

REPORT AND RECOMMENDATION BY HEARING OFFICER DESIGNATED BY  
THE SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF: )  
 ) Report and Recommendations  
John M. McIntyre and Silver Oak Land )  
Management, LLC ) Case Number 12058  
 )  
Respondents, )  
\_\_\_\_\_ )

**RECOMMENDATION**

I recommend that the Securities Commissioner find that the limited liability company interests which constitute the investments at issue in this matter are not securities because the preponderance of the evidence does not establish that they are investment contracts under the facts of this case and the law of South Carolina.

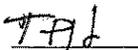
I recommend that the Securities Commissioner dismiss the Cease and Desist Order.

**Hearing**

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 Securities Commissioner for the State of South Carolina. Testimony was taken and evidence was presented.<sup>1</sup>

Witnesses that appeared on behalf of the Securities Division of the Office of the Attorney General of the State of South Carolina (the "Division") were Mr. Phil W.

<sup>1</sup> The hearing on July 30, 2013, was transcribed (Tr1) by Sandra M. Snead. The hearing on October 1, 2013, through October 3, 2013, was transcribed (Tr2) by Jennifer L. Thompson, CVR-M, Nationally Certified Verbatim Court Reporter.

  
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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 Securities Commissioner in accordance with the South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101 *et seq.* (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 Order to Cease and Desist (the "Cease and Desist Order") issued April 19, 2013, and his recommending appropriate action based on his findings.

### **Burden of Proof**

The Act does not set forth the burden of proof the Division must meet to prove that it is entitled to the remedies sought which include penalties and bars. The proceedings conducted by the Division are not subject to the requirements of the South Carolina Administrative Procedure Act. S.C. Code Ann. § 35-1-604(c), South Carolina Reporter's Comment 3. However, the South Carolina Supreme Court has looked to federal law for guidance in interpreting the Act. The South Carolina Supreme Court held that "cases interpreting Section 12(2) of the Securities Act of 1933, while not binding authority on this 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). The South Carolina court noted that the statute

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under consideration there 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 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.

#### **Findings of Fact and Conclusions of Law**

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.

#### **Procedural Background**

Pursuant to the Cease and Desist Order, the Division alleged that Respondents in connection with several limited liability companies “represented, stated, and implied, in connection with the offer and sale of the securities at issue. . . .” See paragraphs 5, 6, 7,

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and 8 of the Cease and Desist Order. In their Answer (the "Answer"), Respondents deny that the membership interests were "securities" as defined in the Act giving rise to these proceedings. See paragraphs 4 and 5 of the Answer. Respondent also raises an affirmative defense that states in part that the "limited liability memberships are not securities under the circumstances of this case." See paragraph 38 of the Answer.

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

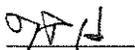
NOW THEREFORE, pursuant to S.C. Code Ann. § 35-1-604(a), IT IS HEREBY ORDERED that:

- 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.

The Division 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.

  
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The Cease and Desist Order, among other things, ordered that “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.

### The South Carolina Securities Act

The operative section of the Act for purposes of this matter is S.C. Code. Ann. § 35-1-501 (emphasis added) that provides that:

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.

The first inquiry in this matter must be whether or not the limited liability company interests were securities. Otherwise, the Act is not applicable.

### The Investments

The matters at issue in this case involve a set of limited liability companies. There are six limited liability companies delineated as land trusts: Silver Oak Land Trust, llc [sic] (“SOLT I”); Silver Oak Land Trust II, LLC (“SOLT II”); Silver Oak Land Trust III, LLC (“SOLT III”); Silver Oak Land Trust IV, LLC (“SOLT IV”); Silver Oak Land Trust V, LLC (“SOLT V”); and Silver Oak Land Trust VII, LLC (“SOLT VII”).<sup>2</sup> These may be collectively referred to as the “SOLT Entities.” Another company, Silver Oak Energy, LLC (“SOE”), was the last company formed and was formed to engage in the renewable energy business by growing biomass. Respondent Silver Oak Land Management, LLC

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<sup>2</sup> There is not a Silver Oak Land Trust VI.

("SOLM") was formed as a land management company and serves as the manager for certain of the SOLT Entities and SOE. SOLT I made a secondary offering and brought in three new members after SOLT I was formed.

