UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| UNITED STATES SECURITIES AND EXCHANGE COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>VEROS PARTNERS, INC.,<br>MATTHEW D. HAAB,<br>JEFFERY B. RISINGER,<br>VEROS FARM LOAN HOLDING LLC<br>TOBIN J. SENEFELD,<br>FARMGROWCAP LLC, and<br>PINCAP LLC,<br><br>Defendants.<br><br>PIN FINANCIAL LLC,<br><br>Relief Defendant. | ) | NO. 1:15-cv-659-JMS-MJD |

**BRIEF IN SUPPORT OF DEFENDANT TOBIN J. SENEFELD'S MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION AND BACKGROUND

The Securities and Exchange Commission ("SEC") has alleged that Senefeld is liable for primary violations of the securities laws, specifically Section 10(b) of the Securities and Exchange Act of 1934 as implemented by Rule 10b-5 and Section 17(a) of the Securities and Exchange Act of 1933, for private placement investments offered by Defendant Matthew Haab ("Haab") to his clients through his investment management firm, Veros Partners, Inc. ("Veros").

The private investments Haab offered to his investor-clients were farm operating loans identified through Senefeld's farming and banking contacts as needing operating capital. Haab charged the farmers interest on the loans, which generally was then passed on to his investors.

Senefeld was responsible for maintaining contacts with the farmers and monitoring their operations. Senefeld communicated the status of the loans to Haab and Defendant Jeffery Risinger ("Risinger"), who functioned as the legal counsel for the investments and transactions. However, the SEC has alleged that Haab did not communicate accurately to his investor-clients the terms of the loans, including that some amounts were being refinanced either through a different Veros lending entity, conventional banks or other sources of capital.

The SEC has alleged that Senefeld is liable for the alleged misstatements and omissions by Haab. The SEC further has alleged that Haab, Risinger and Senefeld engaged in a fraudulent "scheme." Proof under either theory requires the SEC to establish that Senefeld himself, through his own actions, is primarily liable under the securities laws. As the undisputed material facts demonstrate, however, as a matter of law the SEC cannot establish primary violations by Senefeld.

The undisputed facts establish that Senefeld had no relationship to the investors, did not communicate with them and did not owe them fiduciary duties requiring him to speak. The investors were Haab's clients, not Senefeld's, and Senefeld had no ownership interest in Veros. Senefeld accordingly cannot be liable for primary violations for Haab's misstatements or omissions. The undisputed facts also establish that Senefeld did not engage in conduct that was "inherently deceptive," and he therefore cannot be primarily liable for an alleged fraudulent "scheme." Rather, Senefeld's clients were the farmers, and his role in consulting with Haab and Risinger was to identify farms that needed financing, collect information from the farmers and their bankers, examine the farms' operations, communicate the terms of proposed financing to the farmers and monitor their operations. The SEC has not alleged, and the facts do not establish, that the loans were anything other than legitimate business transactions. Haab retained

responsibility at all times for communicating with his investor-clients, disseminating disclosures to them and had ultimate authority over what investments to offer his investor-clients and how to structure those investments. He also controlled all of the accounts and payments to investors.

The facts also establish that Senefeld communicated the status of the loans to Haab and Risinger, and there are no allegations that Senefeld concealed the status of the loans, falsified documents or otherwise engaged in conduct that resulted in deception to investors. Rather, any deception to investors or action that operated as a fraud resulted from Haab's actions, not Senefeld's. Because a defendant cannot be primarily liable for securities violations engaged in by another, Senefeld cannot be liable under either § 10(b) or §17(a). Accordingly, he is entitled to judgment in his favor as a matter of law.

## I. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

### A. Overview Of The Entities.

#### 1. Veros Was Owned And Operated By Haab, And The Investors Primarily Were Haab's Clients Through Veros.

Haab was president of Veros. SEC Testimony of Matthew Haab,[1] relevant excerpts designated as Exhibit 1 hereto ("Haab Test."), 14: 5-14.[2] Haab and his partner, Adam Decker, founded Veros and owned the majority of it. Haab Test., 23: 7-13. Almost all of the investors were Haab's clients through Veros. Haab Test., 79: 8-11. Senefeld did not have an ownership interest in Veros and was not an employee of Veros. Declaration of Tobin J. Senefeld, designated as Exhibit 2 hereto ("Senefeld Decl.,") ¶ 21. Haab controlled the accounts for Veros. Haab Test., 111: 12-25; 112: 7-8; Senefeld Decl., ¶ 30. Senefeld did not have access to the Veros accounts, including even read-only access. Senefeld Decl., ¶ 30.

[1] The transcript of Haab's SEC testimony was filed ex parte by the SEC as Document 9-4.
[2] Citations to transcripts are to Page: Line – Line.

**2. Veros Farm Loan Holdings.**

In 2013, Haab offered a pooled investment to his clients through Veros Farm Loan Holdings ("VFLH"). Haab Test., 133: 1-25. VFLH was wholly owned by Veros Investments, LLC. Haab Test., 137: 7-10. Senefeld did not have an ownership interest in VFLH. *Id*. Haab controlled the accounts for VFLH. Haab Test., 180: 1-20; 180: 25; 181: 1-2; Senefeld Decl., ¶ 30. Senefeld did not have access to the VFLH accounts including even read only access. *Id*.

**3. PinCap, LLC.**

In 2013, Risinger, in his capacity as legal counsel, suggested formation of PinCap, LLC ("PinCap"). SEC Testimony of Jeffery Risinger,[3] relevant excerpts designated as Exhibit 3 hereto ("Risinger Test.,"), 25: 1-7. Risinger incorporated PinCap and advised Haab and Senefeld as to the proper structure for the company. *Id*. PinCap's function was to provide a central organizing structure and support services to FarmGrowCap, LLC ("FarmGrowCap") and Pin Financial, LLC ("Pin Financial"). Risinger Test., 24: 13-18; 35: 10-14. PinCap was owned in equal thirds by Veros, Risinger and Senefeld. Haab Test., 99: 13-24. Haab was the only person who authorized disbursements from the PinCap account. Risinger Test., 51: 23-24. Senefeld did not have access to the account, including read-only access. Senefeld Decl., ¶¶ 30, 34.

**4. FarmGrowCap, LLC.**

FarmGrowCap initially was owned by PinCap and its business was to provide farm loans. Haab Test., 30: 10-12; 98: 25; 99: 1-3. In 2014, Risinger advised Haab and Senefeld that independence was needed for FarmGrowCap's decision making and assigned one hundred percent (100%) ownership in FarmGrowCap to himself. Risinger Test., 22: 4-13. Risinger had

[3] The transcript of Risinger's SEC testimony was filed by the SEC ex parte as Document 10-1.

final decision making authority on behalf of FarmGrowCap, and he exercised that authority. Risinger Test., 22: 14-22.

**5. Pin Financial, LLC**

In late 2012, Senefeld and Risinger purchased Pin Financial, LLC ("Pin Financial"). Senefeld Decl., ¶ 32. Pin Financial is a nickel broker dealer, but it did not issue or sell any of the securities at issue in this litigation. *Id*. Rather, Senefeld operated as President of Pin Financial to continue his consulting services to farms and other business, including sourcing financing, with Veros only one source of potential financing. *Id*.; Haab Test., 86: 19-25.

**B. Each Of Haab, Risinger And Senefeld Had A Distinct Area Of Responsibility, And Senefeld Was Not Authorized To Communicate To Haab's Investors.**

Each of Haab, Risinger and Senefeld had a distinct role in their business relationship. Haab Test., 99: 18-24.

**1. Haab Was Responsible For Investor Communications, Handled All Of The Investor And Loan Funds And Had Final Authority For Deciding Whether To Offer An Investment To His Clients.**

Haab, as he described himself, was Chief Financial Officer/Investor Relationships. Senefeld Declaration, ¶ 31 and Exhibit A. Haab was responsible for overseeing raising investor capital needs for all deals he approved and developing and maintaining all investor relationships. *Id*. He also would review internal budgets and forecasts, review the due diligence prepared by analyst Shawn Gustafson ("Gustafson") and conduct his own analysis of the information underlying the due diligence. *Id*.; Haab Test., 140: 9-23. Haab would vet the accuracy of the final, prepared due diligence and review for additional questions for Senefeld to ask the client, *i.e.*, farmer. Senefeld Declaration, ¶ 31 and Exhibit A. Haab was responsible for designing the deal structure based on a combination of meeting the farmers' needs balanced with the

understanding of what it would take to raise the investor capital needed. *Id*. Haab determined whether a proposed loan was appropriate to offer his clients as an investment, and retained final authority over what loans would be funded and offered as investments. Haab Test., 139: 9-21; Senefeld Decl., ¶ 20.

