ Tr. at 1883.

¹⁰⁹⁸ Tr. at 1588.

¹⁰⁹⁹ Tr. at 1584-1588.

¹¹⁰⁰ Tr. at 1587.

1 about the collateral security issues with Participants because he believed that the Radical Bunny
2 managers had “adequate competent information documented that supports our position that we are
3 secured creditors” and that when the time came, he would not have any trouble getting Scott Coles to
4 sign whatever documents were needed.¹¹⁰¹

5 The Respondents do not deny that they continued to provide to Participants “Directions to
6 Purchase” documents that contained language “[y]our investment is collateralized by the beneficial
7 interest under various deeds of trust held by Mortgages Ltd.”

8 Based upon the testimony and evidence before us, we find that the Respondents decided not
9 to tell Participants about the problem with the secured status of collateral because it would contradict
10 statements Respondents had made to Participants regarding the security of the investments and would
11 undermine Radical Bunny’s operations by decreasing the likelihood that Participants would continue
12 to invest in Radical Bunny and increasing the likelihood that Participants would want to liquidate
13 their existing investments.

14 We find that Respondents had knowledge that the Participants’ investments were not
15 adequately collateralized and that Radical Bunny’s attorneys were unable to get Mortgages Limited
16 to agree to or provide the necessary documentation.¹¹⁰² Although Respondents had this knowledge,
17 they did not provide this information to potential or existing Participants, and continued to provide
18 inaccurate statements concerning the status of security for the investments.

19 We have already discussed and rejected Respondents’ argument that Participants did not
20 invest in Radical Bunny.¹¹⁰³ The evidence is clear that Participants invested in Radical Bunny.
21 Participants’ checks were written to and cashed by Radical Bunny and placed in Radical Bunny’s
22 bank account. Radical Bunny used the pooled funds as capital. Participants did not receive a receipt
23 from Radical Bunny¹¹⁰⁴ and the only document evidencing their investment purported to direct
24 Radical Bunny to do what it had already done. The Direction to Purchase does not create or
25 document an investment by a Participant in Mortgages Limited, nor does it create a “servicing
26

27 ¹¹⁰¹ Tr. at 1809-1810.

¹¹⁰² Tr. at 1584-1588.

¹¹⁰³ See discussion above concerning the RB-ML Loan Program as an investment contract.

¹¹⁰⁴ Exhibit S-14.

1 agreement” between Radical Bunny, a Participant, or Mortgages Limited. No Participant testified
 2 that Radical Bunny was merely their “agent.”¹¹⁰⁵ Although his notes from a PowerPoint presentation
 3 by Radical Bunny at the November 10, 2005 Orange Tree Resort meeting show that the Respondents
 4 called the Direction to Purchase an “After the fact document, An Agency Agreement to ‘member
 5 managers,’”¹¹⁰⁶ the facts show that Radical Bunny was the legal entity that invested in Mortgages
 6 Limited, not individual Radical Bunny Participants.¹¹⁰⁷ When a Participant liquidated, it was Radical
 7 Bunny, not Mortgages Limited, who returned the amount invested. Mrs. Walder made it clear in her
 8 discussion with a potential Participant that there was a difference between investing with Radical
 9 Bunny and with Mortgages Limited, and she explained to a potential Participant the reasons why he
 10 should invest in Radical Bunny instead of going directly to Mortgages Limited.¹¹⁰⁸

11 The “Direction to Purchase” document was created by Mr. Hirsch, a non-attorney, and
 12 patterned after documents used by Mortgages Limited.¹¹⁰⁹ We find that the document was designed
 13 to acknowledge Radical Bunny’s receipt of funds from Participants; make Participants believe that
 14 they had a secure investment in Mortgages Limited; and also characterize Radical Bunny as merely
 15 an “agent” and thereby not responsible for payment.

16 The testimony from investors, as well as statements made by Respondents, demonstrate that
 17 the Respondents represented to potential and existing Participants that Mortgages Limited and/or
 18 Scott Coles had sufficient assets to pay back its loans.¹¹¹⁰ The Respondents made a point of letting
 19 potential Participants know how long Mortgages Limited had been in business and that neither
 20 Mortgages Limited nor Radical Bunny had ever lost a penny and that they paid on time like
 21 clockwork. Mr. Richard Friedberg testified that the Radical Bunny managers talked about Scott
 22 Coles’ net worth and “made him sound like he was a very conservative investor with a lot of money
 23

24 ¹¹⁰⁵ Mr. Levine testified that the use of the word “agent” in the Direction to Purchase meant to him that as managing
 25 director of Radical Bunny, Mr. Hirsch “would be our agent if you want to look at it that way.” Tr. at 117; Mr. Raval, an
 26 investor and friend of Mr. Shah, testified that “Radical Bunny was more like a conduit to, the money was lent to
 27 Mortgages Limited.” Tr. at 1943; 1996.

28 ¹¹⁰⁶ Exhibit R-10.

¹¹⁰⁷ See discussion above on investment contracts and Exhibits S-31, 32(a) & (b), 48, 49, 35, 37(a), 38(a)-(f).

¹¹⁰⁸ Exhibit S-14.

¹¹⁰⁹ Tr. at 1564, 980.

¹¹¹⁰ Tr. at 74, 136-137, 281-282, 417-418, 475-476, 1332-1333.

1 to back up what he was saying.”¹¹¹¹ Ms. Hinman testified that at the May 2008 Orange Tree Resort
 2 meeting Mr. Hirsch was talking about the rumors about Scott Coles being lies, and that Coles was
 3 financially stable and they had nothing to worry about.¹¹¹² Ms. Herbranson’s testimony confirmed
 4 that at the May 2008 Orange Tree Resort meeting, Mr. Hirsch spoke about Scott Coles and told
 5 Participants that Coles did not have financial problems.¹¹¹³

6 The Respondents also made a point of telling potential Participants that the two Radical
 7 Bunny managers who were CPAs did tax work for Scott Coles and Mortgages Limited affiliates,
 8 implying that they were familiar with their financial affairs and were looking out for Radical Bunny
 9 investors.¹¹¹⁴

10 Mrs. Walder testified that she showed Participants a copy of Scott Coles’ personal guarantee
 11 and told them that Hirsch & Shah CPAs did the tax returns for Mr. Coles and Mortgages Limited
 12 investor pools.¹¹¹⁵ Mrs. Walder testified that she believed Scott Coles “was a very substantially
 13 wealthy individual just from the way he would talk about his life and what he had, his possessions”
 14 and from talking to the CPAs in Hirsch and Shah who did tax work for Mr. Coles.¹¹¹⁶ However, she
 15 testified that she was unaware of Mr. Coles’ liabilities and did not make inquiries to ascertain his
 16 liabilities.¹¹¹⁷

17 Mr. Hirsch was aware in December 2007 that Mortgages Limited had stopped making loans
 18 and that one of Mortgages Limited’s loans was in default. Mr. Hirsch was aware in the first quarter
 19 of 2008 that Mortgages Limited’s fundraising from its own investors had slowed and broker/dealers
 20 had been hired to try to raise money; and that Mortgages Limited began calling Radical Bunny at
 21 least twice a week looking for funds. He was also aware that Mortgages Limited had a state banking
 22 audit pending. Mr. Hirsch testified that the audits he saw of Mortgages Limited when he did its taxes
 23 did not show that Mortgages Limited had liabilities in excess of its assets.¹¹¹⁸ Mr. Hirsch testified

24 ¹¹¹¹ Tr. at 136-137.

25 ¹¹¹² Tr. at 417-418.

26 ¹¹¹³ Tr. at 475-476.

27 ¹¹¹⁴ Exhibit S-14 “they know what the pools are like, the strength of the pools, the strength of the portfolio; I sleep very
 well at night;” Tr. at 136.

28 ¹¹¹⁵ Tr. at 1331-1334.

¹¹¹⁶ Tr. at 1332-1333.

¹¹¹⁷ Tr. at 1332-1335.

¹¹¹⁸ Tr. at 1724.

1 that Mortgages Limited's in-house CPA, Chris Olson, provided information to Mr. Hirsch and did
 2 not indicate that there was any trouble at Mortgages Limited.¹¹¹⁹ However, Mr. Hirsch also testified
 3 that he was unaware that: Mortgages Limited had terminated its defined pension plan in February
 4 2007; Mortgages Limited stopped making redemptions to its own investors in early 2007; Mortgages
 5 Limited had a verbal agreement with one of its borrowers to reduce the monthly construction
 6 fundings for the project for an undetermined period of time; and although he was aware that Scott
 7 Coles' trust borrowed \$6 million from Mortgages Limited, Mr. Hirsch said he did not know that it
 8 was unsecured.¹¹²⁰ Mr. Hirsch testified that the personal guaranty that he received from Scott Coles
 9 dated January 10, 2008, did not include Coles' other entities or his trust, and that neither Radical
 10 Bunny nor Mr. Hirsch conducted any independent due diligence with respect to what Mr. Coles
 11 owned in his individual capacity.¹¹²¹

12 We find that the Respondents touted their close ties with Mortgages Limited and used
 13 Mortgages Limited's and the Coles' financial successes and longevity to impress Participants, but did
 14 not perform due diligence with respect to the financial status of Mortgages Limited and never
 15 ascertained the true nature or value of Scott Coles' personal assets, not even when there were clear
 16 signs of trouble.

17 The testimony is clear that Respondents represented to potential Participants and existing
 18 Participants that the proceeds of the RB-ML Loans were to be used solely to fund the Mortgages
 19 Limited loans. Investor Richard Friedberg testified that Mr. Hirsch "emphasized that we were in
 20 commercial real estate with nothing – no more than a 65 percent loan-to-value ratio in commercial
 21 properties and we were in first position."¹¹²² Ms. Hinman testified that Mrs. Walder told her that her
 22 "money would be pooled with other investors that came at this time to invest until they had enough
 23 money to purchase this land, and that is where this money would go."¹¹²³

1119 Tr. at 1725.

1120 Tr. at 1838-1841.

1121 Tr. at 1830-1831; 1880-1881 Mr. Hirsch testified that he did not do the income tax returns for the SMC Revocable Trust for the tax periods 2006 and 2007 because Scott Coles was being audited by the Internal Revenue Service for tax year 2006. Mr. Hirsch did not disclose to Participants that Mr. Coles was being audited by the IRS.

1122 Tr. at 74.

1123 Tr. at 405.

1 Mr. Shah testified that he was not aware of any documents that limited Mortgage Limited's
 2 use of the funds provided by Radical Bunny.¹¹²⁴ Mr. Hirsch testified that he had had a verbal
 3 agreement with Scott Coles that "the use of money that Radical Bunny loans to Mortgages Limited,
 4 we restricted. So they could not use it for their overhead or acquiring any assets that would violate
 5 the lending criteria, that they would not – for example, Mortgages Limited had an underwriting
 6 criteria, and we wanted to make sure that the underwriting criteria is adhered to as relates to the
 7 money received from Radical Bunny."¹¹²⁵ Mr. Hirsch testified that the verbal agreement was
 8 important to him because "we wanted to be consistent with what we are telling our participants. We
 9 wanted to make sure that the money loaned to Mortgages Limited is going to where it's intended to
 10 be, essentially loaned out to the developers of borrowers, not used for other purposes."¹¹²⁶ However,
 11 Mr. Hirsch had no explanation as to why this important alleged verbal agreement was not in
 12 writing.¹¹²⁷

13 We find that Mr. Hirsch's testimony about a verbal agreement with Scott Coles to restrict the
 14 use of the loan proceeds is not credible. Mr. Shah testified that he was unaware of any document that
 15 restricted the use of the loan proceeds, and Mr. Hirsch was unable to explain why such an important
 16 agreement was not in writing.¹¹²⁸ We find that the evidence shows that Respondents represented to
 17 potential and existing Participants that the loan proceeds were to be used solely to fund Mortgages
 18 Limited loans, but failed to advise them that the promissory notes did not contain any language that
 19 limited the use of the RB-ML Loan proceeds and that \$35 million of Participant funds were used by
 20 Mortgages Limited to fund its general business operations.

21 The Respondents also deny that they had been advised that their operations were violating
 22 securities laws. However, during the hearing, four individuals with professional experience in
 23 securities laws and regulation testified that they had given the Respondents such advice. Mr. Sell's
 24 background includes over 30 years in securities work, and involves work as an arbitrator for the
 25 National Association of Securities Dealers, as a receiver appointed by both state and federal agencies,

26 ¹¹²⁴ Tr. at 1176.

27 ¹¹²⁵ Tr. at 1701.

¹¹²⁶ Tr. at 1702.

¹¹²⁷ Tr. at 1702.

28 ¹¹²⁸ Tr. at 1176; 1702.

1 and as an instructor on “what is a security.” Mr. Sell met with Mr. Hirsh and Mr. Shah in the fall of
2 2005, and he testified that based upon Mr. Hirsch’s description of Respondents’ operations, he
3 believed that there were violations of Arizona Securities laws. He testified that he told Mr. Hirsch
4 and Mr. Shah that they were violating securities laws and that they were to cease raising money until
5 it was resolved; that Mr. Hirsch and Mr. Shah should go to the Commission and register as securities
6 dealers, explain that they were unaware of the violations, and plan to do a rescission to all existing
7 investors; and he also offered to help them by contacting the Securities Division and recommending
8 an attorney.¹¹²⁹

9 Mr. Hirsch and Mr. Shah did not dispute that they met with Mr. Sell, but they do not recall
10 that the discussion concerned securities violations.¹¹³⁰ Instead, they claim the discussion concerned
11 the proper tax form to provide Participants for reporting income from Radical Bunny. Mr. Shah
12 testified that the discussion was about “transition” matters that concerned Mr. Hirsch, and Mr. Hirsch
13 claimed to be concerned about being subject to an “enormous penalty” from the treasury department
14 for providing incorrect reporting documents.

15 Mr. Sell is a CPA with many years of experience in securities regulation and is recognized by
16 federal and state agencies for his expertise. He has no reason to fabricate testimony concerning his
17 meeting with Mr. Hirsch and Mr. Shah. The Respondents did not allege or demonstrate any bias
18 resulting from Mr. Sell’s work before federal or state agencies or courts or his experience with
19 Mortgages Limited. Consistent with our resolution of the conflicting testimony about the meeting
20 with Mr. Sell, we find the testimony of Mr. Sell to be truthful and it is clear that the discussion he
21 had with Mr. Hirsch and Mr. Shah concerned securities violations, not corporate filing requirements
22 or tax issues.¹¹³¹ We note that at the time of that meeting, the amount invested in Radical Bunny by
23 Participants was \$20 million.

24 A little over a year after their meeting with Mr. Sell, the Respondents met with Mr. Logan and
25 Mr. Ranno, attorneys experienced in state and federal securities laws, who also advised Respondents
26 that they were in violation of some state/federal laws and needed a license, and that the promissory

27 ¹¹²⁹ Tr. at 349-350.

28 ¹¹³⁰ Tr. at 1152; 1581.

¹¹³¹ See the discussion of the *Howey* test with investment contracts above.

1 notes were securities. Mr. Logan also told Respondents that he was concerned that an audit of
2 Mortgages Limited could create a path to Radical Bunny and start an investigation. Mr. Logan said
3 that the advice did not seem to affect Mr. Hirsch, who remained convinced that Radical Bunny did
4 not need a license and that they were not selling securities. Mr. Logan testified that he told
5 Respondents that they needed a law firm to thoroughly investigate their activities and the structure of
6 their deals and that because no one had lost money, they could make a rescission offer to their
7 investors, but would have to have the money available to pay the Participants.¹¹³² When Mr. Hirsch
8 indicated that Radical Bunny was going to meet with Quarles & Brady, Mr. Logan told him that was
9 a very good thing because he did not believe that a lawyer with knowledge and experience would
10 advise that no license was needed, but that if Mr. Hirsch was determined to continue with Radical
11 Bunny's operations and Quarles & Brady told him he did not need a license, a very large malpractice
12 policy would be required.¹¹³³

13 The Respondents testified that they did not recall any advice from Mr. Logan or Mr. Ranno.
14 Mr. Shah testified that Mr. Hirsch explained Radical Bunny's operations and that they had sought
15 counsel to look at the structure of the company, and the way they were doing business, but did not
16 recall any advice given by Mr. Logan during the meeting or any issues that Mr. Logan thought
17 Radical Bunny should look into.¹¹³⁴ Mr. Walder testified they met with Mr. Logan because they
18 wanted to have counsel for a company that was growing substantially and they needed answers as to
19 whether or not they were complying with all state rules and regulations. Mr. Walder testified that he
20 did not think Mr. Logan was the right attorney for Radical Bunny because they needed a bigger firm
21 and he thought Mr. Logan had little knowledge of securities.¹¹³⁵ Mrs. Walder attended two meetings
22 with Mr. Logan but could not recall any advice given by Mr. Logan or Mr. Ranno concerning Radical
23 Bunny's need for a license to continue its business operations.¹¹³⁶ Mr. Hirsch testified that they met
24 with Mr. Logan and Mr. Ranno because Radical Bunny was looking for a securities attorney to
25

26 ¹¹³² Tr. at 205.

27 ¹¹³³ Tr. at 205-206; 226-227.

28 ¹¹³⁴ Tr. at 1157; 1166; 1194.

¹¹³⁵ Tr. at 1048.

¹¹³⁶ Tr. at 1386.

1 advise them whether they had any securities issues.¹¹³⁷ Mr. Hirsch said that no one at the meetings
2 suggested they stop the participation program.¹¹³⁸ Mr. Hirsch testified that he told Mr. Logan that
3 they were looking at other law firms, too.

4 We find the testimony given by Mr. Logan, that he and Mr. Ranno advised the Respondents
5 that they were in violation of some federal and/or state laws by operating without a license, to be
6 truthful. The Respondents admitted that they sought his counsel for securities issues, and that they
7 did not hire him because they thought he wasn't experienced enough in securities regulation and was
8 not part of a large law firm. The Respondents' testimony also confirms Mr. Logan's testimony that
9 he told the Respondents that they would need a large firm with a very large malpractice policy if they
10 continued their operations. Mr. Logan's description of Mr. Hirsch's demeanor after hearing the
11 attorneys' advice as "very, very confident and very, very determined that they were doing nothing
12 wrong" shows that the Respondents were not actually looking for legal advice, but looking for
13 confirmation of their belief that they had done nothing wrong. Consistent with their previous pattern,
14 when faced with legal advice that did not meet their goal of continuing their operations, they chose to
15 ignore it. We note that at the time of the meeting with Mr. Logan, Participants had invested
16 approximately \$113 million in Radical Bunny.

17 During the December 2006/January 2007 timeframe, the Respondents attended a meeting at
18 Mortgages Limited to discuss the relationship between Mortgages Limited and the manner in which
19 Radical Bunny was soliciting investors. Mr. Kant, a corporate and securities lawyer since 1970 and
20 attorney for Mortgages Limited, testified that at the meeting, he advised Mr. Hirsch that he was
21 concerned about the way Radical Bunny was raising money and that it was pretty clear that Radical
22 Bunny was selling securities. He testified that he told Mr. Hirsch that his actions could lead to Mr.
23 Hirsch's and Mr. Coles' picture being on the front page of the newspaper and could harm Mortgages
24 Limited's good reputation in the community.¹¹³⁹ Mr. Kant also testified he attended an August 2007
25 meeting with Scott Coles, Mike Denning, Bob Moya, Bob Bornhoft, a Quarles & Brady associate,
26 Mr. Hirsch and one or more of the Radical Bunny managers. He testified that during that meeting, he

27 ¹¹³⁷Tr. at 1772.

28 ¹¹³⁸Tr. at 1785.

¹¹³⁹Tr. at 1227-1228.

1 told the Respondents that if they were continuing to offer securities without addressing the concerns
2 that he had raised, that they could go to jail.¹¹⁴⁰ Mr. Kant testified that no one present disagreed with
3 his statement and that after the meeting, Mr. Moya from Quarles & Brady thanked him for making
4 the statement, saying it made his job easier.¹¹⁴¹

5 Mr. Hirsch testified that Mr. Kant never told him whether the way that Radical Bunny was
6 operating was legal or not, and he “vehemently” disagreed with Mr. Kant’s testimony that he told Mr.
7 Hirsch that people go to jail for what Radical Bunny was doing.¹¹⁴²

8 We find Mr. Kant’s testimony to be truthful. As attorney for Mortgages Limited, he was
9 concerned that Radical Bunny’s actions may have a harmful effect on his client and expose it to risk
10 involving securities violations. The Respondents admitted that Mr. Kant recommended that they
11 obtain counsel to help them with securities issues, and they did seek counsel. Although Mr. Bornhoft
12 did not remember hearing Mr. Kant make a statement about people going to jail, Mr. Bornhoft did
13 testify that he was frustrated that the meeting he thought would be about his issue with collateral,
14 ended up being about Mr. Kant’s issue with securities compliance.¹¹⁴³ Mr. Hoffmann also confirmed
15 that Mr. Kant told him that he was concerned about Radical Bunny raising money illegally.

