ADMINISTRATIVE PROCEEDING

BEFORE THE

SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF:	)	**File No: 12058**
	)	
John M. McIntyre and	)	
Silver Oak Land Management, LLC,	)	**ORDER**
	)	
Respondents.	)	
_____	)	

BACKGROUND

On September 12, 2014, I issued an Order in this proceeding, remanding the case to the Hearing Officer and directing him to make a Report and Recommendation to me whether or not Respondents had violated S.C. Code Ann. § 35-1-501 in offering and selling the securities at issue. After review, the Hearing Officer subsequently recommended that I find numerous violations of section 501 and that the following remedies be ordered:

> a. The Respondents immediately cease and desist from transacting business in this State in violation of the South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101 *et seq.* (the "Act"), and, in particular, § 35-1-501 thereof;
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> b. Any exemption available to the Respondents under the Act be permanently revoked prospectively;
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> c. The Commissioner levy appropriate civil penalties in accordance with § 35-1-604 against Respondents in accordance with a maximum number of violations of 78; and
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> d. The Respondents pay the actual cost of the investigation and proceedings.

Based on my independent review of the record and applying a preponderance of the evidence standard, for the reasons set forth below, I concur in the Hearing Officer's Recommendation, except with respect to the number of violations.

FINDINGS OF FACT

I specifically concur in and accept the Hearing Officer's factual findings set forth at pp. 5-12 of his Recommendation. Those findings are incorporated by reference except as otherwise stated herein. I further accept his findings concerning the credibility of the witnesses he heard as set forth at pp. 12-13 of his Recommendation. I also reiterate and incorporate by reference my findings and rulings concerning the formation and operation of the SOLT Entities (as defined below) by Respondents and the issuance of securities by those entities as set forth in my Order of September 12, 2014. I provide additional factual findings below.

Respondent John M. McIntyre ("McIntyre"), individually or through Respondent Silver Oak Land Management, LLC ("SOLM"), formed and managed seven South Carolina limited liability companies[1] (collectively, the "SOLT Entities"; individually, a "SOLT Entity"). Six of the SOLT Entities, all save Silver Oak Energy ("SOE"), were formed for the purpose of purchasing and managing tracts of timberland. State's Exhibits 2, 4, 8, 10, and 14 and Respondent's Exhibit 3. These six entities are referred to as the "Land Trusts." SOE was formed for the purpose of growing Miscanthus grass as a renewable fuel source.

Respondents represented, stated, and implied, in connection with the offer and sale of the SOLT Entities' securities offerings at issue, that investors in the SOLT Entities would profit from the managerial efforts of the Respondents. In connection with offering and selling to members

[1] SOLT I, SOLT II, SOLT III, SOLT IV, SOLT V, SOLT VII and Silver Oak Energy.

interests in the Land Trusts that were securities, the Respondents represented, stated, and implied that the Land Trusts were being formed for the purpose of purchasing a parcel or parcels of land identified by the Respondents and that investors in the Land Trusts would profit from the managerial efforts of the Respondents to lease the land, sell timber, and put the land to higher and better use. Likewise, Respondents represented, stated, and implied, in connection with the offer and sale of the SOE securities at issue, that SOE was being formed to purchase land for farming and the cultivation of Miscanthus grass and that investors in SOE would profit from the managerial efforts of the Respondents to cultivate, harvest, and sell the grass as a renewable source of energy.

The Hearing Officer determined, at p. 6 of his most recent Report, that a total of at least 78 member interests in the SOLT Entities were offered and sold by Respondents apart from interests allocated to Respondents. In offering and selling those interests, Respondents were offering and selling securities and needed to comply with the South Carolina Uniform Securities Act of 2005. They did not do so.

A central problem with the way memberships in the SOLT Entities were offered and sold relates to what investors were not told. For most of the SOLT Entities, the operative documentation does not provide for the payment of the manager, whether the manager was McIntyre or SOLM. Respondents typically represented to investors that their compensation for the managerial services provided was only a stated and defined percent interest in the company. For Land Trust II and Land Trust III, the representation was different: it provided that the "Manager shall receive as a management fee fifteen percent (15%) of all revenue received by the Company."