**a. Haab Decided Whether The Risk Assessment Was Appropriate And What Collateral Would Be Required.**

In conducting his due diligence, Haab would review the risk assessment and determine whether he would offer the loan to his clients and on what terms. Haab Test., 57: 1-18. He would also determine whether the proposed loan had an appropriate risk versus reward. Haab Test., 119: 25; 120: 10-3. He would look at the sources of collateral and determine what collateral would be required to properly secure the investment, typically requiring a first position lien on the crops and a first assignment right in any crop insurance police as security collateral for the loan. Haab Test., 115: 200-25; 117: 1-4.

Haab also would decide what interest rate of return would make a loan a suitable investment vehicle for his clients. Haab Test., 120: 4011. If Haab decided the investment was suitable, he would proceed to offer it to his clients. Haab Test., 120: 12-15. Haab had final authority over the terms of the investment and whether to offer it to his clients. Haab Test., 119: 25; 120: 1-3; Risinger Test., 57: 17-18; Senefeld Decl., ¶ 20.

**b. In His Capacity As Fiduciary, Haab Would Communicate Regarding The Investment To His Clients And Recommend The Investment To His Clients.**

Haab personally would email the offering memorandums and disclosures to his potential investors, who were accredited investor-clients of Veros. Haab Test., 80: 16-25; 82: 2-4. Haab would work with each client to advise them as to the suitability of the investment for the client and what investments of the client's the private offerings should replace. Haab Test., 83: 10-15;

117: 9-16. Haab determined which of his clients to offer the private investments to in his capacity as fiduciary for his clients. Haab Test., 110: 10-14. Haab recognized that he owed a fiduciary duty to his clients and an obligation to act in good faith and out their interests ahead of Veros and its employees and he represented to Senefeld that he had a fiduciary obligation to Veros clients to conduct his own due diligence. Haab Test., 57: 10-25; 58: 1-15; 58: 16-25; 59: 1-8; Senefeld Decl., ¶ 20. Haab personally would collaborate daily with the other Veros' investment advisors and determine suitability of the investments for the clients. Haab Test., 63: 2-10. Haab personally was responsible for compliance by Veros. Haab Test., 62: 12-18.

**c. Haab And His Team At Veros Managed The Private Investments.**

Veros retained custody over the private investments. Haab Test., 40: 9-12; 41: 2-9. Veros tracked the performance of the private investments and was responsible for reporting that performance to its clients. Haab Test., 42: 5-6. Veros' private investment team managed the private investments. Haab Test., 30: 19-25; 31: 1-9. A manager of Veros also maintained the books for PinCap. Haab Test., 29: 20-25; 30: 106.

**d. Haab Controlled All Funds And Made The Decisions On When To Disburse Funds, Either To A Farmer Or Investors.**

Haab, through Veros, established the bank accounts for deposit of investor funds and the accounts for each farm. Haab Test., 111: 12-15; 111: 210-25. Haab retained authority over the accounts. Haab Test., 112: 5-9; Senefeld Decl., ¶ 30. Haab and his team at Veros would disburse loan funds to the farmers from the farm accounts, and the farmers would make repayments into those same accounts controlled by Haab. Haab Test., 111: 14-16; 114: 19-25. As the farmer repaid the loan, Haab and his team at Veros would take the proceeds and pay investors. Haab Test., 111: 16-20. Haab retained authority over distributing funds to investors,

and he authorized all distributions from the investor accounts to investors. Haab Test., 112: 15-16; 112: 22-24. Haab and Decker were the signatories on the accounts. Haab Test., 14: 1-18. Senefeld was not a signatory on the accounts and did not have access to the accounts, including even read-only access. *Id*.; Senefeld Decl., ¶ 30 If Senefeld needed to communicate with a farmer regarding a loan payoff amount or to confirm that Veros had received a payment on the loan, Senefeld would have to ask a Veros member what the bank account showed. Senefeld Decl., ¶ 30

### C. Risinger Was Chief Legal Officer, Responsible For Drafting All Legal Documents And Legal Compliance.

As described by Haab, Risinger was Chief Legal Officer. Senefeld Decl., ¶ 31 and Exhibit A. Risinger considered himself to be General Counsel of PinCap, responsible for performing all legal work. Risinger Test., 11: 11-14. Risinger was responsible for overseeing and/or completing all legal documents and reviewing the due diligence prepared for the deals, specifically focusing on the legal framework of the deal and how the security collateral could be structured to protect the deal. Senefeld Decl., ¶ 31 and Exhibit A. Risinger also was responsible for helping design the deal structure based on a combination of meeting the farmers' needs balanced with the specific legal structure limitations. *Id.*

Risinger was so involved in providing legal services for the deals that in 2014 and 2015 his only clients were PinCap, FarmGrowCap and Pin Financial. Risinger Test., 11: 3-8; 11: 14-18. However, Risinger also consulted with other attorneys in providing his legal services and hired counsel to advise him regarding the disclosures and to assist in working on the deals. Haab Test., 82: 12-18; 101: 11-17; Risinger Test., 14: 12-13; ; Senefeld Decl., ¶ 45.

Risinger performed legal due diligence and structured the loan with the farmers. Risinger Test., 56: 11-16. He also would research liens and confirm that the crop insurance documents

were correct. Risinger Test., 57: 19-25. If a farmer had contracts where he had forward-sold crops, Risinger would examine those contracts. Risinger Test., 58: 5-7. He then would prepare the loan documentation, including drafting the loan agreement with the farmers. Risinger Test., 57: 19-25; 59: 10-12. In addition to his legal work structuring the loans and loan documents with the farmers, Risinger wrote the offering materials that were submitted to investors. Haab Test., 82: 10-18; Risinger Test., 59: 13-15. Risinger might ask Senefeld or Gustafson to provide information, but Risinger maintained responsibility for writing the disclosures. Risinger Test., 59: 16-18.

### D. Senefeld's Clients Were The Farmers, And He Did Not Have A Relationship To The Investors.

Haab described Senefeld's as Chief Marketing Officer. Senefeld Decl., at ¶ 31 and Exhibit A. Senefeld's clients were the farmers, and Senefeld worked with them to provide agricultural consulting services and financing from many sources of potential funds, of which the Veros loans were just one potential source. Senefeld Decl., ¶ 32; Declaration of Harold Birch, designated as Exhibit 4 hereto ("Birch Decl."), ¶ 13. Senefeld also worked with commercial banks, private equity funds and other farming entities to source financing for his clients and ran deals that did not involve any of the Veros entities. Senefeld Decl., ¶¶ 10, 32; Birch Decl., ¶ 13.

Senefeld's responsibilities with regard to PinCap were to oversee all sales and marketing activities and develop and maintain client relationships – *i.e.*, with the farmers. Senefeld Decl., at ¶ 31 and Exhibit A. Senefeld was responsible for reviewing the due diligence prepared for the deals, specifically focusing on getting all information needed from the farmers and helping secure the farmers' answers to all questions so that the due diligence resulted in a complete and accurate portrayal of the farmers' situations and needs. Senefeld also was responsible for helping design the deal structure specifically to meet the needs of the farmers. *Id.*

Senefeld identified the potential farm loans through his contacts in the farming and banking community, where he received referrals through his lifelong involvement in agriculture. Haab Test., 139: 9-21; Risinger Test., 55: 2-6; Senefeld Decl., ¶ 3. Senefeld would meet with the farmers, talk to their banks and get a sense of what capital the farms needed. Risinger Test., 55: 6-11. Senefeld then would obtain information on the farmers' financials for the preceding three to five years, and Gustafson would analyze that information to create a budget for each farm. Risinger Test., 55: 22-25; Senefeld Decl., ¶ 31 and Exhibit A. Senefeld and Gustafson would work with the farmers' crop insurance agents, and Gustafson then would analyze whether the insurance coverage was sufficient and whether a mortgage or other security was needed. Risinger Test., 55: 22-25; 56: 1-10. Senefeld remained the liaison for the farmers. Risinger Test., 58: 8-10. Haab and Risinger were not responsible for interacting with the farmers, although Risinger would sometime be on calls with the farmers and Senefeld. Haab Test., 139: 2-24; Risinger Test., 58: 11-18.