16 The Respondents contacted Quarles & Brady in January 2007 because Scott Coles and others
17 with Mortgages Limited had expressed concerns about Radical Bunny’s compliance with federal and
18 state securities laws and had referred them to several law firms, including Quarles & Brady. After an
19 initial telephone conference call, Mr. Hoffmann and Mr. Moya met in person with Mr. Hirsch and
20 Mr. and Mrs. Walder on February 12, 2007. During that meeting, Mr. Hoffmann took extensive
21 notes which reflect that Mr. Hirsch provided a detailed description of Radical Bunny’s operations,
22 which at that time had approximately \$140 million in loans to Mortgages Limited. Mr. Hoffmann
23 testified that he told them that although he had not yet reviewed their documentation, his opinion was
24 that the participations were securities, their program was structured as an investment contract, they
25 had been selling unregistered securities without an exemption, and that they were most likely an

26
27 ¹¹⁴⁰ Tr. at 1227-1228.

¹¹⁴¹ Tr. at 1268; 1261.

¹¹⁴² Tr. at 1899.

¹¹⁴³ Tr. at 608; 677.

1 unregistered broker/dealer, and may also be an investment advisor, and mortgage broker/banker. Mr.
 2 Hoffmann was also concerned about the lack of appropriate disclosures given by Radical Bunny to its
 3 Participants. At this point, Mr. Hoffmann's judgment was not confirmed, but the Radical Bunny
 4 managers indicated that they wanted to become compliant and if there was a security, they wanted
 5 him to find an exemption or some way to be restructured to avoid securities laws. Following that
 6 meeting, Radical Bunny hired Quarles & Brady, and Mr. Hoffmann and other Quarles & Brady
 7 attorneys reviewed Radical Bunny's documents and conducted research to see if there was an
 8 exemption or way to restructure the Radical Bunny program to avoid securities laws. Mr. Hoffmann
 9 testified that when he learned from Mr. Bornhoft that Radical Bunny did not have a perfected security
 10 interest in Mortgages Limited's collateral it caused him concern because Radical Bunny had told
 11 investors they were secured. Mr. Hoffmann testified that if Radical Bunny was selling securities, it
 12 would be a material misstatement of fact under federal and state Securities laws.

13 Mr. Hoffmann testified that on May 2, 2007, he informed Mr. Hirsch and Mr. and Mrs.
 14 Walder that they had violated the securities laws.¹¹⁴⁴ His notes from the conversation were entered as
 15 exhibits, and Mr. Hoffmann testified from his notes.¹¹⁴⁵ Those notes indicate that he told the
 16 Respondents to "stop selling securities in viol. of fed/st. securities laws."¹¹⁴⁶ He also advised them
 17 that their liability had already occurred, and that the Respondents would face fraud issues if they
 18 continued representing to their investors that they have a valid security interest, because Quarles &
 19 Brady had concluded there was not.¹¹⁴⁷ Although Respondents attempted to discredit the writing and
 20 the use of different writing instruments, they provided no evidence that the agenda and notes were not
 21 made in preparation for and during the conversation. Mr. Hoffmann's explanation of the notes and
 22 the use of a different pen at a specific point is credible. It is significant that upon receiving Mr.
 23 Hoffmann's advice, the first comment made by Respondents was that Scott Coles was borrowing
 24 money from Mortgages Limited, as it demonstrates that they heard the legal advice and understood
 25 its implications.¹¹⁴⁸ Mr. Hoffmann's testimony as to why he did not put the advice in writing is also

26 ¹¹⁴⁴ Tr. at 818.

27 ¹¹⁴⁵ Exhibit S-22(g), Exhibit S-22(i); Tr. at 819-820; 822; 927.

28 ¹¹⁴⁶ Tr. at 925, 926.

¹¹⁴⁷ Tr. at 827-828; See also Tr. at 874.

¹¹⁴⁸ Tr. at 929-930.

1 credible, as he explained that he was advising well educated individuals who clearly understood the
2 advice and told him they wanted to comply with the law.¹¹⁴⁹ Further, Mr. Hoffmann's testimony that
3 he reiterated the same advice in a meeting with Respondents and Mr. Bornhoft after Scott Coles'
4 suicide and that Mr. Hirsch said, "we've done everything wrong" was confirmed by Mr. Bornhoft,
5 who also testified that Mr. Hoffmann's summary of his previous advice was not disputed by the
6 Respondents.¹¹⁵⁰ Although the Respondents testified that Mr. Hoffmann did not tell them they were
7 violating Securities laws, they could not explain why they continued to employ Quarles & Brady to
8 work on securities issues for Radical Bunny.¹¹⁵¹

9 The Respondents' decisions to continue to operate Radical Bunny despite repeated warnings
10 and clear legal advice demonstrate a flagrant willingness to violate the law.

11 We find that the statements and omissions identified by the Division are material. Statements
12 concerning what the investment was, its risks, and the quality and nature of the collateral, go to the
13 core of an investor's decision and would have significant impact on the factors used by investors to
14 determine whether the potential return justified the risk involved.

15 We find that the material statements were also untrue or misleading, including statements that
16 the RB-ML Loans were adequately collateralized and that the collateral was always in a secured first
17 position; that Mortgages Limited and Scott Coles' assets and financial condition were sufficient and
18 monitored by Radical Bunny's Managers; that the investment was in Mortgages Limited loans; and
19 that Radical Bunny was not subject to the Securities laws.

20 The omitted material facts that would have been necessary to make statements not misleading
21 include that the promissory notes evidencing the RB-ML Loans did not contain any language that
22 limited the use of the proceeds; that Mortgages Limited was using Participant funds to fund its
23 general business operations; that Radical Bunny Managers had been repeatedly advised by experts
24 that they may be engaged in the offer and sale of unregistered securities, had in fact, been engaged in
25 the offer and sale of unregistered securities in violation of the Securities Act, or that their activities

26 ¹¹⁴⁹Tr. at 945-946; 876.

27 ¹¹⁵⁰Tr. at 689-690; 714-715; 945.

28 ¹¹⁵¹Tr. at 2212; The documents submitted with the Motion to Supplement the record do not affect our determination herein, as we find they contain no evidence that affects the credibility of testimony from the attorneys who testified under oath in the hearing.

1 may be subject to another regulatory scheme; that Radical Bunny was advised by individuals who
2 had extensive experience in securities and other regulatory matters to stop selling securities until a
3 [new] program could be instituted that was compliant with applicable Arizona and Federal Securities
4 laws; that there were questions about the secured status of Radical Bunny's collateral, and that they
5 had been unable to get the documentation from Mortgages Limited that Radical Bunny's attorneys
6 had advised them was necessary for insuring their collateral was secure; and that the personal
7 guarantee of Scott Coles ended effective December 1, 2007, and then had been renewed until June
8 30, 2008.¹¹⁵² We further find that at the 2007 Orange Tree Resort meetings with Participants,
9 Respondents Mrs. Walder, Mr. Walder, and Mr. Shah had opportunities to inform Participants that an
10 issue was outstanding concerning collateral for the RB-ML Loans and to correct the misleading or
11 false representation of Mr. Hirsch.

12 Respondents argue that because the bankruptcy court approved a settlement of the litigated
13 issue concerning whether and how Radical Bunny's loans to Mortgages Limited were secured, it was
14 unimportant that Participants were not told of the questionable status of the security of their
15 investments. Respondents' argument would mean that the duty to disclose disappears if in the end,
16 everything almost works out as promised. We disagree, and find that there are several problems with
17 this analysis, including the fact that as a result of the Mortgages Limited bankruptcy, the Participants'
18 investments were not treated the way that Radical Bunny had told them that they would be, and they
19 were not as "secure" as promised. The issue is not just whether the Participants' investments are
20 "secured" but where they stand in relation to other claims on Mortgages Limited's assets. Radical
21 Bunny and its managers clearly understood the difference because they repeatedly told prospective
22 and current Participants that Mortgages Limited had strict criteria as to how much it would loan on a
23 property in relation to its value; that they were in "first position" and that such criteria would protect
24 the Participants' investments.¹¹⁵³

25 After Quarles & Brady informed Respondents that the collateral was not properly secured,
26 Respondents continued to represent to Participants that their investments were secure. Richard

27 ¹¹⁵² Exhibit S-37(a) at 44-45; Exhibit S-30 January 10, 2008 renewed "Guaranty" of Scott Coles to Radical Bunny; Tr. at
1628.

28 ¹¹⁵³ Exhibit S-14, Tr. at 47-47, 74, 90; 269, 1325-1326.

1 Friedberg testified that the Radical Bunny managers represented to him and his mother that their
 2 investments were fully collateralized and that statements made by Mr. Hirsch and Mrs. Walder led
 3 him and his mother to believe that they had “invested in first deeds of trust secured by commercial
 4 real estate with no more than a 65 percent loan-to-value ratio.” Exhibit S-14, the recording of Mrs.
 5 Walder speaking to a prospective Participant, confirms that in 2007, the Radical Bunny Managers
 6 were still making statements that they were only into the note 60-65 percent and in first position.¹¹⁵⁴
 7 Mr. Friedberg testified that he learned in the bankruptcy court that they had “fractional interests in
 8 loans to Mortgages Limited, but they didn’t seem to be secured directly by specific property” and that
 9 if they had known that the loan interest was not fully collateralized, they would not have invested.¹¹⁵⁵
 10 Mrs. Walder told potential Participants that Radical Bunny “has never lost a penny, Mortgages
 11 Limited has never lost a single penny,” and explained that even if there was a default on the note,
 12 Participants had the opportunity to make even higher interest if they didn’t need payments every
 13 month while the foreclosure happens.¹¹⁵⁶ We find that these statements were made to induce
 14 Participants to invest with Radical Bunny and convince them that their money would be safe with the
 15 restrictions in place.

16 We note that although Radical Bunny has characterized itself as an “agent” for
 17 Participants,¹¹⁵⁷ the evidence demonstrates that Radical Bunny’s managers placed their own interests
 18 before the Participants’ interests, thereby depriving Participants of the opportunity to decide whether
 19 the additional risks associated with the questionable secured status of the investment and the
 20 unresolved securities issues warranted new or continued investments. The Respondents clearly
 21 understood the significance of disclosing information about these legal issues to their Participants,
 22 and the likely ramifications it would have on Radical Bunny’s continued operations, and on the
 23 managers’ own income stream from the 2 percent interest spread. Mr. Hirsch and Mrs. Walder each
 24 testified that it did not occur to them to stop accepting money until the securities and collateral issues

25
 26 ¹¹⁵⁴ See also Tr. at 755; 779; Exhibit S-45(a), Exhibit S-45(b) (Notes of Mr. Hoffmann’s meeting with Radical Bunny; Tr.
 27 at 269 (Statements made in November 2007); Tr. at 520 (“We are first on the deed of trust” May 2008 Orange Tree
 Resort Semi-Annual Meeting)

¹¹⁵⁵ Tr. at 88-89.

¹¹⁵⁶ Exhibit S-14.

28 ¹¹⁵⁷ Respondents’ Post-Hearing Memorandum at 6, citing Exhibit S-12(i) “Direction to Purchase,” 8, 9, 16.

1 identified by their attorneys were cleared up.¹¹⁵⁸ This testimony is not credible. The Respondents are
2 all college educated, degreed professionals who can understand the meaning of "securities violation"
3 and "lack of perfected collateral." They could also understand what losing their 2 percent interest
4 earnings on every loan would mean to them personally. Mr. Hirsch testified that he decided to focus
5 on resolving the securities issue, "believing that taking care of the securities issue will self-correct the
6 secured status."¹¹⁵⁹

7 If the Respondents stopped accepting money from Participants, then Radical Bunny would no
8 longer be able to loan money to Mortgages Limited. During his testimony, Mr. Hirsch tried to
9 explain the consequences of following such legal advice to stop accepting money or rolling over
10 funds until a new, compliant program could be put into place:

11 Q. Did anyone ever suggest that you may need a license?

12 A. Yes, there was always in conversation that we may need a license or
13 something.

14 Q. Did that concern you?

15 A. Certainly.

16 Q. I believe that you testified that the Quarles & Brady attorneys did not tell
17 you to stop selling securities in the spring of 2007. Is that your testimony?

18 A. Yes ma'am.

19 Q. Okay. And I believe - can you explain to me why you thought that would
20 have been a problem, to stop selling them?

21 A. I don't think so much as a problem, but it would have been an important -
22 extremely important message. We had a meeting with our participants
23 scheduled for May 24th, and we have roughly 500 people that we need to let
24 know immediately that we have to do something. We have to: one, stop
25 accepting money; two, address the issue of the loans as they come in maturity
26 to redeem those loans and refund the money to everyone else; we would have
27 no focus anymore on the POM. I mean, you are talking about a very difficult
28 toxic situation. It needs immediate attention.

¹¹⁵⁸ Tr. at 1584, 1588, 1430-31.

1 Q. And I can see that you are upset, and if you want to take a break, just let me
2 know, but I do have another question about that.

3 A. That is okay, Your Honor. I'm fine.

4 Q. What do you mean by 'toxic situation?' For members of Radical Bunny?
5 Is that what you are saying?

6 Q. No, Ma'am, for all the participants, every individual, all 900 of us.
7 Imagine all of a sudden being told that we have a serious problem here. I don't
8 mean just a casual issue with licensing. We are talking about a situation that
9 can tumble into utter disaster. You can't ignore that. I have a – we had a pool
10 of \$150 million. Forget the managers' money. Think about the participants.
11 How do you ignore that?

12 Q. Okay. Maybe I'm not – maybe we are not understanding each other.
13 When you would stop entering in – when Radical Bunny would stop entering
14 into loans with Mortgages Limited, that would mean that when – to me that
15 means that when the loan matured, the principal would be returned. The
16 participant would then have their money, and they could invest somewhere
17 else. I don't understand how that would harm a participant.

18 A. The consequences – the potential consequences to Mortgages Limited
19 would tumble down to each and every one of our participants.

20 Q. I don't understand what you mean.

21 A. Well, if you consider a \$150 million pool of money that Mortgages Limited
22 would have to return to Radical Bunny, and they're – in the latter part of the
23 year they were having some difficulties, as I believe Ms. Coleman alluded to,
24 raising money. That could create a situation where Mortgages Limited would
25 have to file for bankruptcy or not be able to meet its obligation to Radical
26 Bunny.

27 Q. Why would you think that Mortgages Limited couldn't, say, return their
28 principal at the loan maturity?

A. It's not that I knew for a fact. It's just the potential that affected me.¹¹⁶⁰

¹¹⁵⁹ Tr. at 1587.

¹¹⁶⁰ Tr. at 1900-1902.

1 Other evidence also leads to the conclusion that the Respondents were aware, (as early as
2 March 12, 2007) that the financial condition of Mortgages Limited was doubtful and that they
3 understood the ramifications of not continuing to loan money to Mortgages Limited.¹¹⁶¹

4 The Respondents cite to several cases that they claim establish a defense to allegations of
5 securities fraud. These cases discuss the federal “bespeaks caution doctrine” and how certain
6 cautionary language may render omissions or misrepresentations immaterial. This doctrine is discussed
7 in the excerpt from a case involving the Trump Casinos. In that decision the court explained that:

8
9 The application of bespeaks caution depends on the specific text of the offering
10 document or other communication at issue, i.e., courts must assess the communication
11 on a case-by-case basis. *See Flynn v. Bass Bros. Enters.*, 744 F.2d 978, 988 (3d
12 Cir.1984) (holding courts must determine the materiality of soft information on a case-
13 by-case basis). Nevertheless, we can state as a general matter that, when an offering
14 document's forecasts, opinions or projections are accompanied by meaningful
15 cautionary statements, the forward-looking statements will not form the basis for a
16 securities fraud claim if those statements did not affect the “total mix” of information
17 the document provided investors. In other words, *cautionary language, if sufficient,*
18 *renders the alleged omissions or misrepresentations immaterial as a matter of law.*
19 The bespeaks caution doctrine is, as an analytical matter, equally applicable to
20 allegations of both affirmative misrepresentations and omissions concerning soft
21 information. Whether the plaintiffs allege a document contains an affirmative
22 prediction/opinion which is misleading or fails to include a forecast or prediction
23 which failure is misleading, the cautionary statements included in the document may
24 render the challenged predictive statements or opinions immaterial as a matter of law.
25 *Of course, a vague or blanket (boilerplate) disclaimer which merely warns the reader*
26 *that the investment has risks will ordinarily be inadequate to prevent misinformation.*
27 *To suffice, the cautionary statements must be substantive and tailored to the specific*
28 *future projections, estimates or opinions in the prospectus which the plaintiffs*

¹¹⁶¹ Exhibit S-22(c); Tr. at 917 “run on bank by Radical Bunny investors;” See also Tr. at 872, 929-930 “Scott is borrowing from the ML company” and Tr. at 1900-1902.

1 challenge. In *Re Donald J. Trump Casinos Securities Litigation*, 7 F.3d 357, 371-372
2 (emphasis added).

3 In *Trump Casinos*, the court reviewed the numerous provisions contained in the prospectus
4 that was provided with the bonds and found “abundant and meaningful cautionary language” that
5 contained warnings and cautionary language that directly addressed the substance of the statement the
6 plaintiffs were challenging. The court found that “the cautionary statements were tailored precisely
7 to address the uncertainty concerning the Partnership's prospective ability to repay the
8 bondholders.”¹¹⁶² Because the prospectus took “considerable care to convey to potential investors the
9 extreme risks inherent in the venture while simultaneously carefully alerting the investors to a variety
10 of obstacles the Taj Mahal would face, all of which were relevant to a potential investor's decision
11 concerning purchase of the bonds,” the court concluded “that, given these warning signals in the text
12 of the prospectus itself, the plaintiffs cannot establish that a reasonable investor would find the
13 alleged misstatements and omissions material to his or her decision to invest in the Taj Mahal.”¹¹⁶³

14 The court in *Worlds of Wonder* said that the “bespeaks caution doctrine provides a mechanism
15 by which a court can rule as a matter of law (typically in a motion to dismiss for failure to state a
16 cause of action or a motion for summary judgment) that defendants' forward-looking representations
17 contained enough cautionary language or risk disclosure to protect the defendant against claims of
18 securities fraud” (*In Re Worlds of Wonder*, 35 F.3d 1407, 1413 (internal quotation and citation
19 omitted))¹¹⁶⁴ and that “when properly construed, merely represents the pragmatic application of two
20 fundamental concepts in the law of securities fraud: materiality and reliance.”¹¹⁶⁵

21 Respondents also rely on the decision in *Teamsters Local 175, et. al. v. Clorox Co., et. al.*,
22 353 F.3d 1125 (9th Cir. 2004). That case involved a private action brought by investors against an
23 acquiring company and its officers for securities fraud based upon alleged understatement of
24 problems associated with the acquisition. There, the court said that the Private Securities Litigation
25 Reform Act (“PSLRA”) had created a statutory version of the bespeaks caution doctrine “by

26
27 ¹¹⁶² *Trump Casinos*, 7 F.3d 357, 372.

¹¹⁶³ *Trump Casinos*, 7 F.3d 357, 364.

¹¹⁶⁴ See also, *Teamsters Local 175, et.al. v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004).

¹¹⁶⁵ *In Re Worlds of Wonder*, 35 F.3d 1407, 1414.

1 providing a safe harbor for forward-looking statements identified as such, which are accompanied by
 2 meaningful cautionary statement.”¹¹⁶⁶ The court analyzed the Company’s Form 10K filed with the
 3 SEC and statements made during conference calls with analysts, money and portfolio managers,
 4 institutional investors and large shareholders and concluded that liability for a statement predicting
 5 that problems would be resolved within one year was precluded by the safe harbor doctrine because
 6 there was sufficient cautionary language.

7 *In re Copper Mountain Sec. Litig.*, 311 F.Supp.2d 857 (N.D. Cal. 2004), was also a private
 8 action brought under the PSLRA. There, the court said, “the PSLRA does not require a list of *all* the
 9 factors that might make the results different from those forecasted. Instead, the warning must
 10 mention *important factors* of similar significance to those actually realized.”¹¹⁶⁷ The court analyzed
 11 statements made in SEC filings, conference calls, and press releases and found that the accompanying
 12 warnings included references to specific factors that were of similar significance to those that actually
 13 occurred, and held that the safe harbor warnings were adequate to protect from liability. *In re*
 14 *Convergent Technologies, Inc.*, 948 F.2d 507 (9th Cir. 1991), involved a class action brought by a
 15 stock purchaser against a computer workstation manufacturer alleging securities fraud. The court
 16 analyzed the prospectuses, reports to shareholders, and press releases and determined that they were
 17 not fraudulent and that the manufacturer had no duty to disclose detailed internal projections about
 18 new product lines under development. The court held that “the securities laws do not require
 19 management ‘to bury the shareholders in an avalanche of trivial information – a result that is hardly
 20 conducive to informed decision making.’”¹¹⁶⁸

21 All of these cases cited by the Respondents involve the application of “the bespeaks caution
 22 doctrine” to litigation concerning securities (stocks or bonds) that were being regulated under federal
 23 securities laws. The courts reviewed the prospectus, registration materials, SEC filings, and
 24 conversations and discussions with market analysts, investors and money managers. It is interesting
 25 that Respondents chose to align their operations with these federally-regulated public securities

26 ¹¹⁶⁶ *Teamsters*, 353 F.3d 1125, 1132.

27 ¹¹⁶⁷ *Copper Mountain*, 311 F.Supp.2d 857, 882 (emphasis original).

