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 |

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

Plaintiff, the United States Security and Exchange Commission ("SEC"), has failed to identify any factual or legal basis to defeat Tobin J. Senefeld's ("Senefeld") Motion for Summary Judgment, and Senefeld is entitled to judgment as a matter of law on the SEC's claims.

## I. The SEC's Inadmissible Evidence Should Be Disregarded.

As an initial matter, the Court should determine evidence offered by the SEC is inadmissible and should be disregarded in ruling on summary judgment.

### A. The Unauthenticated Emails Offered By The SEC Are Inadmissible.

The unauthenticated emails offered as Exhibits 6 through 33 to the SEC's Response in Opposition to Senefeld's Motion for Summary Judgment ("SEC's Response") are inadmissible

and cannot be relied upon in ruling on summary judgment. As this Court recognizes, evidence presented at summary judgment "must be *admissible* evidence." *Ragan v. Jeffboat, LLC*, 149 F. Supp.2d 1053, 1062 (S.D. Ind. 2001) (Barker, J.) (Court's emphasis). "One condition precedent of admissibility is authentication." *Id*. (citing Fed. R. Evid. 901(a) and *Otto v. Variable Annuity Life Ins. Co*., 134 F.3d 841, 852-53 (7th Cir. 1998)). The SEC has recognized in the context of its own motions for summary judgment that unauthenticated emails submitted in opposition to summary judgment are inadmissible. *SEC v. U.S. Sustainable Energy Corp*., 2011 U.S. Dist. LEXIS 79909, at * 35 (S.D. Miss. July 21, 2011) ("various unauthenticated email strings" were inadmissible and did not create disputes of material fact.). *See also, e.g*., *Carroll v. Tavern Corp*., 2011 U.S. Dist. LEXIS 30126, at * 39 (N.D. Ga. 2011) (striking unauthenticated emails); *Henderson v. Southwestern Bell Comms, Inc*., 2006 U.S. Dist. LEXIS 49477, at * 16 (W.D. Tex. July 13, 2006) ("unauthenticated email" was not "competent summary judgment evidence"). These were not produced by or to Senefeld. *Cf. United States v. Lawrence*, 934 F.2d 868, 871 (7th Cir. 1991) (Defendant could not object to authentication of records it had produced).

Troublingly, although the SEC took Senefeld's testimony twice, in the investigative stage and in a deposition in this lawsuit, these emails were not offered to Senefeld at either, denying him any opportunity to authenticate these emails (including establishing whether he ever read the ones on which he appears to be copied) and testify about their context or content or even whether they relate at all to the SEC's claims in this lawsuit. "Summary judgment practice by ambush is no more to be favored than is trial by ambush." *Zagklara v. Sprague Energy Corp*., 2012 U.S. Dist. LEXIS 120274, at *4 (D. Me. July 2, 2012). *See also Fieldturf USA, Inc. v. Tencate Thiolon Middle East, LLC*, 945 F. Supp. 2d 1379, 1390 (D. Ga. 2013) (disregarding email offered to defeat summary judgment where "[t]here is no testimony from [subject] himself

concerning the statement" referenced therein). Indeed, most of these proffered emails only appear to copy Senefeld and do not contain any statements that appear to be by or about him. Exhibit 33 appears to be an email between Matt Haab ("Haab") and Shawn Gustafson ("Gustafson") that does not even show Senefeld's name on the from, to or cc lines. There is no foundation to admit emails that appear only to copy Senefeld (or do not include him at all) without establishing, at a minimum, that he received and read them. *See, e.g., Oracle America, Inc. v. Google, Inc*., 2011 U.S. Dist. LEXIS 121446, at * 18 (N.D. Ill. Oct. 20, 2011) (inadequate foundation when witness did not state that he read the email); *SEC v. True North Finance Corp*., 2013 U.S. Dist. LEXIS 132666, at * 3 (D. Minn. Sept. 6, 2013) ("proper foundation" requires establishing whether "a particular witness has read any document in question . . .").

