UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16182

In the Matter of PAUL EDWARD "ED" LLOYD, JR., CPA, Respondent.	DIVISION OF ENFORCEMENT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

Pursuant to the Motion for Summary Disposition filed in this matter on January 16, 2015 by Respondent Paul Edward "Ed" Lloyd, Jr., CPA, the Division of Enforcement (the "Division") of the U.S. Securities and Exchange Commission (the "Commission") hereby moves that Respondent's Motion be denied. The Division demonstrates in its supporting brief containing arguments and citation of authorities that Respondent is not entitled to judgment in his favor and that the Division's case in chief, to be presented at the hearing scheduled in this matter to begin on March 16, 2015, will show:

1. There is a genuine issue of material fact as to whether the transactions at issue involving the Forest Conservation entities are securities under Section 2(a)(1) of the Securities Act of 1933, and, therefore, whether the Commission has jurisdiction over the transactions and any conduct in connection therewith;

2. There is a genuine issue of material fact as to whether Respondent, in offering and selling the Forest Conservation entities to his tax-planning and investment advisory clients, acted as an unregistered broker-dealer in violation of Section 15(a) of the Securities Exchange Act of 1934; and

3. There is a genuine issue of material fact as to whether Respondent violated the antifraud provisions of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, thereunder, as well as the prohibited transaction provisions of Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940, and Rule 206(4)-8, thereunder.

WHEREFORE, for the reasons set forth in the accompanying brief, the Division respectfully prays that Respondent's Motion for Summary Disposition be denied.

This the 26 day of January, 2015.

Respectfully submitted,

Robert F. Schroeder
Brian M. Basinger
Attorneys for the Division of Enforcement
Securities and Exchange Commission
950 E. Paces Ferry Road NE
Atlanta, Georgia 30326-1232
(404) 942-0688 (Schroeder)
(404) 842-5748 (Basinger)
schroederr@sec.gov
basingerb@sec.gov

UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16182

In the Matter of

PAUL EDWARD "ED" LLOYD, JR., CPA,

Respondent.

BRIEF IN SUPPORT OF DIVISION'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

TABLE OF REGULATIONS

UNITED STATES OF AMERICA

Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16182

In the Matter of **PAUL EDWARD "ED" LLOYD, JR., CPA,** **Respondent.**	**BRIEF IN SUPPORT OF DIVISION'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION**

Pursuant to the Motion for Summary Disposition filed in this matter on January 16, 2015 by Respondent Paul Edward "Ed" Lloyd, Jr., CPA, the Division of Enforcement (the "Division") of the U.S. Securities and Exchange Commission (the "Commission") hereby submits this brief in support of the Division's Response in Opposition to Respondent's Motion for Summary Disposition.

I. STATEMENT OF FACTS

Respondent Paul Edward "Ed" Lloyd, Jr., is a North Carolina-licensed certified public accountant ("CPA") and tax-planner and preparer. Lloyd is the sole owner of his tax-planning business, Ed Lloyd & Associates, PLLC. Between October 2006 and March 2013, he also was a registered representative and associated person of LPL Financial, LLC ("LPL"), a broker-dealer and investment adviser registered with the Commission.

Between August 2012 and December 2012, Lloyd induced seventeen of his tax-planning clients, including four who also were Lloyd's LPL investment advisory clients, to purchase a total of $632,500 of interests in a limited liability company and special purpose vehicle that Lloyd created and controlled, called Forest Conservation 2012, LLC ("Forest Conservation 2012").

Through Forest Conservation 2012, Lloyd pooled his clients' funds and purchased units in a private Regulation D offering (See Exhibit 1) of an unrelated entity called Piney Cumberland Holdings, LLC (hereafter, "Piney Cumberland") which had filed a Form D (Notice of Exempt Offering of Securities) (See Exhibit 2) with the Commission. Piney Cumberland planned to acquire a controlling interest in land that would later be evaluated for an investment development or for preservation through a conservation easement. The offering summary for Piney Cumberland noted on pages 34-35 that project managers had already conducted preliminary feasibility studies for investment and conservation options. However, the final decision as to whether to develop the land or preserve it would not be made until after the offering was closed and would require approval of the majority of Piney Cumberland investors.

Under Section 170(h) of the Internal Revenue Code, the owners of land that is set aside as a conservation easement may obtain a tax deduction equal to the difference between a hypothetical best-use of the preserved land (*e.g.*, use for a residential sub-division) and the lower existing value of the undeveloped land. Investing in a land-conservation easement occurs when an investor, for the purpose of obtaining the benefit of a tax deduction, acquires an interest in land that is then set aside for conservation purposes. The value of the tax deduction resulting from the easement is typically a multiple of the value of the ownership units purchased by the investor, thereby leading to a net profit in the form of tax savings for the investor that are greater than the funds used to acquire the ownership units.