Senefeld did not have a relationship with Haab's investor-clients at Veros. Senefeld Decl., ¶ 21. Senefeld did not know the identities of the investors and did not communicate with them. Senefeld Decl., ¶ 10. He did not draft, publish or disseminate any of the offering materials or other disclosures to Haab's investors, and he did not know what disclosures Haab made to his investors. Senefeld Decl., ¶¶ 48, 49. Haab represented to Senefeld that he was aware of his fiduciary obligations to his clients and was communicating the status reports Senefeld was providing regarding the farms' operations and loan status to his investors. Senefeld Decl., ¶¶ 20, 47, Exhibit B.

### E. In 2012, Haab Offered To His Investor-Clients A Private Investment Making A Loan To Kirbach Farms.

In 2012, Haab decided to offer to his investor-clients a private investment providing an operating loan, including inputs (seeds, fertilizer, etc.) and expenses to plant the crops and harvest them, to Kirbach Farms of $1.43 million dollars Haab Test., 107: 19-25; 108: 1-16; Risinger Test., 61: 24-25; 62: 1-7; Senefeld Decl., ¶ 22

**1. Senefeld Discussed Kirbach Farms' Possible Loan With Kirbach And The Company Managing Kirbach Farms.**

Senefeld worked with the owner of Kirbach Farms, Marty Kirbach ("Kirbach") and Harold Birch ("Birch"), who owned the company, Central Management that managed Kirbach Farms, regarding a potential loan. Senefeld Decl., ¶ 23. Senefeld explained to Kirbach and Birch that if Veros funded a loan, Senefeld's company, CCG, Inc., of which Kirbach Farms was a client, would receive a loan origination fee for its work in gathering information on Kirbach Farms' operations, reviewing Kirbach Farms' crop insurance and potential collateral to secure a loan, due diligence and monitoring Kirbach Farms' operations during the crop season. Senefeld Decl., ¶ 23. Haab also testified that he disclosed that fee to his investors. Haab Test., 127: 12-25; 128: 1-3; 155: 20-25. The fee would not be due if the loan did not fund and GGC therefore would not be paid for its work. Risinger Test., 82: 14-25; Senefeld Decl., ¶ 24. Kirbach and Birch agreed to the proposed terms of the loan as set by Haab. Senefeld Decl., ¶¶ 24, 25.

**2. Haab Determined The Terms Of The Loan, Communicated To His Investor-Clients And Controlled The Accounts.**

Haab determined the terms of the loan, including the interest rate Veros would charge to Kirbach Farms and the necessary collateral, and Senefeld communicated those terms to Kirbach and Birch. Senefeld Decl., ¶ 24. Haab personally distributed it to his investor-clients. Haab Test., 80: 16-25; 82: 2-4. Senefeld did not draft, publish or disseminate the private placement memorandum to any investors. Senefeld Decl., ¶ 48. Haab controlled both the accounts to make

loan disbursements to Kirbach Farms and the investor accounts. Haab Test., 114: 1-18. Haab solely authorized the disbursements from the Kirbach loan account. Haab Test., 121: 21-25; 122: 1-22. Haab also disbursed the funds to his investors. Haab Test., 123: 1-10. Senefeld did not have access to these accounts, including even read-only access, and did not know the identities of the investors or how Haab held their funds. Senefeld Decl., ¶¶ 30, 49.

#### 3. Risinger Performed The Legal Work For The Kirbach 2012 Loan And The 2012 Offering Materials For Investors.

Risinger acted as the attorney for the 2012 investment. Risinger Test., 60: 19-21. Risinger drafted the loan agreement with Kirbach Farms, which was between Kirbach Farms and the lending entity, Veros. Risinger Test., 61: 4-5; Senefeld Decl., ¶ 25. Risinger also prepared the offering materials and wrote the private placement memorandum. Risinger Test., 60: 25; 61: 1-2; 61: 16-23.

### C. In 2012, Haab Also Offered To His Investor-Clients A Private Investment Making A Loan To Crossroads Farms.

In 2012, Haab also offered to his investor-clients a private investment making a loan to Crossroads Farms ("Crossroads") of $3,370,000.00. Risinger Test., 80: 1-7; Senefeld Decl., ¶ 22. The loan was partly an operating loan for 2012 operations and also a land loan secured by a mortgage on the farm land. Risinger Test., 85: 17-25.

#### 1. Senefeld Discussed Crossroads' 2012 Proposed Loan With Crossroads And Family Farms Group.

Crossroads was a member of Family Farms Group, which Birch co-founded and for which he currently serves as Executive Vice President responsible for finance and technology. Senefeld Decl., ¶ 26; Birch Decl., ¶¶ 2, 3, 26. Senefeld gathered information on Crossroads and provided all of the information he had gathered to Haab for Haab to perform his own due diligence. Senefeld Decl., ¶ 26. Once Haab determined the terms of the loan, Senefeld

explained those terms to the Crossroads partners and Birch, including that CCG would receive an origination fee payable only if the loan funded, for its work in gathering information on operations, crop insurance analysis, due diligence and continued monitoring if Crossroads' operations. Senefeld Decl., ¶¶ 27, 28. Haab also testified that he disclosed CCG's fee to his investors. Haab Test., 155: 14-16. The Crossroads partners and Birch agreed to the terms of the loan. Senefeld Decl., ¶ 28.

**2. Haab Set The Terms Of The Loan, Signed And Disseminated The Offering Materials To His Investors And Controlled The Accounts.**

Haab determined the terms of the loan to Crossroads. Senefeld Decl., ¶ 27. Haab personally disseminated the private placement memorandum to his investor-clients. Haab Test. 80: 16-25; 82: 2-4. Senefeld did not draft the private placement memorandum, did not distribute it to investors and did not communicate with Haab's investors. Senefeld Decl., ¶ 48. Haab controlled the accounts for the loan and the investors. Haab Test., 114: 1-18; 130: 5-8; Senefeld Decl., ¶ 30. Senefeld did not have access to these accounts, including even read-only access, and did not know the identities of the investors or how Haab held investor funds in the accounts he controlled. Senefeld Decl., ¶¶ 30, 49.

**3. Risinger Performed The Legal Work For The 2012 Crossroads Loan And The 2012 Offering Materials For Investors.**

Risinger drafted the loan agreement with Crossroads, which was between Crossroads and the lending entity, Veros. Risinger Test., 85: 2-6; Senefeld Decl., ¶ 40. Risinger also drafted the private placement memorandum for Haab to distribute to his investors. Risinger Test., 85: 7-12.

**D. In 2013, Haab Instead Offered A Pooled Investment Vehicle To His Clients Through Veros-Owned VFLH.**

In 2013, instead of offering separate investments like the 2012 investments, Haab offered a pooled investment vehicle to his investor-clients through Veros-owned VFLH. Haab Test., 133: 1-25.

**1. Haab Structured The Investment To Make Sure The Veros Name Was Attached To The Investment.**

Haab and Risinger made the decision together to pool the investor funds. Haab Test., 136: 7-14. The loan documents actually were entered into between the farmers and FarmGrowCap. Haab Test., 134: 8-11. However, Haab decided to structure the deal so that the Veros name was attached to it since he was going to offer the deal to his investor-clients at Veros. Haab Test., 136: 25; 137: 1-3. Accordingly, although FarmGrowCap entered into the loan agreements with the farmers, Haab testified that FarmGrowCap assigned 100% of its interest in the loans and the underlying security collateral to VFHL, thereby assigning all of FarmGrowCap's rights with regard to the loans to VFLH. Haab Test., 134: 15-25; 135: 1.