These unauthenticated emails also constitute inadmissible hearsay. *Cortezano v. Salin Bank & Trust Co*., 680 F.3d 936, 942 (7th Cir. 2012) (email offered to prove defendant made statements contain therein are inadmissible hearsay that the "district court properly disregarded . . . on summary judgment."). Indeed, the SEC acknowledges it purports to offer the emails for the truth of the content contained therein, stating that "[t]he content of the emails are [sic] evidence . . . ." SEC's Response, p. 23. *See also White v. Brown*, 408 Fed. Appx. 595, 599 (3d Cir. 2010) ("email . . . is inadmissible hearsay that cannot be used to overcome summary judgment."); *Boyter v. Pennington County Sheriff Dep't*, 2015 U.S. Dist. LEXIS 129643, at * 5 (Sept. 27, 2015) ("email constitutes inadmissible hearsay evidence" disregarded for summary judgment); *Jennings v. Housing Auth. of Baltimore,* 2015 U.S. Dist. LEXIS 29273, at * 5, n. 5 (Mar. 10, 2015) ("email is inappropriate hearsay and inappropriate for the Court to consider on a motion for summary judgment."). Nor does any exception to the rule against hearsay apply. *Green v. Springfield Medical Care Sys., Inc*., 2014 U.S. Dist. LEXIS 87911, * 6 n. 1 (D. Vt. June

24, 2014) (even if email could be considered a business record, admission of business records at summary judgment requires, at a minimum, authentication "by a person who would be qualified to introduce the record as evidence at trial[.]") Emails that appear to be from Senefeld cannot be considered admissions of a party opponent without authentication. *Evergreen Partnering Gp. v. Pactiv Corp*., 116 F. Supp. 3d 1, 15 n. 29 (D. Mass. 2015) "To establish [documents] as the admission of an opposing party, [plaintiff] at a minimum would be required to authenticate them, which it has failed to do.") And, of course, emails that appear to be written by other parties are not party-opponent admissions by Senefeld.

### B. Statements In Declarations Offered By The SEC That Contradict The Declarant's Prior, Sworn Testimony Are Inadmissible.

Testimony from Haab and Jeffery Risinger ("Risinger") that contradicts their earlier sworn testimony cannot be relied upon for purposes of ruling on summary judgment. "The well-established rule is that affidavits in conflict with prior sworn testimony should be disregarded." *Holman v. Revere Electric Supply Co*., 154 Fed. Appx. 501, 503 (7th Cir. 2005). *See also Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 724 (7th Cir. 1998) ("a party cannot create an issue of fact by submitting an affidavit whose conclusions contradict prior testimony.") (citation omitted).[1]

Haab now states that he "strongly disagree[s]" that "he had 'the ultimate authority on what loans Veros would fund and what the terms of the investments [he] offered Veros clients would be." Haab Declaration, Exhibit 3 to the SEC's Response ("Haab Decl."), ¶ 10. He now testifies that "[i]n practice, all three of us, Senefeld, Risinger and me had to be in agreement before a particular loan was conducted . . ." *Id*. This is directly contradictory to his prior, sworn

[1] Although the SEC criticizes Senefeld's designation of his declaration in support of summary judgment, they do not point to a single statement that contradicts his earlier sworn investigative or deposition testimony.

testimony that only "if everything came together and . . . we [Veros] felt it was a suitable investment then we [Veros] would proceed with offering it to our clients." SEC Testimony of Matthew Haab, designated as Exhibit 1 to Senefeld's Motion for Summary Judgment ("Haab Test."), 120: 4-15. *See also* Haab Test., 83: 7-15 ("Q: So does Veros itself identify any of the investment opportunities that underlie the 53 private investments here? A: [T]hese opportunities have all been brought to us [Veros] in some form or capacity and then we [Veros] reviewed it based on a risk/reward and . . . what we [Veros] believe to be a good investment for our [Veros] clients or not to be a good investment for our [Veros] clients."). He also now testifies that "the terms for the farm loans . . . prepared by Senefeld in the due diligence materials . . . usually were approved without modification by the three of us . . ." Haab Decl., ¶ 10. This contradicts Haab's earlier, sworn testimony that Risinger and Senefeld "would share the opportunity with me in terms of . . . is this something *you think* is a suitable investment, you know, an investment with an appropriate risk/reward" and "they would look to me to give them feedback and advice in terms of saying . . . the return needs to be higher . . . for the risk/reward to be appropriate . . . for investors that would invest in it."). Haab Test., 119: 25; 120: 1-3; 120: 7-11 (emphasis added).