Lloyd represented to his clients that an easement was the expected outcome of the Piney Cumberland offering and that once the easement took effect, Forest Conservation 2012 would obtain a singular tax deduction based on its pooled investment in Piney Cumberland. Lloyd explained that he would then allocate the tax deduction on a *pro rata* basis among those holding

interests in Forest Conservation 2012. Lloyd further told his clients that the value in terms of tax savings from the deduction that each would obtain as a result of the investment would exceed the initial amount that each invested through the offering. For example, Lloyd e-mailed Forest Conservation 2012 investor Ashley Shawn Hooks on November 15, 2012, writing: "A $35,000 contribution into the land trust reduces your taxes approximately $53,000. I will need a check sent to my office for $35,000 make payable to Forest Conservation 2012, LLC by November 26 as [sic] sooner if possible."(See Exhibit 3). Hooks wrote her check for $35,000 on November 20, 2012, as Lloyd instructed, and Lloyd deposited the check six days later.

In fact, Lloyd's offering was a fraud. Although Lloyd sold to his clients $632,500 of interests in Forest Conservation 2012, he used only $502,500 of the clients' funds raised to purchase ownership units of Piney Cumberland and misappropriated the remainder of $130,000. The funds that Lloyd misappropriated were the aggregated investments of three of his tax-planning clients (Chris Brown, James Carson and Mike Malloy). Lloyd was required to identify the members of Forest Conservation 2012 and provide accredited investor paperwork for each investor to Strategic Financial Alliance ("SFA"), the broker-dealer sponsoring the Regulation D offering. (See Exhibit 4) However, in his communications with SFA registered representative Nancy Zak ("Zak"), Lloyd identified only fourteen of his clients (including the four who also were his advisory clients), along with himself, as investors and never confirmed any participation by the three clients whose money he stole.

At one point in early December 2012, Lloyd provided Carson's draft paperwork as a potential investor to Zak for review. This led Zak to email Lloyd on December 6, 2012 with various questions, including a request for Lloyd to indicate the amount Carson was investing. Lloyd responded to Zak by e-mail the next day on December 7, 2012—which was just three days

after depositing Carson's check into the Forest Conservation 2012 bank account—telling Zak that Carson was "OUT" [emphasis in original] of Forest Conservation 2012. Wanting to confirm that she understood what Lloyd meant, Zak then emailed Lloyd the same day for further clarification, writing, "Carson is not participating, correct?" To this, Lloyd responded promptly, writing back in an email to Zak: "Correct." (See Exhibit 5)

After receiving contribution checks from all seventeen clients whom Lloyd lured into participating in Forest Conservation 2012, Lloyd then drafted and signed an operating agreement on December 7, 2012 for Forest Conservation 2012 (hereafter, "Operating Agreement") to which he attached a schedule of only fifteen investors (fourteen investors plus himself), omitting the names of the three clients whose funds he misappropriated (Brown, Carson and Malloy) (See Exhibit 6). Of the $130,000 from Brown, Carson and Malloy that Lloyd diverted to himself, he transferred $105,750 to other accounts that he or his current spouse controlled, and then claimed the remainder, $24,250, as part of his own fraudulently-inflated personal investment in Forest Conservation 2012 for a total of $41,052 (See Exhibit 7), even though Lloyd himself only deposited a check to participate for $16,802. (See Exhibit 8).

Lloyd took additional steps to conceal his scheme. After Forest Conservation 2012 received its singular tax deduction based on its ownership interest in Piney Cumberland, and after the SEC examined Lloyd's office in March 2013 to inquire about the Forest Conservation entities, Lloyd prepared and distributed to all seventeen of his clients individual Internal Revenue Service ("IRS") Schedule K-1s that were fraudulently misstated (See Exhibit 9, noting each participant's "share of profit" from the Forest Conservation 2012 investment). To the three tax-planning clients whose money he stole, Lloyd gave Schedule K-1s allocating a tax deduction that none of the three clients had earned because their funds were not used in their names to purchase ownership interests.

in Forest Conservation 2012, they were not listed on the Forest Conservation 2012 Operating Agreement as owning any interests in Forest Conservation 2012, and they were never identified to, or approved by SFA, as accredited investors. To the remaining fourteen clients, Lloyd sent Schedule K-1s that understated the deductions that they should have earned. This was the result of Lloyd trying to conceal his scheme by allocating across all seventeen clients on a *pro rata* basis a tax deduction that in actuality was based on his use of only fourteen clients' funds, plus his own investment, to purchase units in Piney Cumberland. Lloyd now argues that he was due a tax-planning fee from each client, which thereby reduced each client's amount of funds invested in Forest Conservation 2012. In fact, there is no written evidence of any such fee being disclosed by Lloyd to his clients at the time of the offering, unlike the other Forest Conservation entities he created, and is inconsistent with the client investment amounts that Lloyd provided to Zak.