**2. Haab Made The Decision To Refinance Part Of Kirbach Farms' And Crossroads' 2012 Loans.**

Haab decided that part of Kirbach Farms' and Crossroads' 2012 loans should be refinanced.[4] Haab Test., 193: 5-9; 202, 16-18; Risinger Test., 88: 22-25; 89: 1-3; 93: 16-19. Haab testified that he believed the refinances were in his investors' best interest because he

[4] VFLH also funded loans to Boyer Farms, Rosentreter Farms, D&S Partnership, Williams Farms, True Blueberrry Management and Bassen Farms. Risinger Test., 107: 12-25; 108: 1. Prior to the VFLH investment, none of the loans experienced a loss. Haab Test., 157: 20-23. Rosentreter, True Blueberry Management, and D&S Farms repaid in full. Risinger Test., 108: 10-13; 110: 12-13; 119: 11-15. Williams fraudulently defaulted by selling grain subject to a crop lien to another company, and Risinger initiated litigation. Risinger Test., 112: 9-15; 115: 20-25. Bassen also fraudulently defaulted by selling grain subject to a crop lien and filing for bankruptcy. Risinger Test., 120: 22-25. Boyer had a loss. Risinger Test., 109: 2-7. Senefeld was not a party to Haab's communications with his investors and does not know what Haab disclosed to his investors. Senefeld Decl., ¶ 49. Even Risinger did not know what Haab told his investors about the Williams loss. Risinger Test., 144: 18-19.

concluded from his due diligence that there was sufficient security collateral on each loan to completely repay the 2013 loans, including refinanced amounts. Haab Test., 194: 7-10; 195: 1-7; 199: 6-13.

Risinger, on behalf of FarmGrowCap, also analyzed the refinance of Crossroads and determined it was warranted because it would be backed by a first position mortgage on Crossroads' land, valued at $3 million and had a loan-to-value ratio of around 50% earning 12% interest. Risinger Test., 88: 22-25; 89: 1-3; 93: 4-9. From 2012 to 2013, Crossroads doubled the collateral securing their loan. Risinger Test., 103: 4-18. Senefeld considered Crossroads' operations to be too expensive, and he recommended to Risinger that he foreclose on Crossroads, but Risinger overruled him and decided the loan should be refinanced. Risinger Test., 90: 15-19; 90: 23-25; 91: 1-6; Senefeld Decl., ¶ 39; Birch Decl., ¶26. Senefeld also recommended to Crossroads that it sell part of its land to be a more attractive lending client to a conventional bank with a lower interest rate, but the Crossroads partners effused. Senefeld Decl., ¶ 39.

**3. Senefeld Worked With Kirbach Farm And Crossroads, Their Managers And Banks To Refinance The Loans, And The Refinance Operated Like Any Standard Refinancing Transaction.**

Senefeld worked with Kirbach and Birch to identity additional security capital Haab and Risinger decided was needed to secure the loan. Senefeld Decl., ¶ 35. Birch and Kirbach agreed to the terms, including an origination fee to be paid to FarmGrowCap for its work in originating the loan only if the loan funded. Senefeld Decl., ¶ 35; Birch Decl., ¶¶ 19, 20. Jersey State Bank also was involved in the discussions, because Jersey State Bank was financing part of Kirbach Farms' 2013 operating expenses. Senefeld Decl., ¶ 35; Birch Decl., ¶ 18. Senefeld disclosed to all parties involved in financing Kirbach Farms' 2013 operations the sources of financing, including the refinance of some debt from the 2012 loan. Birch Decl., ¶ 18. The

refinance functioned like any other standard refinancing transaction, such as refinancing a residential mortgage, with the lending-entity of the 2012 loan repaid at the time of refinance and Kirbach assuming responsibility to repay the new loan, including any refinanced amounts. Senefeld Decl., ¶37; Birch Decl., ¶¶ 12, 20. The loan agreement was between Kirbach and FarmGrowCap. Haab Test., 139: 25; 140: 1-2.

Senefeld also worked with Crossroads and Birch on financing Crossroads' 2013 operations and the refinance of part of Crossroads' debt, including obtaining additional security for the loan through a first position mortgage on Crossroads' 432 acres of land, valued at approximately $3.3 million. Senefeld Decl., ¶39; Birch Decl., ¶ 26. The refinance was structured like any standard refinance, with the entity that had loaned Crossroads Farms' money in 2012 being repaid at the time of refinance, with Crossroads assuming responsibility to repay the new loan in its entirety, including refinanced amounts. Senefeld Decl., ¶39; Birch Decl., ¶¶ 12, 26. The loan agreement was between Kirbach and FarmGrowCap. Haab Test., 139: 25; 140: 1-2.

Senefeld did not know what Haab disclosed to his investors regarding the refinancing of debt or the terms Haab agreed to in repaying his investors. Senefeld Decl., ¶ 49.

#### 4. Risinger Drafted The Disclosures To Investors, Which Haab Disseminated To His Investor-Clients.

Risinger drafted the private placement memorandum, which Haab distributed to his investors along with other disclosures. Haab Test., 161: 1-25; 162: 1-6; 211: 20-25; 212: 1-5; Risinger Test., 95: 14-17. Haab listed himself and Veros employee Kyle Thompson as the investor contacts. Haab Test., 167: 1-7. Haab and Risinger also met twice with investors and explained to them the terms of the investment, the outlook for the industry and anticipated impact on future farm loans. Haab Test., 213: 7-18; 213: 22-25; 214: 1-6. In his capacity as a

fiduciary for his investor-clients, Haab performed due diligence to determine if it was suitable to offer to his clients. Haab Test., 140: 12-25; 141: 1-15. Haab considered the suitability of the investment for his clients, the risk versus reward and made personal recommendations for them to invest. Haab Test., 156: 1-3; 156: 6-14; 160: 16-25.

Risinger told Senefeld his prior SEC settlement needed to be disclosed in the private placement memorandum. Senefeld Decl., ¶ 45. Senefeld had given Risinger a copy of the SEC settlement when he first began hiring Risinger to perform legal work for CCG, around 2006, and Risinger performed his own online research about it.[5] Risinger Test., 32: 3-19; Senefeld Decl., ¶¶ 5, 6. Haab also was aware of the prior settlement. Haab Test., 90: 23-25; Senefeld Decl., ¶ 20. Risinger represented to Senefeld that he had drafted the disclosure about the prior settlement after consulting with an outside attorney with securities law experience. Senefeld Decl., ¶ 45. Senefeld did not direct Risinger as to how to draft the disclosure, and he did not question the accuracy of the disclosure drafted by Risinger. *Id*. Risinger has maintained that the disclosure he drafted was accurate. Risinger Answer to Amended Complaint ¶ 53, Doc. 64. Haab has denied that he mislead investors by providing them with the disclosure. Haab's Answer to SEC's Interrogatory No. 10, designated as Exhibit 5 hereto. Senefeld did not draft the disclosure and he did not disseminate it to investors, and Senefeld did not know what disclosures Haab made or communications Haab had with investors regarding Senefeld. Senefeld Decl., ¶¶ 45, 48.

**5. Haab Controlled All Accounts And Distributions From The Accounts.**

Haab, through Veros, controlled the accounts, the release of loan proceeds to the farms, money collection from his investors and distributions to his investors. Haab Test., 176: 13-25; 177: 1-5. Haab and Decker were the only authorized signatories on the accounts, and Senefeld

[5] The 1999 settlement in its entirety can be found at https://www.sec.gov/litigation/admin/34-41579.htm.

was not a signatory on the accounts. Haab Test., 180: 6-20; 180: 25; 181: 1-2. The SEC alleged in its Amended Complaint, ¶ 42, Doc. 57 that Senefeld was "involved" in repaying investors from VHLF accounts because Senefeld asked Gustafson for wire instructions to get loan funds to farmers Kirbach and Rosentreter. Exhibit 49 to SEC Testimony of Tobin J. Senefeld, designated as Exhibit 6 hereto. Senefeld did not draft the wire instructions. Haab Test., 188: 14-25. Senefeld was not a signatory to the VFLH account and did not have access or authority to make distributions from the accounts, including to his clients, the farmers. Haab Test., 180: 6-14; 180: 25; 181: 1-2; Senefeld Decl., ¶ 30. Haab, through Veros, was responsible for disbursements to investors from the VFLH accounts. Haab Test., 177: 1-5; 180: 1-20; 180: 25; 181: 1-2; 190: 7-20.

