FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014-CP-40-07917

John M. McIntyre and Silver Oak Land Management, LLC	Securities Commissioner of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _Dismissed without prejudice

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

JEANETTE W. McBRIDE C.C.P. & G.S. 2015 MAY -7 AM 11:45 RICHLAND COUNTY FILED

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : After considering counsel's written submissions and arguments, Judge Gee decided not to seek proposed orders and has prepared the following order.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Jaycee H. Gee **Judge Code** 2756 **Date** 5/7/2015

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 12 day of May 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2014-CP-40-07917

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

Appellants,

v.

Securities Commissioner of South Carolina,

Respondent.

ORDER AFFIRMING THE DECISION OF THE SECURITIES COMMISSIONER

This is an appeal from a decision of the Securities Commissioner, finding that Appellants John M. McIntyre and Silver Oak Land Management, LLC, had committed 54 violations of the South Carolina Uniform Securities Act ("the Act"). As a result of these violations, the Securities Commissioner ordered McIntyre and Silver Oak to cease and desist from transacting business in South Carolina, permanently revoked any exemption available to them under the Act, levied $540,000 in civil penalties against them, and required them to pay for the actual cost of the investigation and proceedings. On appeal, McIntyre and Silver Oak Land Management argue (1) that the administrative proceedings violated their due process and equal protection rights (Complaint ¶¶ 14 & 15); (2) that the Act is not applicable because their limited liability companies are not securities (Complaint ¶¶ 16-18); and (3) that even if the LLCs were securities, substantial evidence does not support the Commissioner's findings that McIntyre and Silver Oak violated the Act (Complaint ¶¶ 14, 19, 20, 21, 22, 23, & 24). After careful considerations of counsel's written submissions, their arguments, and the transcript from the hearings below, I affirm.

FACTUAL BACKGROUND

At the heart of this dispute are seven limited liability companies managed by either John McIntyre individually or by McIntyre's management company, Silver Oak Land Management, LLC.[1] According to McIntyre, these seven companies were formed as follows.

McIntyre and a business partner, Jim Paris, co-owned a rental company on Hilton Head, and in the early to mid-2000s, they began actively looking for another investment opportunity. McIntyre began looking into the timber industry, and he identified a 349-acre tract of land in Hilton Head that he believed could be harvested for timber and then developed. In order to purchase the property, McIntyre, Paris, and three other friends (Murray Reed, Martin Rehder, and Susan Vitek[2]) pooled their money to form Silver Oak Land Trust, LLC (SOLT I). From there, McIntyre formed five other SOLT LLCs, and each entity purchased a different tract of land.

SOLT II purchased property in Fairfield County, and its members included the original five investors along with eight other members. SOLT III purchased approximately 70 acres in Prosperity, South Carolina, and the five original investors were its only members. SOLT IV purchased 420 acres in Edenton, North Carolina, and it had 24 members. SOLT V purchased 131 acres in Winton, North Carolina, and it had 13 members. SOLT VII purchased 258 acres with direct access to Lake Wateree in Ridgeland, South Carolina, and it had 13 members.[3]

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[1] Silver Oak Land Management, LLC has two members: (1) McIntyre and (2) Dave Jeff, LLC. Dave Jeff, LLC is a single member LLC, whose member is Susan Vitek. Both Appellant McIntyre and Dr. Vitek were present at the hearing before this Court.

[2] Susan Vitek invested her money via Dave Jeff, LLC.

[3] There is no SOLT VI, LLC.

The primary intention for all of these LLCs was "tree farming coupled with potential opportunities of long-term real estate holdings." The offerings stated that timber has shown an average annual compounded return of over 11 percent for the past 30 years.

In the late 2000s, when the banking industry and real estate markets crashed, the timber market also declined. As a result, McIntyre sought a new way to generate income and decided to invest in the biomass renewable energy industry. He and five other investors became members of Silver Oak Energy, LLC, which purchased land to cultivate Miscanthus grass and other biofuels.