Between December 2011 and December 2012, Lloyd also offered and sold interests to his tax and advisory clients in two other Lloyd-created special purpose vehicles similar to Forest Conservation 2012. Specifically, Lloyd pooled investor funds through Forest Conservation 2011, LLC in order to buy ownership units in an offering (**See Exhibit 10**) by Maple Equestrian, LLC ("Maple Equestrian") (which also filed a Form D with the Commission (**See Exhibit 11**)). Lloyd also pooled investor funds through Forest Conservation 2012 II, LLC in order to buy ownership units in an offering (**See Exhibit 12**) by Meadow Creek Holdings, LLC ("Meadow Creek") (which also filed a Form D with the Commission (**See Exhibit 13**)). When selling interests in these two offerings, Lloyd collected from each investor a fee, which he disclosed upfront – unlike in the Forest Conservation 2012 offering – ranging from $4,500 to $7,500 per investor. Lloyd never told LPL of any of the offerings of investments in the three Forest Conservation Entities, and LPL did not sponsor these offerings.

II. LEGAL ARGUMENT

A. There is a genuine issue of material fact as to whether the transactions at issue involving the Forest Conservation entities are securities under Section 2(a)(1) of the Securities Act of 1933, and, therefore, whether the Commission has jurisdiction over the transactions and any conduct in connection therewith.

Lloyd contends in his Motion for Summary Disposition that, since his conduct did not involve the "purchase and sale of a security", the proceedings against him should be dismissed. However, his Motion for Summary Disposition should be denied, because the Division will show ample evidence at the hearing that a material fact exists as to whether Respondent's conduct involved securities.

The touchstone of any analysis as to whether a particular instrument is a security under Section 2(a)(1) of the Securities Act of 1933 ("Securities Act") and Section 3(a)(10) of the Securities Exchange Act of 1934 ("Exchange Act") is the substance rather than the form of the transaction, with an emphasis on economic reality. SEC. v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946); United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 848 (1975). Investment schemes may fall within several of the categories of instruments included within the definition of a security. Tcherepnin v. Knight, 389 U.S. 332, 339 (1967). The Howey court, *supra*, defined an investment contract as a contract, transaction or scheme whereby a person: (1) invests his money; (2) in a common enterprise; and (3) is led to expect profits solely from the efforts of the promoter or a third party. See also Robinson v. Glynn, 349 F.3d 166, 170 (4th Cir. 2003).

The first element of the Howey test, that a person must invest money, means "that the investor must commit his assets to the enterprise in such a manner as to subject himself to financial loss." SEC v. Pinckney, 923 F. Supp. 76, 80 (E.D. N.C. 1996), quoting Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976). Here, the Division will show in its case in chief that Respondent solicited individuals to provide funds to the Forest Conservation entities, promising each individual would

receive his or her *pro rata* interest in the total ownership units that the Forest Conservation entities purchased through the real estate investment offerings sponsored by SFA. The offering summaries for the companies selling ownership units through SFA explained that the company manager would recommend to members of each entity whether to pursue either an investment proposal, or, in the alternative, a conservation easement proposal. Further, the offering summaries explained that the companies were under no obligation to grant a conservation easement for any interest in land the companies acquired. Because Lloyd's clients committed funds and subjected themselves to the risk of financial losses, the first prong of Howey is satisfied.

The second element of Howey – requiring a "common enterprise" – has been interpreted differently among the nation's circuit courts. The Fourth Circuit, where Respondent resides and from where he offered and sold securities to investors in various states, has held that "horizontal commonality," whereby profits are distributed on a *pro rata* basis to investors whose assets were pooled together, is sufficient to show a common enterprise. Teague v. Bakker, 35 F.3d 978, 986 n. 8 (4th Cir. 1994); see also SEC v. Merklinger, 489 Fed. Appx. 937, 940-941 (6th Cir. 2012) (holding that SEC sufficiently alleged that investments in an LLC constituted "securities" under federal securities fraud law where the SEC alleged that funds were pooled in a common bank account and used for the LLC's expenses and where the LLC principal represented the LLC as a passive investment for which investors could expect significant returns).