The members in the various SOLT Entities and SOE vary both in ownership percentages and in number of members. SOLM was the first company formed and has two members.<sup>3</sup>

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

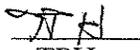
SOLT I has five members which was expanded to eight members after the SOLT I Second Offering in 2010. Tr1, p. 123, ll. 13-24., SOLT II has 13 members. The interests in SOLT III were distributed to the five members of SOLT I. SOLT IV has the most members at 24. SOLT V has thirteen members as derived from the signature pages to the SOLT V Operating Agreement. However, three of these membership interests are taken up by Clifford D. Emery and Betsey A. Emery as joint tenants as one membership and two more memberships by Clifford D. Emery and Betsy A. Emery individually. Thomas M. Woodbury and Gloria B. Woodbury also own two separate membership interests. SOLT VII has 13 members. SOE has six members.

The SOLT Entities were engaged in timber land investments. SOE was formed to grow bio fuel and engaged in the cultivation of miscanthus grass.

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<sup>3</sup> Dave Jeff, LLC and John M. McIntyre are the members of SOLM. Dave Jeff, LLC is a single member LLC whose member is Susan Vitek. Tr1, p. 44, ll. 3-10.

<sup>4</sup> 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.

  
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## Fraud in Connection with the Offer and Sale of a Security

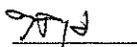
For the Act to apply, the interests in the limited liability companies must qualify as securities. To be a security under the the Act, there must be “investment in a common enterprise” with the “expectation of profits to be derived primarily from the efforts of a person other than the investor.” As set forth in the Act, the term “security” includes:

an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a “common enterprise” means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors.

S.C Code Ann. § 35-1-102(29)(D).

The Act goes on to state that an “investment contract **may** include, among other contracts, an interest in a limited partnership, and a limited liability company...” S.C. Code Ann. § 35-1-102(E) (emphasis added).

When interpreting the Act, the courts may look for guidance in the interpretation of the federal securities laws. *Majors v. South Carolina Securities Commission*, 373 S.C. 153, 163, 644 S.E.2d 710, 715 (2007). An investment contract has been defined at the federal level as a “contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party...” *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). In fact, the South Carolina Supreme Court has applied the *Howey* Test in defining an investment contract. *Majors*, 373 S.C. at 163, 644 S.E.2d at 715-716. As cited above, the Act refers to the “expectation of profits to be derived primarily from the efforts of a person other than the investor.” The Act, relying on primarily rather than solely through the efforts of others is consistent with the current *Howey* jurisprudence. For examples of the lessening

  
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of the “solely” requirements, see *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (eliminating the word “solely” from the recitation of the *Howey* test); *Securities and Exchange Commission v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9<sup>th</sup> Cir. 1973) (“We adopt a more realistic test, 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.”); *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 920 (4<sup>th</sup> Cir. 1990) (“The most essential functions or duties must be performed by others and not the investor.”). “Investment contracts may be found where the investor has duties that are nominal and insignificant or where the investor lacks any real control over the operation of the enterprise.” *Majors*, 373 S.C. at 167, 644 S.E.2d at 717-718, citing *O’Quinn v Beach Associates*, 272 S.C. 95, 105, 249 S.E.2d 734, 739 (1978). In *O’Quinn*, the court found that the sale of condominium units under the facts of that case were not investment contracts.

In this case, there were eight investment offerings that spanned five years beginning in 2005 and continuing until 2010. These were SOLT I (2005), SOLT II (2006), SOLT III (date uncertain from the record), SOLT IV (2007), SOLT V (2008), SOLT VII (2009), SOE (2009), and the Second Offering of SOLT I (2010 based on testimony of Richard Silver as to the time of his investment, Tr.2, p. 118, ll. 9-22). Whether the sales of interests in the limited liability companies were sales of interests in investment contracts is the key to this analysis.

#### **Investment Contract Analysis**

As set forth earlier, interests in limited liability companies are not *per se* securities. The Act clearly sets forth that these interests “may” be securities. The record

  
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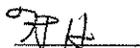
in this matter contains testimony with regard to investor participation in the operation of the enterprises. For example, when asked “Do you feel that the other parties of Silver Oak I were active in the management of the company?” Mr. McIntyre responded “Absolutely.” Tr 1, p. 68, l. 3. See Tr2, p. 544, ll. 2 - 21 for testimony about how the members of SOLT I worked on SOLT I’s land including “with the exception of Martin, all of us went in there weekly and monthly and identified property lines, identified upland, that we thought was upland.” See Tr2, p. 544, ll., 14-18.