**6. Senefeld Kept Haab, Risinger And Gustafson Informed Regarding Farm Operations And Loan Repayments.**

Senefeld monitored the operations of the farms, including requiring them to submit monthly status reports. Senefeld Decl., ¶ 46. Haab represented to Senefeld that he was keeping his investors informed of the farms' operations and repayment of the loans. *Id*. Haab requested updates from Senefeld, which he represented he would communicate to his investor group. *Id*. and Exhibit B. Senefeld understood from Haab's representations that Haab was accurately communicating to his clients the information Senefeld was communicating to him. *Id*. Risinger let Haab handle the disclosures he was making to his investors about repayment and did not know what he told them about the refinances. Risinger Test., 129: 13-17; 167: 5-8.

**7. Senefeld Provided Consulting Services, And Was Compensated By Haab In Amounts Controlled By Haab.**

Senefeld provided consulting services and was not compensated when origination fees were funded but rather was paid monthly consulting fees by Haab through PinCap in amounts set

and controlled by Haab. Risinger Test., 43: 18-23; 48: 16-21; Senefeld Decl., ¶ 34. Haab set the amounts of the draws payable to Senefeld because he wanted complete control over what Senefeld could make, and that was a requirement of Haab's. Risinger Test., 48: 16-21. Risinger disclosed in the private placement memorandum disseminated by Haab that Risinger and Senefeld would receive economic benefit in amounts to be determined and allowed by Haab through Veros. Risinger Test., 97: 4-8; 97: 21-25; 98: 7-10. Senefeld also had business expenses, primarily travel from visiting the farms, reimbursed. Senefeld Decl., ¶ 34. Haab had final approval over reimbursement of Senefeld's expenses. Risinger Test., 48: 16-21; Senefeld Decl., ¶ 34. Senefeld could not pay himself, and only Haab authorized distributions from the PinCap account. Risinger Test., 51: 23-24; Senefeld Decl., ¶ 34.

### F. In 2014, FarmGrowCap, Controlled By Risinger, Agreed To Refinance Some Debt From 2013.

In 2014, FarmGrowCap, then controlled 100% by Risinger, entered into the loan agreements with the farmers. Risinger Test., 22: 4-13; 59: 25; 60-: 2-3. Risinger had final decision making authority for FarmGrowCap, and he decided on behalf of FarmGrowCap to refinance portions of Kirbach's, Crossroads' and Boyer's 2013 loans. Risinger Test., 22: 14-22; 134: 5-8. It was Risinger's, not Senefeld's, idea and decision to refinance 2013 loans. Risinger Test., 147: 12-16. Haab agreed to the refinance of the 2013 loans on behalf of VFLH. Risinger Test., 147: 12-16.

#### 1. Senefeld Worked With The Farms, Their Managers And Bankers To Refinance And Secure Operating Capital For 2014.

Senefeld worked with Kirbach and Birch on a refinance of part of Kirbach Farms' 2013 debt. Birch Decl., ¶ 21. Central Management also agreed to provide operating capital to Kirbach Farms for its 2014 operations. *Id.* Birch agreed to personally guarantee Kirbach Farms' 2014

loan from FarmGrowCap, a requirement presented to him by Senefeld as part of the terms FarmGrowCap required to make a 2014 loan to Kirbach. Birch Decl., ¶ 23. Birch understood that he would be personally liable to repay the loan to FarmGrowCap, including all refinanced amounts. *Id.* Birch understood and agreed that FarmGrowCap would receive an origination fee when the loan funded for its additional work in looking at new sources of collateral and analyzing Kirbach Farms' operations. Birch Decl., ¶ 22. Birch agreed to the terms of the loan on behalf of Central Management, including the refinance, which functioned like a traditional refinance with the 2013 lending entity repaid at the time of refinance and the refinanced amounts assumed as part of the new loan obligation. Birch Decl., ¶ 24. The refinanced loan was between Kirbach Farms and FarmGrowCap. Risinger Test., 59: 25; 60: 2-3.

Senefeld represented to Birch that FarmGrowCap no longer wanted to provide operating capital to Crossroads Farms. Senefeld Decl., ¶ 42; Birch Decl., ¶ 27. Senefeld attempted to source conventional financing from banks for Crossroads Farms, but had no success until Mid-State Bank agreed to refinance Crossroads debt and fund operating expenses on the condition that Central Management would provide management services and another member of Family Farms would partner with Crossroads Farms on operations. Senefeld Decl., ¶ 42; Birch Decl., ¶ 27. The refinance operated like any other refinance, with the lender of the funds in 2013 repaid at the time of refinance. Senefeld Decl., ¶ 42.

All of the refinancing transactions functioned like standard refinance terms, with the lender being repaid at the time of refinance, similar to the terms of refinance of any debt. Senefeld Decl., ¶ 44; Birch Decl., ¶ 12. When Senefeld arranged for refinancing of Kirbach's debt to FarmGrowCap with Mid-States Bank in 2015, the refinance operated the same as all prior transactions, with FarmGrowCap repaid when the new loan with Mid-States Bank closed. Birch

Decl., ¶ 25. Senefeld was not privy to Haab's communications with his investors and did not know what Haab disclosed regarding refinancing of debt or the terms of payments to investors. Senefeld Decl., ¶ 49.

**2. Haab Continued To Be Responsible For Investor Communications And Authorized All Payments To Investors.**

Haab reviewed the private placement memorandum, which Risinger drafted, and Haab sent it to his investor-clients. Haab Test., 309: 12-10. Senefeld did not communicate with any investors. Senefeld Decl., ¶ 48. Haab authorized all payments to 2013 investors from the FarmGrowCap account. Haab Test., 273: 18-20; 275: 14-17. Haab authorized the disbursement of all funds for the 2014 investment. Haab Test., 301: 19-24. Senefeld did not authorize the release of any funds. Haab Test., 301: 25; 302: 1-2; Senefeld Decl., ¶ 30. Senefeld did not know the identities of any of the investors in the various funds or what Haab had communicated to them about repayment. Senefeld Decl., ¶ 49.

**3. Haab Also Authorized a 2014 Bridge Loan And Controlled The Distributions.**

Veros also offered a bridge loan offering in 2014. Haab Test., 299: 8-10. Haab authorized the transfer of funds from the 2014 fund's accounts to a PinCap bridge loan account. Haab Test., 312: 5-12. Haab also authorized distributions of funds to investors in the 2014 bridge loan. Haab Test., 304: 21-22. Senefeld did not authorize the release of any funds. Haab Test., 304: 21-22. Senefeld did not know the identities of the investors in the bridge loan or what Haab had communicated to them about repayment. Senefeld Decl., ¶ 49.

## II. LEGAL ARGUMENT

### A. Senefeld Meets The Standard For Summary Judgment In His Favor.

Pursuant to Rule 56(E) of the Federal Rules of Civil Procedure, the court "*shall* grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (emphasis added). *See also Celotex v. Cartrett*, 477 U.S. 317, 322 (1986) (mandating summary judgment when this standard is met). To avoid summary judgment, the SEC must come forward with "*specific* facts creating a genuine issue for trial and may not rely on vague, conclusory allegations." *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 822 (7th Cir. 2003) (court's emphasis). *See also Morfin v. City of E. Chicago*, 349 F.3d 989, 1002 (7th Cir. 2003). The SEC must present more than conclusory allegations to defeat a motion for summary judgment. *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137, 1140 (7th Cir. 1998). Indeed, "[n]either the mere existence of some alleged factual dispute between the parties, nor the demonstration of some metaphysical doubt as to the material facts, will sufficient demonstrate a genuine issue of material fact." *Richter v. Revco D.S.*, 959 F. Supp. 999, 1005 (S.D. Ind. 1997) (Barker, J.), *aff'd*, 142 F.3d 1024 (7th Cir. 1998) (internal quotations omitted).