None of the disclosures given to investors by any SOLT Entity represented or warned that Respondents intended or reserved the right to use investor funds or entity assets to pay themselves substantial undisclosed, unauthorized compensation or management fees, much less to pay for

personal expenses of Mr. McIntyre and Mr. McIntyre's family (such as groceries, online retailers, college application fees, clothing, wine and spirits, and pet hospital and kennel visits). Nor were offerees or purchasers advised that in practice, Respondents preferred an opaque rather than transparent management style, with investors' requests for information being unwelcome and destined to be ignored.

These nondisclosures were material omissions which made the representations made by Respondents incomplete and materially misleading. Further, even though documentation for Land Trust II and Land Trust III allowed Respondents to take a management fee, Respondents went beyond the permission granted by paying themselves significant consulting fees on top of taking the permitted distributions allowed by the Land Trust II and III operating agreements.

Another similar material omission relates to Respondents' practice of using the assets of one SOLT Entity to financially support a different entity or entities. For example, Respondents never disclosed to investors that the assets of Land Trust VII could be diverted to Land Trust I to enable that entity to make its mortgage payments, though this was done. The problem with diverting assets in this way is that it exposes investment money entrusted by Land Trust VII investors to the financial risks faced by a completely different business. The practice operates as a fraud on Land Trust VII investors.

Likewise, Respondents misappropriated Land Trust III investor funds by transferring thousands of dollars to SOLM from August, 2011, to December, 2011. Further, during this same time period, the Respondents caused thousands of dollars of Land Trust III investor funds to be transferred to Land Trust I. Thus, whereas Respondents represented to investors in connection with the offer and sale of the securities of the various entities that the investors' money would be used in furtherance of the entity in which they invested, as a common business practice Respondents

nonetheless diverted entity funds for personal use or enrichment and made multiple transfers and so-called loans between the various entities, resulting in a commingling of funds among the various Land Trusts and SOE.

Obviously, Respondents never disclosed the intention when soliciting investments from the public to siphon off or commingle the funds raised with other SOLT Entities. Nor were investors warned about any possibility or likelihood that Respondents would see fit to divert the investor funds raised for personal purposes. The diversion of assets in this way was testified to at the hearing by investor Richard Silver as follows:

> Q As to SOLT I, did you find transfers of money to Jack McIntyre himself?
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> A I found many transactions that were recorded as loans to Jack McIntyre and many more that were recorded as loans to Silver Oak Land Management and some transactions that were payments not labeled as loans but as consulting fees or other types of payments to Jack McIntyre or Silver Oak Land Management.
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> Q Who was the manager of SOLT I?
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> A Jack McIntyre.
>
> Q Did Silver Oak Land Management have a relationship with SOLT I?
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> A None whatsoever.
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> Q According to your financial analysis, what amount of transfers did you see to Mr. McIntyre and then Silver Oak Land Management?
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> A In the aggregate, I accounted based on information in the documents approximately $133,000 worth of loans to either Jack McIntyre or Silver Oak Land Management which were recorded as such by Jack McIntyre in doing the books. In addition to that,

I discovered 50-something thousand dollars worth of consulting or management fees that were paid to him that were labeled as such either on the books or on the tax records. So those were the direct payments that I would say that went from Silver Oak Land Trust I only to either Jack McIntyre or Silver Oak Land Management. . . .

I did notice a number of transactions that would be to all appearances personal in nature, not even counting the tens of thousands of dollars that were spent at restaurants which are a different matter entirely. But there were many other transactions that clearly appear to be purely personal in nature.

Q Do you have examples of those expenses?

A I do. And we're talking Silver Oak I only. There were purchases at liquor stores. There were payments for college board SAT fees. There were payments to car services other than for the vehicle that was operated by Jack McIntyre which the original five members of Silver Oak I allowed him to purchase and service at company expense. There were payments to the Evergreen Pet Lodge for kenneling somebody's dog. There were payments to a tire company, again, not related to the truck that Jack drove. There were payments to Sea Turtle Cinemas. There was payment to a chiropractor. There was a transfer of money to his wife's business account. There was another transfer to his wife's business account. There were [sic] a purchase at Victoria's Secret. There were payments to Plantation Animal Hospital. There was a payment to a photographer whose work I had purchased at Jack's wife's art gallery. There was a payment -multiple payments to a dentist or Dr. Galloway. I think that's a dentist. And those are just the ones that were altered when they were entered into the Quicken records. In other words, the payee as it's clearly shown on the bank records using a debit card was totally changed when the transactions were entered into the Quicken records. . . .