In analyzing the record, we may look at how the Silver Oak Entities and SOE actually operated to answer questions of the allocation of control.

As an evidentiary matter, however, we may look at how the RLLPs [registered limited partnerships] actually operated to answer the question of how control was allocated at the outset. See *Albanese v. Fla. Nat’l Bank*, 823 F.2d 408, 412 (11<sup>th</sup> Cir. 1987) (looking to “reality” of partners’ control over placement of ice machines as evidence of amount of control present at inception); *Rivanna Trawlers Unltd. V. Thompson Trawlers, Inc.*, 840 F.2d 235, 242 (4<sup>th</sup> Cir. 1988) (noting as evidence of control at inception, that the managers were in fact replaced on two later occasions)

*SEC v. Merchant Capital, LLC*, 483 F3d 747, 756 (11<sup>th</sup> Cir. 2007)

The resolution of the dispute with regard to participation in the operation of the companies by the members is aided by the lines of cases that discuss the importance of the powers retained by the investors. Therefore, an analysis of cases that have recognized the importance of the allocation of manager rights and powers and the nature of the investors is relevant to this analysis. A discussion of the allocation of responsibility for management is set forth in Bishop, Carter G. and Kleinberger, Daniel S., *Limited Liability Companies: Tax and Business Law*, Thomson Reuters, 2014 at paragraphs 11.02. They compare general partnership cases with limited liability company cases because, among other things, “the management structure of both entities is almost

  
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infinitely flexible. The promoters of both types of enterprise can allocate management rights virtually as they see fit.” *Id.*

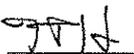
Carter and Bishop note that “The most important general partnership case is *Williamson v. Tucker* [645 F.2d 404 (5<sup>th</sup> Cir. 1981), cert. denied, 454 U.S. 897 (1981)], which has become the touchstone of analysis for most LLC ‘securities’ cases.” *Id.*

In *Garett v. Snedigar*, 293 S.C. 176, 359 S.E. 2d 283 (Ct. App. 1987, overruled on other grounds, *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003)), the South Carolina Court of Appeals recognized *Williamson* as the “leading recent case on this issue . . . whether an interest in a general partnership is a security.” *Id.* 293 S.C. at 181, 359 S.E.2d at 286. The Court of Appeals cited the following in this regard:

(1) [whether] an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) [whether] the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) [whether] the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

*Id.*, 293 S.C. at 181, 359 S.E. at 286, citing *Williamson*, 645 F.2d at 424.

The *Snedigar* partnership agreement “provides that Mr. Snedigar, as managing partner, has ‘full charge of the management, conduct and operation of the Partnership business in all respects’ and that “Mr. Snedigar can be replaced as managing partner by a two-thirds vote of the other partners.” *Snedigar*, 293 S.C. at 179, 359 S.E.2d at 285. The *Snedigar* court pointed out the following in their decision finding that the general partnership interests were not securities:

  
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Further, it appears from the record that at least **two of the partners are lawyers and several others are businessmen**. We recognize that these partners may not have specific expertise in the field of commercial development. However, **it does not necessarily follow as a matter of law that they lack the business experience and knowledge necessary to exercise partnership powers intelligently or that they were dependent on Mr. Snedigar to the extent they could not replace him or otherwise exercise meaningful partnership powers.**

*Id.*, 293 S.C. at 182, 359 S.E.2d at 286 (emphasis added)

Key elements of the *Snedigar* decision are the Court of Appeals' recognition of the factors set forth in *Williamson*, the fact that the general partners were lawyers and businessmen, and that the partnership agreement, though making *Snedigar* the managing partner, provided that he could be removed by a two-thirds vote of the other partners.

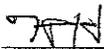
The *Snedigar* court noted that the agreement also provided that:

No one member of the Partnership, including the Managing Partner, shall be authorized or empowered without the consent of the majority of the other Partners (but with such consent shall be authorized and empowered) on behalf of the Partnership to borrow (from any Partner or third party) or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, deed, release or purchase or contract to purchase, or sell or contract to sell any property, or compromise or release any claims or debts, or obligate the Partnership in an amount in excess of or withdraw any money of the Partnership having a value or being in excess of \$1,000.00.