Haab now testifies that Senefeld had "input" over payments to investors. Haab Decl., ¶ 18. To the extent Haab is attempting to suggest this undefined "input" controlled any payments to investors, it is directly contradictory to Haab's prior, sworn testimony: Q: "[D]o you authorize all disbursements to investors from the investor account? A: Yes." Haab Test., 112: 22-25. *See also* Haab Test., 121: 24-25; 122: 1-2; 122: 14-18 ("Q: Was this the bank account that Veros used to collect investor funds for the Kirbach 2012 investment? A: Yes, it was. Q: [W]ere funds disbursed from this account? A: Yes. Q: Who authorized the disbursements? A: I did."). *See also* Haab Test., 177: 1-5 ("Q: And is it also true that Veros was in charge of the

money collection for the investors and money disbursement to the investors with respect to VFLH? A: We were in charge of the account where those monies were repaid to and disbursed to the investors."). *See also* Haab Test., 273: 18-20 ("Q: Who authorized the transfers we discussed between the FGC account and the 2013 investors? A: I did."). *See also* Haab Test., 301: 19-25; 302: 1-2 ("Q: And were disbursements of money made from the business checking account at MainSource for the 2014 FarmGrowCap deal? A: Yes, there was. Q: And who authorized those disbursements? A: I did. Q: Did anybody besides you authorize those disbursements? A: No."). *See also* Haab Test., 304: 5-8; 304: 16-22 ("Q: And then investors in the PinCap bridge loan, the deposited money into the PinCap, LLC business checking account? A: Correct. . . . Q: Were disbursements paid out of that account to investors in the PinCap, LLC bridge loan? A: Yes. Q: Who authorized those disbursements? A: I did. Q: Did anybody but you authorize those disbursements? A: No."). *See also* Haab Test., 312: 5-12 ("Q: Were transfers made from the 2014 bank account to the PinCap, LLC bridge account? A: Yes. Q: Who authorized those transfers? A: I did. Q: And were those transfers used to repay investors in the PinCap bridge loan? A: Yes."). Indeed, Haab expressly previously disclaimed, under oath, that Senefeld was a signatory to or could authorize disbursements of investor funds: "Q: [D]oes Exhibit 13 appear to be bank records for the MainSource Bank account that Veros used for VFLH? A: Yes. . . . Q: And who were the authorized persons on that account? A: Me and Adam Decker . . . Q: Was Tobin Senefeld a signatory at all on this account? A: No, he was not." Haab Test., 180: 6-9; 180: 12-14; 180: 25; 181: 1-2.

Haab now testifies that for the VFLH and FarmGrowCap Offerings, "the investors were the lenders." Haab Decl., ¶¶ 23, 24. This is directly contradictory to Haab's prior, sworn testimony that for loans through the VFLH and FarmGrowCap offerings, "those loans were all

made by FarmGrowCap LLC to the farm or to the ultimate . . . farming operation that borrowed the money." Haab Test., 113: 8-11. *See also* Haab Test., 134: 8-14 ("Q: And you mentioned it was FarmGrowCap that did the lending? A: Yeah, the actual loan document with the farming entity was between the farmer and FarmGrowCap. Q: So the actual loan with the farmer was between the farmer and FarmGrowCap? A: Yes.").

Haab further now testifies that "In 2011 and 2012 Risinger and Senefeld helped create a document entitled 'The Case for Investing in Farms: A Summary for Accredited Investors only' . . ." and "the final draft was a group project." Haab Decl., ¶ 32. That is directly contradictory to Haab's prior, sworn testimony: "Q: Is that a document called The Case For Investing in Farms? A: Yes. Q: And who authored that document? A: Jeff Risinger. Q: Did you review or edit it at all before sending it to your investors? A: I definitely reviewed. I may have provided a few comments or edits to Jeff. But I definitely reviewed it before he finalized it. Q: But Jeff drafted the document? A: Yes." Haab Test., 161: 15-25; 162: 1.