Here, the undisputed facts establish as a matter of law that Senefeld cannot be liable for primary violations of the securities laws as alleged by the SEC. Accordingly, summary judgment should be granted in his favor.

### B. The Undisputed Facts Establish That Senefeld Is Not Liable For Primary Violations Of Section 10(b) As A Matter Of Law.

To establish primary liability under § 10(b), as implemented by Rule 10b-5(b), for alleged misstatements or omissions, the SEC must prove that Senefeld (1) made a materially[6]

[6] "'To fulfill the materiality requirement, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Flannery v. SEC*, 810 F.3d 1, 9 (1st Cir. 2015) (quoting *Basic, Inc. v. Levinson*, 485 U.S. 244, 231-32 (1988)).

false statement or omitted a material fact about which he had a duty to speak, (2) with scienter, (3) in connection with the purchase or sale of a security. *SEC v. Lucent Technologies*, 610 F. Supp. 2d 342, 350 (D.N.J. 2009). To establish primary liability under § 10(b) as implemented by Rule 10b-5(a) or (c), the SEC must prove that Senefeld (1) committed a deceptive or manipulative act, (2) in furtherance of an alleged scheme to defraud, (3) with scienter. *Id*. at 361. "All of the requirements for primary liability under Rule 10b-5 [must be] met." *Central Bank of Denver, N.A. v. First Int'l Bank of Denver*, 511 U.S. 164, 177 (1994). Because the undisputed material facts establish as a matter of law that the SEC cannot prove these required elements, summary judgment should be granted for Senefeld on the SEC's claims under § 10(b).

**1. Senefeld Is Not Liable Under § 10(b)For Alleged Misstatements Or Omissions.**

**a. Senefeld Was Not The "Maker" Of Any Disclosures To Investors.**

As the United States Supreme Court held in *Janus Capital Gp. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011), "[f]or purposes of Rule 10b-5, the maker of the statement is the person or entity with the ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." The undisputed facts establish that at all times Haab retained ultimate control over the content of the disclosures he provided to his investor-clients, when to disseminate the disclosures and to which of his clients to distribute the disclosures. Senefeld did not have authority over any of the communications with investors and did not communicate with them. Senefeld cannot be the "maker" of disclosures simply because he was copied on drafts of them or provided information to include at Risinger's or Haab's request. "[A]ssistance, subject to the ultimate control of [Haab or Risinger], does not mean that [Senefeld] 'made' any statements in the [disclosures] . . . [Senefeld himself] did not 'make' those

statements for the purposes of Rule 10b-5." *Id*. *See also Glickenhaus & Co. v. Household Int'l, Inc*., 787 F.3d 408, 427 (7th Cir. 2014) (who has "'ultimate authority' over [a disclosure's] content and whether and how to communicate it, [is] the touchstone of *Janus*.")

That one of Haab's disclosures involved a prior SEC settlement Senefeld entered into does not change the result under *Janus* or make Senefeld responsible for a primary violation of § 10(b) for disclosures over which Haab retained ultimate authority. Indeed, Senefeld did not draft the disclosure or act "like a speechwriter," which the *Janus* court determined was not even sufficient for liability where another person or entity, like Haab, retained ultimate authority over the disclosures, their content and their dissemination. *Janus*, 131 S.Ct. at 2305.[7]

**b. The SEC Has Conceded That *Janus* Applies To its Civil Enforcement Actions.**

The SEC has conceded in civil enforcement actions across the country (including in district courts in this Circuit) that *Janus* forecloses a misstatements claim under § 10(b) where, as here, the defendant was not the "maker" of the statements. The same result should apply here. *See, e.g*., *SEC v. Bender*, 931 F. Supp. 2d 908, 912 (N.D. Ill. 2013) (SEC took the position at oral argument that it did not dispute that *Janus* applies to the SEC); *SEC v. Sentinel Mgmt. Gp*., 2012 U.S. Dist. LEXIS 57579, at * 15 (N.D. Ill. Mar. 20, 2012) ("In light of the [*Janus*] decision the SEC does not dispute that Bloom was not the maker of the statements . . ."); *SEC v. Geswein*, 2011 U.S. Dist. LEXIS 111898, at * 6 (N.D. Ohio Sept. 29, 2011). ("Further, as conceded by the

[7] The "misleading" disclosure the SEC alleges, that the disclosure did not completely describe the 1999 settlement also would not meet the "materiality" standard as it could not alter the "total mix of information" available to Veros' accredited investor-clients. *Flannery*, 810 F.3d at 9. The entire 1999 settlement was publicly available online, and was part of the "total mix" of information available. *See also SEC v. Rose*. 2006 U.S. Dist. LEXIS 98574, at * 8-9 (S.D. Tex. Jan. 17, 2006) (failure to disclose *identity* of 10% owner of stock may be material because "a reasonable investor [then] might have investigated [his] public record" which could alter the "total mix" of information.)

SEC, any conduct alleged against Miller pursuant to Section 10(b) and Rule 10b-5 are dismissed . . . ."); *SEC v. Kelly*, 817 F. Supp. 2d 340, 342 (S.D.N.Y. 2011) ("In its opposition brief to the defendants' motion, the SEC concedes that *Janus* forecloses a misstatement claim against Rinder and Wovsaniler under subsection (b) of Rule 10b-5 . . . ."); *SEC v. Daifotis*, 2011 U.S. Dist. LEXIS 83872, at * 6 ("Both sides agree that this order must reconsider the order granting in part and denying in part defendants' motion to dismiss and strike . . . pursuant to these new principles [in *Janus*]).

**c. Even Before *Janus*, However, Senefeld Did Not "Cause" Any Misstatements To Be Made.**

Even prior to *Janus*, indeed, the law establishes that Senefeld could not be liable for primary violations under § 10(b) for the statements he did not actually make. "[A] defendant must *actually make* a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger [primary] liability under Section 10(b)." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998). Senefeld cannot be liable for "statements he [did not] personally draft[] or communicate[] to others." *SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 367 (S.D.N.Y. 2004). In determining liability for misstatements even before *Janus*, the focus must be on the party's "actual role . . . in creating, composing or causing the existence of an untrue statement of material fact." *SEC v. Tambone*, 597 F.3d 436, 446 (1st Cir. 2010) (en banc). It is undisputed that Senefeld did not create, compose or cause the existence of an untrue statement of any material fact. The SEC's allegations regarding Risinger's draft disclosing Senefeld's prior settlement are unavailing – it is undisputed that Senefeld provided Risinger with a copy of the settlement from which Risinger could draft the

disclosure. Senefeld did not direct Risinger as to how or what to include in the disclosure and did not "cause" Risinger to make misstatements (if any).

**d. Senefeld Did Not Have A Fiduciary Duty To The Investors And Accordingly Is Not Liable For Any Alleged Omissions.**

The undisputed material facts establish that the investors were Haab's clients, not Senefeld's. Senefeld did not know the investors, never communicated with them, was not privy to Haab's communications with them and did not have any relationship to the investors. Accordingly, he had no duty to disclose information to the investors. A party's nondisclosure of information is only actionable under § 10b and Rule 10b-5 where there is an independent duty to disclose arising from a "*fiduciary* or other relation of trust and confidence" between the party and investors. *Chiarella v. United States*, 445 U.S. 222, 228 (1980). *See also Tambone*, 597 F.23d at 448 ("'the duty to disclose material facts arises only when there is some basis outside the securities laws, such as state law, for finding a fiduciary or other confidential relationship.'") (quoting *Fortson v. Winstead, McGyurem, Sechrest & Minick.*, 961 F.2d 469, 472 (4th Cir. 1992). "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella*, 445 U.S. at 234-35.

Here, far from a fiduciary or confidential relationship of trust between Senefeld and the investors, there was *no* relationship between them. Senefeld accordingly cannot be liable for a primary violation of § 10(b) and Rule 10b-5 for alleged omissions "without the required showing of a fiduciary relationship." *Tambone*, 597 F.3d at 448.