28 ¹¹⁶⁸ *Convergent Technologies*, 948 F.2d 507, 516, citing to *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49, 96 S.Ct. 2126, 2132, 48 L.Ed. 757 (1976).

offerings for purposes of defending against a securities fraud claim, while at the same time denying they sold securities.

However, we find these federal cases not applicable or persuasive for several reasons. First, Respondents did not issue a prospectus or anything remotely similar to one. Neither can the Respondents rely upon the Loan Participation Disclosure Statement and Acknowledgements that some Participants received.¹¹⁶⁹ That document purports to inform Participants of risks, but the document itself contains incorrect and misleading statements, including, “[t]he Participants will have a security interest in the Loan in that the Note is secured by a lien on the assets of Borrower as described in the Security Agreement.” There was no “Security Agreement” as described in the Loan Participation Disclosure Statement and Acknowledgements.¹¹⁷⁰ Second, the boilerplate oral statements made by Respondents of “no guarantee” do not come close to “abundant and meaningful cautionary language” that would warn potential investors that the secured status of the collateral was in question or that the Respondents had been advised their operations violated securities laws. Third, the bespeaks caution doctrine applies to forward-looking statements, and the misleading statements made by Radical Bunny and its managers related to existing facts (i.e. the secured status of the investment).

The Respondents failed to cite any Arizona cases that applied the federal bespeaks caution doctrine to state securities law violations. Even if the doctrine were applied to these facts, as discussed above, we find that the Respondents would find no safe harbor. The evidence establishes that the Respondents did not provide a prospectus to investors; the verbal communications were overwhelmingly assurances of the safety of the investment (“paid like clockwork” “never lost a penny” “I sleep well at night” “the best part – the CPAs” “dirty bomb”) and there is no testimony that any cautionary language was spoken other than the boilerplate statement about “no guarantees.” We find that Respondents’ misstatements and omissions were material and that there were no forward-looking representations containing enough cautionary language or risk disclosure to protect them against claims of securities fraud. Further, it is clear that Mr. Hirsch and Mrs. Walder took draft

¹¹⁶⁹ A document that Radical Bunny copied from a set of draft documents created by their attorneys in an effort to develop a securities-law compliant program.

¹¹⁷⁰ Tr. at 283, 579, 627, 918, 2133, 2155; Exhibit S-16(b); Exhibit S-22(c); Exhibit S-44.

1 documents from Quarles and Brady and made changes to those documents and used them with
2 Participants.¹¹⁷¹

3 The Respondents' reliance on *McAlister v. Citibank*, 171 Ariz. 207, 215, 829 P.2d 1253, 1261
4 (Ct. App. 1992), is misplaced, as that case involved a civil tort claim for negligent misrepresentation,
5 not a securities fraud violation.¹¹⁷² In any event, the Respondents' misrepresentations did not all
6 concern future events, nor were they alleged to be "negligent" misrepresentations.

7 The Division also argues that Respondents employed a device, scheme or artifice to defraud,
8 and engaged in transactions, practices or a course of business which operated as a fraud or deceit. As
9 set forth above, proof of scienter need not be direct, but may be an inference from the circumstantial
10 evidence.

11 It is clear that Respondents' RB-ML Loan Program was a scheme designed to skirt the
12 protections of the Arizona Securities Laws and did so for a number of years. Respondents admitted
13 that they formed an entity to accomplish what they as individuals were unable to do,¹¹⁷³ because of
14 the restrictions of the securities laws and Mortgages Limited's efforts to comply with those laws.¹¹⁷⁴
15 Further, Respondents had knowledge that they were violating the securities laws, yet they continued
16 to engage in the unlawful conduct. Finally, the evidence shows that the Respondents were aware, as
17 early as March 12, 2007, that the financial condition of Mortgages Limited was doubtful, that they
18 understood the ramifications of not continuing to loan money to Mortgages Limited,¹¹⁷⁵ and that they
19 decided not to comply with the advice of their attorneys to stop selling securities. We find that the
20 evidence demonstrates that the Respondents intended to defraud its Participants and engaged in
21 transactions, practices and a course of business which operated as a fraud using deceit.

22 ¹¹⁷¹ The differences between Exhibit R-13 (document prepared by Quarles & Brady) and Exhibit S-17 (document used by
23 Radical Bunny) show that it was not Quarles & Brady who made changes to the document Mr. Hoffmann faxed to "Tom,
24 Bunny & Howard" on May 21, 2007; but rather, that Radical Bunny took the Quarles & Brady document and modified it
and used it with Participants.

25 ¹¹⁷² *McAlister* involved a civil action brought by an individual against a bank and included a tort claim of negligent
misrepresentation. The court held that the tort of negligent misrepresentation "requires a misrepresentation or omission of
26 a fact. A promise of future conduct is not a statement of fact capable of supporting a claim of negligent
misrepresentation." *McAlister v. Citibank*, 171 Ariz. 207, 215, 829 P.2d 1253, 1261 (Ct. App. 1992). No issues involving
securities were present in the case.

27 ¹¹⁷³ Respondents' Post-Hearing Brief at 6.

¹¹⁷⁴ Exhibit S-14 (drive a jeep around a boulder); Tr. at 1510-1511.

28 ¹¹⁷⁵ Exhibit S-22(c); Tr. at 917 "run on bank by Radical Bunny investors;" See also Tr. at 872, 929-930 "Scott is
borrowing from the ML company" and Tr. at 1900-1902.

Accordingly, based upon the testimony and evidence, we find that Respondents violated A.R.S. § 44-1991(A)(1);(2); and (3).

D. Are the Radical Bunny Managers Jointly and Severally Liable for Radical Bunny's Violations of the Antifraud Provisions of the Securities Act?

Division

The Division argues that not only are the Radical Bunny Managers liable for their own multiple violations of the antifraud provisions of the Securities Act, but because they are control persons, they are also liable for the violations committed by Radical Bunny. A.R.S. § 44-1999(B) addresses controlling persons' liability for violations of the antifraud provisions as follows:

B. Every person who, directly or indirectly, controls any person liable for a violation of section 44-1991 or 44-1992 is liable jointly and severally with and to the same extent as the controlled person to any person to whom the controlled person is liable unless the controlling person acted in good faith and did not directly or indirectly induce the act underlying the action.

The Division also cites *Eastern Vanguard Forex Ltd. v. Ariz. Corp. Comm'n*, 204 Ariz. 399, 412, 79 P.3d 86, 89 (Ct. App. 2003), as interpreting A.R.S. § 44-1999(B) to impose presumptive liability on persons who have the power to directly or indirectly control the activities of the person(s) or entities who are liable as the primary violators of A.R.S. § 44-1991. The Division noted that pursuant to the terms of the Horizon Partners and Radical Bunny Operating Agreements, each of the managers had the power to make management decisions, and they also had the authority to participate in the day-to-day operations of Radical Bunny. Although Mr. Hirsch was the primary decision maker, the other Respondents "all actively contributed to the business operations on a regular basis."¹¹⁷⁶

The Division characterized Mr. Hirsch as the "Captain" of Radical Bunny, meaning that he was the highest responsible officer with respect to Radical Bunny's business operations and purpose. According to the Division, Mr. Hirsch:

¹¹⁷⁶ Division Post-Hearing Memorandum at 49.

1
2 ...met with potential investors to discuss the RB-MLtd Loan Program, served as a
3 contact for Participants, collected investment checks from investors, authored all of
4 the investment documentation, was the primary presenter and answered questions at
5 the Orange Tree Meetings, participated in meetings with attorneys and other
6 professionals, acted as a signatory on the Radical Bunny bank accounts, prepared the
7 income tax returns and financial statements of Radical Bunny, negotiated the terms of
8 the RB-MLtd Loans with MLtd, and executed some of the RB-MLtd Loan promissory
9 notes on behalf of Radical Bunny.¹¹⁷⁷

10 The Division characterized Mrs. Walder as the "Chief Officer" of Radical Bunny who was in
11 charge of navigating the business operations and carrying out the daily office functions on a full-time
12 basis. According to the Division, she:

13 ... served as the primary contact for new and existing investors; met with potential
14 investors to discuss the RB-MLtd Loan Program; collected and deposited investment
15 checks from investors; made distributions of interest and principal to investors; set up
16 IRA accounts for Participants, attended, participated in presentations, and answered
17 questions at the Orange Tree Meetings; participated in meetings with attorneys and
18 other professionals; participated in weekly meetings with MLtd management; and
19 acted as a signatory on the Radical Bunny bank accounts.¹¹⁷⁸

20 The Division characterized Mr. Shah's role as "Second Officer" of Radical Bunny. Mr. Shah
21 assisted with the business operations of Radical Bunny, but not on a daily basis; he met with potential
22 investors to discuss the RB-MLtd Loan Program and served as a "contact for a specific group of
23 potential investors and Participants."¹¹⁷⁹ Mr. Shah also collected investment checks from investors,
24 he attended and was able to answer questions at the Orange Tree Meetings, he attended and
25 participated in meetings with attorneys and other professionals, and he was a signatory on Radical
26 Bunny's bank accounts and prepared tax returns and financial statements for Radical Bunny.

27 ¹¹⁷⁷ Division Post-Hearing Memorandum at 49.

28 ¹¹⁷⁸ Division Post-Hearing Memorandum at 49-50.

¹¹⁷⁹ Division Post-Hearing Memorandum at 50.

1 The Division characterized Mr. Walder's role as the "Third Officer" of Radical Bunny.
2 According to the Division, he:

3 ... maintained the IT system of Radical Bunny, served as primary contact for MLtd
4 with respect to the funding of the RB-MLtd Loans, executed some of the RB-MLtd
5 Loan promissory notes on behalf of Radical Bunny, verified that MLtd had paid the
6 correct amount of interest due on a monthly basis under the terms of the RB-MLtd
7 Loans, maintained the bank account records, maintained all of the Participant files,
8 assisted in setting up IRA accounts for Participants, deposited investment checks from
9 investors, meticulously reviewed the distributions of interest and principal to
10 investors, made certain that all of the investors' accounts balanced, attended and was
11 available to answer questions at the Orange Tree Meetings, participated in meetings
12 with attorneys and professionals, participated in weekly meetings with MLtd
13 management, and served as signatory on the Radical Bunny bank accounts.¹¹⁸⁰

14 The Division argues that the roles and duties of each Radical Bunny Manager demonstrate
15 that they each not only had the power to control the activities of Radical Bunny, but they actively
16 participated in Radical Bunny's business operations. Therefore, because Radical Bunny engaged in
17 activity that violated the antifraud provisions of the Securities Act, the Division asserts that the
18 Radical Bunny Managers are also liable for those violations as control persons of Radical Bunny.

19 Respondents

20 The Respondents did not directly address the Division's argument about control persons'
21 liability for Radical Bunny's antifraud violations. The Respondents did argue that Mr. Walder "did
22 not manage" Radical Bunny and that he should be dismissed from this proceeding.¹¹⁸¹

23 Analysis and Conclusion

24 The Respondents did not dispute that the Radical Bunny Operating Agreement provided that
25 each of them, as managers, had the power to make management decisions and the authority to
26 participate in the day-to-day operations of Radical Bunny. We find that not only did they have the
27 power to control Radical Bunny's operations; they did each actively participate in the business
28 operations. Accordingly, because Radical Bunny engaged in activity in violation of A.R.S. § 44-

¹¹⁸⁰ Division Post-Hearing Memorandum at 49-50.

¹¹⁸¹ Respondents' Post-Hearing Memorandum at 24.

1991(A), and because the Respondents are control persons of Radical Bunny, pursuant to A.R.S. § 44-1999(B), the individual Respondents are also liable for Radical Bunny's violations of the antifraud provisions of the Securities Act.

E. Are Radical Bunny, Horizon Partners, and the Radical Bunny Managers Liable for the Payment of Restitution and Administrative Penalties for their Violations of the Registration and Antifraud Provisions of the Securities Act?

Division

The Division argues that Horizon Partners, Radical Bunny, and the Radical Bunny Managers are liable for payment of restitution and administrative penalties for their violations of the registration and antifraud provisions of the Securities Act.

Restitution

The Commission's authority to order restitution is found in A.R.S. § 44-2032, which provides:

If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission under this chapter, the commission may, in its discretion:

1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction including, without limitation, a requirement to provide restitution as prescribed by rules of the commission....¹¹⁸²

All of the Horizon Partners Participants' funds have already been returned or rolled over into Radical Bunny. Of the over \$190 million raised from Radical Bunny Participants, the principal amount of \$189,867,000 is still outstanding and due to over 900 Participants. The Division

¹¹⁸² See also, A.A.C. R14-4-308. Rescission and Restitution.

1 recommends that the Radical Bunny Managers should be liable to repay the non-manager Participants
 2 the principal amount of their investment. This is based upon the Radical Bunny Managers'
 3 participation in the registration and antifraud violations of the Securities Act, as well as their being
 4 control persons of the entity, Radical Bunny, who participated in the antifraud violations.¹¹⁸³

5 The Division requests that the Commission:

6
 7 Order Respondent Tom Hirsch, individually, the marital community of
 8 Respondent Tom Hirsch and Diane Rose Hirsch, Respondent Berta Walder,
 9 individually, Respondent Howard Walder, individually, the marital community
 10 of Respondents Berta Walder and Howard Walder, Respondent Harish Shah,
 11 individually, and the marital community of Respondent Harish Shah and
 12 Madhavi H. Shah, jointly and severally with Respondent Radical Bunny under
 13 Docket No. S-20660A-09-0107, to pay restitution to the Commission in the
 14 principal amount of \$189,800,867.00, pursuant to A.R.S. § 44-2032 and 25-
 215.¹¹⁸⁴

15 Penalties

16 The Commission's authority to assess administrative penalties for securities violations is
 17 found in A.R.S. § 44-2036(A), which provides that "[a] person who, in an administrative action, is
 18 found to have violated any provision of this chapter or any rule or order of the commission may be
 19 assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed
 20 five thousand dollars for each violation."

21 The Division argues that for approximately seven and one half years, Horizon Partners, an
 22 unregistered securities dealer, and Mr. Hirsch, an unregistered securities salesman, sold unregistered
 23

24 ¹¹⁸³ Division Post-Hearing Memorandum at 51.

25 ¹¹⁸⁴ The Division recommends that the Commission credit the amount of restitution owed by Horizon Partners, Tom
 26 Hirsch, individually, the marital community of Tom Hirsch and Diane Rose Hirsch, Berta Walder, individually, Howard
 27 Walder, individually, the marital community of Berta and Howard Walder, Shah, individually, and the marital community
 28 of Shah and Madhavi H. Shah with the amount of any funds recovered by the investors in the following court
 proceedings: (1) *In re Radical Bunny, LLC*, case no. 2:08-bk-13884-CGC in the United States Bankruptcy Court for the
 District of Arizona (Phoenix); and (2) *Facciola v. Greenberg Traurig et al.*, case no. 2:10-cv-01025 in the United States
 District Court for the District of Arizona. Respondents and Respondent Spouses shall provide to the Commission all
 information and documentation to verify that such restitution has been paid, which the Commission in its sole discretion
 may accept or reject.

1 securities in violation of the Securities Act. Horizon Partners stopped violating the Act solely
 2 because it stopped investing in the Mortgages Limited Pass-Through Participation Program. At the
 3 end of 2005, Horizon Partners still owed over \$65 million to its Participants, and most of those funds
 4 were “rolled over” by the Radical Bunny Managers to participate in the RB-MLtd Loan Program.

5 The Division argues that Mr. Hirsch raised over \$40 million from Radical Bunny Participants
 6 by the end of 2005, and that the Radical Bunny Managers raised over \$150 million by June 2008, all
 7 while purposefully and repeatedly violating the registration and antifraud provisions of the Securities
 8 Act. The Division noted that:

9
 10 [T]here are in excess of 900 Participants from Arizona, other states, and
 11 multiple foreign countries, most of whom the Radical Bunny Managers were
 12 unacquainted with prior to receiving their investment funds. Their conduct
 13 cannot be characterized as anything less than egregious. They ignored the
 14 advice of experienced securities professionals, including Radical Bunny’s
 15 attorneys. Their actions were deliberately designed to mislead investors about
 16 the adequacy of the collateral for the RB-MLtd Loans and to minimize the
 17 risks associated with the Participants’ investments, in part, by suggesting that
 their investment funds were safe absent a doomsday scenario.¹¹⁸⁵

18 The Division noted that the Commission could assess administrative penalties against each of
 19 the Radical Bunny Managers in excess of \$13.5 million.¹¹⁸⁶ However, the Division recommends that
 20 the appropriate amount of administrative penalties to assess is:

- 21 • \$150,000 against Horizon Partners, Mr. Hirsch, individually, and the marital
 22 community of Mr. and Mrs. Hirsch, jointly and severally, for their multiple
 23 violations of the registration provisions of the Securities Act, pursuant to A.R.S. §
 24 44-2036;
- 25 • \$2 million against Mr. Hirsch, individually, and the marital community of Mr.
 26 and Mrs. Hirsch for Mr. Hirsch’s multiple violations of the registration and
 27

28 ¹¹⁸⁵ Division Post-Hearing Memorandum at 52.

¹¹⁸⁶ 900 investors X \$5,000 X violations of 3 statutes (A.R.S. §§ 44-1841, 44-1842, and 44-1991(A)(B)(C)).

antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-2036 and 25-215;

- \$1.25 million against Mrs. Walder, individually, and the marital community of Mrs. and Mr. Walder for Mrs. Walder's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-2036 and 25-215;
- \$1 million against Mr. Shah, individually, and the marital community of Mr. and Mrs. Shah for Mr. Shah's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-2036 and 25-215; and
- \$500,000 against Mr. Walder, individually, and the marital community of Mr. and Mrs. Walder for Mr. Walder's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-2036 and 25-215.¹¹⁸⁷

Respondents

The Respondents did not address the size of the recommended penalties in their Post-Hearing Memorandum. They did, however, argue that they did not "gain," saying that the total amount they put into Mortgages Limited programs as Radical Bunny Participants that was not returned was over \$7 million.¹¹⁸⁸ They also argued that Mr. Walder should be dismissed from this proceeding because he "only ran the computer and accounting side of the Horizon and Radical Bunny operation. He did that without a single reported error. It was not his function to even talk to investors. He did not prepare the confirmation of purchase or the letters that went out. He did not manage either of the LLC's."¹¹⁸⁹ The Respondents stated in their Post-Hearing Memorandum that "[t]he participants' losses, if any, are beyond the powers of this Commission."¹¹⁹⁰

Analysis and Conclusion

Restitution

Because all of the Horizon Partners Participants funds have already been returned or rolled over into Radical Bunny, it is not necessary to order restitution for those investments in Horizon Partners. We agree with the Division that based upon the evidence in this matter, the principal

¹¹⁸⁷ Division Post-Hearing Brief at 52.

¹¹⁸⁸ Respondents' Post-Hearing Memorandum at 9.

¹¹⁸⁹ Respondents' Post-Hearing Memorandum at 24.

¹¹⁹⁰ Respondents' Post-Hearing Memorandum at 25.

1 amount of \$189,867,000 is outstanding and due to over 900 Radical Bunny Participants. We also
2 agree with the Division's recommendation that the Radical Bunny Managers should be liable to repay
3 the non-manager Participants the principal amount of their investment, based upon the Radical Bunny
4 Managers' participation in the registration and antifraud violations of the Securities Act, as well as
5 their being control persons of the entity, Radical Bunny, who participated in the antifraud violations.

6 Administrative Penalties

7 The administrative penalties recommended by the Division are significant and reflect the
8 serious, egregious nature of Respondents' activities. The recommended amounts vary by Respondent
9 and reflect the Division's opinion as to the role each Respondent played in the operations.

10 It is clear from the testimony and evidence presented in this case that Mr. Hirsch's decisions
11 and actions determined how Horizon Partners and Radical Bunny operated. It is also clear that he
12 was the "leader" and that the other managers generally deferred to his opinions. Mr. Hirsch created
13 the documents that Radical Bunny and Horizon Partners provided to Participants, he was the contact
14 with and connection to Mortgages Limited and Scott Coles, he used his position as a CPA to involve
15 Participants in Radical Bunny and Horizon Partners, and he determined the content and timing of
16 information provided to Participants. Mr. Hirsch was in the meetings with Mr. Sell, Mr. Logan and
17 Mr. Ranno, and the numerous discussions with Radical Bunny's attorneys at Quarles & Brady, as
18 well as meetings with Mr. Kant and Mortgages Limited employees. His decisions and actions caused
19 the violations of the Securities laws, including the anti-fraud statutes. It is appropriate, therefore, that
20 Mr. Hirsch should be assessed a significant administrative penalty. We find that the Division's
21 recommendation of \$150,000 in administrative penalties against Horizon Partners, Mr. Hirsch,
22 individually, and the marital community of Mr. and Mrs. Hirsch, jointly and severally, for their
23 multiple violations of the registration provisions of the Securities Act, pursuant to A.R.S. § 44-2036,
24 is appropriate. Further, we find that the Division's recommendation of \$2 million against Mr. Hirsch,
25 individually, and the marital community of Mr. and Mrs. Hirsch for Mr. Hirsch's multiple violations
26 of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-2036 and
27 25-215, is appropriate.