> In addition to that, in July 2007 there was a cash withdrawal taken from Silver Oak I's bank account in the amount of $4,366, and the paperwork from the bank explains and shows clearly that the check that was requested was a bank check, based on the withdrawal slip, payable to the Beaufort County Treasurer for property taxes. None of these companies owns property in Beaufort County except, I think, for one acre of Silver Oak Land Trust I's 159 acres. I think one acre of it may overlap into Beaufort County. So that was not for company taxes of any kind. There were 40 different payments to dry cleaners amounting to over -- almost $1100. Another chiropractor. Seven payments over time for 400-and-something dollars to a home coffee service. Eighty-two payments to car washes. A payment to the Medical University of South Carolina. Fifty-two payments to super markets aggregating almost three-and-a-half thousand dollars and 54 payments to Starbucks aggregating $3,218. Those are just some of what appear to be what I would call purely personal unrelated to what could be argued to be travel and entertainment expenses like a restaurant. That's a different matter in terms of the volume of that that was done. And, just for the record, the volume of that that was done in Silver Oak I alone $39,000 was spent at eating establishments in 600 separate transactions.

Tr. 10/1/13, 153:3 to 158:24.

Evidence was also adduced at the hearing concerning discrepancies between how disbursements were recorded on SOLT Entity books versus bank records. Tr. 10/3/2013, 460:23 to 464:14. The changes in reporting appeared to reflect efforts to disguise personal charges as business-related charges, such as by recording Home Depot as the vendor, when payments really went to a jeweler and to Vanderbilt University and Wake Forest University for application fees.

A central complaint of investors in SOLT Entities was "[t]hat the money that they had invested had not been spent in the way they had been told it would be spent." Tr. 10/3/2013,

472:17-20. The record reflects that the investors in the SOLT Entities had good grounds for this fundamental grievance. Due to material nondisclosures, they were induced to entrust their funds to Respondents without any inkling that Mr. McIntyre reserved the right to use the SOLT Entities as a sort of personal piggy bank. In essence, because of the cavalier, self-serving way the SOLT Entities were managed and operated, the ability of investors to earn a positive return on their investments in the SOLT Entities was dependent upon Respondents' whim, meaning that investments in the SOLT Entities were highly risky. Missing from disclosures given to investors in the various SOLT Entities was any warning that Respondents reserved the right to do with investor money whatever they chose to do. Nor were investors told that Respondents reserved the right to withhold important financial information from them.[2] These were material failings.

CONCLUSIONS OF LAW

S.C. Code Ann. § 35-1-501 is captioned, "General fraud." It reads:

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[2] Mr. McIntyre's reluctance to share important information was criticized by one investor in a letter read into the record at the Hearing, Tr: 10/3/13 602:2 to 603:12.

> Jack, it is interesting that you are defending your tree farming expertise. To my knowledge, no one has questioned that. What is in your question is your refusal to share company records with the investors. Martin Rehder and I had countless conference calls with you demanding to know such things as how much money is in our company accounts, the amount of money paid for harvests, our expenses for forester and taxes and accounting of where a loan of $500,000 got spent, many more questions on the additional 250,000 that was somehow added to the original loan. We have many, many more requests for written information. Apparently you borrowed money from this loan that we are all paying interest on without telling us. . . . We have been friends a very long time. For that reason I have sent you private emails imploring you to do the right thing. . . . Yes, you have turned over many files, but not the ones specifically asked for by Rich. The other requests he made need to be addressed as well. Please comply immediately.

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

(1) to employ a device, scheme, or artifice to defraud;

(2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

An early Securities and Exchange Commission ("SEC") case focusing on the importance of managerial integrity to investors involved the offering of securities by a real estate syndication specialist who was prone to engage in risky self-dealing transactions. In re Franchard Corp., 42 S.E.C. 163 (1964). Glickman, the syndicator-promoter in question, had a history of financial misbehavior (such as a tendency to divert entity funds for self-serving purposes) that had been undisclosed to investors at the time securities were offered and sold. The SEC in Franchard found these concealments were material, reasoning:

> Of cardinal importance in any business is the quality of its management. Disclosures relevant to an evaluation of management are particularly pertinent where, as in this case, securities are sold largely on the personal reputation of a company's controlling person. . . .
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> . . . . In many respects, the development of disclosure standards adequate for informed appraisal of management's ability and integrity is a difficult task. . . . Managerial talent consists of personal attributes, essentially subjective in nature, that frequently defy meaningful analysis through the impersonal medium of a prospectus. . . . The integrity of management—its willingness to place its duty to public shareholders over personal interest—is an equally elusive factor for the application of disclosure standards.
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> Evaluation of the quality of management—to whatever extent it is possible—is an essential ingredient of informed investment decision. A need so important cannot be ignored . . . .