**2. As A Matter Of Law, Senefeld Did Not Engage In Manipulative Or Deceptive Acts.**

**a. The SEC's Allegations Of A "Scheme" Allege Nothing More Than Misstatements And Omissions.**

The SEC's allegations merely allege misrepresentations and omissions by Haab to his investor-clients about the terms of the loans and the refinance of loans repaying investor-lenders upon refinance. The SEC has not identified any "scheme" beyond those misstatements and omissions. "[A] defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rule 10b-5(a) or (c) when the scheme also encompassed conduct beyond those misrepresentations or omissions." *Benger*, 931 F. Supp. 2d at 913. Failing to disclose the "real terms of the deal" – that loans would be refinanced by subsequent investors in exchange for additional collateral securing the refinances loan – is insufficient to find a fraudulent "scheme." *Lucent*, 610 F. Supp. 2d 342, 361 (D.N.J. 2009) ("The alleged 'deception' in this case arose from the failure to disclose the 'real terms' of the deal, which is nothing more than a reiteration of the misrepresentations and omissions that underlie plaintiff's disclosure claim" and according the SEC "cannot breathe new life into the defunct primary liability claims) (internal quotation omitted). *See also Benger*, 931 F. Supp. 2d at 913 ("The holding of *Janus* cannot be skirted by . . . rechristening a 10b-5 claim as a claim under Rule 10b-5(a) and (c)."

Compare the cases finding a fraudulent scheme with the "comparatively simpl[e]," *id*., at 914, claim that Haab wired investor funds to repay prior investor without disclosing that loans were being refinanced by subsequent investors. The types of "labyrinthine and multi-layered" conduct, *id*., courts have found to be a "scheme" beyond misstatements and omissions include a corporate hijacking scheme where defendants also made a market for securities, *SEC v. Boock*, 2011 U.S. Dist. LEXIS 95363 (S.D.N.Y. Aug. 25, 2011); a "complicated and controversial" scheme of late trading and market timing, *SEC v. Pentagon Capital Mgmt PLC*, 844 F. Supp. 2d 377, 382 (S.D.N.Y 2012); and a scheme with a "web of interrelated transactions" that "had no

economic substance" involving fraudulent accounting and sham swap transactions creating phantom revenue, *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004).

In contrast, here the SEC's claims are essentially for misstatements and omissions regarding the terms of the investments Haab offered his clients. "The SEC's case here is clearly a 10b-5(b) case and . . . not . . . comparable to the conduct in *Boock, Pentagon Capital* and *Global Crossing*." *Benger*, 931 F. Supp. 2d at 915.

**b. In Any Event, Senefeld Did Not Engage In "Manipulative" Or "Deceptive" Acts.**

In any event, the undisputed facts establish that Senefeld himself did not commit any "manipulative" or "deceptive" acts and accordingly he cannot be liable for primary violations of § 10(b). Section 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act." *Central Bank*, 511 U.S. at 177. There is no "liability for acts that are not themselves manipulative or deceptive within the meaning of the statute." *Id*. at 177-78.

The SEC does not allege, and the undisputed facts do not establish, that Senefeld engaged in any "manipulative" acts. "Manipulation" is virtually a term of art when used in connection with securities markets . . . [and] refers generally to practices such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Sec. Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977). Senefeld accordingly did not commit any "manipulative: acts.

Nor did Senefeld commit any "deceptive" acts. "For conduct to be a manipulative or deceptive act, it must be inherently deceptive when performed." SEC v. Sullivan, 68 F. Supp. 3d 1367, 1377 (D. Co. 2014) (internal quotation omitted). "In other words, [Senefeld] must have participated in an illegitimate, sham, or inherently deceptive transaction where *his* conduct or

role has the purpose and effect of creating a false appearance.' *Id*. (emphasis added). "It is not enough that a transaction in which a defendant was involved had a deceptive purpose and effect; the defendant's *own conduct* contributing to the transaction or overall scheme must have had a deceptive purpose and effect." *Simpson v. AOL Time Warner Inc*., 452 F.3d 1040, 1048 (9th Cir. 2006).

The undisputed facts establish that Senefeld's conduct was not inherently deceptive. Senefeld assisted farms in obtaining financing for the farm operations, both through investments Haab would decide to offer to his investor-clients, and to through other entities, including banks, private equity funds and other farming operations. There is nothing "inherently deceptive" about assisting farms in locating financing, nor assisting the farmers in refinancing debt, which is common in the farming community and was structured similar to a refinance of a residential mortgage. The SEC does not allege, the facts do not establish, that the loans themselves were not provided as agreed to by the farmers and the lender, were forged or any other conduct by Senefeld that could be considered deceptive. Indeed, there is no dispute that the loans were made pursuant to their terms, and "[l]egitimate business transactions that do not have a deceptive purpose or effect cannot form the basis of scheme liability." *SEC v. Quan*, 2013 U.S. Dist. LEXIS 145146, at * 44 (D. Minn. Oct. 8, 2013). *See also Lucent*, 610 F. Supp. 2d at 360 (scheme liability is limited to "sham" or "inherently deceptive transactions").

Nor did any action Senefeld took "cause" Haab or Risinger to mislead investors. The undisputed facts establish that Senefeld kept Haab and Risinger fully informed as to the status of the loans and the farming operations. Indeed, Haab requested updates from Senefeld, representing that he was communicating those updates to his investors. Accordingly "nothing [Senefeld] did made it necessary or inevitable for [Haab or Risinger] to [make the disclosures] as

[they] did." *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.*, 552 U.S. 148, 161 (2008).

The SEC's allegations that Senefeld "directed" repayment of 2012 investors is unsupported by the record and does not change the result. The undisputed facts establish that Senefeld did not draft the wire instructions and did not control the accounts from which the wires were sent or received and did not know who were the beneficiaries of those accounts. Haab acknowledged that he – not Senefeld – authorized those payments. Even if asking Gustafson to send Haab wire instructions could conceivably be characterized as any level of "participation" – which is wholly unsupported by the record – "a claim based on mere 'participation' is legally insufficient." *SEC v. Collins & Aikman Corp.*, 524 F. Supp. 2d 477, 486 (S.D.N.Y. 2007).

**c. Senefeld Did Not Act With "Scienter."**

Although the SEC's claims fail as a matter of law without reaching the element of scienter, which the SEC also must prove, the undisputed facts negate any finding that Senefeld acted with scienter. Scienter can be established through intentional or reckless conduct. In the Seventh Circuit, however, recklessness is "the functional equivalent of intent[.]" *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977). Here, however, the record establishes that Senefeld relied on the professional competence of Haab and Risinger to fulfill their responsibilities, and Risinger's assurance that he also was consulting outside counsel. "[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter." *Howard v. SEC*, 476 F.3d 1136, 1147 (D.C. Cir. 2004) (citation omitted). "An essential means by which securities professionals comply with the law is through the guidance of counsel." *Id.* at 1148, n. 20. "Depending on others to ensure the accuracy of disclosures to purchasers and sellers of securities

. . . is not severely reckless conduct that is the functional equivalent of an intentional securities fraud." *SEC v. Shanahan*, 646 F.3d 536, 544 (8th Cir. 2011). Moreover, Senefeld's conduct was completely transparent to all entities and individuals with whom he interacted. "This transparency is not the behavior one would expect from an intentional or severely reckless violator of the securities laws." *Id*. at 545.

Accordingly, the SEC's claims under § 10(b) as implemented by Rule 10b-5 fail as a matter of law, and Senefeld should be granted summary judgment in his favor.

### C. The Undisputed Facts Establish That Senefeld Is Not Liable For Primary Violations Of Section 17(a) As A Matter Of Law.

Proof of a violation of § 17(a) through (c) requires essentially the same elements as under § 10(b), with the exception that the SEC's burden of proof is negligence on an injunction claim under § 17(a)(2) and (3). *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Senefeld cannot be found primarily liable for violation of any of these section, however, because a primary violation "'turns on the nature of [one's] acts[.]'" *SEC v. U.S. Env'tl, Inc*., 155 F.3d 107, 113 (2d Cir. 1998).