1 Although Mrs. Walder was initially brought in to help out in the office, she became the
2 second most powerful manager of Radical Bunny, handling most of the Participant contact and
3 paperwork. The evidence showed that she had what was essentially a "sales pitch" she gave to
4 potential Participants, and that she was a vital part of acquiring new Participants and maintaining a
5 comfortable ongoing relationship with existing Participants. She also attended meetings with
6 attorneys and participated in discussions concerning violations of Securities laws and heard warnings
7 concerning potential fraud issues with the information she was giving Participants about the secured
8 status of investments. In addition to the legal advice given to her as a manager of Radical Bunny,
9 Mrs. Walder had independent knowledge of Securities laws, having had a Series 63 securities license.
10 However, Mrs. Walder continued to participate in the management of Radical Bunny being well
11 aware of the potential consequences of Radical Bunny's continued operations. We find that the
12 Division's recommendation of \$1.25 million in administrative penalties against Mrs. Walder,
13 individually, and the marital community of Mrs. and Mr. Walder for Mrs. Walder's multiple
14 violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-
15 2036 and 25-215, is appropriate.

16 Mr. Shah's role in the management of Radical Bunny was minimal compared to the roles of
17 Mr. Hirsch and Mrs. Walder. He appears to have been included in the management due to his
18 relationship to the accounting firm he acquired from Mr. Hirsch. Mr. Shah had a large circle of
19 friends in the Indian community, which provided opportunities to acquire new Participants. He was
20 not involved in the day-to-day management of Radical Bunny, and did not attend all of the meetings
21 with the Quarles & Brady attorneys. However, it is clear that Mr. Shah had knowledge about
22 possible securities violations, and he did not take appropriate action to insure that Radical Bunny was
23 in compliance with the law. Accordingly, we find that \$750,000 in administrative penalties against
24 Mr. Shah, individually, and the marital community of Mr. and Mrs. Shah for Mr. Shah's multiple
25 violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-
26 2036 and 25-215, is appropriate.

27 Mr. Walder's role in the management of Radical Bunny was also minimal compared to the
28 roles of Mr. Hirsch and Mrs. Walder. He was primarily in charge of IT and accounts, and making

sure that the appropriate interest amounts were paid by Mortgages Limited and to Participants. However, he did sign promissory notes, attend meetings with Radical Bunny's attorney, and he participated in weekly meetings with Mortgages Limited. We find that the Division's recommendation of \$500,000 in administrative penalties against Mr. Walder, individually, and the marital community of Mr. and Mrs. Walder for Mr. Walder's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. § § 44-2036 and 25-215, is appropriate.

F. Community Property - Are the Marital Communities of Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah and the Respondent Spouses Subject to Liability under the Securities Act?

Division

The Division argues that the marital communities of Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah are subject to an order of restitution, administrative penalties, or any other appropriate relief.

Pursuant to A.R.S. § 25-211, all property acquired by either the husband or the wife during the marriage is the community property of the husband and wife, except for property that is acquired by gift, devise, descent; or is acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.¹¹⁹¹ The Arizona Supreme Court found that "the presumption of law is, in the absence of the contrary showing, that all property acquired and all business done and transacted during

¹¹⁹¹ **A.R.S. § 25-211. Property acquired during marriage as community property; exceptions; effect of service of a petition**

A. All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is:

1. Acquired by gift, devise or descent.
2. Acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.

B. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal separation or annulment does not:

1. Alter the status of preexisting community property.
2. Change the status of community property used to acquire new property or the status of that new property as community property.
3. Alter the duties and rights of either spouse with respect to the management of community property except as prescribed pursuant to section 25-315, subsection A, paragraph 1, subdivision (a).

1 coverture, by either spouse, is for the community.” *Johnson v. Johnson*, 131 Ariz. 38, 45, 638 P.2d
2 705, 712 (1981), citing *Benson v. Hunter*, 23 Ariz. 132, 134-35, 202 P. 233, 233-34 (1921).

3 Pursuant to A.R.S. § 25-214(B), the spouses have “equal management, control and disposition
4 rights over their community property and have equal power to bind the community”¹¹⁹² and A.R.S. §
5 25-215(D) provides that “[e]xcept as prohibited in section 25-214, either spouse may contract debts
6 and otherwise act for the benefit of the community. In an action on such a debt or obligation the
7 spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community
8 property, and second, from the separate property of the spouse contracting the debt or obligation.”¹¹⁹³

9 The Division stated that each Respondent admitted they were married during the time period
10 when the securities registration and antifraud violations occurred and that they were acting for their
11 own benefit and for the benefit or in furtherance of their and their respective Respondent Spouses’
12 marital communities. Mr. Hirsch was married to Diane Rose Hirsch; Mr. and Mrs. Walder were
13 married to each other; and Mr. Shah was married to Madhavi H. Shah.

14 According to the Division, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah failed to rebut
15 the presumption that a debt incurred during their marriages is a community obligation. Because no
16

17 ¹¹⁹² **A.R.S. § 25-214. Management and control**

18 A. Each spouse has the sole management, control and disposition rights of each spouse's separate property.

19 B. The spouses have equal management, control and disposition rights over their community property and have equal
20 power to bind the community.

21 C. Either spouse separately may acquire, manage, control or dispose of community property or bind the community,
22 except that joinder of both spouses is required in any of the following cases:

23 1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented
24 mining claim or a lease of less than one year.

25 2. Any transaction of guaranty, indemnity or suretyship.

26 3. To bind the community, irrespective of any person's intent with respect to that binder, after service of a petition for
27 dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal
28 separation or annulment.

¹¹⁹³ **A.R.S. § 25-215. Liability of community property and separate property for community and separate debts**

A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent
agreement of the property owner to the contrary.

B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after
September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which
would have been such spouse's separate property if single.

C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would
have been community debts if incurred in this state.

D. Except as prohibited in section 25-214, either spouse may contract debts and otherwise act for the benefit of the
community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be
satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or
obligation.

Respondent overcame that presumption, the debt remains a liability of the respective marital communities.¹¹⁹⁴

The Division contends that the restitution and administrative penalty is a community debt, and it is not necessary for the Commission to determine whether the Respondent Spouses had any knowledge, participation, or intent. "If the husband acts with the object of benefiting the community, a fact not questioned here, the obligations so incurred by him are community in nature, whether or not the wife approved thereof."¹¹⁹⁵

The Division recommends that since Mr. Hirsch, Mrs. Walder, Mr. Walder, Mr. Shah, and the Respondent Spouses failed to meet their burden and present evidence to rebut the presumptions, the debts are liabilities of Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah's respective marital communities, and are subject to an order of restitution, administrative penalties, or other appropriate relief.

Respondents

The Respondents did not present any evidence or legal argument that the marital communities of Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah and the Respondent Spouses are not subject to liability under the Securities Act.

Analysis and Conclusion

Mr. Hirsch, Mrs. Walder, Mr. Walder, Mr. Shah, and the Respondent Spouses failed to meet their burden and present evidence to rebut the presumption that a debt incurred during marriage is a community obligation. Accordingly, we find that restitution and administrative penalties are liabilities of Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah's respective marital communities and are subject to this order of restitution, administrative penalties, or other appropriate relief.

¹¹⁹⁴ See *Hrudka v Hrudka*, 186 Ariz. 84, 91-92, 919 P.2d 179, 186-87 (Ct. App. 1995) ("A debt incurred by a spouse during marriage is presumed to be a community obligation; a party contesting the community nature of a debt bears the burden of overcoming that presumption by clear and convincing evidence"); and *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 805 (Ct. App. 2008) ("...a debt is incurred at the time of the actions that give rise to the debt.")

¹¹⁹⁵ *Ellsworth v. Ellsworth*, 5 Ariz. App. 89, 92, 423 P.2d 364, 367 (Ct. App. 1967), citing *Donato v. Fishburn*, 90 Ariz. 210, 367 P.2d 245 (1961).

1 **G. Other Relief Requested**

2 The Division also requests that the Commission:

- 3 • order Respondents, and any of Respondents' agents, employees, successors and assigns, to
4 permanently cease and desist from violating the Securities Act, pursuant to A.R.S. § 44-2031;
5 and
6 • and order any other relief that the Commission deems appropriate.

7 * * * * *

8 Having considered the entire record herein and being fully advised in the premises, the
9 Commission finds, concludes, and orders that:

10 **FINDINGS OF FACT**

11 1. Horizon Partners is an Arizona limited liability company organized on August 19,
12 1997. Since its inception, Horizon Partners conducted business from its sole business office located
13 in Phoenix, Arizona.¹¹⁹⁶

14 2. The business of Horizon Partners was governed pursuant to the terms of an Operating
15 Agreement, the terms of which were identical to the Operating Agreement of Radical Bunny.¹¹⁹⁷

16 3. Horizon Partners was a manager-operated entity in which its non-manager members
17 were unable to actively participate in the business operations of the entity (i.e., passive).¹¹⁹⁸

18 4. All the members of Horizon Partners were required to execute its Operating
19 Agreement.¹¹⁹⁹

20 5. Mr. Hirsch has been the manager of Horizon Partners since August 19, 1997.¹²⁰⁰

21 6. As the manager of Horizon Partners, Mr. Hirsch was authorized to offer and sell its
22 membership interests.¹²⁰¹

23 7. Horizon Partners is not, and has never been, registered as a securities dealer with the
24 Commission.¹²⁰²

25 ¹¹⁹⁶ Notice ¶4; Verified Answer ¶4; Exhibit S-4.

26 ¹¹⁹⁷ Tr. at 1513; 1530-1531.

26 ¹¹⁹⁸ Tr. at 1557; Exhibit S-9(a).

27 ¹¹⁹⁹ Tr. at 1513; Exhibit S-10; Exhibit S-55.

27 ¹²⁰⁰ Exhibit S-4; Notice ¶5; Verified Answer ¶5.

28 ¹²⁰¹ Exhibit S-9(a).

28 ¹²⁰² Exhibit S-1(b); Notice ¶25; Verified Answer ¶25.

8. Radical Bunny was an Arizona limited liability company organized on June 24, 1999. Since its inception, Radical Bunny conducted business from its sole business office located in Phoenix, Arizona.¹²⁰³

9. The articles of organization of Radical Bunny were amended on February 26, 2006, and filed with the Commission on July 15, 2008.¹²⁰⁴

10. The business of Radical Bunny was governed pursuant to the terms of an Operating Agreement dated June 25, 1999.¹²⁰⁵

11. Radical Bunny was a manager-operated entity in which its non-manager members were unable to actively participate in the business operations of the entity (i.e., passive).¹²⁰⁶

12. All of the members of Radical Bunny were required to execute its Operating Agreement.¹²⁰⁷

13. Mr. Hirsch has been a manager of Radical Bunny since June 24, 1999.¹²⁰⁸

14. Mr. Shah has been a manager of Radical Bunny since 2005.¹²⁰⁹

15. Mrs. Walder has been a manager of Radical Bunny since June 2005.¹²¹⁰

16. Mr. Walder has been a manager of Radical Bunny since September 2005.¹²¹¹

17. As a manager of Radical Bunny, Mr. Hirsch was authorized to offer and sell its membership interests.¹²¹²

18. As a manager of Radical Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah were each authorized to borrow and loan money and/or enter into contracts on behalf of Radical Bunny.¹²¹³

19. As a manager of Radical Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder and Mr. Shah

¹²⁰³ Exhibit S-3(a); Exhibit S-3(b); Exhibit S-40; Notice ¶2; Verified Answer ¶2.

¹²⁰⁴ Exhibit S-3(b).

¹²⁰⁵ Tr. at 1530; Exhibit S-9(a).

¹²⁰⁶ Tr. at 1557-1558; Exhibit S-9(a).

¹²⁰⁷ Tr. at 1537-1538; Exhibit S-9(b); Exhibit S-53; Exhibit S-54.

¹²⁰⁸ Notice ¶3; Verified Answer ¶3; Exhibit S-3(a); Exhibit S-3(b); Exhibit S-9(a).

¹²⁰⁹ Notice ¶60; Verified Answer ¶60.

¹²¹⁰ Notice ¶61; Verified Answer ¶61.

¹²¹¹ Notice ¶62; Verified Answer ¶62; Tr. at 970.

¹²¹² Exhibit S-9(a).

¹²¹³ *Id.*

each were an authorized signatory on Radical Bunny's bank accounts.¹²¹⁴

20. Radical Bunny is not, and has never been, registered as a securities dealer with the Commission.¹²¹⁵

21. Mr. Hirsch is a married person who, at all relevant times hereto, resided in Maricopa County, Arizona.¹²¹⁶

22. Diane Rose Hirsch was at all relevant times the spouse of Mr. Hirsch.¹²¹⁷

23. Mr. Hirsch is a certified public accountant who has been licensed with the Arizona State board of Accountancy since October 19, 1979.¹²¹⁸

24. Mr. Hirsch is not, and has never been, registered as a securities salesman with the Commission.¹²¹⁹

25. Mr. Shah is a married person who, at all times relevant hereto, resided in Maricopa County, Arizona.¹²²⁰

26. Madhavi H. Shah was at all relevant times the spouse of Mr. Shah.¹²²¹

27. Mr. Shah is a certified public accountant who has been licensed with the Arizona State Board of Accountancy since January 11, 1993.¹²²²

28. Mr. Shah is not, and has never been, registered as a securities salesman with the Commission.¹²²³

29. In or around September 2001, Mr. Hirsch and Mr. Shah became business partners conducting business as Hirsch & Shah CPA's, LLC, an Arizona limited liability company.¹²²⁴

30. Mrs. Walder is a married person who, at all times relevant hereto, resided in Maricopa County, Arizona.¹²²⁵

¹²¹⁴ Tr. at 984-987; 1148-1149; Exhibit S-25.

¹²¹⁵ Notice ¶25; Verified Answer ¶25; Exhibit S-1(a).

¹²¹⁶ Notice ¶6; Verified Answer ¶6.

¹²¹⁷ Notice ¶11; Verified Answer ¶11.

¹²¹⁸ Notice ¶24; Verified Answer ¶24.

¹²¹⁹ Notice ¶26; Verified Answer ¶26; Exhibit S-1(c).

¹²²⁰ Notice ¶9; Verified Answer ¶9.

¹²²¹ Notice ¶12; Verified Answer ¶12.

¹²²² Notice ¶24; Verified Answer ¶24.

¹²²³ Notice ¶26; Verified Answer ¶26; Exhibit S-1(f).

¹²²⁴ Notice ¶24; Verified Answer ¶24; Exhibit S-8.

¹²²⁵ Notice ¶7; Verified Answer ¶7.

1 31. Mrs. Walder earned a doctorate of education, and is a retired school teacher, principal,
2 and superintendent.¹²²⁶

3 32. Mrs. Walder was once a registered securities salesman and was associated with an
4 SEC-registered broker-dealer and, as such, became familiar with the rules governing representations
5 that can be made to investors as well as distribution of disclosure documents to investors.¹²²⁷

6 33. Mrs. Walder was once a licensed real estate agent and broker.¹²²⁸

7 34. Mrs. Walder is not, and has never been, registered as a securities salesman with the
8 Commission.¹²²⁹

9 35. Mr. Walder is a married person who, at all times relevant hereto, resided in Maricopa
10 County, Arizona.¹²³⁰

11 36. Mr. Walder is a pharmacist.¹²³¹

12 37. Mr. Walder is not, and has never been, registered as a securities salesman with the
13 Commission.¹²³²

14 38. At all times relevant, Mr. Hirsch, Mrs. Walder, Mr. Walder and Mr. Shah were acting
15 for their own benefit and for the benefit or in furtherance of their respective and respective
16 Respondent Spouse's marital communities.¹²³³

17 39. Mortgages Limited was incorporated on April 1, 1964.¹²³⁴

18 40. Mortgages Limited was a licensed mortgage banker until its license, Number BK-
19 0007577, was revoked by the Arizona Department of Financial Institutions pursuant to a Consent
20 Order entered on July 28, 2009.¹²³⁵

21 41. Mortgages Limited operated as a private mortgage lender for residential property since
22 its inception and in connection with commercial real estate since the late 1980s. Scott M. Coles acted
23

24 ¹²²⁶ Verified Answer ¶7; Tr. at 1283.

¹²²⁷ Tr. at 1287-1290.

¹²²⁸ Tr. at 1285-1287.

¹²²⁹ Notice ¶26; Verified Answer ¶26.

¹²³⁰ Notice ¶8; Verified Answer ¶8.

¹²³¹ Verified Answer ¶8; Tr. at 969-970.

¹²³² Notice ¶26; Verified Answer ¶26; Exhibit S-1(e).

¹²³³ Notice ¶15; Verified Answer ¶15.

¹²³⁴ Exhibit S-5(a).

¹²³⁵ Exhibit S-6(a); Exhibit S-6(b); Exhibit S-56.

1 as the CEO/Chairman of Mortgages Limited from 1997 until his death on June 2, 2008. The sole
2 shareholder of Mortgages Limited was the SMC Trust.¹²³⁶

3 42. Mortgages Limited originated, invested in, sold and serviced its own short-term real
4 estate loans. Mortgages Limited loans ranged from \$1 million to \$150 million, with an average term
5 of 6 to 18 months, carried higher interest rates than traditional institutional lenders, and often were
6 used as bridge financing. All of Mortgages Limited's loans were secured by real estate, including
7 multifamily residential projects, office buildings, and mixed-use projects within Arizona.¹²³⁷

8 43. As of June 23, 2008, Mortgages Limited had outstanding loans of approximately \$894
9 million in approximately sixty-six (66) real estate projects.¹²³⁸

10 44. The Mortgages Limited Loans were funded, in part, from the sale to investors of
11 direct, "pass-through" fractional loan and lien interests in the real estate collateral securing each
12 Mortgages Limited Loan (Mortgages Limited Pass-Through Investor). Each Mortgages Limited
13 Pass-Through Investor acquired an interest in the Mortgages Limited Loan and signed an agency
14 agreement, among other documents, which appointed Mortgages Limited as their agent (Mortgages
15 Limited Pass-Through Participation Program).¹²³⁹

16 45. Each Mortgages Limited Pass-Through Investor was assigned (i.e., endorsed) an
17 interest in the secured promissory note evidencing the Mortgages Limited Loan, and a corresponding
18 assignment of beneficial interest in the real estate collateral (i.e., first lien position deed of trust) was
19 duly recorded.¹²⁴⁰

20 46. The fractional interest of the Mortgages Limited Pass-Through Investor in the
21 Mortgages Limited Loan promissory note and lien on real estate collateral belong to and are the
22 property of the Pass-Through Investor.¹²⁴¹

23 47. Mortgages Limited owned, in its own name, a portion of the fractional interests in the
24 Mortgages Limited Loan promissory notes and liens on real estate collateral (Mortgages Limited
25

26 ¹²³⁶ Exhibit S-5(b); Exhibit S-56.

¹²³⁷ Tr. at 1522-1523; Exhibit S-56.

¹²³⁸ Exhibit S-56.

¹²³⁹ Tr. at 1510-1512; Exhibit S-56.

¹²⁴⁰ Mr. Hirsch Declaration; Tr. at 1510-1512; Exhibit S-39(a); Exhibit S-39(b).

¹²⁴¹ Exhibit S-56.

1 Loan Portfolio).¹²⁴²

2 48. Mortgages Limited also raised funds for the Mortgages Limited Loans through the
3 sale of membership interests in limited liability companies to investors (MP Funds). The MP Funds
4 were manager-run entities with Mortgages Limited acting as the manager. The MP Funds would then
5 invest in the Mortgages Limited Pass-Through Participation Program.¹²⁴³

6 49. As of June 2008, there were nine (9) MP Funds-MP122009 (known as MP9),
7 MP062011 LLC (known as MP10), MP122030 LLC (known as MP11), Mortgages Limited
8 Opportunity Fund MP12 LLC (known as MP12), Mortgages Limited Opportunity Fund MP 13 LLC
9 (known as MP13), Mortgages Limited Opportunity Fund MP14 LLC (known as MP14), Mortgages
10 Limited Opportunity Fund MP15 LLC (known as MP 15), Mortgages Limited Opportunity Fund
11 MP16 LLC (known as MP16), and Mortgages Limited Opportunity Fund MP17 LLC (known as
12 MP17) ("Mortgages Limited Pools").¹²⁴⁴

13 50. The Mortgages Limited Loan secured promissory notes were sold to investors through
14 Mortgages Limited Securities, L.L.C. (MLS), a wholly owned subsidiary of Mortgages Limited.
15 Mortgages Limited also used its own funds for loans that it originated.¹²⁴⁵

16 51. MLS, an Arizona limited liability company, was organized on February 1, 2001.¹²⁴⁶

17 52. The Articles of Organization of MLS were amended and filed with the Commission on
18 April 4, 2008, and again amended and filed with the Commission on October 8, 2008.¹²⁴⁷

19 53. MLS was registered as a securities dealer with the Commission on March 9, 2004. On
20 December 31, 2008, MLS terminated its registration with the Commission.¹²⁴⁸

21 54. Horizon Partners and Radical Bunny were formed by Mr. Hirsch and others for the
22 purpose of investing in the Mortgages Limited Pass-Through Participation program through the use
23 of pooled investor funds.¹²⁴⁹

24

25 ¹²⁴² *Id.*

26 ¹²⁴³ *Id.*

27 ¹²⁴⁴ *Id.*

28 ¹²⁴⁵ *Id.*

¹²⁴⁶ Exhibit S-7(a).