*Id.*, 293 S.C. at 179, 359 S.E. 2d at 285

Given the analysis by the South Carolina court in *Snedigar*, the favorable recognition of *Williamson*, and the emphasis on rights that the investors retained, it seems appropriate to apply the *Williamson* analysis to the limited liability companies in this case by analogy and that this is consistent with South Carolina law.

In *Securities and Exchange Commission v. Merchant Capital, LLC*, 483 F.3d 747 (11<sup>th</sup> 2007) the court summarized the three situations (the "*Williamson* Factors") where a general partnership would qualify as an investment contract as follows:

  
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(1) “[A]n agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership,”

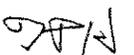
(2) “[T]he partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers,” or

(3) “[T]he partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers,”

*Id.*, at 755.

In performing its analysis of the *Williamson* Factors, the *Merchant* court, with regard to the first factor, whether the arrangement in fact distributed power as would a limited partnership, found barriers to removal of the managing partner to include (1) a unanimous vote, (2) removal was for cause only, (3) the investors were geographically dispersed with no preexisting relationship and (4) the lack of face-to-face contact among the partners exacerbated the other difficulties and rendered the supposed power to remove *Merchant* illusory. *Id.*, at 758.

With regard to the second factor, whether the partners were so inexperienced and unknowledgeable in business affairs that they were incapable of intelligently exercising partnership or venture powers, the court pointed out that the business in *Merchant* was a debt purchasing business. The court stated “The ultimate question is whether the investors were led to expect profits solely from the efforts of others. Regardless of investors' general business experience, where they are inexperienced in the particular business, they are likely to be relying solely on the efforts of the promoters to obtain their profits.” *Id.*, at 762. In Footnote 12, the court stated “it is clear here that general business experience does not have any significant overlap with the debt purchasing business. *Id.*

  
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“[T]he SEC presented uncontradicted evidence that the individual partners have no experience in the debt purchasing business. They were members of the general public, and included a railroad retiree, a housewife, and a nurse. Their possible general business experience is not significant in this case.” *Id.* The court found that this second factor was present.

With regard to the third factor, whether the partners were so dependent on the manager’s entrepreneurial or managerial ability that they could not replace it or otherwise exercise meaningful powers, the court found that the partners did not have a reasonable alternative to the manager because the assets were held in pools.

[T]he RLLP partners did not have any realistic alternative to management by Merchant (in addition to having no practical ability to remove Merchant). That is because Merchant effectively had permanent control over each partnership’s assets. Merchant pooled the partnerships’ assets and invested them in pools of accounts owned by New Vision. Merchant had a service contract with New Vision that gave Merchant a right to the return of debt accounts only in certain limited circumstances, or upon termination of the entire contract.

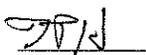
*Id.* at 764.

The court concluded:

D. Conclusion: RLLP [registered limited liability partnership] interests were investment contracts.

For all of these reasons, the RLLP interests were investment contracts covered by the federal securities laws. The partners had the powers of limited partners, since they had no ability to remove Merchant and the purported authority to approve purchases was illusory. They were completely inexperienced in the debt purchasing industry. Finally, even if they could have removed Merchant (which they could not), they had no realistic alternative to Merchant as manager because their debt pools were in fractional form with a company whose only contractual relationship was with Merchant.

*Id.*, at 765-766.

  
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Analysis of the *Williamson* Factors as to the SOLT Entities and SOE

Factor 1

**Do the agreements among the SOLT Entities and SOE leave so little power in the hands of the partners or venturers that the arrangement in fact distributes power as would a limited partnership?**

The SOLT Entities and SOE are all controlled by Operating Agreements.<sup>5</sup>

As set forth in the Uniform Limited Liability Company Act of 1996 (the “LLCACT”):

(a) Except as otherwise provided in subsection (b), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.

S.C. Code Ann. § 33-44-103(3)(i).

The removal and replacement of the manager is not addressed in any of the Operating Agreements. However, the LLCACT provides that unless not otherwise set forth in the operating agreement, “a manager: (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority of the members.” S.C. Code Ann. § 33-44-404.