In all, seven LLCs were formed from 2005 to 2010, and eight investment offerings were made (two offerings for SOLT I and one offering for each of the remaining six LLCs). All of the LLCs are manager-managed, as stated in paragraph 6.1 of their operating agreements. McIntyre is the manager of SOLT I, II, and III. Silver Oak Land Management is the manager of Silver Oak Energy and SOLT IV, V, and VII.

On April 19, 2013, the Attorney General, acting as the South Carolina Securities Exchange Commissioner (the Commissioner) issued a Cease and Desist Order to McIntyre and Silver Oak Land Management, alleging that they committed at least 39 violations of section 501 of the South Carolina Uniform Securities Act. Thereafter, the Commissioner appointed a hearing officer to take testimony and to recommend findings as to the matters alleged in the Cease and Desist Order. After a four-day trial, the hearing officer recommended that the Commissioner dismiss the Cease and Desist Order because the membership interests in the LLCs at issue were not securities. Upon review of the hearing transcript, the Securities Commissioner rejected this recommendation and issued a lengthy order finding the membership interests were

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securities. The Commissioner then remanded the matter back to the hearing officer to determine whether violations of the Act occurred.

On remand, the hearing officer found violations had occurred in the offerings of each membership and that 78 unique memberships existed. Specifically, the hearing officer found that, among other violations, McIntyre paid for personal expenses out of LLC funds, transferred hundreds of thousands of dollars from the LLC accounts to either himself or his land management company, paid himself consulting fees, transferred money between SOLT entities indiscriminately, and that all of this was done without the members' knowledge or permission.

The Securities Commissioner accepted the recommendation, but modified the number of violations. The Commissioner found that McIntyre and Silver Oak Land Management began to misappropriate investor money by mid-2007, if not before. Using mid-2007 as the cut-off date, the Commissioner found the number of investors to be 54. Accordingly, the Commissioner imposed a fine of $540,000, ordered McIntyre and Silver Oak Land Management to cease and desist from transacting business in South Carolina, permanently revoked any of the Act's exemptions that were available to them, and required them to pay for the cost of the investigation and proceedings. This appeal followed.

ISSUES

1. Were the Appellants' due process and equal protection rights violated in the underlying administrative proceeding?

2. Are membership interests in the LLCs securities?

3. If the LLC membership interests are securities, does substantial evidence support the Commissioner's findings that violations of the Securities Act occurred?

STANDARD OF REVIEW

"[T]he findings of the Securities Commissioner as to the facts, if supported by competent, material, and substantial evidence, are conclusive." S.C. Code Ann. § 35-1-609. Accordingly, this Court's appellate jurisdiction is limited to the correction of errors of law, and the factual findings of the Commissioner will not be disturbed unless unsupported by "competent, material, and substantial evidence."

LAW/ANALYSIS

I. South Carolina Uniform Securities Act

Beginning in the early 1900s, states began enacting laws to regulate securities in an effort to protect investors. These regulations are often referred to as "Blue Sky Laws," because they are meant to protect investors from promoters who might otherwise "sell building lots in the blue sky." *See* Louis Loss & Joel Seligman, Fundamental s of Securities Regulation, § 1, at 9 (3d ed. 1995) (quoting Mulvey, Blue Sky Law, 36 Can. L.T. 37 (1916)). South Carolina's current blue sky laws, codified at S.C. Code Ann. §§ 35-1-101 to -703 and enacted in 2005, are modeled after the Uniform Securities Act of 2002. *See* S.C. Code Ann. § 35-1-101.

As with all securities regulations, the purpose of South Carolina's Securities Act is to prevent fraud in the sale and disposition of securities. Section 35-1-501 is the "general fraud" provision, and states:

> 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.