Here, the Division expects that its case in chief will show that there clearly is horizontal commonality between the various individuals who contributed funds to the Forest Conservation entities, as Lloyd's clients wrote checks to the bank accounts identified by Lloyd. Subsequently, Lloyd used those pooled funds to make purchases of ownership units in the Piney Cumberland, Maple Equestrian and Meadow Creek offerings, respectively. Lloyd's clients who held ownership

interests in the Forest Conservation entities were entitled, based on their *pro rata* purchases of ownership interests, to any profits or losses achieved through the ownership purchases in the offering entities, respectively. Further, investors in the Forest Conservation entities ultimately shared in the net profit they achieved through *pro rata* tax deductions that reduced their individual taxable income and led ultimately to a greater savings in taxes paid than the funds they initially invested.[1]

Finally, the third element of Howey, that investors expected profits to come solely from the efforts of others, requires a court to examine "(1) that the opportunity provided to offerees tended to induce purchases by emphasizing the possibility of profits, (2) that the profits are offered in the form of capital appreciation or participation in earnings ..., and (3) that the profits offered would be garnered from the efforts of others." Teague, 35 F.3d at 987. Here, the Division will show there are two ways in which Respondent's clients reasonably expected profits from the efforts of others. First, the clients reasonably expected profits from their participation in the Forest Conservation entities because the offering summaries explained that the issuers intended to acquire a controlling interest in land which, under one scenario, could be developed for profit through the development and sale of residential lots. Separately, Lloyd's clients also reasonably expected profits from the efforts of others because Lloyd induced his clients to invest in the Forest Conservation entities by emphasizing that each client would receive a tax deduction and corresponding decrease in income taxes owed of greater value than each client's initial investment, *i.e.*, a net profit earned through participation in the anticipated conservation easements.

[1] Because the fortunes of Lloyd's clients were clearly interwoven with the efforts and successes of the Forest Conservation entities created, identified and managed solely by Lloyd, there also is vertical commonality. See, e.g., SEC v. Reynolds, 2010 WL 3943729, *3 (N.D. Ga. 2010) (finding vertical commonality established because investors "were dependent on [the promoter's] purported expertise in 'banking processes'," and the promoter claimed "the returns offered were possible because of [his] relationships with undisclosed banking partners").

Case law regarding the relationship between tax benefits and the existence of an investment contract has developed over the last several decades. In United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 853-58 (1975), the Supreme Court held that residents of a government-financed co-op building who bought "shares" in the co-op in exchange for residential space did not purchase "securities" under the Howey test because the residents purchased the shares for "personal consumption or living quarters for personal use" and "were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments." Further, the Court held that mortgage interest paid by the residents, while deductible for the residents' tax purposes, did not constitute a "security" because such "tax benefits are nothing more than that which is available to any homeowner who pays interest on his mortgage." Id. at 855.

In 1986, the Supreme Court, in Randall v. Loftsgaarden, 478 U.S. 647, 667 (1986), held that "tax benefits" from an investment in a tax shelter were not to be used in calculating "actual damages," *i.e.*, the court did not reduce the investor's recovery by the tax benefits actually received from a tax shelter investment which involved fraud in the offering terms. The Randall case was a dispute concerning whether tax benefits would reduce an investor's recovery under a theory of rescission. Despite Respondent's asserted reliance on Randall in his Motion for Summary Disposition, Randall did not address the Howey analysis *in any way*. Case law before and after Randall, however, has found that a "security" may exist in the form of tax benefits where promoters take sufficient steps to create the reasonable expectation of profits on the part of a purchaser. Newmyer v. Philatelic Leasing Ltd., 888 F.2d 385, 394 (6th Cir. 1989), cert. denied, 495 U.S. 930 (1990) (holding that tax benefits alone do not satisfy the "profit" element under Howey, but also finding a material question of fact existed as to whether a tax shelter involving leasehold interests of postage stamp printing plates was an investment contract under Howey, and

observing in *dicta* that a trier of fact would likely examine the promoter's appraisals, offering memorandum and "glowing" description of the popularity of stamp collecting in determining whether a reasonable expectation of profits existed); see also Investors Credit Corp. v. Extended Warranties, Inc., 1989 WL 67739 at * 28 (M.D. Tenn. 1989) ("As to profits, tax benefits which are the dominant inducement for investing are properly considered to be profits in satisfaction" of the Howey test).