Each Operating Agreement contains provisions that enable the investors to protect their interests. The following provisions are in each of the Operating Agreements for the SOLT Entities, including SOE (emphasis added):<sup>6</sup>

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<sup>5</sup> The various Operating Agreements refer to Articles of Organization. I note that no Articles of Organization were placed in the Hearing record.

<sup>6</sup> 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 11.

3.2: Additional Capital Contributions. If the **majority** of Members (**voting based upon Ownership Percentages**) determine that the Company needs additional capital, the additional capital contributions made by the Members shall be in proportion to their respective Ownership Percentages in the Company.

3.3(c): Loans by Members. A Member shall be allowed to make a loan to the Company if the Members **unanimously** agree to the making of said loan or if the loan is made pursuant to Section 3.3(a) [payment by non-defaulting members of defaulting members obligations].

5.3: Information. In addition to the other rights specifically set forth in this Operating Agreement, each Member is **entitled to all information** to which that Member is entitled to have access pursuant to South Carolina Code § 33-44-408.

7.4: New Members. Upon **unanimous consent** of the Members, the Company shall have the ability to admit new Members either by the Members selling a portion of their interest to the New Member or by the Company granting an additional interest to the new Member. In either event, the new Member must comply with Section 7.5 in order to be recognized as a Member of the Company.

12.5: Amendments. This Agreement may be amended only by a written instrument executed by **all the Members**.

The LLC ACT gives the members the following rights to information:

**§ 33-44-408. Member's right to information.**

(a) A limited liability company shall provide members and their agents and attorneys access to its records, if any, at the company's principal office or other reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access provides the opportunity to inspect and copy records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.

(b) A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability:

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As discussed earlier, 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.

  
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(1) without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement or this chapter; and

(2) on demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) A member has the right upon written demand given to the limited liability company to obtain at the company's expense a copy of any written operating agreement.

By default, since the Operating Agreements are silent, the members can replace the managing member by majority vote. The *per capita* majority required for action ranges from 3 in a 5 member entity to 13 in a 24 member entity.

The overlapping and partially overlapping memberships, and testimony of how the members knew each other make it reasonable that the members could effectively communicate with each other and exercise their retained powers.

Trial testimony indicates that members knew each other for the most part. As to SOLT I, Mr. McIntyre testified that "Silver Oak I was a small group of members that were also on a - - if not a daily conversation, at least a weekly conversation of what was going on. So, that was a - We made, collectively made, decisions on a lot of things." Tr1, p. 67, ll. 21-25. As to SOLT IV, McIntyre testified "I'm fairly confident that each and every one of them [SOLT IV members] were one degree of separation from an existing member, a friend or a family member." Tr2, p. 565, ll. 6-8. As to SOLT II, Mr. McIntyre testified

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We had all of the Silver Oak I people. We had my friend Phil Cart. We had Murray's pal Jim Delamarter. We had, you know, Jim brought somebody. You know, Dr. Vitek brought in a couple of her friends, local friends and maybe relatives.

Tr2, p. 558, ll. 7-11.

Mr. McIntyre referred to Jim Paris, Dr. Vitek and Murray Reed as friends. Tr2, p. 540, ll. 1-3.

Mr. McIntyre testified that Martin Rehder was Murray Reed's business partner, Tr2, p. 540, ll. 9-11.

Mr. Silver testified "I became friendly over time." with Jim Paris "through whom I later met Jack McIntyre." Tr2, p. 91, l. 18 – 20.

Mr. Finn testified that he learned about Silver Oak land operations through his "friend" Jim Paris. Tr2, p. 195, ll. 1-5. Mr. Paris testified that Mr. Silver and Mr. Finn were real estate customers of his. Tr1, p. 418, ll. 13-21.

Mildred Fauerby is Dr. Vitek's mother. Tr2, p. 575, ll. 13-14. Mr. Paris testified that his participation was through Bourbon Place, LLC. Tr2, p. 420, ll. 12-13.

By analogy to another general partnership case, it is not necessary that all members be active or sophisticated.

The fact that some of the general partners may have remained passive or lacked financial sophistication or business expertise does not affect the result. General partners who are capable of exercising significant managerial powers cannot convert their partnership interests into a security merely by remaining passive. [citation omitted] Moreover, members of a general partnership who lack financial sophistication or business expertise nevertheless may exercise intelligently the powers conferred on them by the partnership agreement and state law. They are entitled to receive financial reports and have the right to inspect and obtain copies of partnership books and records. [citation omitted]. To the extent a partner needs advice or assistance in the exercise of his powers, he is of course free to consult with more knowledgeable partners or third persons, or to employ accountants and lawyers. In a word, a general partner is not

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dependent only on the degree of his own business sophistication in order to exercise intelligently his partnership powers.

*Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F2d 336, at 242, footnote 10.

**I recommend** that the Securities commissioner find, based on the (1) requirement of a simple majority of the members to replace the manager, (2) the small number of votes required to replace the manager due to sizes of the memberships and the per capital majority rule, (3) the requirement that a majority approve any additional capital contributions, (4) the protections afforded the members by requiring unanimous consent for any member to make loans to the entities, (5) the inability to amend the operating agreements without unanimous consent, (6) the requirement that new members be admitted only upon unanimous consent, (7) the access to financial information afforded by the Operating Agreements and the LLC ACT, (8) the interrelatedness of the various entities, and (9) the relationships between the members, that the preponderance of the evidence shows that the members have retained enough powers to protect their interests, to replace the management should they so elect, and to confer with each other to do so should they so elect.

**I also recommend** that the Securities Commissioner find, by the preponderance of the evidence and given the terms of the Operating Agreements, that the SOLT Entities and SOE are not entities “where the investor lacks any real control over the operation of the enterprise.” *Majors*, 644 S.E.2d at 717-718, citing *O’Quinn v Beach Associates*, 272 S.C. 95, 105, 249 S.E.2d 734, 739 (1978) and that this is not a case where the “investor was required to put up his money and then sit back while nature and the promoter took their courses.” *O’Quinn*, 272 S.C. at 106, 249 S.E. 2d at 739.

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**Factor 2: Do the investors in the SOLT Entities and SOE have the sophistication and wherewithal to exercise their retained powers such that the powers are not illusory?**

The facts here are similar to what the South Carolina Court of Appeals recognized in *Snedigar*. Various members of the SOLT Entities and SOE were business people and included attorneys. Summaries of the backgrounds of the principals of SOE are attached to the SOE Business plan (R. Exhibit 5). Note that certain of these individuals are also members of various of the SOLT Entities as well as SOE:

Richard A. Silver: Financial Advisor. Silver was Treasurer of the Fidelity funds and was an employee of Fidelity Management Research (1997). Currently, he serves on their Board of Directors of The Korea Fund, Inc. and also serves as the Chairman of the Audit Committee of that Board. Before joining FMR, Mr. Silver served as Executive Vice President, Fund Accounting & Administration at First Data Investor Services Group, Inc. (1996-1997). Prior to 1996, Mr. Silver was Senior Vice President and Chief Financial Officer at The Colonial Group, Inc. Mr. Silver also served as Chairman of the Accounting/Treasurer's Committee of the Investment Company Institute (1987-1993).

Mr. Silver is a member, either directly or through his IRAs, in SOLT IV, SOLT V, SOLT VII, and SOE.

Paul Finn, JD: Legal Advisor. Finn is Chief Executive Officer of Commonwealth Mediation and Conciliation, Inc. of Brockton, Massachusetts. Finn has mediated and/or arbitrated more than 5,000 claims. He also serves as the chief administrator and marketing executive for the company. Finn graduated from Stonehill in 1971 with a bachelor's degree in history. He received a J.D. from New England School of Law in 1976 and a master's degree in government from Harvard University in 1990.

Mr. Finn is a member in SOLT IV, SOLT VII, and SOE.

James R. Paris: Real Estate Advisor. Paris owns and operates Hilton Head Real Estate.com. His many accomplishments include: Former National Membership Director of Sales, Sea Island, GA; Former Director of Sales Greenbrier Sporting Club; Member Gold Level Prudential Chairmen's Circle; International Presidents Premier Club Member 2001(awarded to

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only the top 1% of Coldwell Banker agents worldwide); Accredited Buyers Representative (ABR); Life Member Distinguished Sales Award Winner; Former State Director SC Association of Realtors; Former Board of Directors Hilton Head Area Association of Realtors; Former Board of Trustees Hilton Head MLS.

