

ADMINISTRATIVE PROCEEDING

BEFORE THE

SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF:

John M. McIntyre and
Silver Oak Land Management, LLC,

Respondents.

RECOMMENDATION
(File No. 12058)

RECOMMENDATION

I recommend to the Securities Commissioner (the "Commissioner") 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, Section 35-1-501 thereof;
- b. Any exemption available to the Respondents under the Act be permanently revoked prospectively; and
- 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.
- d. The Respondents pay the actual cost of the investigation and proceedings.

REMAND BACKGROUND

This matter came before me by hearing commenced on July 30, 2013, which continued on October 1 through October 3, 2013, in the offices of the Commissioner. Testimony

was taken and evidence was presented.¹ I issued my May 6, 2014, Report and Recommendations (the “Initial Report”) to the Commissioner. My recommendation pursuant to the Initial Report was to “find that the limited liability company interests which constitute the investments at issue in this matter are not securities” and accordingly dismiss the Cease and Desist Order (the “Cease and Desist Order”) issued April 19, 2013. The Commissioner issued an Order dated September 12, 2014 (the “Commissioner’s Order”), wherein he found that the investments were securities and remanded this matter to me to make further findings in accordance with the Commissioner’s Order. **THEREFORE**, I proceed in accordance with the Commissioner’s Order from the conclusions of the Commissioner that the investments are securities. The issues that remain in this matter and are addressed in this subsequent order are whether or not the sales of the securities were in violation of § 35-1-501.

HEARING

Witnesses that appeared on behalf of the Securities Division of the State of South Carolina (the “Division”) were Mr. Phil W. Hartman, Mr. Richard A. Silver, Mr. Paul Fin, Mr. James Russell Paris, and Ms. Sandra Matthews.

Mr. John M. McIntyre was called by the Division and by Respondent.

JURISDICTION

This matter was heard pursuant to Order Designating Hearing Officer (the “Order of Appointment”) dated June 14, 2013, issued by the Commissioner in accordance with the Act.

The Order of Appointment grants the hearing officer the authority to hear the case and to take all actions he deems relevant or material to his recommending findings as to the matters alleged in the Cease and Desist Order.

¹ The hearing on July 30, 2013, was transcribed (Tr.1) by Sandra M. Snead. The hearing on October 1, 2013, through October 3, 2013, was transcribed (Tr.2) by Jennifer L. Thompson, CVR-M, Nationally Certified Verbatim Court Reporter.

BURDEN OF PROOF

The Act does not set forth the burden of proof the Commissioner must meet to prove that the remedies recommended should be implemented. The remedies are penalties and bars. This proceeding is not subject to the requirements of the South Carolina Administrative Procedure Act., § 35-1-604(c), South Carolina Reporter's Comment 3.

The South Carolina Supreme Court has looked to federal law for guidance for interpreting the Act. “[C]ases interpreting Section 12(2) of the Securities Act of 1933, while not binding authority on this Court [South Carolina Supreme Court], are looked to for guidance in interpreting the corresponding South Carolina Code provision with which we are dealing.” Bradley v. Hullander, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978). In Bradley, the Court noted that the statute under consideration was taken almost verbatim from Section 12(2) of the Securities Act of 1933. 15 U.S.C.A. § 77L (2). I note that S.C. Code Ann. § 35-1-501 is not identical to Section 17A of the Securities Act of 1933, but for the purposes of this litigation, there is no reason to treat it as significantly different for purposes of using federal cases to provide guidance for interpreting the Act. With this in mind, the decisions of the U.S. Supreme Court and South Carolina courts show that the appropriate burden of proof to be applied in administrative securities actions is a preponderance of the evidence standard. The United States Supreme Court, *citing* Steadman v. SEC, 450 U.S. 91, 101 S. Ct. 999 (1981), stated “we upheld use of the preponderance standard in SEC administrative proceedings concerning alleged violations of the anti-fraud provisions.” Herman & MacLean v. Huddleston, 459 U.S. 375, 390, 103 S. Ct. 683, 691 (1983).

The United States Supreme Court has not required the higher standard of clear and convincing evidence in securities cases and no case in South Carolina has done so. Therefore, the preponderance of the evidence standard is the applicable standard.