¹²⁴⁷ Exhibit S-7(b); Exhibit S-7(C).

¹²⁴⁸ Exhibit S-2.

¹²⁴⁹ Mr. Hirsch Declaration.

1 55. Horizon Partners and Radical Bunny were vehicles for Mr. Hirsch, Mrs. Walder, Mr.
2 Walder, and Mr. Shah to pool their money to become accredited investors and purchase, for
3 themselves and others, securities offered by Mortgages Limited.¹²⁵⁰

4 56. Radical Bunny was a client of MLS.¹²⁵¹

5 57. As of June 2008, Radical Bunny was owed the principal amount of \$3,748,000 from
6 Mortgages Limited, as the servicing agent for its borrowers, as a result of Radical Bunny's
7 investments in the Mortgages Limited Pass-Through Participation Program.¹²⁵²

8 58. From January 1998 until June 2008, investors learned of the Horizon Partners and
9 Radical Bunny investment opportunities from their accountant, Mr. Hirsch and/or Mr. Shah, or by
10 "word of mouth" from existing investors or their friends and/or family. Investors were friends,
11 relatives, friends of relatives, friends of friends of friends, and friends of clients. Some of the Radical
12 Bunny investors did not have any pre-existing relationship with either Radical Bunny or Mr. Hirsch
13 prior to making an investment.¹²⁵³

14 59. Investors reside in Arizona and at least twenty-four other states and five foreign
15 countries.¹²⁵⁴

16 60. From January 1998 until September 2005, Horizon Partners invested in the Mortgages
17 Limited Pass-Through Participation Program.¹²⁵⁵

18 61. From January 1998 until the fall of 2005, all endorsements of the secured promissory
19 notes and corresponding assignments of the beneficial interests in the deeds of trust were issued in
20 the name of Horizon Partners and duly recorded.¹²⁵⁶

21 62. From at least January 1998 through the fall of 2005, Horizon Partners and Mr. Hirsch
22 raised in excess of \$65 million from investors (Horizon Partners Participants) through the sale of
23 limited liability company membership interests in Horizon Partners in order to participate in the
24

25 ¹²⁵⁰ Tr. at 1510.

26 ¹²⁵¹ Tr. at 1554-1555; Exhibit R-2.

26 ¹²⁵² Tr. at 1554-1555; 1958-1959; Exhibit S-48; Exhibit S-49.

27 ¹²⁵³ Tr. at 1558; 347-348; 1055-1057; 1947-1948.

27 ¹²⁵⁴ Tr. at 1558-1559; Exhibit S-34; Exhibit S-35.

28 ¹²⁵⁵ Notice ¶27; Verified Answer ¶27; Mr. Hirsch Declaration.

28 ¹²⁵⁶ Notice ¶27; Verified Answer ¶27; Exhibit S-39(a).

1 Mortgages Limited Pass-Through Participation Program.¹²⁵⁷

2 63. Each of the Horizon Partners Participants was required to execute its Operating
3 Agreement.¹²⁵⁸

4 64. Horizon Partners did not register the offer and sale of the limited liability company
5 interests with the Commission.¹²⁵⁹

6 65. Until late 2005, Mr. Hirsch represented to investors that Horizon Partners would then
7 “invest” all or a part of the Horizon Partner Participant’s capital account into a specific loan pursuant
8 to the investor’s instruction or “Direction to Purchase” executed by the investor and Mr. Hirsch on
9 behalf of Horizon Partners. The Direction to Purchase authorized Mr. Hirsch, as the “purchaser’s
10 agent,” to acquire an interest in a specific Mortgages Limited Loan. The Direction to Purchase also
11 set forth the amount invested, the percent interest in the Mortgages Limited Loan that was
12 represented by the Horizon Partners Participant’s investment, the annual interest rate to be paid to the
13 Horizon Partners Participant, the maturity date of the Mortgages Limited Loan, and the interest
14 payment due date.¹²⁶⁰

15 66. Mr. Hirsch patterned the Direction to Purchase after a similar form that had been used
16 by Mortgages Limited. The same version of the Direction to Purchase form was used by Horizon
17 Partners until the fall of 2005 when Horizon Partners ceased making investments in the Mortgages
18 Limited Pass-Through Participation Program.¹²⁶¹

19 67. From June 24, 1999 until September 2005, Horizon Partners was compensated for the
20 management services that it provided on behalf of the Horizon Partners Participants. The
21 management fee was calculated based on a “spread” (i.e., one quarter of one percent) between the
22 stated annual interest rate being paid to Horizon Partners under the terms of the Mortgages Limited
23 Loan and the reduced annual interest rate being paid by Horizon Partners to the Horizon Partners
24 Participants. The fee was assessed as interest payments on each of the Mortgages Limited Loans
25

26 ¹²⁵⁷ Tr. at 1518; 1559-1560.

27 ¹²⁵⁸ Tr. at 1513; Exhibit S-10; Exhibit S-55.

28 ¹²⁵⁹ Exhibit S-1(b).

¹²⁶⁰ Notice ¶30; Verified Answer ¶30.

¹²⁶¹ Tr. at 1564; 1516; Exhibit S-12(b); Exhibit S-12(f).

1 were made by Mortgages Limited, as the servicing agent, to Horizon Partners.¹²⁶²

2 68. Until late 2005, as the Mortgages Limited Loans matured or were repaid, the Horizon
3 Partners Participants were given the following options: (a) receive a complete distribution of their
4 principal amounts invested in the Mortgages Limited Loan; (b) "roll-over" all of their principal
5 amounts invested in the Mortgages Limited Loan for participation in another Mortgages Limited
6 Loan; (c) "roll-over" a portion of their principal amounts invested in the Mortgages Limited Loan for
7 participation in another Mortgages Limited Loan and receive a distribution of their remaining
8 principal amounts; or (d) "roll-over" all of their principal amounts invested in the Mortgages Limited
9 Loan along with additional funds for participation in another Mortgages Limited Loan.¹²⁶³

10 69. Until late 2005, Horizon Partners and Mr. Hirsch made all investments in the
11 Mortgages Limited Pass-Through Participation Program on behalf of the Horizon Partners
12 Participants, made all distributions of interest and/or principal to HP Participants, prepared and
13 maintained all investment documents for each of the Horizon Partners Participants, sent out quarterly
14 account statements for each of the Horizon Partners Participants, reviewed the loan summary sheets
15 for each of the Mortgages Limited Loans in which Horizon Partners invested and provided them to
16 potential and existing Horizon Partners Participants for review, and issued an IRS Form 1065
17 ("Schedule K-1") to the Horizon Partners Participants at the conclusion of each tax year. The Horizon
18 Partners Participants completed "Application" forms and provided funds for and received
19 distributions of principal and interest from their investments pursuant to Direction to Purchases
20 and/or "Instructions for Maturing Funds."¹²⁶⁴

22 70. U.S. income tax law requires a pass-through entity (e.g., partnership, limited liability
23 company, S corporation, or income trust) to issue at year-end a Schedule K-1 to each owner outlining
24 that owner's share of the pass-through entity's income, deductions, and credits. As members of
25 Horizon Partners, a Schedule K-1 was distributed to each Horizon Partners Participant at the end of
26

27 ¹²⁶² Mr. Hirsch Declaration; Tr. at 983-984.

28 ¹²⁶³ Notice ¶31; Verified Answer ¶31.

¹²⁶⁴ Notice ¶33; Verified Answer ¶33; Mr. Hirsch Declaration.

1 each tax year.¹²⁶⁵

2 71. As of December 2005, the minimum investment for each Horizon Partners Participant
3 in Horizon Partners was \$25,000.¹²⁶⁶

4 72. In September 2005, Horizon Partners ceased investing in the Mortgages Limited Pass-
5 Through Participation Program on behalf of the Horizon Partners Participants.¹²⁶⁷

6 73. Radical Bunny began investing in the Mortgages Limited Pass-Through Participation
7 Program beginning in June 1999. All endorsements of the secured promissory notes and
8 corresponding assignments of the beneficial interest in the deeds of trust were issued in the name of
9 Radical Bunny and duly recorded.¹²⁶⁸

10 74. From at least January 1, 2000 through approximately December 2005, Radical Bunny,
11 Mr. Hirsch, Mrs. Walder, and Mr. Shah raised at least \$40 million from investors (Radical Bunny
12 Participants) through the sale of limited liability company membership interests in Radical Bunny in
13 order to participate in the Mortgages Limited Pass-Through Participation Program.¹²⁶⁹

14 75. Radical Bunny did not register the offer and sale of the limited liability company
15 interests with the Commission.¹²⁷⁰

16 76. All of the Radical Bunny Participants were required to execute its Operating
17 Agreement.¹²⁷¹

18 77. In 2002, Radical Bunny provided to Participants a copy of its Operating Agreement,
19 which listed the other members in Schedule 3.1.2.¹²⁷²

20 78. Until late 2005, Mr. Hirsch, Mrs. Walder, and Mr. Shah represented to investors that
21 Radical Bunny would then “invest” all or a part of the Radical Bunny Participant’s capital account
22 into a specific loan pursuant to the investor’s instruction or “Direction to Purchase” executed by the
23

24
25 ¹²⁶⁵ Tr. at 263-264; 763-764; 1111-1112.

26 ¹²⁶⁶ Notice ¶; Verified Answer ¶34.

27 ¹²⁶⁷ Mr. Hirsch Declaration; Tr. at 1519.

28 ¹²⁶⁸ Mr. Hirsch Declaration; Exhibit S-39(b).

¹²⁶⁹ Tr. at 1559-1560.

¹²⁷⁰ Notice ¶37; Verified Answer ¶37; Exhibit S-1(b).

¹²⁷¹ Tr. at 1513; 1537-1538; Exhibit S-9(b); Exhibit S-53; Exhibit S-54.

¹²⁷² Tr. at 50-52; Exhibit S-12(a) with list of members as of June 10, 2003.

1 investor and Mr. Hirsch and/or a “managing member” on behalf of Radical Bunny. The Direction to
2 Purchase authorized Mr. Hirsch and/or a “managing member,” as the “purchaser’s agent,” to acquire
3 an interest in a specific Mortgages Limited Loan. The Direction to Purchase also set forth the amount
4 invested, the percent interest in the Mortgages Limited Loan that was represented by the Radical
5 Bunny Participant’s investment, the annual interest rate to be paid to the Radical Bunny Participant,
6 the maturity date of the Mortgages Limited Loan, and the interest payment due date.¹²⁷³

7 79. The minimum investment in Radical Bunny was \$50,000.¹²⁷⁴

8 80. Mr. Hirsch patterned the Direction to Purchase from a form that had been used by
9 Mortgages Limited. The same version of the Direction to Purchase form was used by Radical Bunny
10 until the fall of 2005.¹²⁷⁵

11 81. From June 24, 1999 until September 2005, Radical Bunny was compensated for the
12 management services that it provided on behalf of the Radical Bunny Participants. The management
13 fee was calculated based on a “spread” (i.e., one quarter of one percent) between the stated annual
14 interest rate being paid to Radical Bunny under the terms of the Mortgages Limited Loan and the
15 reduced annual interest rate being paid by Radical Bunny to the Radical Bunny Participants. The fee
16 was assessed as interest payments on each of the Mortgages Limited Loans made by Mortgages
17 Limited, as the servicing agent, to Radical Bunny.¹²⁷⁶

18 82. Until late 2005, as the Mortgages Limited Loans matured or were repaid, the Radical
19 Bunny Participants were given the following options: (a) receive a complete distribution of their
20 principal amounts invested in the Mortgages Limited Loan; (b) “roll-over” all of their principal
21 amounts invested in the Mortgages Limited Loan for participation in another Mortgages Limited
22 Loan; (c) “roll-over” a portion of their principal amounts invested in the Mortgages Limited Loan for
23 participation in another Mortgages Limited Loan and receive a distribution of the remaining principal
24 amounts; or (d) “roll-over” all of their principal amounts invested in the Mortgages Limited Loan
25

26
27 ¹²⁷³ Notice ¶38; Verified Answer ¶38.

¹²⁷⁴ Tr. at 1516.

¹²⁷⁵ Tr. at 1564; 1516; Exhibit S-12(b); Exhibit S-12(f).

¹²⁷⁶ Mr. Hirsch Declaration.

1 along with additional funds for participation in another Mortgages Limited Loan.¹²⁷⁷

2 83. Until late 2005, Radical Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah
3 made all investments in the Mortgages Limited Pass-Through Participation Program on behalf of the
4 Radical Bunny Participants, made all distributions of interest and/or principal to Radical Bunny
5 Participants, prepared and maintained all investment documents for each of the Radical Bunny
6 Participants, sent out quarterly account statements for each of the Radical Bunny Participants,
7 reviewed the loan summary sheets for each of the Mortgages Limited Loans in which Radical Bunny
8 invested and provided them to potential and existing Radical Bunny Participants for review, and
9 issued a Schedule K-1 to the Radical Bunny Participants at the conclusion of each tax year. The
10 Radical Bunny Participants completed "Application" forms and provided funds for and received
11 distributions of principal and interest from their investments pursuant to Directions to Purchase
12 and/or "Instructions for Maturing Funds."¹²⁷⁸

13 84. U.S. income tax law requires a pass-through entity (e.g., partnership, limited liability
14 company, S corporation, or income trust) to issue at year-end a Schedule K-1 to each owner outlining
15 that owner's share of the pass-through entity's income, deductions, and credits. As members of
16 Radical Bunny, a Schedule K-1 was distributed to each Radical Bunny Participant at the end of each
17 tax year.¹²⁷⁹

18 85. By December 31, 2002, Mr. Shah had invested in Radical Bunny.¹²⁸⁰

19 86. Prior to 2005, Mr. Shah understood that the collateral for the repayment of the loan
20 associated with the Mortgages Limited Pass-Through Participation Program was tied to the beneficial
21 interest in a specific deed of trust in the name of Radical Bunny. It was important to Mr. Shah that
22 his investment was collateralized in this matter due to the foreclosure rights which Radical Bunny
23 possessed with respect to a specific piece of real estate in the event of default by the Mortgages
24 Limited borrower.¹²⁸¹

26 ¹²⁷⁷ Notice ¶39; Verified Answer ¶39.

27 ¹²⁷⁸ Notice ¶41; Verified Answer ¶41; Mr. Hirsch Declaration.

28 ¹²⁷⁹ Tr. at 263-264; 763-764; 1111-1112.

¹²⁸⁰ Tr. at 1105-1107; Exhibit S-12(c).

¹²⁸¹ Tr. at 1108-1110; 1112-1114.

1 87. Since September 2005, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah were all
2 managers of Radical Bunny (Radical Bunny Managers).¹²⁸²

3 88. In late August 2005, Mr. Hirsch and Mr. Shah, and one or more of the other Radical
4 Bunny Managers, met with James Sell, a certified public accountant licensed in Arizona and former
5 securities regulator for the state of Arizona.¹²⁸³

6 89. Mr. Sell was introduced to Mr. Hirsch in the summer of 2005 by a lawyer with whom
7 Mr. Sell and Mr. Hirsch were both acquainted, and who was a tax client of Mr. Hirsch and Mr. Shah
8 CPAs. That lawyer told Mr. Sell that he was “concerned” and had suggested to Mr. Hirsch and his
9 partners to consider retaining Mr. Sell to advise them on their compliance with the Arizona securities
10 laws with respect to the business [Horizon Partners’ and Radical Bunny’s] activities in which the
11 Radical Bunny Managers were engaging.¹²⁸⁴

12 90. Mr. Hirsch described the past and prospective business activities of Radical Bunny to
13 Mr. Sell.¹²⁸⁵

14 91. Mr. Hirsch told Mr. Sell that “they” [Horizon Partners, Radical Bunny, and the RB
15 Managers] did not do any independent due diligence with respect to the Mortgages Limited Loans;
16 rather, “they” [Horizon Partners, Radical Bunny, and the Radical Bunny Managers] relied solely on
17 Mortgages Limited to perform due diligence.¹²⁸⁶

18 92. Mr. Hirsch told Mr. Sell that the “participants” [Horizon Partner Participants and
19 Radical Bunny Participants] were “passive investors,” relying essentially on “their” [Horizon
20 Partners’, Radical Bunny’s, and the Radical Bunny Managers’] efforts.¹²⁸⁷

21 93. Mr. Hirsch told Mr. Sell that the investors were “friends, relatives, friends of relatives,
22 friends of friends of friends, and friends of clients.”¹²⁸⁸

23 94. Mr. Sell told Mr. Hirsch and Mr. Shah that based on what Mr. Hirsch described to
24

25 ¹²⁸² Tr. at 1536-1537; 1540-1541.

26 ¹²⁸³ Tr. at 327-333.

27 ¹²⁸⁴ Tr. at 344-345; 385-386.

28 ¹²⁸⁵ Tr. at 345-346; 386-388.

¹²⁸⁶ Tr. at 389; 395.

¹²⁸⁷ Tr. at 346-347.

¹²⁸⁸ Tr. at 347-348.

1 him, in Sell's opinion, "they" [Horizon Partners, Radical Bunny, and the Radical Bunny Managers]
2 were selling unregistered securities.¹²⁸⁹

3 95. Mr. Sell told Mr. Hirsch and Mr. Shah that, at a minimum, "they" [Horizon Partners,
4 Radical Bunny, and/or the Radical Bunny Managers] needed to be registered as a securities dealer
5 with the Commission.¹²⁹⁰

6 96. Mr. Sell told Mr. Hirsch and Mr. Shah that "they" [Horizon Partners and Radical
7 Bunny] should offer rescission to their existing investors, but Mr. Hirsch responded, "[N]obody
8 would rescind because everybody was making money."¹²⁹¹

9 97. Mr. Sell told Mr. Hirsch and Mr. Shah that Mr. Hirsch should self-report "their"
10 [Horizon Partners, Radical Bunny, and the Radical Bunny Managers] securities-related violations to
11 the Commission.¹²⁹²

12 98. Mr. Sell told Mr. Hirsch and Mr. Shah that they should stop making sales to investors
13 until their securities related issues were resolved.¹²⁹³

14 99. Mr. Sell told Mr. Hirsch and Mr. Shah that he could assist them and that he would
15 prepare a consulting agreement and send it to them, which he did on or about September 1, 2005.
16 However, Mr. Sell was not retained.¹²⁹⁴

17 100. In September 2005, Radical Bunny instituted a new program in which Radical Bunny
18 would advance funds to Mortgages Limited, the proceeds of which would be used, in part, to fund
19 Mortgages Limited Loans to the Mortgages Limited borrowers. In order to raise funds for this new
20 venture, Radical Bunny sold "participations" or fractional interests in the RB-Mortgages Limited
21 Loans to investors (Participants) (the RB-Mortgages Limited Loan Program).¹²⁹⁵

22 101. Radical Bunny did not register the RB-Mortgages Limited Loan Program with the
23
24

25 ¹²⁸⁹ Tr. at 348-349; 369; 375-376; 377-378.

26 ¹²⁹⁰ Tr. at 348-349; 352.

27 ¹²⁹¹ Tr. at 349; 350-351; 388.

28 ¹²⁹² Tr. at 349; 354-355.

¹²⁹³ Tr. at 373; 388.

¹²⁹⁴ Tr. at 349; 354.

¹²⁹⁵ Tr. at 1519-1520; 1541-1546; 1548-1549; Exhibit R-8.

1 Commission.¹²⁹⁶

2 102. From December 2005, the minimum investment for each existing Radical Bunny
3 Participant or Horizon Partner Participant in the RB-Mortgages Limited Loan Program was
4 \$50,000.¹²⁹⁷

5 103. With the institution of the RB-Mortgages Limited Loan Program, Horizon Partners
6 ceased to operate effective December 31, 2005, and “any and all remaining investments” with
7 Horizon Partners “would be rolled over” to the RB-Mortgages Limited Loan Program.¹²⁹⁸

8 104. Effective December 1, 2005, as the Mortgages Limited Loans in which Horizon
9 Partners or Radical Bunny held a fractionalized interest under the Mortgages Limited Participation
10 Pass Through Program matured or were repaid, the Horizon Partners Participants and/or Radical
11 Bunny Participants were given the following options: (a) receive a complete distribution of their
12 principal amounts invested in the Mortgages Limited Loan; (b) “roll-over” all of their principal
13 amounts invested in the Mortgages Limited Loan for participation in the new Radical Bunny
14 investment program; (c) “roll-over” a portion of their principal amounts invested in the Mortgages
15 Limited Loan for participation in the new Radical Bunny investment program and receive a
16 distribution of their remaining principal amounts; or (d) “roll-over” all of their principal amounts
17 invested in the Mortgages Limited Loan and add additional funds for participation in the new Radical
18 Bunny investment program.¹²⁹⁹

19
20 105. The Radical Bunny Managers did not provide financial statements to the Participants
21 because financial statements for Radical Bunny did not exist.¹³⁰⁰

22 106. From September 2005 through June 2008, as the RB-Mortgages Limited Loans
23 matured, the Participants were to execute and deliver to Radical Bunny a form created by Mr. Hirsch
24 entitled “Instructions for Maturing Funds” which included the following options: (a) receive a

25 ¹²⁹⁶ Notice ¶44; Verified Answer ¶44; Exhibit S-1(a).