"The purpose of both [§ 10(b) and § 17(a)] is protection of investors from fraudulent practices." *SEC v. Int'l Chem. Dev. Corp*., 469 F.2d 20, 26 (10th Cir. 1972). To establish liability under § 17(a)(1), the SEC must establish that Senefeld, "in the sale or offer of a security," employed a device, scheme or artifice to defraud, with scienter. 15 U.S.C. §77q(a). Section 17(a)(1) also requires a showing of materiality. *Flannery*, 810 F.3d 9. To establish liability under § 17(a)(2), the SEC must establish that Senefeld, "in the sale or offer of a security," made a material representation or omission. *Id*. To establish liability under § 17(a)(3), the SEC must establish that Senefeld, "in the sale of a security," engaged in in a transaction,

practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser of the security. *Id.*

In its brief in support of its Motion for Temporary Restraining Order, the SEC urged this Court to apply its Administrative ruling in *In re Flannery and Hopkins*, No. 3-14081, Dec. 15, 2014, 2014 SEC LEXIS 4981. That decision was reversed by the First Circuit Court of Appeals, 810 F.3d 1 (1st Cir. 2015), and the SEC's expansive reading of its enforcement capabilities is not law.[8] In any event, even in that expansive decision that would purport to greatly expand liability under § 17(a), the Commission acknowledged that, liability "can be established only through a showing of particular instances of misconduct by the defendant." *Id*. at * 103, n. 142. Senefeld can only be liable if he, *himself*, made "an actual misrepresentation or [employed] a fraudulent device." *Collins & Aikman*, 524 F. Supp. 2d at 487.

As an initial matter, the SEC cannot establish that § 17(a) applies to Senefeld because he was not the "seller" or "offeror" of securities. In its overruled *Flannery* opinion, the SEC cited approvingly as precedent for interpretation of § 17(a) *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008) ("*Tambone I*"), which since was vacated on other grounds. The *Tambone I* court, however, made clear that "section 17(a) applies only to brokers and dealers selling or offering to sell securities." *Id*. at 121. Here, while Senefeld was associated with Pin Financial, Pin Financial did not issue or offer the securities at issue. Accordingly, 17(a) does not apply to Senefeld as he did not engage "in the sale or offer of a security." *See also*

In any event, for purposes of liability under § 17(a)(1), the SEC cannot establish that Senefeld himself "employed" any "device, scheme or artifice to defraud," much less with

[8] Senefeld references *In re Flannery* only to illustrate that even under the SEC's most expansive and overruled view of Section 17(a), it could not have established liability against Senefeld. That the SEC's ruling was overruled is of course further reason why Senefeld is entitled to summary judgment in his favor.

scienter. Senefeld's conduct was not deceptive, and he did not conceal facts from Haab or otherwise engage in a scheme to defraud. *SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1237 (D. N.M. 2013) (SEC could not maintain primary liability claims under either § 10(b) or § 17(a) where "none of the conduct the SEC references in furtherance of the scheme is inherently deceptive."). Senefeld did not employ a fraudulent device; he participated in legitimate business transactions that were not fraudulent, and nothing in his actions caused Haab to misrepresent the refinancing or otherwise deceive his investors. Senefeld cannot be vicariously liable for Haab's actions, nor can Senefeld intend Haab's actions in order to act with scienter. Accordingly, the SEC's claims under § 17(a)(1) fail as a matter of law.

The SEC's claims under § 17(a)(2) also fail as a matter of law. The SEC, in its overruled *Flannery* opinion, urged adherence to the holding of *Tambone I*, which held that a defendant could be liable for using his own misstatement or a misstatement of another that he did not make. Again, the SEC's claims fail because Senefeld did not "sell" or "offer" the securities at issue, and the *Tambone I* court expressly relied on that narrow application in determining § 17(a)(2) could reach conduct broader than that prohibited under Rule 10b-5(b). *Id*. at 127 (10b-5 could apply more broadly than to sellers, but defendants could only be liable for "making" a material misrepresentation). In any event, the undisputed facts establish that Senefeld did not "use" a misstatement – made by himself or any other individual. He did not communicate with investors and did not "use" any misstatements. *See also Filler v. Lernour (in re Leanour & Haupsie Sec. Litig*., 230 F. Supp. 2d 152, 171 (D. Mass. 2002) (no primary liability where the defendant "did not prepare, draft, edit or provide numbers for the audit. Its role was more akin to the 'review and approval' allegations which no court has found sufficient to trigger [primary] liability after *Central Bank*.").  Nor can the SEC establish that Senefeld "obtained" money or property by the

"use" of a misstatement. As the SEC acknowledged in its overruled *Flannery* administrative ruling, "Section 17(a)(2) require[s] more than a mere temporal connection between a misrepresentation and the acquisition of money or property." *Flannery*, 2014 SEC LEXIS 4981, at * 127. Rather, the Commission must show a "*causal* link between a misrepresentation and the acquisition of money or property." *Id*. at * 127. The SEC cannot establish that Senefeld "used" any misrepresentations, material or otherwise, to "obtain money or property," much less a "causal link" and not a "mere temporal connection." *Id*. Further, even in its overruled *Flannery* opinion the Commission rejected an argument that "receipt of a salary and/or bonus payment" suffices, noting that the SEC still must prove "how, if at all, [the employer's] receipt of money or property was tied to, or dependent upon, *Flannery's* alleged misconduct." *Id*. n. 162 (emphasis added).

Finally, the SEC's claims under § 17(a)(3) fail as a matter of law. In its overruled *Flannery* administrative opinion, the SEC urged a reading of the statute to not require "manipulative or deceptive" conduct. *Id*. at * 55. Again, that standard is not the law. *See, e.g.*, Patel, 2009 U.S. Dist. LEXIS 90558, at * 146 (17(a)(3) claim fails for not identifying a manipulative or deceptive scheme); *SEC v. McGinn, Smith* & Co., 2015 U.S. Distr. LEXIS 18499, at * 26 (N.D.N.Y. Sept. 30, 2009) (Section 17(a) prohibits "the exact same conduct" as 10(b) In any event, even the SEC recognized in *Flannery* that a defendant's *own conduct* must have caused a fraud. As the Commission illustrated in *Flannery*, "Section 17(a)(3)'s prohibition could apply . . . where, as a result of a *defendant's negligent conduct*, investors receive misleading information about the nature of an investment or an issuer's financial condition. It also might apply where, as a result of a *defendant's negligence*, prospective investors ae prevented from learning material information about a securities offering." *Id*. at * 64 (emphasis

added). The SEC can establish no conduct – let alone a course of conduct – by Senefeld that caused investors to receive deceptive information in the sale of offer of the securities. Senefeld did not engage in any acts that caused Haab to misrepresent the terms of the investments to his investor-clients and Senefeld did not "sell" or "offer" the securities.

In any event, the record does not establish that Senefeld owed Haab's investor-clients investors (as opposed to Senefeld's clients, the farmers) a duty or that he discharged his duties negligently. *SEC v. True North Finance Corp*., 909 F. Supp. 2d 1073, 1117-18 (D. Minn. 2012) (to establish negligence, the SEC must prove the breach of a duty of reasonable care); *See also Shanahan*, 646 F.3d 546 (upholding judgment as a matter of law for defendant on SEC's negligence claim and noting district court found there was no evidence "as to whether a duty existed" on the part of the defendant). Nothing in the record suggests Senefeld did not discharge the duties that were part of his responsibility with reasonable care – informing all parties with whom he dealt of the true nature of the transaction into which they were entering and keeping Haab and Risinger informed as to the loan status and operations of the farms. *See SEC v. Ginder*, 752 F.3d 569, 576 (2d Cir. 2014) (no liability under § 17(a)(3) where there is no evidence that defendant "negligently performed an intentional act that is otherwise legal.").

Accordingly, because the undisputed facts establish as a matter of law that Senefeld is not liable for primary violations of Section 17(a), summary judgment should be granted in his favor.

## III. CONCLUSION

For the foregoing reasons, Senefeld should be granted summary judgment on the SEC's claims.

Respectfully submitted,

*/s/ Jeanine Kerridge*
Jeanine Kerridge
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, IN 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433
jkerridge@btlaw.com

*Attorney for Defendant Tobin J. Senefeld*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 28th day of March, 2016, a copy of the foregoing was filed electronically using the CM/ECF system and is available to all counsel of record using same.

*/s/ Jeanine Kerridge*

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