CEASE AND DESIST ORDER

The Commissioner found in the Cease and Desist Order that:

43. On at least 39 occasions, the Respondents, jointly and severally, in connection with the offer, sale, or purchase of a security, directly or indirectly,
 - a. Employed a device, scheme, or artifice to defraud;
 - b. Made an untrue statement of a material fact or omitted 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
 - c. Engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

The Commissioner ordered the following relief pursuant to the Cease and Desist Order:

NOW THEREFORE, pursuant to S.C. Code Ann. § 35-1-604(a), IT IS HEREBY ORDERED that:

- a. The Respondents immediately cease and desist from transacting business in this State in violation of the Act and, in particular, Section 35-1-501 thereof;
- b. Any exemption available to the Respondents under the Act is hereby permanently revoked prospectively; and
- c. The Respondents each pay a civil penalty in an amount not to exceed \$10,000 for each violation of the Act committed by that Respondent, and the actual cost of the investigation and proceedings. In the alternative, if a Respondent chooses to let this Order become effective by operation of law, that Respondent shall pay a civil penalty of \$50,000 for violating the Act as detailed in this Order.

NATURE OF RELIEF

This matter requires me to make determinations of whether the Respondents have violated § 35-1-501 in connection with the “offer, sale, or purchase of a security.” Pursuant to § 35-1-604, the Commissioner may issue a cease and desist order and may impose a civil penalty in an amount not to exceed ten thousand dollars for each violation. Administrative enforcement actions under § 35-1-604 do not require culpability to be pled or proven. Official Comment number 6. I have not delineated every possible incident that contributes to a violation of § 35-1-501 in this recommendation and do not intend for the matters set forth herein to be considered an exhaustive list of possible impermissible actions by Respondents. The number of violations for purposes of this recommendation is the number of securities constituting interests in various limited liability companies sold and not each act of misappropriation of funds or other violations. My recommended finding as to the number of violations is seventy-eight.

FINDINGS OF FACT

As to matters delineated as “recommended findings,” they should be construed as findings of fact or conclusions of law as appropriate. For factual matters that are not referenced to the record in the body of this report, see the transcripts of record and the exhibits which are incorporated into this report.

Respondent John M. McIntyre (“McIntyre”), individually or through Silver Oak Land Management, LLC (“SOLM”) as Manager formed seven limited liability companies (collectively, the “SOLT Entities”) pursuant to the South Carolina Uniform Limited Liability Company Act of 1996.² S.C. Code Ann. § 33-44-101, *et seq.* Six of the SOLT Entities (SOLT I,

² The various operating agreements are in the record as follows: SOLT I at Exhibit 10, SOLT II at Exhibit 2, SOLT IV at Exhibit 4, SOLT V at State Exhibit #14, SOLT VII at R Exhibit 3, and SOE at Exhibit 8. There is not an operating agreement for SOLT III in the record and there was not a SOLT VI. However, as regards SOLT III, it was formed on the basis of SOLT I. Note that there were two court reporters and exhibit numbering is not consistent.

SOLT II, SOLT III, SOLT IV, SOLT V, and SOLT VII) were formed for the purpose of purchasing and managing tracks of timberland.³ State's Exhibits 2, 4, 8, 10, 14, and Respondent's Exhibit 3. Silver Oak Energy ("SOE") was formed for the purpose of growing miscanthus grass as a renewable fuel source. Tr.1, p. 95, Respondents' Exhibit 5. The SOLT Entities owned land and had operations in various locations in North Carolina and in South Carolina. SOLT I made a secondary offering and brought in three new members after SOLT I was formed.

Each company is manager managed. John McIntyre is the manager of SOLT I, SOLT II, and SOLT III.⁴ SOLM is the manager of SOLT IV, SOLT V, SOLT VII, and SOE.

The number of interests sold in the SOLT Entities is as follows, excluding interests sold to Respondents McIntyre and SOLM:

Entity	Number of Members ⁵ excluding McIntyre and SOLM	Source
SOLT I	4	Ex. A, Operating Agreement for SOLT I, Exhibit 10
SOLT II	12	Ex. A, Operating Agreement for SOLT II, Exhibit 2 prior to death of M. Fauerby.
SOLT III	4	Tr.1, p. 119, ll. 16-20 ⁶
SOLT IV	22	Ex. A, Operating Agreement for SOLT IV, Exhibit 4
SOLT V	11	Ex. A, Operating Agreement for SOLT V, State's Exhibit 14
SOLT VII	13	Ex. A, Operating Agreement for SOLT VII, R Exhibit 3
SOE	5	Ex. A, Operating Agreement for SOE, Exhibit 8
Second Offering	78 ⁷	Tr1, p. 123, ll. 17-24
TOTAL	78	

I note that 39 violations were found by the Commissioner in the Cease and Desist Order.