This provision can be enforced in an administrative proceeding brought by the Securities Commissioner directly against the person or entity violating the Act. S.C. Code Ann. § 35-1-604. Pursuant to the "definitions" section of the statute, "'Securities Commissioner' means the Attorney General," and a "security" means, among other things, an investment contract. S.C. Code Ann. § 35-1-102 (28) & (29). "'Investment contract' may include . . . an interest in . . . a limited liability company . . . ." S.C. Code Ann. § 35-1-102 (29)(E). The Official Comments to the Securities Act explain that the language of section 102(29)(E) is consistent with state and federal laws which, in some circumstances, have recognized interests in limited liability companies as investment contracts.

With that basic background, I now turn to the specific issues raised in this appeal.

II. Due Process and Equal Protection Arguments

The Appellants first argue their due process and equal protection rights were violated because (1) the Attorney General's Office functioned as the investigator, prosecutor, and adjudicator in the administrative proceeding; and (2) the Attorney General failed to adopt or promulgate any rules of procedure or evidence with regard to the administrative proceeding. I find these arguments to be unavailing.

A. Conflict of Interest

Appellants' argument regarding the dual roles of the Attorney General's Office has already been addressed and rejected by our Supreme Court. In *Garris v. Governing Board of S.C. Reinsurance Facility*, 333 S.C. 432, 443, 511 S.E.2d 48, 54 (1998), the Court stated, "[t]he fact that investigative, prosecutorial, and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more,

constitute a violation of due process." Nearly ten years later, in *Majors v. South Carolina Securities Commission*, 373 S.C. 153, 162, 644 S.E.2d 710, 715 (2009), the Court considered a similar due process argument in the context of the Attorney General acting as the Securities Commissioner and found that "the power of the SEC Commissioner is akin to [the Supreme] Court's power to issue an order of interim suspension of an attorney, and then, after an investigation by the Commission on Lawyer Conduct and a Report and Recommendation, issue the ultimate sanction."

Here, Appellants have not identified specific examples of how the Attorney General was impartial beyond the "per se" argument that he had a conflict of interest based on the various roles played by members of his staff. Without more, this is not enough to constitute a violation of due process. *See Garris*, 333 S.C. at 443, 511 S.E.2d at 54. *See also In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002) ("A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." (internal quotations omitted)).

B. Lack of Promulgated Rules

Appellants further contend that their due process and equal protection rights were violated because the Attorney General did not promulgate any rules "as was expressly required by S.C. Code Ann. § 3[5]-1-605." (Petition for Review ¶¶ 4&14) However, the plain language of section 35-1-605 states the Securities Commissioner "may" promulgate rules. Despite Appellants' assertion to the contrary, the statute does not ***require*** the Attorney General to promulgate rules. *See State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980) ("The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary.").

Appellants also argue that without promulgated rules, they did not know the burden of proof, were unsure about the standards for admitting evidence, and had no established method for engaging in discovery or subpoenaing witnesses. However, they do not argue that the Commissioner erred in applying the "preponderance of evidence" burden of proof, they do not specify what evidence should or should not have been admitted, and the record reflects they were, in fact, allowed to subpoena witnesses. Thus, they assert error but not prejudice and therefore have failed to carry their burden of proving reversible error. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (explaining that appellant has the burden of proving reversible error and that "mere allegations of error are not sufficient" to carry this burden). Moreover, Appellants fail to cite to any authority for their argument and instead rely solely on bald conclusions. Accordingly, I find the Appellants have abandoned this issue on appeal. *See Solomon v. City Realty Co.*, 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) (finding an exception was effectively abandoned where the argument relating to the exception consisted solely of a "bald conclusion").

III. LLCs as Investment Contracts

In addition to their constitutional arguments, Appellants further argue that the offerings of memberships in their LLCs did not involve the sale of a security and therefore the Securities Act does not apply. I disagree.