26 ¹²⁹⁷ Notice ¶42; Verified Answer ¶42; If a Radical Bunny Participant had more than one investment account with Radical
27 Bunny (e.g., an individual account and an IRA account), then the total amount invested in all accounts had to total the
28 minimum investment amount of \$50,000.

¹²⁹⁸ Tr. at 1519-1520; Exhibit S-12(i).

¹²⁹⁹ Notice ¶46; Verified Answer ¶46.

¹³⁰⁰ Tr. at 1482.

1 complete distribution of their principal amounts invested in the RB-Mortgages Limited Loan; (b)
2 “roll-over” all of their principal amounts invested in the RB-Mortgages Limited Loan for
3 participation in a new RB-Mortgages Limited Loan; (c) “roll-over” a portion of their principal
4 amounts invested in the RB-Mortgages Limited Loan for participation in a new RB-Mortgages
5 Limited Loan and receive a distribution of their remaining principal amounts; or (d) “roll-over” all of
6 their principal amounts invested in the RB-Mortgages Limited Loan for participation in a new RB-
7 Mortgages Limited Loan.¹³⁰¹

8 107. Under the RB-Mortgages Limited Loan Program, investor funds were advanced to
9 Radical Bunny and held until a RB-Mortgages Limited Loan became available. Radical Bunny
10 would then pool the Participants’ monies and fund the RB-Mortgages Limited Loan. Depending on
11 the duration of the loan period, the stated interest rate of the RB-Mortgages Limited Loan ranged
12 between eleven and fourteen percent per annum. Interest was to be paid to Radical Bunny by
13 Mortgages Limited on at a least monthly basis. Participants would then receive their interest
14 payments from Radical Bunny on a monthly basis.¹³⁰²

15 108. For most of the RB-Mortgages Limited Loans, Mortgages Limited paid Radical
16 Bunny either thirteen percent (13%) or fourteen percent (14%) interest for a one-year term. Radical
17 Bunny, in turn, paid most investors either eleven percent (11%) or twelve percent (12%) for a one-
18 year term.¹³⁰³

19 109. Radical Bunny and the Radical Bunny Managers accepted money from investors
20 regardless of whether the investor was “accredited.”¹³⁰⁴

21 110. In September 2005, Radical Bunny imposed upon the Participants a fee of two percent
22 (2%) for its management services. The two percent (2%) fee represented the difference between the
23 stated annual interest rate being paid to Radical Bunny under the terms of the RB-Mortgages Limited
24 Loan and the annual interest rate being paid by Radical Bunny to the Participants. The management
25

26
27 ¹³⁰¹ Tr. at 1008-1010; Exhibit S-12(l).

¹³⁰² Notice ¶47; Verified Answer ¶47.

¹³⁰³ Tr. at 1355; Exhibit S-33; Exhibit S-37(a); Exhibit S-37(b).

¹³⁰⁴ Tr. at 412; 768; Exhibit S-45(a).

1 fee was assessed as interest payments were made by Mortgages Limited to Radical Bunny.¹³⁰⁵

2 111. Between January 2006 and June 2008, the Radical Bunny Managers received
3 approximately \$3.5 million in management fees.¹³⁰⁶

4 112. In September 2005, the Direction to Purchase was modified by Mr. Hirsch to include
5 the language: “[Y]our investment is collateralized by the beneficial interest under various deeds of
6 trusts held by Mortgages Ltd.” The Direction to Purchase was also modified by Mr. Hirsch to
7 reference to a specific RB-Mortgages Limited Loan, rather than to a specific Mortgages Limited
8 Loan. This new Direction to Purchase was used until June 2008, and was sent to all investors.¹³⁰⁷

9 113. From September 2005 until June 2008, Radical Bunny’s “welcome letter” stated, in
10 part, “I am certain that you will find the experience to be very inspirational and financially
11 rewarding.”¹³⁰⁸

12 114. In December 2005, all existing Participants received a letter which stated:

13
14 Effective December 01, 2005, the member managers have adopted the following
changes and reaffirmation of several existing policies:

- 15
- 16 • Horizon Partners, LLC, will cease operating on December 31, 2005. Any and
17 all remaining investments with Horizon Partners, LLC will be rolled over to
the Radical Bunny LLC.
 - 18 • Investor request for partial or complete redemption of their investment must be
19 in writing. A thirty (30) day notice of the investor’s intention is required.
 - 20 • Beginning December 01, 2005, all NEW investments will be subject to a
21 reduction of 2% from the stated interest rate if redeemed prior to the maturity
date. The reduction of the stated interest rate will be retroactive to the funding
22 date of the investment.
 - 23 • A management fee of 2% per annum was negotiated with Mortgages LTD. and
24 will be paid to the member managers. The aforementioned payment is over
and above the stated interest rate earned by the investor.
 - 25 • A minimum investment of \$25,000 will apply to all NEW investors.

26
27 ¹³⁰⁵ Mr. Hirsch Declaration at 3.

¹³⁰⁶ Tr. at 1579.

¹³⁰⁷ Tr. at 995-1003; 1564-1566; Exhibit S-12(e); Exhibit S-12(g); Exhibit S-13(f); Exhibit S-13(g); Exhibit S-13(h).

28 ¹³⁰⁸ Exhibit S-52.

- 1 • Interest earned on the investment commences one (1) day after the funding date.
- 2 • Payments of interest and/or principal will be distributed at the end of each month.
- 3 • Interest earned is not static. Be sure to consult the member manager for the rate in effect.¹³⁰⁹

6 115. Mrs. Walder understood the December 1, 2005, letter from Radical Bunny to the
7 Participants to be the only written description of the changes to the Radical Bunny investment
8 program.¹³¹⁰

9 116. Radical Bunny, Mr. Hirsch, Mrs. Walder, and Mr. Shah represented to investors that
10 Radical Bunny would “invest” the Participant’s funds “in Mortgages Limited,” which investment
11 would be evidenced by a “secured” promissory note pursuant to the investor’s instruction or
12 “Direction to Purchase” executed by the investor and a “managing member” on behalf of Radical
13 Bunny. The Direction to Purchase authorized a “managing member,” as the “purchaser’s agent,” to
14 acquire an interest in a specific RB-Mortgages Limited Loan as well as set forth the amount invested,
15 the percent interest in the loan that the investment amount represented, the annual interest rate to be
16 paid to the Participant, the loan maturity date, and the interest due dates.¹³¹¹

17 117. If a Participant desired to redeem his/her principal prior to the RB-Mortgages Limited
18 Loan maturity date, Radical Bunny imposed a redemption fee of an additional two or five percent
19 above the stated interest rate being paid to the Participant retroactive to the date of investment.¹³¹²

20 118. From January 2006 until June 2008, the sources of money used to honor Participant
21 liquidation or redemption requests were new investor funds, the assets of Radical Bunny, and the
22 personal funds of the Radical Bunny managers. This was not disclosed to investors.¹³¹³

23 119. From 2006 until June 2008, Mortgages Limited did not repay any of the principal due
24
25

26 ¹³⁰⁹ Tr. at 1122; Exhibit S-12(i).

27 ¹³¹⁰ Tr. at 1340-1341; Exhibit S-12(i).

28 ¹³¹¹ Mr. Hirsch Declaration at 3; Mr. Hirsch Declaration Exhibits A and B.

¹³¹² Mr. Hirsch Declaration Exhibits A and B.

¹³¹³ Tr. at 1481; 1976; 1979; 1982.

1 to Radical Bunny under the RB-Mortgages Limited Loans.¹³¹⁴

2 120. The unpaid principal advances are evidenced by ninety-nine separate promissory notes
3 executed by Mortgages Limited in favor of Radical Bunny.¹³¹⁵

4 121. Mr. Hirsch and Mr. Walder executed promissory notes evidencing the RB-Mortgages
5 Limited Loans on behalf of Radical Bunny (the RB-Mortgages Limited Notes). The RB-Mortgages
6 Limited Notes do not refer to any collateral.¹³¹⁶

7 122. Mr. Hirsch, Mrs. Walder, and Mr. Walder communicated with Mortgages Limited
8 regarding the RB-Mortgages Limited Loans.¹³¹⁷

9 123. From at least December 2005, Radical Bunny and the Radical Bunny Managers failed
10 to advise offerees and Participants that promissory notes evidencing the RB-Mortgages Limited
11 Loans did not contain any language that limited the use of the RB-Mortgages Limited Loan proceeds
12 to funding of Mortgages Limited Loans.¹³¹⁸

13 124. As of July 18, 2008, Radical Bunny was owed the aggregate principal amount of
14 \$197,232,758.05 by Mortgages Limited.¹³¹⁹

15 125. Since at least December 2005, Radical Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder,
16 and Mr. Shah made all distributions of interest and/or principal to the Participants, prepared and
17 maintained all investment documents for each of the Participants, sent out quarterly account
18 statements for each of the Participants, reviewed the loan summary sheets and other loan
19 documentation for each of the Mortgages Limited Loans for which RB-Mortgages Limited Loan
20 proceeds were to be used to fund, visited the real estate subject to the Mortgages Limited Loans,
21 received and reviewed audited and unaudited financial statements of Mortgages Limited, and issued
22 an IRS Form 1099-INT to the Participants at the conclusion of each tax year. The Participants
23 completed various application forms and provided funds for and received distributions of principal
24

25
26 ¹³¹⁴ Tr. at 1981-1982; Exhibit S-37(a).

27 ¹³¹⁵ Notice ¶54; Verified Answer ¶54; Exhibit S-38(a), Exhibit S-33; Exhibit S-37(b).

28 ¹³¹⁶ Exhibit S-38(b); Exhibit S-38(c); Exhibit S-38(d); Exhibit S-38(e); Exhibit S-38(f).

¹³¹⁷ Exhibit R-2 at RAD00081-83.

¹³¹⁸ Notice ¶74; Verified Answer ¶74.

¹³¹⁹ Notice ¶54; Verified Answer ¶54; Exhibit S-37(a); Exhibit S-37(b).

1 and interest from their investments pursuant to Directions to Purchase and/or "Instructions for
2 Maturing Funds."¹³²⁰

3 126. As of December 31, 2006, none of the Horizon Partners Participants held a
4 membership interest in Horizon Partners with the exception of Mr. Hirsch, Mrs. Walder, and Mr.
5 Walder.¹³²¹

6 127. As of December 31, 2006, none of the Radical Bunny Participants held a membership
7 interest in Radical Bunny with the exception of Mr. Hirsch as Trustee of the Hirsch Family Trust,
8 Mrs. Walder, Mr. Walder, and Mr. Shah and Modhavi Shah.¹³²²

9 128. Despite the institution of the Mortgages Limited-RB Loan Program, Radical Bunny
10 continued to be a manager-operated entity in which their non-manager members were unable to
11 actively participate in the business operations of the entities (i.e., passive).¹³²³

12 129. Since at least January 2000, Radical Bunny and Mr. Hirsch represented to offerees and
13 investors that he was a member and manager of Radical Bunny. As a manager of Radical Bunny, Mr.
14 Hirsch received a management fee for the performance of certain business activities of Radical
15 Bunny including meeting with potential investors to discuss the investment program, serving as a
16 contact for existing investors, collecting investment checks from investors, attending and making
17 presentations at the Orange Tree Resort investor meetings, participating in meetings with Radical
18 Bunny attorneys, acting as a signatory on the Radical Bunny bank accounts, preparing income tax
19 returns of Radical Bunny, preparing financial statements of Radical Bunny and negotiating the RB-
20 Mortgages Limited Loans with Coles.¹³²⁴

21 130. Since at least 2005, Radical Bunny and Mr. Shah represented to offerees and investors
22 that he was a "managing member" of Radical Bunny. As a "managing member" of Radical Bunny,
23 Mr. Shah received a management fee for the performance of certain business activities of Radical
24 Bunny including meeting with potential investors to discuss the investment program, serving as a
25

26 ¹³²⁰ Notice ¶55; Verified Answer ¶55.

27 ¹³²¹ Notice ¶56; Verified Answer ¶56.

¹³²² Notice ¶57; Verified Answer ¶57.

¹³²³ Tr. at 270; 468; 511; Exhibit S-3(b); Exhibit S- 9(a).

28 ¹³²⁴ Notice ¶59; Verified Answer ¶59.

1 contact for existing investors, collecting investment checks from investors, attending and making
2 presentations at the Orange Tree Resort investor meetings, participating in meetings with Radical
3 Bunny attorneys, acting as a signatory on the Radical Bunny bank accounts, preparing income tax
4 returns of Radical Bunny, and preparing financial statements of Radical Bunny.¹³²⁵

5 131. As part of his management responsibilities, Mr. Shah was to provide RB-Mortgages
6 Limited Loan Program information to “friends or relatives.”¹³²⁶

7 132. Mr. Shah includes immediate family members as well as distant relatives of distant
8 relatives as part of his definition of “relative,” and CPA clients to someone he was just introduced by
9 a casual acquaintances, as part of his definition of “friend.”¹³²⁷

10 133. Between 2005 and 2008, Radical Bunny received approximately \$40 million from
11 about 150 families through Mr. Shah.¹³²⁸

12 134. Since the inception of the RB-Mortgages Limited Loan Program, Mr. Shah understood
13 that the collateral for the repayment of the RB-Mortgages Limited Loans was in the nature of a
14 purported blanket lien on all of the assets of Mortgages Limited, including the Mortgages Limited
15 Portfolio Loans. However, Radical Bunny did not receive an assignment of the beneficial interest in
16 the deeds of trust associated with the Mortgages Limited Portfolio Loans.¹³²⁹

17 135. Since June 2005, Radical Bunny and Mrs. Walder represented to offerees and
18 investors that she was a “managing member” of Radical Bunny. As a “managing member” of
19 Radical Bunny, Mrs. Walder received a management fee for the performance of certain business
20 activities of Radical Bunny including meeting with potential investors to discuss the investment
21 program, serving as the primary contact with existing investors, collecting and depositing investment
22 checks from investors, setting up IRA accounts for investors to participate in Radical Bunny
23 investment opportunities, attending and making presentations at the Orange Tree Resort investor
24 meetings, participating in meetings with Radical Bunny attorneys, participating in weekly meetings
25

26 ¹³²⁵ Notice ¶60; Verified Answer ¶60.

27 ¹³²⁶ Tr. at 1114; 1117.

28 ¹³²⁷ Tr. at 1114-1115.

¹³²⁸ Tr. at 1115-1116.

¹³²⁹ Tr. at 1118-1119.

1 with Mortgages Limited management, acting as a signatory on the Radical Bunny bank accounts, and
2 making distributions to investors.¹³³⁰

3 136. Since September 2005, Radical Bunny and Mr. Walder represented to offerees and
4 investors that he was a “managing member” of Radical Bunny. As a “managing member” of Radical
5 Bunny, Mr. Walder received a management fee for the performance of certain business activities of
6 Radical Bunny including collecting and depositing investment checks from investors, assisting in
7 setting up IRA accounts for investors to participate in Radical Bunny investment opportunities,
8 attending the Orange Tree Resort investor meetings, participating in meetings with Radical Bunny
9 attorneys, participating in weekly meetings with Mortgages Limited management, serving as a
10 signatory on the Radical Bunny bank accounts, maintaining bank account records, preparing
11 distributions to investors, maintaining the IT system of Radical Bunny, and serving as a contact for
12 Mortgages Limited for the funding of the RB-Mortgages Limited Loans.¹³³¹

13 137. Since September 2005, Mr. Walder, on behalf of Radical Bunny, also made certain
14 that all of the investors’ accounts balanced, meticulously reviewed the distributions of interest and
15 principal to investors, made certain that Mortgages Limited had paid the correct amount of interest
16 due on a monthly basis under the terms of the RB-Mortgages Limited Loans, maintained investor
17 files, and executed some of the RB-Mortgages Limited Loan promissory notes on behalf of Radical
18 Bunny.¹³³²

19 138. Mr. Walder assisted in the preparation of the Power Point presentations and attended
20 all of the Orange Tree Resort meetings, but declined to communicate with investors because he did
21 not like to speak in public.¹³³³

22 139. Since at least November 2005, Radical Bunny conducted semiannual meetings for its
23 investors at the Orange Tree Resort in Scottsdale, Arizona which included a dinner/luncheon and the
24 Radical Bunny Managers presented a slide/PowerPoint presentation. They were also available to
25

26
27 ¹³³⁰ Notice ¶61; Verified Answer ¶61.

¹³³¹ Notice ¶62; Verified Answer ¶62.

¹³³² Tr. at 981-983; 994-995; 1019-1024; Exhibit S-38(c); Exhibit S-38(d); Exhibit S-38(e); Exhibit S-38(f).

¹³³³ Tr. at 1036; 1038; 1044-1045.

1 answer questions from investors. These meetings were conducted over a three-day period in order to
 2 accommodate all people who wanted to attend. Announcements were forwarded to the Participants.
 3 Included with the invitation was a response card requesting that Radical Bunny be advised of how
 4 many people were going to attend. While the invitation stated that the purpose of the meeting was
 5 not to solicit new investors, no steps were taken in order to ensure that potential new investors did not
 6 attend.¹³³⁴

7 140. An investor first met Mr. Hirsch and learned about the RB-Mortgages Limited Loan
 8 Program at the November 2006 Orange Tree Resort meeting. He did not know Mr. Hirsch prior to
 9 the Orange Tree Resort meeting; rather, he learned of the meeting from his then accountant. He was
 10 not an invited guest, nor was he asked to leave by any of the Radical Bunny Managers.¹³³⁵

11 141. In the fourth quarter of 2006, Radical Bunny and Mr. Hirsch were advised by
 12 Mortgages Limited representatives that Radical Bunny may be engaged in the offer and sale of
 13 unregistered securities and they should seek legal advice regarding the conduct of the business
 14 activities of Radical Bunny.¹³³⁶

15 142. In response to a request from Mortgages Limited regarding how many of the
 16 Participants were accredited, Radical Bunny sent out a form in early 2007 to all existing Participants
 17 requesting them to disclose whether or not they were accredited.¹³³⁷

18 143. At the request of his client Mortgages Limited, Robert Kant, an attorney with the law
 19 firm Greenberg Traurig, met with Mr. Hirsch, Mr. Coles, and other Mortgages Limited
 20 representatives in December 2006 or January 2007 because Mr. Kant and Mortgages Limited were
 21 concerned about the manner in which Radical Bunny was raising money from investors.
 22 Specifically, Mr. Kant and Mortgages Limited were concerned about the absence of a private offering
 23 memorandum, subscription agreements to ascertain the qualification of investors, and a registered
 24 securities dealer.¹³³⁸

26 ¹³³⁴ Tr. at 294-296; 1947-1948; Exhibit S-23(a); Exhibit S-23(b); Exhibit S-23(c); Exhibit S-24.

27 ¹³³⁵ Tr. at 1947-1948.

¹³³⁶ Notice ¶63; Verified Answer ¶63.

¹³³⁷ Tr. at 1064-1066; 1069; Exhibit S-15(a).

28 ¹³³⁸ Tr. at 1224-1225.

1 144. Mr. Kant believed that Mr. Hirsch was selling securities.¹³³⁹

2 145. In late January 2007, the Radical Bunny Managers met with attorneys Ronald Logan
3 and Carl Ranno¹³⁴⁰ to discuss securities-related issues and get legal advice.¹³⁴¹

4 146. Mr. Hirsch advised Mr. Logan that Radical Bunny had sold investments to individuals
5 residing in over twenty (20) states.¹³⁴²

6 147. Mr. Hirsch provided Mr. Logan and Mr. Ranno with a description of the business
7 activities of Radical Bunny. Mr. Hirsch advised Mr. Logan and Mr. Ranno that Radical Bunny and
8 the Radical Bunny Managers had been either “brokering” or “issuing” “notes” to investors; however,
9 Mr. Hirsch did not believe that the “notes” were securities. Mr. Ranno advised Mr. Hirsch to the
10 contrary.¹³⁴³

11 148. Mr. Hirsch told Mr. Logan and Mr. Ranno that the managers were receiving
12 compensation for raising funds from investors.¹³⁴⁴

13 149. Based on the description provided by Mr. Hirsch regarding the business operations of
14 Radical Bunny, Mr. Logan told the Radical Bunny Managers that they “could not do business in the
15 future without violating some state or regulatory scheme.”¹³⁴⁵

16 150. Mr. Logan advised the Radical Bunny Managers that they were in violation of some
17 federal or state law in operating their business without a license.¹³⁴⁶

18 151. Mr. Hirsch told Mr. Logan and Mr. Ranno that based on advice that he had previously
19 received, Radical Bunny did not need any license to continue to engage in the same business
20 activities.¹³⁴⁷

21 152. Mr. Logan and Mr. Ranno believed that no other attorney could come to a different
22
23

24 ¹³³⁹ Tr. at 1228-1229.

25 ¹³⁴⁰ Respondents waived attorney-client privilege. Exhibit S-18(a); Exhibit S-18(b).

26 ¹³⁴¹ Tr. at 192-193; 1156; 1046.

27 ¹³⁴² Tr. at 203-204.

28 ¹³⁴³ Tr. at 205-206; 214; 1157-1158.

¹³⁴⁴ Tr. at 224.

¹³⁴⁵ Tr. at 212; 222; 224-225.

¹³⁴⁶ Tr. at 208.

¹³⁴⁷ Tr. at 225; 228-232.