Violations and penalties must be determined by the Commissioner as a matter of public policy.

³ There is not a SOLT VI.

⁴ The interests in SOLT III were distributed to the members of SOLT I. There is no evidence in the record that SOLT III was managed differently than SOLT I.

⁵ I have counted each interest that is uniquely titled other than the interests held by McIntyre and SOLM, as one interest so far as I could delineate in the various parts of the record.

⁶ SOLT III's operating agreement is not in evidence.

⁷ These include all members of SOLT I plus three additional investor interests.

The SOLT Entities and their dates of formation are:

SOLT I: December 13, 2005. Operating Agreement, Exhibit 10.

SOLT II: June 1, 2006. Operating Agreement, Exhibit 2.

SOLT III: SOLT III was formed by the distribution of interests to members of SOLT I.⁸ Interests were distributed to the members of SOLT I in accordance with their capital percentages in SOLT I. Tr.1, p. 119, l. 21 - p. 120, l. 8.

SOLT IV: October 30, 2007. Operating Agreement, Exhibit 4.

SOLT V: January 30, 2008. Operating Agreement, Exhibit 14.

SOLT VII: March 6, 2009. Operating Agreement, R Exhibit 3.

SOE: November 2, 2009, Operating Agreement, Exhibit 8.

SOLT I Secondary Offering: December/January, 2010/2011. Tr.2, p. 125, ll. 5-9.

The SOLT Entities and the locations of their investments and operations are:

SOLT I: Timberland investments on Route 278, Hilton Head, South Carolina. Tr1, p.44-46.

SOLT II: Timberland in Fairfield County, South Carolina. Tr.1, p. 47, ll. 6-8.

SOLT III: Timberland in Newberry County, South Carolina. Tr.1, p. 53.

SOLT IV: Timberland in or around Edenton, North Carolina. Tr.1, p. 54-55, Exhibit 4.

SOLT V: Tract of land in the Chowan River Forest, North Carolina [Judicial Notice]. Exhibits 6 and 14.

SOLT VII: Fairfield County, South Carolina, Tr1, p. 50, ll. 9-12.

SOE: Various places around the low country of South Carolina, with the main farm being located in Clio, Marlboro County [Judicial Notice] South Carolina. Tr.1, p. 163.

⁸ The SOLT III Management Agreement is not in evidence.

ACTS IN VIOLATION OF § 35-1-501

SOLT I

The various land trusts were tree farms. There are no other stated purposes for the investments. Tr.1, pp. 47-50. The State put in evidence of specific personal expenditures charged to the SOLT I debit card on behalf of Respondents that constituted charges for Island Chiropractic, Victoria's Secret, Barnes and Noble, J. Crew Factory Store, Evergreen Pet Lodge, Plantation Animal Hospital, and Dr. Elizabeth Galloway (dentist). These charges are set forth in the SOLT I bank statement at Exhibit 19.

Lending credibility to the State's position that these were personal expenditures is Mr. McIntyre's admission that "some of it could be considered personal" when asked whether he paid personal expenses out of SOLT I funds. Tr.1, p. 73, l. 25 – p. 74, l. 5.

The SOLT I accounting records, kept in the ordinary course of business by McIntyre, indicate that \$65,025.00 was transferred to SOLM in 31 transactions labeled as loans starting in 2009. Exhibit 26. Other loans shown in Exhibit 26 include 25 transactions labeled as loans to officer of \$68,533.50 that commenced in July of 2007. Of these, \$54,505.00 specifically named McIntyre or SOLM as the beneficiary. The accounting report also shows loans to SOLT V and SOE.