Id. at 169-70 (footnotes omitted). Respondent McIntyre's practices of diverting and siphoning assets exposed investors to great risks and cast great doubt on the quality of the SOLT Entities'

management. To cover up those facts while continuing to solicit public money was a flagrant violation of the South Carolina Uniform Securities Act.

Rather than disclose, Respondents resorted to concealments. Respondents were unwilling to explain to trusting investors the material risks that awaited investors once they purchased memberships in the SOLT Entities. Consequently, in making disclosures to offerees and purchasers, Respondents omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. They likewise employed their SOLT Entity capital-raising operation as a device, scheme, or artifice to defraud innocent investors. They further engaged in acts, practices, and a course of business that operated or would operate as a fraud or deceit upon other persons, namely innocent, trusting SOLT Entity investment offerees and members.

The Cease and Desist Order dated April 19, 2013, identifies "at least 39 occasions" on which the Respondents violated Section 501. The Hearing Officer's Recommendation doubles that number to 78, with that number reflecting the number of investors in the SOLT Entities, not counting Respondents.

The record reflects that Respondents began to misappropriate investor money by at least mid-2007. Clearly, at that point, if not before, risk factors existed that called for explicit, detailed disclosure, which was never forthcoming. Among those risk factors were the possibility of financial harm resulting from Respondents' failure to implement and adhere to proper internal controls, as well as the dangers posed by Respondents' greed and their willingness to self-deal with and commingle investor-provided entity funds. Clearly, by the middle of 2007 if not before, Section 501 was being violated on a regular basis when investor funds were being sought.

Units in all SOLT Entities except SOLT I, SOLT II, and SOLT III were issued from mid-2007 onward. Investors in each of the four SOLT Entities capitalized after the beginning of 2007, plus the three additional investors added in the SOLT I second offering, needed disclosure protection of the type offered by Section 501 at the time SOLT Entity investments were offered to them and issued. No such disclosures were forthcoming. Using a mid-2007 cut-off date means the number of investors in question totals 54, consisting of 22 investors from SOLT IV, 11 from SOLT V, 13 from SOLT VII, 5 from SOE, and 3 new investors from the second SOLT I solicitation in or around 2010 and 2011. I find that section 501 was violated due to material nondisclosures of facts as to each of the 54 foregoing securities offerings and sales.

CIVIL PENALTY

Pursuant to § 35-1-604, the Securities Commissioner may impose a civil penalty in an amount not to exceed ten thousand dollars for each violation. I find that the record in this proceeding supports no fewer than 54 violations of § 35-1-501 as measured by the number of uniquely titled limited liability company interests, less those owned by McIntyre and SOLM, sold subsequent to mid-2007. I find that a civil penalty of $10,000 is appropriate for each violation.

REMEDIES ORDERED

Based on the foregoing, it is hereby ORDERED:

a. The Respondents shall immediately cease and desist from transacting business in this State in violation of the South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101 *et seq.* (the "Act"), and, in particular, § 35-1-501 thereof;

b. Any exemption available to the Respondents under the Act is permanently revoked prospectively;

c. Civil Penalties in accordance with § 35-1-604 are levied against Respondents, jointly and severally, in the total sum of $540,000, based on no fewer than 54 violations, with a penalty of $10,000 imposed for each violation; and

d. The Respondents shall pay the actual cost of the investigation and proceedings. An authorized Representative of the Securities Division shall serve Respondents with a statement of the actual cost of the investigation and proceedings and an affidavit attesting to the accuracy of same within ten (10) days of the date of this Order. The costs so itemized and verified shall be paid by Respondents within fifteen (15) days of service of the statement.

IT IS SO **ORDERED** this 20 day of November, 2014

By: Alan Wilson

The Honorable Alan M. Wilson
Securities Commissioner
State of South Carolina