The Act itself provides that the interest in a limited liability company "may" be an investment contract, which is included in the definition of a security. S.C. Code Ann. § 35-1-102(29)(E). In order to determine whether an investment contract exists, our state supreme court and court of appeals have adopted a relaxed version of the test set forth in *Securities & Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946). *See Majors v. S.C. Securities Com'n*, 373

S.C. 153, 163-67, 644 S.E.2d 710, 716-18 (2007); *Garrett v. Snedigar*, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987), *overruled on other grounds*, *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003). Under this test, an investment contract exists (and the Securities Act will apply) where there has been (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits to be derived primarily from the efforts of a person other than the investor. *Majors v. S.C. Securities Com'n*, 373 S.C. 153, 163-67, 644 S.E.2d 710, 716-18 (2007). *See also* S.C. Code Ann. § 35-1-102(29)(D) (including in the definition of "security" 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").

The parties disagree over the third element of the *Howey* test: whether the success or failure of the LLCs largely rested in the hands of Appellants, as managers. In determining whether the third factor of the *Howey* test was met, the hearing officer relied on *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981). In that case, the United States Court of Appeals for the Fifth Circuit held that, in analyzing the third factor of the *Howey* test ***in the context of a general partnership***, there is a strong, yet rebuttable, presumption that general partners do not rely solely on the efforts of others for profit. *Id.* at 422-23. This presumption (that general partners are not passive investors) is based on the following characteristics accompanying general partnerships:

- General partners have a legal right to participate in the management and control of the partnership.
- General partners can promote the partnership's success through their efforts, and even if they delegate their actual authority, they retain the apparent authority to bind the partnership.
- General partners remain liable for the acts of the partnership.

Id. at 421-22 ("These factors critically distinguish the status of a general partner from that of the purchaser of an investment contract who in law as well as in fact is a 'passive' investor.").

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Having explained this presumption, the *Williamson* Court then set forth a three-part test for determining when the presumption has been overcome. This test provides that if "the partner has irrevocably delegated his powers, or is incapable of exercising them, or is so dependent on the particular expertise of the promoter or manager that he has no reasonable alternative to reliance on that person, then [the] partnership powers may be inadequate to protect [the partner] from the dependence on others which is implicit in an investment contract." *Id.* at 422-23.

Applying those factors from *Williamson*, the hearing officer recommended that the Securities Commissioner find that the sale of LLC memberships were not investment contracts and therefore not securities. The Commissioner rejected this recommendation, found the *Howey* test was satisfied, and explained that the *Williamson* analysis was not appropriate in determining whether a membership in a manager-managed LLC was an investment contract. The Commissioner then went on to find that even if the *Williamson* analysis was appropriate, the record provided compelling evidence that at least one of the three *Williamson* factors was satisfied.

On appeal, Appellants argue that once the Securities Commissioner delegated its authority to take testimony to a hearing officer, the Commissioner was required to adopt the hearing officer's recommendation. However, they cite no authority in support of this argument, and therefore, it is deemed abandoned. *See Solomon v. City Realty Co.*, 262 S.C. at 201, 203 S.E.2d at 436. Furthermore, our Supreme Court has recognized that administrative proceedings before the Securities Commissioner are similar to attorney disciplinary proceedings. *See Majors*, 373 S.C. at 162, 644 S.E.2d at 715. In attorney disciplinary proceedings, members of the Board of Grievance (who are officers of the Supreme Court) are charged with the duty of investigating allegations of professional misconduct and of reporting to the Court their findings and

recommendations. *Id.* However, the Supreme Court is not required to adopt the Board's recommendation because it is the Court, and not the members of the Board of Grievances, that holds ultimate authority to sanction attorneys. *Id. See also Matter of Yarborough*, 327 S.C. 161, 165, 488 S.E.2d 871, 873 (1997) ("The Supreme Court has the ultimate authority to discipline attorneys, and the findings of the panel and [interim review committee of the Board of Grievances] are not binding."). Similarly, the Securities Commissioner has the ultimate authority to enforce the securities regulations, and the recommendation of the hearing officer is not binding.