1 conclusion that the “notes” were not securities.¹³⁴⁸

2 153. Mr. Logan advised them that Radical Bunny may be required by a federal or state
3 regulator to conduct a rescission offering.¹³⁴⁹

4 154. Mr. Logan told the Radical Bunny Managers that an investor complaint to state or
5 federal regulators or an audit of Mortgages Limited could expose their unlicensed conduct and they
6 should be “concerned.”¹³⁵⁰

7 155. Mr. Logan sent an engagement letter to the Radical Bunny Managers for the purpose
8 of resolving licensing issues including compliance with the securities laws, but was not retained.¹³⁵¹

9 156. As of late January 2007, Radical Bunny had raised in excess of \$110 million from
10 investors.¹³⁵²

11 157. In February 2007, the Radical Bunny Managers retained the law firm of Quarles &
12 Brady on behalf of Radical Bunny to provide legal advice as to whether Radical Bunny held a valid
13 security interest in the assets of Mortgages Limited and on Radical Bunny’s securities-related
14 activities.¹³⁵³

15 158. Quarles & Brady was advised by Mr. Hirsch on February 12, 2007, that as of January
16 2007, Radical Bunny had 200-300 accredited investors and 200-300 non-accredited investors.¹³⁵⁴

17 159. On February 12, 2007, the Radical Bunny managers were advised by Quarles & Brady
18 that it was likely that Radical Bunny and the RB Managers: (a) were offering securities in the form of
19 investment contracts; (b) they would be required to register as a securities dealer or securities
20 salesmen, obtain an investment adviser or investment adviser representative license, and/or obtain a
21 mortgage banker’s or brokers license in order to continue to conduct the business of Radical Bunny;
22 and (c) they had violated the registration provisions of Arizona and federal securities laws.¹³⁵⁵

24
25 ¹³⁴⁸ Tr. at 228.

26 ¹³⁴⁹ Tr. at 232-233.

27 ¹³⁵⁰ Tr. at 229-230.

28 ¹³⁵¹ Tr. at 209-212; Exhibit S-21.

¹³⁵² Tr. at 195.

¹³⁵³ Tr. at 1199; 798.

¹³⁵⁴ Tr. at 768; Exhibit S-45(a).

¹³⁵⁵ Tr. at 794-796; 798; Exhibit S-42; Exhibit S-45(b); Exhibit S-24.

1 160. In March 2007, the RB Managers were advised by Quarles & Brady that the collateral
2 for the RB-Mortgages Limited Loans was either in question or outright nonexistent.¹³⁵⁶

3 161. Mrs. Walder provided to Quarles & Brady all documents concerning the relationship
4 between Radical Bunny and Mortgages Limited.¹³⁵⁷

5 162. During the week of April 6-13, 2007, Steven Friedberg met with Mrs. Walder at the
6 offices of Radical Bunny to discuss a potential investment. Mr. Friedberg was not a resident of
7 Arizona; rather, he was in Phoenix for the purpose of visiting his ailing mother.¹³⁵⁸

8 163. Mrs. Walder represented to Mr. Friedberg that "since everything is collateralized...the
9 only thing that could actually go wrong is if all of a sudden a dirty bomb and the land got
10 polluted."¹³⁵⁹

11 164. Mrs. Walder represented to Mr. Friedberg that the investment was "safe."¹³⁶⁰

12 165. Mrs. Walder represented to Mr. Friedberg that Radical Bunny had four "non-
13 negotiables." She stated that: (a) Mortgages Limited does not loan outside of Arizona; (b) Mortgages
14 Limited loans on commercial properties only, no residential; (c) the loan-to-value ratio for the
15 Mortgages Limited Loans was 65 percent; and (d) Mortgages Limited was "always in first position."
16 She stated that with those four things, "you stay pretty safe."¹³⁶¹

17 166. Mrs. Walder represented to Mr. Friedberg that Mortgages Limited had been in
18 business since 1963 providing commercial bridge loans and made hard money loans, "always
19 commercial." She told Mr. Friedberg that Radical Bunny pools monies from investors and loans it to
20 Mortgages Limited, which used the money to loan to borrowers.¹³⁶²

21 167. Mrs. Walder represented to Mr. Friedberg that Mortgages Limited meets with
22 borrowers and reviews loan applications with "its team of people including an appraiser and title
23 people," and Mortgages Limited is "licensed by rigorous banking and securities regulators," and
24

25 ¹³⁵⁶ Tr. at 586-587.

26 ¹³⁵⁷ Tr. at 1491.

27 ¹³⁵⁸ Tr. at 1447; 1448.

28 ¹³⁵⁹ Tr. at 1652; Exhibit S-14 at 00:45:17.

¹³⁶⁰ Tr. at 1653.

¹³⁶¹ Tr. at 1657; Exhibit S-14 at 00:12:00.

¹³⁶² Exhibit S-14 at 00:06:00.

1 “Mortgages Limited has to be very strict because it is subject to inspections and audits all the
2 time.”¹³⁶³

3 168. Mrs. Walder represented to Mr. Friedberg, “[W]e’ve never lost a single penny.
4 Mortgages Limited has never lost a single penny.”¹³⁶⁴

5 169. Mrs. Walder represented to Mr. Friedberg that Radical Bunny paid interest to
6 investors “like clockwork.” She said that with the interest payments Radical Bunny paid, investors
7 could “buy a car or house or take a vacation” because “you know you’re getting these payments on
8 time every month -- every single month. There’s never any question.”¹³⁶⁵

9 170. Mrs. Walder represented to Mr. Friedberg that the “best part” of the Radical Bunny
10 investment was that Mr. Hirsch and Mr. Shah did the taxes on Mortgages Limited’s pools of
11 mortgages. She told Mr. Friedberg that Mr. Hirsh and Mr. Shah “know what the pools are like, the
12 strength of the [Mortgages Limited] pools, the strength of the [Mortgages Limited Loan] portfolio. I
13 sleep very well at night... we’ve taken about every single security measure you can think of.” Mrs.
14 Walder also stated that Mr. Hirsch and Mr. Shah, “know the strength of the [Mortgages Limited
15 Loan] portfolios” because “they see what is coming in---and they see the flow of monies coming in.
16 They prepare all of the K-1s. They prepare- they answer the questions on those [Mortgages Limited]
17 pools.”¹³⁶⁶

18
19 171. In April 2007, Mrs. Walder told Mr. Friedberg:

20 [N]one of this is guaranteed... we have a history. You have people involved
21 that at one time or another, like myself, were licensed, have careers that
22 showed the integrity, the—the way they dealt with people in their own
23 professions. You have two CPAs that are still licensed, still actively involved
24 in taxes and working, actively involved in doing the pools, but there’s no
25 guarantees. I mean, there can’t be. Otherwise it wouldn’t be an investment.
26 You know, even if you put it in your mattress, there’s no guarantee it’s going
27 to be there tomorrow or *if you hid it in the ground, somebody could find it,*
28 huh?”¹³⁶⁷

26 ¹³⁶³ Exhibit S-14 at 00:30:00 and 1:06:00.

27 ¹³⁶⁴ Exhibit S-14 at 00:15:00.

27 ¹³⁶⁵ Exhibit S-14 at 00:28:00 and 00:41:00.

28 ¹³⁶⁶ Exhibit S-14 at 00:42:40.

28 ¹³⁶⁷ Exhibit S-14 at 00:44:27.

1 172. Mrs. Walder represented to Mr. Friedberg that so long as Radical Bunny did not
2 actively solicit for investors, then Radical Bunny would not be subject to the Securities laws.¹³⁶⁸

3 173. Mrs. Walder was not acquainted with Mr. Friedberg prior to the April 2007
4 meeting.¹³⁶⁹

5 174. In June 2007, Mr. Friedberg received the Direction to Purchase after he provided his
6 investment funds to Radical Bunny.¹³⁷⁰

7 175. Mr. Friedberg did not receive a financial statement, private offering memorandum, or
8 any written risk disclosures from Radical Bunny.¹³⁷¹

9 176. Mr. Friedberg would not have invested if he was told that there may be an issue with
10 the purported collateral for the RB-Mortgages Limited Loans and that Radical Bunny had retained
11 counsel to examine that issue.¹³⁷²

12 177. On May 2, 2007, the RB Managers were advised by Quarles & Brady that Radical
13 Bunny and the Radical Bunny Managers had, in fact, violated Arizona and federal securities laws and
14 they were all subject to civil and possible criminal liability.¹³⁷³

15 178. On May 2, 2007, the Radical Bunny Managers were advised by Quarles & Brady that
16 since Radical Bunny's collateral documents for the RB-Mortgages Limited Loans were defective,
17 their representations to investors that their funds were collateralized and secured could be
18 fraudulent.¹³⁷⁴

19 179. On May 2, 2007, the Radical Bunny Managers were advised to immediately stop
20 offering and selling securities. Quarles & Brady did not put this legal advice to the Radical Bunny
21 Managers in writing because its advice to stop selling securities was "simple, straight forward, 'no' is
22 not a hard word to understand, and Quarles & Brady gave a lot of credence to the people with whom
23

24
25 ¹³⁶⁸ Tr. at 1657-1658.

26 ¹³⁶⁹ Tr. at 1665-1666.

27 ¹³⁷⁰ Tr. at 1654-1655; Exhibit S-52.

28 ¹³⁷¹ Tr. at 1655.

¹³⁷² Tr. at 1655.

¹³⁷³ Tr. at 819-826; Exhibit S-22(g).

¹³⁷⁴ Tr. at 1882-1883; 827-828; Exhibit S-22(g).

1 Quarles & Brady was discussing these matters.”¹³⁷⁵

2 180. On May 2, 2007, Mr. Hirsch told Quarles & Brady that he wanted Radical Bunny to
3 be compliant with the securities laws and he understood what needed to be done to become
4 compliant.¹³⁷⁶

5 181. On May 11, 2007, the Radical Bunny Managers were advised by Quarles & Brady
6 that, among other things, “the documentation to create and/or perfect the necessary liens and security
7 interests [in Mortgages Limited’s assets] is either non-existent or defective in numerous respects.”
8 However, this information was never disclosed to investors.¹³⁷⁷

9 182. In May 2007, Kelly Levine and his mother, Diane Levine, who had been investing
10 with Radical Bunny since 1999, met with Mr. Hirsch for the purpose of investing the proceeds of the
11 sale of his mother’s business.¹³⁷⁸

12 183. Diane Levine was a tax client of Mr. Hirsch.¹³⁷⁹

13 184. Mr. Levine attended the meeting to help his mother understand the RB-Mortgages
14 Limited Loan Program because if she invested the sale proceeds, her entire life savings would be
15 invested in the RB-Mortgages Limited Loan Program.¹³⁸⁰

16 185. While Mr. Levine’s mother had been investing in Radical Bunny since 1999, Mr.
17 Hirsch never explained to Mr. Levine or Diane Levine the specific changes in the investment
18 opportunity to the RB-Mortgages Limited Loan Program with respect to the loan collateral.¹³⁸¹

19 186. Mr. Hirsch told Mr. Levine that the investment was in commercial real estate and that
20 because “I hold the deed of trust to this property, that we [Radical Bunny] can, if the borrower doesn't
21 pay the loan back, we will have -- we can foreclose and then get the property, and that that was much
22 better than something like a stock....”¹³⁸²

24
25 ¹³⁷⁵ Tr. at 823; 827; 945-946.

26 ¹³⁷⁶ Tr. at 799; 826; Exhibit S-22(g).

27 ¹³⁷⁷ Tr. at 594-601; 1323; 1588; 1655; Exhibit S-43.

28 ¹³⁷⁸ Tr. at 139; 141; 142; 173.

¹³⁷⁹ Tr. at 141-142.

¹³⁸⁰ Tr. at 141-142; 176.

¹³⁸¹ Tr. at 148-149.

¹³⁸² Tr. at 143.

1 187. On June 15, 2007, Quarles & Brady again advised Radical Bunny managers that,
2 among other things, the RB-Mortgages Limited Loans lacked “meaningful collateral security” and
3 that “the loans were to have been collateralized by the assets of [Mortgages Limited]...However, the
4 existing documentation is not adequate to achieve this end.” However, this information was never
5 disclosed to investors.¹³⁸³

6 188. On June 19, 2007, Quarles & Brady again advised Mr. Hirsch that there were not to be
7 any roll-overs, no new sales, and to not use any draft documents which were intended to be used in a
8 future securities offering. Mr. Hirsch agreed and stated that he understood.¹³⁸⁴

9 189. On August 13, 2007, an “all hands” meeting took place at Mr. Kant’s office at the
10 request of Mortgages Limited. Mr. Kant, Mr. Coles, Quarles & Brady attorneys, and the Radical
11 Bunny Managers all attended. The purpose of the meeting was to address the ongoing issues
12 regarding the defective collateral for the RB-Mortgages Limited Loans and Radical Bunny’s
13 compliance with federal and state securities laws.¹³⁸⁵

14 190. Mr. Kant told Mr. Hirsch that “if they were continuing to offer securities without
15 addressing the concerns that I raised, people go to jail for that, and he [Mr. Hirsch] could go to jail.”
16 Following the meeting, Mr. Kant received an e-mail from Quarles & Brady thanking Mr. Kant for
17 making the statement to Mr. Hirsch which also stated, “[Y]ou have made my job easier.”¹³⁸⁶

18 191. The ongoing issue with respect to the collateral with the RB-Mortgages Limited Loans
19 was not addressed because Mr. Kant’s goal was not to enhance Radical Bunny’s loan position with
20 Mortgages Limited as it would not have been in his client’s best interest.¹³⁸⁷

21 192. On December 12, 2007, Mr. Hirsch and Mrs. Walder were again advised by Quarles &
22 Brady that, among other things, the “current loans from [Radical] Bunny to ML [Mortgages Limited]
23 are not collateralized. You may recall that a financing statement was provided by ML [Mortgages
24 Limited], but the financing statement is not sufficient to create or perfect the security interest that
25

26 ¹³⁸³ Tr. at 604-607; Exhibit S-44.

27 ¹³⁸⁴ Tr. at 829; Exhibit S-45(c).

¹³⁸⁵ Tr. at 1235-1236; Exhibit R-2.

¹³⁸⁶ Tr. at 1236-1237; 1261; 1268.

28 ¹³⁸⁷ Tr. at 1233-1234; Exhibit S-43.

1 presumably was intended when it was provided.” However, this information was never disclosed to
 2 investors.¹³⁸⁸

3 193. On November 2, 2007, Barbara Mathis met in person with Mr. Hirsch and Mrs.
 4 Walder to discuss investing in the RB-Mortgages Limited Loan Participation Program.¹³⁸⁹

5 194. Ms. Mathis learned of the investment from a family friend who was a Participant.¹³⁹⁰

6 195. Ms. Mathis received and completed the Loan Participation Disclosure Statement and
 7 Acknowledgements indicating that she was an unaccredited investor.¹³⁹¹

8 196. Ms. Mathis was told that accreditation was not necessary to invest in the RB-
 9 Mortgages Limited Loan Program.¹³⁹²

10 197. Ms. Mathis did not have any previous investment experience other than participation
 11 in her retirement savings plan, and Mr. Hirsch and Mrs. Walder did not inquire into same.¹³⁹³

12 198. No specific risks associated with the RB-Mortgages Limited Loan Participation
 13 Program other than those disclosed in the Loan Participation Disclosure Statement were disclosed
 14 orally or in writing prior to Ms. Mathis making her investment in the RB-Mortgages Limited Loan
 15 Program.¹³⁹⁴

16 199. Ms. Mathis believed that the risks disclosed in the Loan Participation Disclosure
 17 Statement were minimized by the representations of Mr. Hirsch and Mrs. Walder.¹³⁹⁵

18 200. Ms. Mathis believed that the capitalized term, “Security Agreement” meant that the
 19 document existed between Mortgages Limited and Radical Bunny, although she did not receive a
 20 copy.¹³⁹⁶

21 201. Ms. Mathis understood that she would be a passive investor with Radial Bunny.¹³⁹⁷

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 23
 24 ¹³⁸⁸ Tr. at 626-629; Exhibit S-22(o); Exhibit R-2.

25 ¹³⁸⁹ Tr. at 266-267; 268; 276; 281; Exhibit S-16(a); Exhibit S-16(b).

26 ¹³⁹⁰ Tr. at 265; Exhibit S-16(b).

27 ¹³⁹¹ Tr. at 311-312; 317-318; Exhibit S-16(b).

28 ¹³⁹² Tr. at 292-293; 314-316.

¹³⁹³ Tr. at 293-294.

¹³⁹⁴ Tr. at 274-277; Exhibit S-16(b).

¹³⁹⁵ Tr. at 281-282.

¹³⁹⁶ Tr. at 282-284.

¹³⁹⁷ Tr. at 270; 275.

1 202. Mr. Hirsch and Mrs. Walder described the investment as “safe” because it was
2 unlikely that all of the Mortgages Limited Loans would go bad at the same time.¹³⁹⁸

3 203. Mr. Hirsch and Mrs. Walder stated that Mr. Coles “never lost a dollar of investor
4 money.”¹³⁹⁹

5 204. Following the meeting with Mr. Hirsch and Mrs. Walder, Ms. Mathis invested her
6 entire retirement savings account (\$226,881.94 saved over 23 years) with Radical Bunny in
7 December 2007.¹⁴⁰⁰

8 205. On January 28, 2008, Donna Hinman met with Mrs. Walder at the offices of Radical
9 Bunny along with two other friends, Max McCarty and Dula McCarty, for the purpose of investing in
10 the RB-Mortgages Limited Loan Program.¹⁴⁰¹

11 206. Mr. McCarty had learned about Radical Bunny from a friend.¹⁴⁰²

12 207. Mrs. Walder represented to Ms. Hinman that she had just returned from a meeting at
13 Mortgages Limited in which “they” reviewed the Mortgages Limited Loans because “they” wanted to
14 “pick the very best loans for Radical Bunny participants.” Mrs. Walder told Ms. Hinman that the
15 Radical Bunny Managers attended weekly meetings at Mortgages Limited.¹⁴⁰³

16 208. Mr. Hirsch represented to Ms. Hinman that he attended weekly meetings at Mortgages
17 Limited.¹⁴⁰⁴

18 209. Mrs. Walder represented to Ms. Hinman that Radical Bunny only invested in
19 commercial real estate projects, no residential condominium projects.¹⁴⁰⁵

20 210. Ms. Hinman understood from the conversation that her investment funds would be
21 pooled then loaned to Mortgages Limited to acquire an interest in a single piece of property.¹⁴⁰⁶

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¹³⁹⁸ Tr. at 272-274.

25 ¹³⁹⁹ Tr. at 316-317.

26 ¹⁴⁰⁰ Tr. at 266-267; 298; Exhibit S-16(a); Exhibit S-16(c).

27 ¹⁴⁰¹ Tr. at 402-403.

28 ¹⁴⁰² Tr. at 460.

¹⁴⁰³ Tr. at 403.

¹⁴⁰⁴ Tr. at 418.

¹⁴⁰⁵ Tr. at 404-405.

¹⁴⁰⁶ Tr. at 405-407; 408; Exhibit S-12(l).

1 211. Mrs. Walder represented to Ms. Hinman that there was a “loophole” in the securities
 2 laws in that Radical Bunny could continue to legally sell the RB-Mortgages Limited Loan Program
 3 until \$200 million in RB-Mortgages Limited Loans was reached.¹⁴⁰⁷

4 212. Mrs. Walder told Ms. Hinman that she could invest even though she was not
 5 accredited. Ms. Hinman believed that she was accredited based solely on the definition provided by
 6 Mrs. Walder.¹⁴⁰⁸

7 213. Ms. Hinman had very little investment experience.¹⁴⁰⁹

8 214. Mrs. Walder told Ms. Hinman that investing in the RB-Mortgages Limited Loan
 9 Program was “safer than a 401(k).” Mrs. Walder further represented to Ms. Hinman, “[n]o one has
 10 ever lost any money at Radical Bunny,” and that “it was safer than the stock market because it was
 11 actual real estate.”¹⁴¹⁰

12 215. Ms. Hinman invested with Radical Bunny because she believed that it was a safe
 13 investment.¹⁴¹¹

14 216. Mrs. Walder represented to Ms. Hinman that even though foreclosure was a risk,
 15 foreclosure was not an issue because the loan default interest rate would be higher.¹⁴¹²

16 217. Ms. Hinman did not receive any investment documents other than the Participant
 17 Record and Loan Participation Disclosure Statement and Acknowledgements prior to investing.¹⁴¹³

18 218. Ms. Hinman received a Direction to Purchase and monthly account statements after
 19 investing.¹⁴¹⁴

20 219. Mr. Walder understood the opinion of Quarles & Brady with respect to the defective
 21 collateral for the RB-Mortgages Limited Loans, but dismissed its advice.¹⁴¹⁵

22 220. By mid-2007, Mrs. Walder understood from Quarles & Brady that the collateral for
 23

24 ¹⁴⁰⁷ Tr. at 410; 423; 441-442.

25 ¹⁴⁰⁸ Tr. at 412; Exhibit S-17.

26 ¹⁴⁰⁹ Tr. at 424-425.

27 ¹⁴¹⁰ Tr. at 426; 458-459; 460.

28 ¹⁴¹¹ Tr. at 460.

¹⁴¹² Tr. at 426-427.

¹⁴¹³ Tr. at 428-431; Exhibit S-17.