Rich Silver, an investor and current manager of the Silver Oak Land Trusts, ("Rich Silver") identified 600 transactions made by the Respondents at eating establishments out of the SOLT I bank account totaling \$39,000.00. Tr.2, p. 158. Mr. Silver further testified that SOLT I revenue was not distributed to owners properly, but rather diverted to the benefit of the Respondents and loans to McIntyre and/or SOLM. Tr.2, p. 163. SOLT I monies were also transferred and intermingled with other Silver Oak entities in amounts totaling approximately \$53,000.00 Tr.2, p. 165.

Sandra Matthews, an auditor with the Division, testified that the total transfers to McIntyre or SOLM totaled approximately \$217,110.37. Tr.2, p. 448.

SOLT II

McIntyre testified SOLT II was formed in 2006 for the purpose of purchasing a parcel of timber land in Fairfield County, South Carolina. Tr.1, p. 51. To finance the operation, McIntyre solicited investments from individuals and was able to obtain twelve investors.

In connection with the offer and sale of SOLT II membership units, McIntyre omitted telling investors that he would be loaning himself investor money, paying himself consulting fees, or loaning other SOLT entities SOLT II money. Tr.1, pp. 84-85, 89. The operating agreement provided the "Manager" a management fee of fifteen percent of revenues. State's Exhibit 2. However, McIntyre testified that fees taken in excess of that fifteen percent would be wrongful. Tr.1, p. 84.

McIntyre testified that although he did not tell investors that he would be paying himself consulting fees from the investor's money, he did ultimately do so. Tr.1, p. 84. McIntyre stated that the reason for doing so was that the management required more work and time than he envisioned when entering into the original agreement. Tr.1, p. 85. According to the accounting records, kept by the Respondents in the ordinary course of the business, consulting fees paid to the Respondents totaled over \$19,000.00. State's Exhibit 27. In addition, the Respondents also received distributions of the timber revenues of approximately \$8,700.00 while all other investors received a total of approximately \$17,200.00. State's Exhibit 27. There are no expenses listed as management fees in the accounting records kept in the ordinary course of business by the Respondents. State's Exhibit 27.

SOLT III

The existing SOLT I investors reduced the values of their SOLT I investments to make the SOLT III investment. SOLT III money was transferred to the Respondents and to other SOLT entities. Tr.2, p. 167-168.

SOLT IV

Respondents told investors in SOLT IV in connection with the offering of the membership units that their compensation for their efforts would be a percentage of the company without the requirement of capital contribution. Tr.2, pp. 21-22, 100-101. One investor testified and supplied notes taken contemporaneous with a conversation with McIntyre explaining that the 20% of the company provided to the Respondents for management services was to cover planning, consulting fees, legal work, phase study, wetland study, title insurance, timber insurance, land planning, and listing the property, among other things. Tr.2, p. 21-22, State's Exhibit 13. Contrary to the representations made to investors in connection with the offer and sale of the SOLT IV membership units, investor and company monies were transferred to other SOLT entities and the Respondents. Sandra Matthews testified that \$49,124.98 of investor and SOLT IV money went to the Respondents. Tr.2, p. 453. The SOLT IV accounting records, kept by the Respondents in the ordinary course of business, indicate that approximately \$23,746.00 of that amount went to the Respondents listed as a loan. State's Exhibit 29. Silver testified that he discovered \$28,796.00 in transfers to the Respondents. Tr.2, p.171-72. Additionally, McIntyre admitted to paying personal property taxes of \$12,834.16 with SOLT IV money. Tr.1, pg. 106. That payment was listed in the accounting records kept in the ordinary course of business by the Respondents, as a consulting expense paid to Milliken Forestry. Tr.2, p. 171.

SOLT V

The investors were told by the Respondents that their investment would go to purchase the land that SOLM had identified. State's Exhibit 6, Tr.2 p. 106. Contrary to the representations made by the Respondents in connection with the offer and sale of the membership units, the SOLT V financial statements show various loans from other SOLT entities. State's Exhibit 30.

SOLT VII

The Respondents were successful in raising a total of approximately \$574,000.00. Tr.2, p.111. SOLM was the manager of SOLT VII and received 20% of SOLT VII for management services with no capital contribution. Respondents Exhibit 3, Tr.2 p. 111. In connection with the offer and sale of the membership interest, the investors were only told that their money would be used for the purchase of the plot of land. They were not told that money would be diverted to personal expenses, loaned to the manager, loaned to McIntyre, and loaned to other SOLT entities. Tr. 1, p. 89, Tr.2 pp. 111-112, 200-202.