Regardless of whether the third-party entities at issue in this matter ultimately chose to develop the land for profit or seek tax deductions through conservation easements, any such profits or tax deductions would be garnered by the efforts of others, *i.e.*, Lloyd, as manager of and investment adviser to the Forest Conservation entities, as well as by Piney Cumberland, Maple Equestrian and Meadow Creek. Any earnings expected, whether residential-lot sale profits or easement tax deduction net profits, would come from the efforts of others, as Lloyd's clients' only meaningful role was to write checks and wait for their *pro rata* profit. Once Lloyd's clients provided their investment funds to the Forest Conservation entities, they had no role in the success or failure of the ventures. They were passive investors relying on the efforts of others to generate their profits.

B. There is a genuine issue of material fact as to whether Respondent, in offering and selling the Forest Conservation entities to his tax-planning and investment advisory clients, acted as an unregistered broker-dealer in violation of Section 15(a) of the Securities Exchange Act of 1934.

Respondent's argument that the Commission lacks jurisdiction over this matter should be denied because the Division will show ample evidence that Lloyd was acting as an unregistered broker/dealer. Section 3(a)(4) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." The phrase "engaged in the business" connotes a regular participation in securities transactions and can be evidenced by

commerce or the mail. Specifically, Section 17(a), in the offer or sale of a security, prohibits: (1) employing any device, scheme or artifice to defraud; (2) obtaining money or property by means of making material misstatements of fact or omitting to state material facts; or (3) engaging in any transaction, practice or course of business which operates as a fraud or deceit.

Separately, Section 10(b) of the Exchange Act, in connection with the purchase or sale of securities, prohibits any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 10b-5, thereunder, prohibits: (1) employing any device, scheme or artifice to defraud; (2) making any untrue statement of a material fact or omitting to state a material fact; or (3) engaging in any act, practice or course of business which operates as a fraud or deceit. Further, to establish a violation of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Commission must prove scienter, defined as "a mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n. 12 (1976). Violations of Sections 17(a)(2) and (a)(3) of the Securities Act may be established by a showing of negligence. SEC v. Morgan Keegan & Co., Inc., 678 F.3d 1233, 1244 (11th Cir. 2012).

Lloyd established and operated a scheme or business through interstate commerce using Forest Conservation 2012 to offer or sell securities to individuals in different states, and fraudulently declaring that the funds would be used on the individuals' behalf in order to acquire ownership interests in the real-estate-related offerings. Lloyd never gave SFA finalized accredited investor paperwork for the three clients (Brown, Carson and Malloy) whose money he stole, and, therefore, Lloyd kept them from participating in the offering and from acquiring ownership interests in the Forest Conservation 2012 entity. As noted above, when Zak asked Lloyd whether

Carson was participating in the Forest Conservation 2012 offering, Lloyd responded to Zak that Carson was "OUT." Lloyd ultimately tried to cover up his scheme by issuing Schedule K-1s to all seventeen clients, thereby diminishing the ownership interests owed to the fourteen investors known to SFA. As such, Lloyd evidenced a mental state embracing an intent to deceive, manipulate or defraud.

Lloyd also made material misstatements and omissions to clients. He told Brown, Carson and Malloy, respectively, that their funds were being used to acquire ownership interests in Forest Conservation 2012, but instead, Lloyd misappropriated their funds. Lloyd also took steps to conceal that he had misappropriated $130,000 from these three tax-planning clients, deliberately hiding those individuals' funds from SFA. Lloyd's misstatements and omissions, described above, were material because they concerned the very nature of the investment offered and sold by the proposed respondent to individuals who gave funds to Forest Conservation 2012. SEC v. Research Automation Corp., 585 F.2d 31, 35-36 (2d Cir. 1978) (misleading statements and omissions concerning the use of money raised from investors are material as a matter of law).

Further, Lloyd, through emails, informed investors who were approved as accredited investors in Forest Conservation 2012 that their entire contribution amounts were going toward acquiring ownership interests in the real estate offerings, and Lloyd did not communicate in writing to these individuals, prior to their investing, that he would be claiming a portion of their contribution checks as his tax-planning fees. These statements were all material as there is a substantial likelihood that such information about the actual amount used for contribution purposes would have been significant in the deliberations of a reasonable investor. Reynolds, 2010 WL 3943729 at *3. Again, Lloyd's actions evidence the requisite scienter that must be shown, as described above.