¹⁴¹⁴ Tr. at 431.

¹⁴¹⁵ Tr. at 1060-1061.

1 the RB-Mortgages Limited Loans was either in question or nonexistent, but dismissed Quarles &
 2 Brady's advice and continued to represent to Participants that the RB-Mortgages Limited Loans were
 3 secured by all of the assets of Mortgages Limited.¹⁴¹⁶

4 221. Mr. Shah participated in conversations about the ongoing RB-Mortgages Limited
 5 Loan collateral and securities issues with Quarles & Brady.¹⁴¹⁷

6 222. Mr. Walder participated in conversations about the ongoing RB-Mortgages Limited
 7 Loan collateral and securities issues with Quarles & Brady.¹⁴¹⁸

8 223. Mrs. Walder participated in conversations about the ongoing RB-Mortgages Limited
 9 Loan collateral and securities issues with Quarles & Brady.¹⁴¹⁹

10 224. Mr. Hirsch participated in conversations about the ongoing RB-Mortgages Limited
 11 Loan collateral and securities issues with Quarles & Brady.¹⁴²⁰

12 225. Mr. Hirsch and Mrs. Walder understood that the issue with the collateral for the RB-
 13 Mortgages Limited Loans remained unresolved.¹⁴²¹

14 226. Radical Bunny and the RB Managers never disclosed to the Participants in writing that
 15 Quarles & Brady had been retained to examine whether or not they were in compliance with Arizona
 16 and federal securities laws.¹⁴²²

17 227. Since approximately June 2007, Radical Bunny required each new Participant to
 18 execute a form entitled "Loan Participation Disclosure Statement and Acknowledgements." The form
 19 was created by Mr. Hirsch by using various drafts created by Quarles & Brady. While the form
 20 refers to documents entitled "Security Agreement," "Term Notes," and "Participant Notes," no such
 21 documents ever existed. The fact that they did not exist was never disclosed to investors.¹⁴²³

22 228. From at least December 2005, Radical Bunny, Mr. Hirsch, Mrs. Walder, and Mr. Shah
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 24

25 ¹⁴¹⁶ Tr. at 1407; 1470-1472.

26 ¹⁴¹⁷ Exhibit R-2.

27 ¹⁴¹⁸ Exhibit S-22(k); Exhibit S-22(m); Exhibit R-2.

28 ¹⁴¹⁹ Exhibit S-22(k); Exhibit S-22(m); Exhibit R-2.

¹⁴²⁰ Exhibit S-22(k); Exhibit S-22(m); Exhibit R-2.

¹⁴²¹ Tr. at 1406-1407; 1883-1884; Exhibit S-22(o).

¹⁴²² Tr. at 1594-1596.

¹⁴²³ Tr. at 1070-1073; 1372; 1596-1604; Exhibit S-16(a); Exhibit S-17.

1 represented to offerees and Participants that repayment of the RB-Mortgages Limited Loans was
 2 personally guaranteed by Scott Coles. At an Orange Tree Resort meeting in 2007, Mr. Hirsch
 3 represented to investors that Mr. Coles had a personal net worth of \$100 million. However, Radical
 4 Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah never ascertained the nature and/or
 5 value of Mr. Coles' personal assets.¹⁴²⁴

6 229. Radical Bunny, Mr. Hirsch, Mrs. Walder, and Mr. Shah represented to offerees and
 7 Participants that they were well-informed regarding the financial wherewithal of Mortgages Limited.
 8 However, Radical Bunny did not receive any audited financial statements for Mortgages Limited for
 9 the 2007 income tax year.¹⁴²⁵

10 230. From at least January 2007 to June 2008, Radical Bunny, Mr. Hirsch, Mrs. Walder,
 11 and Mr. Shah represented to offerees and Participants that Mr. Hirsch and Mr. Shah prepared the tax
 12 returns for Scott Coles and the Mortgages Limited Pools. However, they did not prepare the tax
 13 returns for the 2007 income tax year for Mortgages Limited Pools. They had not prepared the
 14 personal income tax returns for Scott Coles for the 2005-2007 income tax years because Mr. Coles
 15 was the subject of an IRS inquiry. This was not disclosed to investors.¹⁴²⁶

16 231. Scott Coles died on June 2, 2008.

17 232. On June 8, 2008, Mr. Hirsch admitted to Quarles & Brady that Radical Bunny and the
 18 Radical Bunny Managers had not followed their advice which had been articulated to them on May 2,
 19 2007, and stated, "We've done everything wrong."¹⁴²⁷

20 233. On June 10, 2008, Quarles & Brady terminated their representation of Radical Bunny,
 21 in part, because Radical Bunny had continued to sell unregistered securities.¹⁴²⁸

22 234. At a meeting shortly after the death of Scott Coles, Mr. Hirsch described Radical
 23 Bunny as being a "bank" for Mortgages Limited to Mr. Levine and other investors.¹⁴²⁹

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 26 ¹⁴²⁴ Tr. at 135-137; 1820-1821; 1830-1831; Exhibit S-30.

27 ¹⁴²⁵ Tr. at 1834-1835; 1858.

28 ¹⁴²⁶ Tr. at 1820-1827; 1822; 1880-1881.

¹⁴²⁷ Tr. at 944-945; 949-950; Exhibit S-22(g).

¹⁴²⁸ Tr. at 834; Exhibit S-22(p).

¹⁴²⁹ Tr. at 147-148; Exhibit R-8.

235. At a meeting after the death of Coles in June, 2008, Mr. Hirsch represented to Ms. Hinman and other Participants that Radical Bunny's status with respect to the RB-Mortgages Limited Loans was secured.¹⁴³⁰

236. Between January 1, 2007, and April 30, 2008, Radical Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah received at least an additional \$73 million from investors.¹⁴³¹

237. Between January 1, 2008, and April 30, 2008, Radical Bunny, Mr. Hirsch, Mrs. Walder, Mr. Walder, and Mr. Shah received \$28,933,491 from investors.¹⁴³²

238. Between at least January 2006 and June 2008, Radical Bunny received the principal amount of \$189,800,867.00 from investors (excluding \$11,179,893 from the Radical Bunny Managers) from at least 900 account holders. This sum remains due and owing.¹⁴³³

239. On June 23, 2008, an involuntary petition for relief was filed against Mortgages Limited under Chapter 7 of Title 11 of the United States Bankruptcy Code in the United States District Court for the District of Arizona, under case No.2:08-bk-07465-RJH (Mortgages Limited Bankruptcy).¹⁴³⁴

240. On June 24, 2008, the United States Bankruptcy entered an order converting the Mortgages Limited Bankruptcy case to a proceeding under Chapter 11 of the Bankruptcy Code.¹⁴³⁵

241. Mortgages Limited remained the debtor-in-possession in the Mortgages Limited Bankruptcy.¹⁴³⁶

242. In the Mortgages Limited Bankruptcy, Radical Bunny asserted that it had lent Mortgages Limited approximately \$197 million under approximately 98 promissory notes. Radical Bunny also asserted that the total \$197 million in RB-Mortgages Limited Loans was secured by a lien in substantially all Mortgages Limited's assets, including all its interest in the Mortgages Limited Portfolio Loans (approximately \$162 million) and all real estate owned by Mortgages Limited (the

¹⁴³⁰ Tr. at 432-435.

¹⁴³¹ Notice ¶67; Verified Answer ¶67.

¹⁴³² Tr. at 1042; Exhibit S-24.

¹⁴³³ Tr. at 1678; Exhibit S-34; Exhibit S-35; Exhibit S-37(a); Exhibit S-37(b).

¹⁴³⁴ Exhibit S-6(b); Exhibit S-56.

¹⁴³⁵ *Id.*

¹⁴³⁶ Exhibit S-56.

1 RB Claim).¹⁴³⁷

2 243. Radical Bunny's alleged security interest was the subject of substantial dispute in the
3 Mortgages Limited Bankruptcy, with Mortgages Limited, the Mortgages Limited investors'
4 committee, the Mortgages Limited unsecured creditors' committee, and other parties-in-interest
5 asserting that Radical Bunny's security interest in the Mortgages Limited assets was invalid or
6 unenforceable under various legal theories. The amount of the RB Claim was not in dispute.¹⁴³⁸

7 244. On October 8, 2008, an involuntary petition for relief was filed against Radical Bunny
8 under Chapter 11 of the United States Code in the United States Bankruptcy Court for the District of
9 Arizona (Phoenix) under case no. 2:08-bk-13884-CGC (the Radical Bunny Bankruptcy). On October
10 20, 2008, the Bankruptcy Court entered an order converting the case to a voluntary petition under
11 Chapter 11 of the Bankruptcy Code.¹⁴³⁹

12 245. On November 11, 2008, Mr. Hirsch, on behalf of Radical Bunny, executed and filed
13 Schedule F-Creditors Holding Unsecured Nonpriority Claims in the Radical Bunny Bankruptcy
14 ("Schedule F"). Schedule F is a sworn declaration containing the list of individuals and entities to
15 which Radical Bunny owed money. Schedule F contains the same names as those listed on the
16 Radical Bunny "Lender Name & Address Listing."¹⁴⁴⁰

17 246. Radical Bunny did not remain the debtor-in-possession in the Radical Bunny
18 Bankruptcy. In anticipation of the United States Trustee taking a formal position on a then pending
19 motion, Radical Bunny stipulated to the appointment of a Chapter 11 Trustee, and an order directing
20 the United States Trustee to appoint a Chapter 11 Trustee was entered by the Bankruptcy Court on
21 December 29, 2008.¹⁴⁴¹

22 247. G. Grant Lyon began serving as the Chapter 11 Trustee in the Radical Bunny
23 Bankruptcy on December 30, 2008 ("Radical Bunny Chapter 11 Trustee").¹⁴⁴²

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26 ¹⁴³⁷ Tr. at 2046-2048; Exhibit S-37(a); Exhibit S-37(b); Exhibit S-40.

¹⁴³⁸ Exhibit S-40.

¹⁴³⁹ Exhibit S-36.

¹⁴⁴⁰ Exhibit S-34; Exhibit S-35.

¹⁴⁴¹ Tr. at 2041-2043; Exhibit S-36.

¹⁴⁴² Tr. at 2041-2042; Exhibit S-40.

1 248. On May 20, 2009, the Bankruptcy Court entered an Order Confirming the Investors
2 Committee's First Amended Plan of Reorganization dated March 12, 2009 for Mortgages Limited
3 ("Mortgages Limited POR")("Mortgages Limited Bankruptcy Confirmation Order") after an
4 extensively litigated trial.¹⁴⁴³

5 249. During the Mortgages Limited Bankruptcy proceedings, Mortgages Limited and the
6 official committee of investors contested the issue whether Radical Bunny had a valid security
7 interest in Mortgages Limited's assets. As part of the Mortgages Limited confirmation trial, the
8 dispute regarding the validity and extent of Radical Bunny's secured status as against Mortgages
9 Limited's assets became a central issue. The issue was resolved in the Mortgages Limited
10 Bankruptcy by agreement among the parties and without an evidentiary hearing and without findings
11 of fact by the Bankruptcy Court in either the Mortgages Limited Bankruptcy or the Radical Bunny
12 Bankruptcy.¹⁴⁴⁴

13 250. The Mortgages Limited POR recognizes and eliminates all disputes as to the validity
14 and extent of Radical Bunny's secured creditor claim in the approximate amount of \$162 million,
15 which represents the principal amount of the Mortgages Limited Portfolio Loans.¹⁴⁴⁵

16 251. The Mortgages Limited POR also allows Radical Bunny's unsecured claim against
17 Mortgages Limited for approximately \$35 million.¹⁴⁴⁶

18 252. The repayment of the principal balance of the RB-Mortgages Limited Loans will be
19 governed by the Mortgages Limited POR.¹⁴⁴⁷

20 253. On April 28, 2010, the Bankruptcy Court entered an Order Confirming the Amended
21 Plan of Reorganization dated March 9, 2010 for Radical Bunny ("Radical Bunny POR"). The
22 Radical Bunny POR treats the Participants as unsecured creditors of Radical Bunny, entitling those
23 creditors to share *pro rata* in all recoveries from Radical Bunny's creditor interests (deemed secured
24
25

26 ¹⁴⁴³ Exhibit S-6(b); Exhibit S-40; Exhibit R-4.

27 ¹⁴⁴⁴ Tr. at 2053-2064; 2077-2079; 2087; 2088; 2089-2090; Exhibit S-40; Exhibit S-56.

28 ¹⁴⁴⁵ Tr. at 2079-2082; Exhibit S-40; Exhibit S-56; Exhibit R-5.

¹⁴⁴⁶ Tr. at 2079; 2082-2083; 2103-2104; Exhibit S-40; Exhibit S-56; Exhibit R-5.

¹⁴⁴⁷ Exhibit S-56.

and unsecured) in Mortgages Limited's assets and the Mortgages Limited liquidating trust.¹⁴⁴⁹

254. While being served with a copy of the Notice on March 12, 2009, Mr. Hirsch stated to Ronald Clark, the Chief Investigator of the Securities Division, that “[W]e have already established that we sold unregistered securities; everybody knows that.”¹⁴⁵⁰

255. These findings of fact are based upon the Discussion above, and those findings are also incorporated herein.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Arizona Securities Act.

2. The findings and conclusions of law contained in the Discussion above are incorporated herein.

3. Respondents offered or sold securities within or from Arizona, within the meaning of A.R.S. §§ 44-1801.

4. Respondents violated A.R.S. § 44-1841 by offering or selling securities that were neither registered nor exempt from registration.

5. Respondents violated A.R.S. § 44-1842 by offering or selling securities while neither registered as dealers or salesmen nor exempt from registration.

6. Respondents violated the anti-fraud provisions of A.R.S. § 44-1991 in the manner set forth hereinabove.

7. Respondents' conduct is grounds for a cease and desist order pursuant to A.R.S. § 44-2032.

8. Respondents' conduct is grounds for an order of restitution pursuant to A.R.S. § 44-2032.

9. An administrative penalty of \$150,000 against Horizon Partners, Mr. Hirsch, individually, and the marital community of Mr. and Mrs. Hirsch, jointly and severally, for their multiple violations of the registration provisions of the Securities Act, pursuant to A.R.S. § 44-2036,

¹⁴⁴⁹ Tr. at 2045-2046; Exhibit S-40.

¹⁴⁵⁰ Tr. at 245-247.

10. An administrative penalty of \$2 million against Respondent Mr. Hirsch, individually, and the marital community of Mr. and Mrs. Hirsch for Mr. Hirsch's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215 is appropriate.

11. An administrative penalty of \$1.25 million against Mrs. Walder, individually, and the marital community of Mrs. and Mr. Walder for Mrs. Walder's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215, is appropriate.

12. An administrative penalty of \$750,000 against Mr. Shah, individually, and the marital community of Mr. and Mrs. Shah for Mr. Shah's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215 is appropriate.

13. An administrative penalty of \$500,000 against Mr. Walder, individually, and the marital community of Mr. and Mrs. Walder for Mr. Walder's multiple violations of the registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215 is appropriate.

IT IS THEREFORE ORDERED that Respondents, and any of Respondents' agents, employees, successors and assigns, shall permanently cease and desist from violating the Securities Act, pursuant to A.R.S. § 44-2031.

DECISION NO. 73768

1 annum from the date of this Decision until paid in full. Payment shall be made to the "State of
2 Arizona" to be placed in an interest-bearing account controlled by the Commission, until distributions
3 are made.

4 IT IS FURTHER ORDERED that the Commission will credit the amount of restitution owed
5 by Horizon Partners, Tom Hirsch, individually, the marital community of Tom Hirsch and Diane
6 Rose Hirsch, Berta Walder, individually, Howard Walder, individually, the marital community of
7 Berta and Howard Walder, Harish Shah, individually, and the marital community of Harish Shah and
8 Madhavi H. Shah with the amount of any funds recovered by the investors in the following court
9 proceedings: (1) *In re Radical Bunny, LLC*, case no. 2:08-bk-13884-CGC in the United States
10 Bankruptcy Court for the District of Arizona (Phoenix); and (2) *Facciola v. Greenberg Traurig et al.*,
11 case no. 2:10-cv-01025 in the United States District Court for the District of Arizona. Respondents
12 and Respondent Spouses shall provide to the Commission all information and documentation to
13 verify that such restitution has been paid, which the Commission in its sole discretion may accept or
14 reject.

15 IT IS FURTHER ORDERED that the Commission shall disburse the funds on a *pro-rata*
16 basis to the non-manager investors shown on the records of the Commission. Any restitution funds
17 that the Commission cannot disburse because an investor refuses to accept such payment, or any
18 restitution funds that cannot be disbursed to an investor because the investor is deceased and the
19 Commission cannot reasonably identify and locate the deceased investor's spouse or natural children
20 surviving at the time of distribution, shall be disbursed on a *pro-rata* basis to the remaining investors
21 shown on the records of the Commission. Any funds that the Commission determines it is unable to
22 or cannot feasibly be disbursed shall be transferred to the General Fund of the State of Arizona.

23 IT IS FURTHER ORDERED that Horizon Partners, Tom Hirsch, individually, and the marital
24 community of Tom Hirsch and Diane Rose Hirsch, jointly and severally, shall pay to the State of
25 Arizona administrative penalties in the amount of \$150,000 for their multiple violations of the
26 registration provisions of the Securities Act, pursuant to A.R.S. § 44-2036.

27 IT IS FURTHER ORDERED that Tom Hirsch, individually, and the marital community of
28 Tom Hirsch and Diane Rose Hirsch, jointly and severally, shall pay to the State of Arizona

1 administrative penalties in the amount of \$2,000,000 for Mr. Hirsch's multiple violations of the
2 registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215.

3 IT IS FURTHER ORDERED that Berta Walder, individually, and the marital community of
4 Berta Walder and Howard Walder, jointly and severally, shall pay to the State of Arizona
5 administrative penalties in the amount of \$1,250,000 for Berta Walder's multiple violations of the
6 registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215.

7 IT IS FURTHER ORDERED that Harish Shah, individually, and the marital community of
8 Harish Shah and Madhavi H. Shah, jointly and severally, shall pay to the State of Arizona
9 administrative penalties in the amount of \$750,000 for Harish Shah's multiple violations of the
10 registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215.

11 IT IS FURTHER ORDERED that Howard Walder, individually, and the marital community
12 of Howard Walder and Berta Walder, jointly and severally, shall pay to the State of Arizona
13 administrative penalties in the amount of \$500,000 for Howard Walder's multiple violations of the
14 registration and antifraud provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215.

15 IT IS FURTHER ORDERED that pursuant to authority granted to the Commission under
16 A.R.S. § 44-2036, the administrative penalties ordered hereinabove shall be payable by either by
17 cashier's check or money order payable to "the State of Arizona" and presented to the Arizona
18 Corporation Commission for deposit in the General Fund for the State of Arizona.

19 IT IS FURTHER ORDERED that the payment obligation for these administrative penalties
20 shall be subordinate to the restitution obligations ordered herein and shall become immediately due
21 and payable only after restitution payments have been paid in full or upon Respondents' default with
22 respect to Respondents' restitution obligations.

23 IT IS FURTHER ORDERED that if Respondents fail to pay the administrative penalties
24 ordered hereinabove, any outstanding balance plus interest at the rate of the lesser of ten percent *per*
25 *annum* or at a rate *per annum* that is equal to one percent plus the prime rate as published by the
26 Board of Governors of the Federal Reserve System in Statistical Release H.15 or any publication that
27 may supersede it on the date that the judgment is entered may be deemed in default and shall be
28 immediately due and payable, without further notice.

1 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order,
2 any outstanding balance shall be in default and shall be immediately due and payable without notice
3 or demand. The acceptance of any partial or late payment by the Commission is not a waiver of
4 default by the Commission.

5 IT IS FURTHER ORDERED that default shall render Respondents liable to the Commission
6 for its cost of collection and interest at the maximum legal rate.

7 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order,
8 the Commission may bring further legal proceedings against the Respondent(s) including application
9 to the Superior Court for an order of contempt.

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IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-1974, upon application the Commission may grant a rehearing of this Order. The application must be received by the Commission at its offices within twenty (20) calendar days after entry of this Order. Unless otherwise ordered, filing an application for rehearing does not stay this Order. If the Commission does not grant a rehearing within twenty (20) calendar days after filing the application, the application is considered to be denied. No additional notice will be given of such denial.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

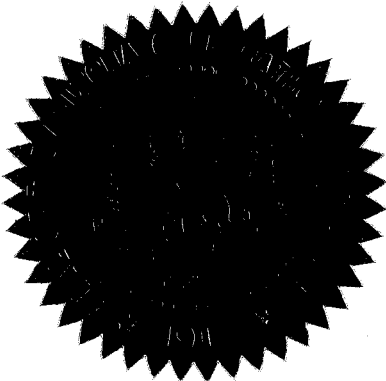
CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER



IN WITNESS WHEREOF, I, JODI JERICH, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 21st day of March, 2013.

JODI JERICH
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR:

RADICAL BUNNY, L.L.C., HORIZON PARTNERS,
L.L.C., TOM HIRSCH, DIANE ROSE HIRSCH,
BERTA FRIEDMAN WALDER, HOWARD EVAN
WALDER, HARISH PANNALAL SHAH and
MADHAVI H. SHAH.

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S-20660A-09-0107

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