Risinger now testifies that with regard to the 2012 Kirbach Farms and Crossroads loans, "Haab, Senefeld and I jointly made the decision to extend operating loans to Kirbach and Crossroads. It was a group decision." Risinger Declaration, Exhibit 4 to the SEC's Response ("Risinger Decl."), ¶ 11. That is directly contradictory to Risinger's prior, sworn testimony that at the time a proposal would be submitted to Veros, Haab "was the guy. He was the one involved and, from my information, making the decisions." Risinger Test., 57: 16-18. This testimony also contradicts Risinger's prior sworn testimony that he made final decisions once he owned FarmGrowCap: "I would get input from Matt and Tobin, but I had authority to make the decisions, and I exercised that authority." Risinger Test., 2: 17-19. "Q: So you made all decisions for FarmGrowCap after ownership was transferred to you? A: Correct." Risinger

Test., 22: 20-22. It also contradicts his prior, sworn testimony that he and Haab made final decisions without Senefeld: "Q: [Y]ou mention . . . the assignment of the 2013 notes by VFLH to FGC. A: Yes . . . . Q: Who is the oral agreement between? A: That would be FarmGrowCap '14 and Veros Farm Loan Holdings. There would have been discussions between *Matt and I*. Q: Which one of you would have been FarmGrowCap 2014 and which one of you would have been VFLH 2013? A: *I* would have been FarmGrowCap 2014. *Matt* would have been Veros Farm Loan Holding." Risinger Test., 133: 5-7; 133: 19-25; 134: 1-8 (emphasis added).

Risinger also now testifies that Senefeld had "equal" authority over what loans to fund. However, that is in direct contradiction to his prior, sworn testimony that "sometimes you have to tell Tobin, you know, Tobin, you really want to do something, but we can't do that. And what I am saying to him here is that, you want to go use this money for something else, a new loan . . . That's just a way of telling him that. *I can't let you* go do some new loan . . . ." Risinger Test., 147: 23-25; 148: 1-2; 148: 10-11 (emphasis added).

Risinger now testifies that Senefeld set his salary, Risinger Decl., ¶ 17, but he previously testified that "I mentioned in there [the private placement memorandum for the 2013 VFLH investment] that Tobin and I would be making salaries, but that would be under the control of Veros. The purpose for that was to let Veros' clients know that we couldn't make any more money than what Matt would allow us to make; that he had control of that." Risinger Test., 97: 12-17.

### C. Speculation Is Inadmissible.

The Declarations offered by the SEC also contain inadmissible speculation. "[S]peculation is not a sufficient defense to a summary judgment motion." *Karazanos v. Navistar Int'l Transp. Corp*., 948 F.2d 332, 337 (7th Cir. 1991).

Haab speculates that "[b]ased on my conversations and interactions with Senefeld, I am confident he knew the content of the PPMs that were provided to investors." Haab Decl., ¶ 32. Haab cannot speculate as to what Senefeld "knew." "Testimony regarding the knowledge of another person based merely upon speculation is insufficient to demonstrate a genuine issue of material fact." *United States ex rel. Marshall v. Woodward, Inc*., 812 F.3d 556, 562 (7th Cir. 2015). Moreover, the SEC has failed to lay a proper foundation for these undefined "conversations." "A proper foundation for a conversation must include information as to when and where the conversation occurred, who was present, and who said what to whom." *Brown v. Chicago Transit Auth. Retirement* Plan, 2005 U.S. Dist. LEXIS 43328, at * 17 (N.D. Ill. July 22, 2005).

Similarly, Risinger speculates that with regards to the Crossroads 2014 refinance, "Senefeld was aware that the funds for the extension/refinance would be provided by investors." Risinger Decl., ¶ 25. Risinger established no foundation for asserting how he (or anyone else) made Senefeld "aware," and Risinger cannot speculate as to Senefeld's "awareness." Similarly, Risinger cannot speculate that "based on my conversations and interactions with Senefeld, I am certain he knew that the private placement memoranda were being provided to investors and potential investors." Risinger Decl., ¶ 28. Risinger has not identified any specific conversations or interactions that make him "certain" what Senefeld "knew," and his testimony is speculative, lacks a proper foundation and therefore is inadmissible.