As evidenced by bank records, accounting records kept by the Respondents, and analysis of those records performed by Rich Silver and Securities Division staff, money was diverted away from the stated purpose of that money and spent on personal expenses of SOLM and McIntyre, loaned to SOLM and McIntyre, and loaned to other SOLT entities to pay their expenses. Sandra Matthews testified that over \$70,000.00 was transferred to the Respondents. Tr.2, p. 455. The accounting records from August, 2010 to July, 2011, indicate that the Respondents received over \$11,000.00 in transfers labeled as consulting expenses. State's Exhibit 31. Further, the accounting records indicate that the Respondents received commissions of over \$27,000.00, and loans of approximately \$11,800.00. State's Exhibit 31. Further, there were several loans listed on the accounting records to other Silver Oak entities. Rich Silver identified transfers to the Respondents, cash withdrawals, and wrongful distributions. Tr.2, p. 175.

SOE

Investors were told in connection with the offer and sale of the membership units that their money would go to purchasing a plot of land and financing the operation of the Miscanthus farm. Tr.1, p. 97-98, Tr.2, p. 206, Respondents' Exhibit 5. However, investor monies were used for various and numerous personal expenses. These personal expenses include charges at a dentist office, SteveMadden.com, college application fees for McIntyre's daughter, and a jewelry store. Tr.1, pp. 99-105.

Paul Finn, an investor in SOE, examined bank records indicating exactly how his investment was spent. These expenses include, among others, multiple transfers to SOLM, college application fees, a

jewelry store, a movie theater, Macy's, and SteveMadden.com. State's Exhibits 20, 33. Mr. Finn specifically testified he was not told his money was going to be used in this manner and that he would not have invested if he had known. Tr.2 p. 213-218.

SOLT I Secondary Offering

The Respondents were successful in obtaining three additional investors. Tr1, p. 123.

Rich Silver, an investor in the SOLT I Secondary Offering, testified that he was told that his investment in the secondary offering of SOLT I membership units would be used to pay down the debt of SOLT I and that he was not told that his money would be transferred to the Respondents. Tr.2, pp. 124, 128-9. However, contrary to the representations made to the investors, the SOLT I financial records, kept in the ordinary course of business by the Respondents, indicate that in less than four months, \$42,750.00 from the investment of Rich Silver and another investor, were transferred to the bank account of SOLM. State's Exhibit 26, "SOLT I Profit and Loss Detail," p. 24.

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 78 violation of § 35-1-501 as measured by the number of uniquely titled limited liability company interests less those owned by McIntyre and SOLM.

CONCLUSIONS AND RECOMMENDATIONS

1. I find that the testimony of Mr. Phil W. Hartman, Mr. Richard A. Silver, Mr. Paul Fin, Mr. James Russell Paris, and Ms. Sandra Matthews is credible.

2. I find based on the testimony of Mr. Phil W. Hartman, Mr. Richard A. Silver, Mr. Paul Fin, Mr. James Russell Paris, and Ms. Sandra Matthews in the hearings and the exhibits that there were violations of § 35-1-501 with regard to each of the SOLT Entities.

3. I find, based on the number of uniquely titled membership interests sold from each of the SOLT Entities that the Commissioner could levy penalties based on 78 violations.

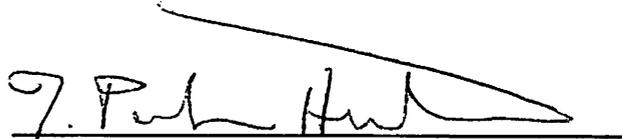
4. I find based on his admissions in his testimony in this case of improper transactions that Mr. McIntyre's testimony is less credible than that of the other witnesses.

5. The Cease and Desist Order required Respondents to pay the actual cost of the investigation and proceedings. No evidence was placed in this record of the costs and therefore I make no recommendations as to the costs of the investigation.

NOW THEREFORE, I recommend to the Commissioner 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, Section 35-1-501 thereof;
- b. Any exemption available to the Respondents under the Act be permanently revoked prospectively; and
- 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.
- d. The Respondents pay the actual cost of the investigation and proceedings.

AND I SO RECOMMEND.



T. Parkin Hunter, Appointed Hearing Officer

October 22, 2014

Columbia, South Carolina