2. Violations of the Investment Advisers Act.

Section 206(1) of the Advisers Act makes it unlawful for an investment adviser to employ any device, scheme or artifice to defraud any client or prospective client. Section 206(2) makes it unlawful for an investment adviser to engage in any transaction, practice or course of business that operates as a fraud or deceit upon any client or prospective client. Both Sections 206(1) and 206(2) of the Advisers Act apply to all investment advisers meeting the statutory definition, regardless of their registration status. Section 206(1) requires a showing of scienter; Section 206(2) does not. SEC v. Steadman, 967 F.2d 636, 641 n.3, 643 n.5 (D.C. Cir. 1992).

An investment adviser is defined by Section 202(a)(11) of the Advisers Act as someone who in return for compensation, engages in the business of advising others as to the advisability of investing in, purchasing, or selling securities. Lloyd entered into advisory contracts with his LPL clients providing him with discretionary authority to trade securities for them. Further, Lloyd's individual role as an unregistered investment adviser – activity which was hidden from LPL – is evidenced by his creation, identification and recommendation of the Forest Conservation 2012 offering to his pre-existing advisory clients (*i.e.*, Lloyd alone advised his clients to invest in Forest Conservation 2012). Lloyd also served as an investment adviser to the Forest Conservation 2012 fund, advising the fund as to which securities to purchase and how much, resulting in his trading of the fund's assets in exchange for the purchase of ownership units in the real estate offering by Piney Cumberland. The subsequent misappropriation of investor funds by Lloyd served as his compensation for advising the Forest Conservation 2012 fund and his LPL clients.

The Division will show in its case in chief that Lloyd violated Sections 206(1) and (2) by misappropriating the assets of his client, the Forest Conservation 2012 fund, which he advised on how to invest. Instead of advising the fund to use all its assets to acquire ownership units in Piney

Cumberland, Lloyd misappropriated $130,000 which had been provided by Brown, Carson and Malloy, collectively, for Forest Conservation 2012 to use in the acquisition of Piney Cumberland ownership units. Further, Lloyd also violated Sections 206(1) and (2) by making misrepresentations and omissions of material fact to his four advisory clients participating in the Forest Conservation 2012, LLC concerning, among other things, the amount each individual was investing and the size of each individual's *pro rata* ownership interest in Forest Conservation 2012. As noted above, Lloyd acted with the required scienter to establish a charge under Section 206(1).

Section 206(4) of the Advisers Act prohibits investment advisers from engaging in any "act, practice or course of business which is fraudulent, deceptive, or manipulative." Rule 206(4)-8(a)(1) defines as a fraudulent practice an investment adviser's making false statements of material fact to any investor or prospective investor in a pooled investment vehicle, or failing to state material facts necessary to make statements made to such investors not misleading. Rule 206(4)-8(a)(2) further defines as a fraudulent practice an investment adviser's engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative, with respect to any investor or prospective investor in the pooled investment vehicle. Scienter is not required to find a violation of this Rule. See Vernazza v. SEC, 327 F.3d 851, 859-60 (9th Cir. 2003) ("It is undisputed that scienter is a required element for violations of ... Advisers Act § 206(1). Scienter is not required for the other violations of the Advisers Act."); see also Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Release No. IA-2628, 2007 WL 2239114 at *5 & n.38 (August 3, 2007) ("We read the language of section 206(4) as not by its terms limited to knowing or deliberate conduct").

Here, Lloyd and, through him, Forest Conservation 2012, pooled investor money in the Forest Conservation 2012 bank account in the name of, or for the benefit of, Lloyd's clients and

such things as holding oneself out as a broker-dealer or receiving transaction-based compensation. See e.g. Massachusetts Fin. Servs., Inc. v. Sec. Investor Prot. Corp., 411 F. Supp. 411, 415 (D. Mass. 1976), aff'd, 545 F.2d 754 (1st Cir. 1976); SEC v. Hansen, 1984 WL 2413, at *10 (S.D.N.Y. 1984).

Section 15(a)(1) of the Exchange Act prohibits a broker or dealer from effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security without registering as, or associating with, a registered broker-dealer, unless such broker or dealer (1) is registered with the Commission in accordance with Section 15(b) of the Exchange Act; (2) in the case of a natural person, is associated with a registered broker-dealer; or (3) satisfies the conditions of an exemption or safe harbor. SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003), aff'd, 94 F. App'x 871 (2d Cir. 2004). The registration exemption for associated persons is not available if an associated person engages in securities transactions that are not within the scope of his employment with the registered firm, and the registered firm is unaware of or has not approved of the associated person's involvement in the transactions. This practice is called "selling away." A registered representative who is selling away may be liable for violations of Section 15(a). See, e.g., SEC v. Ridenour, 913 F.2d 515, 517 (8th Cir. 1990) (bond salesman violated Section 15(a)(1) by engaging in a series of undisclosed, private securities transactions as part of private bond business of which registered firm had no knowledge or opportunity to supervise).