Mr. Paris, either directly or through Bourbon Place Partners, LLC is a member of

SOLT I, SOLT II, SOLT III, SOLET IV, and SOE

Brian Mone. JD: President of Commonwealth Mediation and Conciliation, Inc. of Brockton, Massachusetts. University of Massachusetts-Amherst, B.A. 1978 Suffolk University School of Law, J.D. 1982. Mone is a practicing attorney for 29 years and guest lecturer on mediation and arbitration.

Mr. Mone is a member of SOE.

David Short: Ritz-Carlton Club regional vice president of sales operations for the East Region. Short holds a Bachelor of Arts degree from Washington and Lee University in Lexington, Va

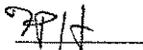
Mr. Short is a member of SOE.

Susan B. Vitek. DDS: Science Advisor. Vitek conducts research and does grant writing on biomass production. She operates a chemistry and biology tutoring service. She was President and sole owner of her dental practice from 1979-1994 in Illinois. Vitek graduated from University of Northern Iowa with a degree in chemistry in 1976 and received a D.D.S. from Northwestern University Dental School in 1979.

Dr. Vitek, through Dave Jeff LLC, is a member of SOLT I, SOLT II, SOLT III, SOLT IV, and SOLT VII and has an interest in SOE through her interest in SOLM.

Mr. Hartman, a member of SOLT IV, testified that he had experience in tree farming, having owned a Christmas tree farm and harvesting hardwood trees. Tr2,p.11, l. 25 – p.12, l. 7.

Mr. McIntyre testified that Jim Paris “brought the local market expertise in real estate to the table” (Tr2, p. 543, ll. 12-13) and that “Murray Reed had sold, managed a marketing company in real estate for 25, 30 years.” Tr2, p. 543, ll. 13-15.

  
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I recommend that the Securities Commissioner find, by the preponderance of the evidence and incorporating the findings for Factor 1 in addition to the business acumen and backgrounds set forth in this section, that the investors in the SOLT Entities and SOE have the sophistication and wherewithal to exercise their retained powers such that the powers are not illusory.

**Factor 3: Are the investors in the Silver Oak Entities and SOE so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that they cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers?**

The earlier findings for Factor 1 and Factor 2 are incorporated into this section. There were at least two investors with real estate expertise (Paris and Reed), at least two attorneys (Mone and Finn), a fund treasurer and also chairman of a fund's audit committee of the board of directors of the fund (Silver), a person with a science background (Vitek), a person with at least some tree farming experience (Hartman) as well as other sophisticated business persons.

Testifying about SOE, McIntyre testified that Mr. Paris "did everything," "he helped at the greenhouse," and "Jimbo, being a native Carolinian, was helpful in getting me some of the appointments" with meetings with government officials. Tr1, p.149, ll. 2-22. Mr. McIntyre testified with respect to Brian Mone that "He was several things. He was trying to raise money, like we all were. He was bringing in trying to bring in capital." and that "He also accompanied Paul [Finn] and I on a trip to England to meet with Drax. We had a meeting with, at the time, the largest energy producer in the United Kingdom, and we met with their renewable energy guy." Tr1, p. 176, ll. 7-23.

Paul Finn testified “No” in response to the question: “At the time that you invested [in SOE], did you think that this was going to be another passive investment?”  
Tr2, p. 203, ll. 1-3

As to additional expertise, *see infra* with regard to Mr. Parish and Mr. Reed’s real estate experience and Dr. Vitek’s role as “scientist.”

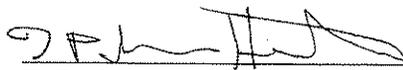
Investors were sophisticated business people with a wide range of experience.

**I recommend** that the Securities Commissioner find by the preponderance of the evidence that given the business acumen of the various members, the legal backgrounds of certain members, and the real estate and science backgrounds of certain of the members that the members are not dependent upon unique entrepreneurial or managerial ability of the manager such that the manager cannot be replaced in the exercise of meaningful venture powers.

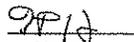
#### CONCLUSION

Based on the analysis set forth within along the lines of *Williamson*, I recommend that the Securities Commissioner find by the preponderance of the evidence that the limited liability company interests which constitute the investments at issue in this matter are not securities because they are not investment contracts under the facts of this case and South Carolina law.

**NOW THEREFORE**, for the reasons set forth herein, I recommend to the Securities Commissioner that the Cease and Desist Order be dismissed.

  
\_\_\_\_\_  
T. Parkin Hunter  
Hearing Officer

May 6, 2014

  
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