Appellants further argue that "[t]he evidence redounds to the effect that the complaining witnesses were heavily involved in the limited liability companies in question, and no credible witness exists to prove that he or she reasonably expected to profit solely from the efforts of others." (Petition at ¶ 17) However, as noted above, the question is not whether investors expected to profit ***solely*** from the efforts of others, but "whether the promoters' efforts, not that of the investors, form the essential managerial efforts which affect the failure or success of the enterprise." *Majors*, 373 S.C. at 167, 644 S.E.2d at 718.

Here, substantial evidence supports the Commissioner's finding that members expected that profits would be derived primarily from the efforts of McIntyre or his management company.[4] Each of the LLC's operating agreements stated that all decisions affecting the

[4] Appellants close their petition with this "catch-all" statement: "The pertinent content of the Initial Report of the Hearing Officer is hereby adopted and expressly incorporated into this Petition as additional grounds to set aside the decision of the Respondent." It is unclear what precise point Appellants intend to raise with this broad statement, and it is not the role of an appellate tribunal to "grope in the dark" to ascertain the issues raised on appeal. *See, e.g., Winter v. U. S. Fid. & Guar. Co.*, 240 S.C. 561, 568, 126 S.E.2d 724, 727-28 (1962). However, assuming Appellants intended to argue that the Commissioner erred in rejecting the *Williamson* analysis, I disagree. The *Williamson* analysis is appropriate when determining whether an interst in a business entity that is presumed ***not to be*** a security is, in fact, a security. Such an analysis is

operations of the company would be decided by consent of the manager, and the manager had the authority to "[e]ngage in any kind of activity and to perform and carry out such contracts of any kind necessary to operate the business and purposes of the [LLCs]." McIntyre identified the property to be purchased and negotiated the purchase price. He was the only member who had the authority to use the LLCs' debit cards. In the marketing documents, potential investors were told to call McIntyre if they had any questions about the offerings and none of those documents indicated that potential investors were expected to engage in any managerial duties after investing. In fact, some marketing materials explicitly state that Appellant Silver Oak Land Management would generate income for the LLC.

Furthermore, the testimony of investors Phil Hartman, Rich Silver, James Paris, and Paul Finn support the finding that the members relied on Appellants' managerial efforts and expected that the success or failure of their investment would be derived primarily from the efforts of the Appellants. Hartman testified that he did not participate in the management of the company and that McIntyre was solely responsible for management. Silver testified that he did not play an active role in the LLCs and that McIntyre was "going to do all the work." Paris denied participating directly in the management of the LLCs or being involved in any decisions regarding tree farming or improving the land. Finn testified that he never played an active role in tree farming LLCs and that, although he provided some services to Silver Oak Energy, he relied on Appellants to grow, cultivate, and sell Miscanthus grass. Accordingly substantial evidence

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not applicable here because manager-managed LLCs carry the opposite presumption: they are presumed ***to be*** securities. 1995 South Carolina Policy Statement, 2A Blue Sky L. Rep. (CCH) P 51, 580. *Cf. McGaha v. Mosley*, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984) ("Since the securities laws are remedial in nature, courts have uniformly held they should be liberally construed to protect investors."). Accordingly, the Commissioner applied the proper legal standard for determining whether the interests in the LLCs in this case were securities.

supports the finding of the Securities Commissioner that the investors expected that their profits, if any, would derive primarily from the efforts of Appellants.

IV. Violations of Section 35-1-501

Finally, Appellants argue that substantial evidence does not support the Commissioner's finding that they violated section 35-1-501 because (1) no misrepresentations, concealments, or false statements were made during the solicitation of members; (2) the operating agreements expressly authorize the acts about which the members complained; and (3) the complaining witnesses did not have a right to rely nor did they actually rely on any statement made by the Appellants. I disagree.

After carefully reviewing the record, I find that competent, material, and substantial evidence – namely the operating agreements, bank records, and testimony from Sandra Matthews, Phil Hartman, Richard Silver, Paul Finn, and James Russell Paris – supports the Commissioner's finding that Appellants violated section 35-1-501(2) in the following ways:

- Appellants paid themselves management and consulting fees in excess of what was allowed in the operating agreements and disclosed to investors.