Lloyd, as a registered representative of LPL, was an associated person of a broker-dealer registered with the Commission at the time of the fraud. With regards to the Forest Conservation entities, Lloyd acted as a broker-dealer by: (1) actively soliciting and inducing individuals to invest in these Forest Conservation entities; (2) requiring investors to pay him transaction-based compensation for the offerings in the case of Forest Conservation 2011 and 2012 II, respectively,

while misappropriating client funds as his compensation for Forest Conservation 2012; (3) handling investor funds in bank accounts which Lloyd controlled; and (4) purchasing ownership units in the real estate offerings using the investors' pooled funds. Lloyd testified that he created and sold investments in the Forest Conservation entities in 2011 and 2012, and then used the funds raised to purchase ownership units in the real estate offerings without informing or seeking approval from LPL. **(See Exhibit 14 at pages 72-75)** As such, Lloyd was "selling away" from LPL in 2011 and 2012 and, therefore, was engaged in securities transactions that were not within the scope of his employment with the registered firm, and LPL was unaware and did not approve of Lloyd's involvement in these transactions. As a result, Lloyd violated Section 15(a) of the Exchange Act by acting as a broker-dealer without registration.

C. There is a genuine issue of material fact as to whether Respondent violated the antifraud provisions of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, thereunder, as well as the prohibited transaction provisions of Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940, and Rule 206(4)-8, thereunder.

Lloyd contends that there were no violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5 thereunder, and Sections 206(1), 206(2) or 206(4) of the Investment Advisers Act or Rule 206(4)-8 thereunder. Again, his Motion for Summary Disposition should be denied because the Division's case in chief will show there is a genuine issue of material fact as to whether Lloyd violated the antifraud and prohibited transaction provisions of the federal securities laws.

1. **Violations of the Antifraud Provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.**

Section 17(a) of the Securities Act prohibits fraud in the offer or sale of a security by the use of interstate commerce or the mail. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit fraud in connection with the purchase or sale of securities by use of interstate

himself personally, purportedly for the purpose of investing or trading in securities (ownership unit offerings). As such, Forest Conservation 2012 meets the definition of an investment company under Section 3(a)(1)(A) of the Investment Company Act which defines an investment company as including an issuer which "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities." Here, the Division will show in its case in chief that the primary purpose of Forest Conservation 2012, as Lloyd told his clients, was to pool investor funds in order to acquire ownership units in an entity that was expected to preserve land through a conservation easement, thereby generating profits through tax deductions which were larger than the individuals' initial investments.

However, Forest Conservation 2012 was not bound by its Operating Agreement to acquire units in Piney Cumberland or any other specific offering. Lloyd advised Forest Conservation 2012 as to which securities to acquire and how much to acquire. Lloyd's fraudulent misconduct as related to investors in Forest Conservation 2012 – consisting of misappropriating investor funds, making false statements and omissions to investors about the use of their funds, making false statements and omissions to SFA in connection with the transactions, and creating misstated Schedule K-1s – violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

3. **Evidence Showing Lloyd's Intent to Defraud Clients in Violation of Federal Securities Laws**

Respondent argues in his Motion for Summary Disposition that Wyoming law allows for an LLC operating agreement to be oral or implied and that failing to include Brown, Carson and Malloy on the Forest Conservation 2012 operating agreement was merely a clerical error and did not preclude their participation. Respondent is incorrect because more than a mere clerical error was afoot. For Lloyd's "clerical error" argument to be believed, one would have to accept that the "error" continued and lasted for months, from the fall of 2012 until the spring of 2013, including

the drafting of an Operating Agreement that failed to include Brown, Carson and Malloy and which incorrectly inflated the contribution amounts of the other fifteen individuals listed on the document. The error also would have to encompass Lloyd's emails to Zak noting only 15 investors in Forest Conservation 2012 and Lloyd's direct response to Zak that Carson was "OUT" of Forest Conservation 2012 and not participating, a mere four days after Lloyd deposited Carson's check into the Forest Conservation 2012 bank account. Further, the error would have to include Lloyd's assertion that he, a licensed CPA and professional tax-preparer, made a $24,250 clerical error when he initially claimed a personal investment of $41,052 in Forest Conservation 2012, but, after the SEC examined his office in March 2013, he later realized his mistake and only issued himself a tax deduction in May 2013 based on the $16,802 for which he actually wrote a check.

And the error would have to account for the fact that finalized accredited investor paperwork for Brown, Carson and Malloy never made its way from Lloyd to SFA. Further, the Division believes that Lloyd's motive for the fraud stemmed from his struggling financially in the months following his June 2012 wedding – when he was already paying child support and other monies to a prior spouse – and had to repeatedly tap a bank line of credit in the months leading up to the misappropriation from clients in December 2012. It strains credulity to argue that one could not have looked at the Forest Conservation 2012 Operating Agreement that Lloyd provided to Zak in 2012 and noticed whether 15 investors or 18 investors were listed as participating in Forest Conservation 2012. The operative document was the Operating Agreement listing only the 15 participants, not including Brown, Carson and Malloy, and should not be disregarded to excuse Lloyd's attempts to conceal his fraudulent scheme.

Furthermore, Lloyd's new version of the Operating Agreement (the "Amendment and Correction to Operating Agreement of Forest Conservation 2012, LLC") was prepared and signed

after the SEC's Wells Notice of June 17, 2014 to Lloyd. The document appears to reflect an attempt by Lloyd to convince investors to sign on to a version of events that they could not independently know is true.[2]

Wyoming Law allows for LLC records filed with the state to be corrected "if at the time of filing the record contained inaccurate information or was defectively signed." Wyo. Stat. Ann. § 17-29-206 (2010). However, Wyoming law does not condone after-the-fact corrections or implied readings of an LLC operating agreement to conceal a fraud. Further, the provision of fraudulent information to the state in LLC filings is grounds for the deeming of the LLC as defunct, transacting business without authority, and in forfeiture of its articles of organization. Wyo. Stat. Ann. § 17-29-705(c) (2010).

Though Lloyd argues an implied operating agreement might exist including Brown, Carson and Malloy, it should be noted that, as Tom Long, Esq. wrote on page 7 of his Report, filed as Exhibit 9 to Respondent's Motion, "Wyoming courts have in the past denied enforcement of various contractual provisions in furtherance of equitable principles involving a duty of good faith and fair dealing, honesty and reasonableness, unconscionability, materiality, commercial impracticability, and other factual circumstances leading a court to find enforcement to be inequitable." The final list of Forest Conservation 2012 participants was established on December 7, 2012, when Lloyd created the Operating Agreement listing the 15 investors and wired the entity's funds to Piney Cumberland's account to buy ownership units. The subsequent attempts to argue for implied Wyoming law remedies and the inclusion of Brown, Carson and Malloy as

[2] Further underscoring the lack of any written disclosure by Lloyd of any fee prior to the Forest Conservation 2012 offering, Lloyd testified under oath in this matter that after his clients received document subpoenas from the Commission concerning the offering, he "had to explain to them ... what the contribution amount was. I had to explain the whole process to them. It had been over a year or so. They don't remember those details." Lloyd Tr. at page 126.

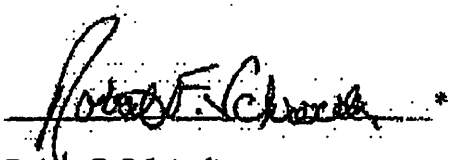
participants owning interests in Forest Conservation 2012 are just part of Lloyd's ongoing cover-up designed to conceal his fraud.

III. CONCLUSION

For the reasons set forth above, the Division respectfully requests that Respondent's Motion for Summary Disposition be denied.

This 26 day of January, 2015.

Respectfully submitted,



Robert F. Schroeder
Brian M. Basinger
Attorneys for the Division of Enforcement
Securities and Exchange Commission
950 E. Paces Ferry Road NE
Atlanta, Georgia 30326-1232
(404) 942-0688 (Schroeder)
(404) 842-5748 (Basinger)
schroederr@sec.gov
basingerb@sec.gov

*By my signature, I certify that this document complies with the length limitation of Rule 154. The word count of this brief and the accompanying response in opposition, excluding the table of cases, table of authorities, and certificates of service, is 6,783 words.

United States
Securities and Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Road, N.E, Suite 900
Atlanta, GA 30326
Phone: 404-842-7600
Fax: 404-842-7666

FACSIMILE COVER SHEET

To:	Office of the Secretary Attn: Brent J. Fields	From:	Brian Basinger
Fax:	202-772-9324	Page(s):	31
Phone:	[redacted]	Date:	2015-01-26
Re:	A-03493 / AP File No: 3-16182	cc:	

☐ Urgent ☐ For Review ☐ Please Comment ☒ Please Reply ☐ Please Recycle

Division of Enforcement's Response and Brief in Support of Response

THANK YOU!