- McIntyre used investor funds to pay for personal items (such as groceries, college application fees, alcohol, and pet care) all without the investors' knowledge or permission. When asked during the hearing about these expenditures, McIntyre himself testified that "some of it could be considered personal." Evidence also revealed that McIntyre tried to conceal these personal expenses by mislabeling them in the LLCs' financial records.

- Appellants failed to disclose to investors that their money would be used to financially support different entities. The accounting records and testimony at trial showed that Appellants commingled the LLCs' money without the investors' knowledge by using money from one LLC to pay obligations of a different LLC.

In the face of not merely substantial but overwhelming evidence in the record supporting the Commissioner's decision, Appellants do not cite to contrary testimony but argue that sections 6.1 to 6.4 of the operating agreements allowed Appellants to take all the actions they took,

including paying themselves consulting fees, using investor money to pay for personal expenses, and commingling LLC funds. These sections state:

> **6. Management of the Company.**
>
> 6.1 Decisions of the Company. Except as otherwise set forth herein, all decisions effecting [sic] the operation of the company shall be decided by consent of the Manager.
>
> 6.2 Authority and Power of the Manager. The Manager shall have the authority and power necessary to discharge the business of the Company. Without limiting the foregoing, the Manager shall have the authority and power ot perform the following acts on behalf of the Company:
>
> (a) Execute and deliver any and all agreements, contracts, documents, certifications, and instruments necessary or convenient in connection with the carrying on in the usual way of the business and affairs of the Company;
>
> (b) Execute and deliver any deed, lease, mortgage, mortgage note, bill of sale, easement, license, contract or other instrument purporting to convey, sell, exchange or encumber all or any part of the Company's property;
>
> (c) Deposit or invest Company funds in such interest bearing or noninterest bearing investments or bank accounts as they deem advisable to the extent such funds are not then required for Company operations, and are not required to be distributed, pursuant to this Agreement.
>
> (d) Retain or employ and coordinate the services of employees, independent contractors, supervisors, accountants, attorneys and other persons necessary or appropriate to carry out the business and purposes of the Company;
>
> (e) Engage in any kind of activity and to perform and carry out such contracts of any kind necessary to operate the business and purposes of the Company, in accordance with this Agreement; and
>
> (f) Pay all debts and other obligations of the Company, to the extent that funds of the Company are available therefor.

> 6.3 Liability of the Members and the Manager. The Members and the Manager shall not be liable to the Company or to any Member for any debts owed by the Company, or for any actions taken or omissions made in good faith and reasonably believed by the Member or Manager to be in the best interest of the Company, or for errors of judgment, except to the extent such acts or omissions constitute gross negligence or willful misconduct. Provided the standards of this Section 6.3 are satisfied, the Company shall indemnify each Member and Manager for all costs and expenses, including reasonable attorneys' fees, associated with the defense of any action or claim brought against the Member or Manger by any other Member, the Company or a third party, except for an action brought pursuant to Section 3.3(b).
>
> 6.4 Conflicts of Interests. The pursuit of other ventures and activities by Members or Manger, even if directly competitive with the business of the Company, is hereby consented to by the Members and shall not be deemed wrongful or improper. No Member or Manager shall be obligated to present any particular investment opportunity to the Company, even if such opportunity is of a character which, if presented to the Company, could be taken by the Company. The Company may enter into agreements with one or more Members or Managers (or an affiliated entity) to provide management, consulting, marketing, construction or other services to the Company.

Although these sections grant broad discretion to the Manager (and reinforce this Court's finding that investors expected that the success or failure of the LLC would derive primarily from the efforts of Appellants), that discretion is not so broad as to allow McIntyre to use investors' money as his personal piggy bank or as a source of funds for other business entities.

CONCLUSION

For the foregoing reasons, the order of the Securities Commissioner is **AFFIRMED.**

Tanya A. Gee

May 7, 2015