Finally, Gustafson speculates that "[b]ased on my communications during 2013 with Senefeld, Risinger, and Haab, I am certain that they knew that the farms in the 2012 farm loan offerings had not fully repaid their loans and that some funds raised or repaid in the 2013 offering were used to repay investors in the 2012 farm loan offerings." Declaration of Shawn

Gustafson, Exhibit 2 to the SEC's Response ("Gustafson Decl."), ¶ 12. Gustafson has not identified any specific "communications during 2013" to lay a foundation for this conclusion, and his speculation as to what he is "certain" Senefeld "knew" is inadmissible. Similarly, Gustafson speculates that "[b]ased on my communications during 2014 with Senefeld, Risinger, and Haab, I am certain they all knew that the farms in the 2013 Veros Farm Loan Holding offering had not fully repaid their loans and that some funds raised or repaid in the 2014 offering were being used to repay investors in the 2013 Veros Farm Loan Holding offering." Gustafson Decl., ¶ 14. Finally, Gustafson testifies that "[b]ased on my communications during 2014 and 2015 with Senefeld, Risinger and Haab, I am certain they all knew that . . . FarmGrowCap lacked the money to repay the investors at that time." Gustafson Decl., ¶ 16. These speculative statements lack foundation and also are inadmissible.

### D. Facts Not Relating To The SEC's Claims In This Lawsuit Should Be Disregarded.

The SEC purports to offer evidence that Senefeld communicated with investors. However, the evidence offered by the SEC is that Senefeld communicated with investors who invested in offerings *other than those at issue in this lawsuit*. Risinger Decl., ¶ 29 (communications were regarding investments "other than FarmGrowCap"). While the SEC offers evidence that Haab thought Senefeld met with two *potential* investors to the 2013 VHLF Offering, the SEC has offered no evidence as to what the content of Senefeld's communications were, whether those communications were misleading in any way or even whether those *potential* investors actually invested in the Offering. *See* Haab Decl., ¶ 34.[2] These references are

[2] None of the unauthenticated emails from the SEC even establish that the potential investors invested in the 2013 VFLH Offering, which is the only Offering at issue in this litigation that Haab testifies Senefeld would "follow up with" potential investors regarding. Haab Decl., ¶ 34. Risinger specifies that his knowledge of Senefeld meeting with potential investors were for deals

irrelevant to the SEC's claims in this litigation. Moreover, the purported evidence that Pin Financial acted as a placement agent for the Blue Crop Group investment is irrelevant. Haab Decl., ¶ 16. Blue Crop Group is not part of the SEC's claims in this litigation. *See* SEC's Amended Complaint and parties' Answers, ¶¶ 26, 40, 43, 54, 56, 57, 90, 91, 93, 94, 95, 96, 100, 101, 103 (raising allegations relating to "Farm Loan A" (Crossroads Farms), "Farm Loan B" (Kirbach Farms) and "Farm Loan C" (Williams Farms)). The SEC "may not use [its] brief opposing summary judgment to introduce claims not stated in [its] complaint – at least not

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"other than FarmGrowCap" – *i.e.*, not part of this lawsuit. Risinger Decl., 29. Exhibit 6 to the SEC's response references Senefeld potentially meeting with Marty McFarland ("McFarland") and Rick Dennen ("Dennen") but is devoid of any evidence such a meeting ever even took place, what was discussed, what was said, or whether McFarland or Dennen actually invested in any of the Offerings at issue in this lawsuit. The SEC's bald assertions in its Response that "McFarland was an investor in the private offerings" and "[w]ithin days, Dennen and McFarland invested in the 2014 PinCap Bridge Loan Offering," p. 7, are not supported by any citation to the record and are not evidence. Exhibit 7 appears to be an email from McFarland to Haab saying he is "willing to put $2.5 million in the farmland bridge financing *as long as we come to terms on the side agreement*." (emphasis added). It is wholly devoid of context as to whether Haab and McFarland came to terms on a side agreement, what the side agreement was or whether McFarland ever invested. Exhibit 8 appears to reference a $100,000 wire from Dennen and "signed docs" for a "PinCap LLC Bridge Loan" but there are no signed documents attached to the exhibit and no context as to what the wire was for. Exhibit 10 references setting up a meeting among "Matt, Shelly, Dennis & John" with McFarland and Haab, but is devoid of any context as to whether such a meeting took place, what was discussed and whether such discussions, if they occurred, related in any way to the Offerings at issue in this lawsuit. Exhibit 11 references a "TBF 2014" deal, which the SEC has not identified is at issue in this lawsuit. Exhibit 12 references dropping off a check from Rick Dennen but is devoid of any context to tell what the check might be for. Exhibit 13, 14 and 15 appear to be emails from Haab to "The Veros Farm Loan Holding LLC Lending Group," but no individual investor names are shown in the "To" or "Cc" lines to identify any investors. And the SEC does no more than speculate that "[s]one of the information in the update likely was supplied by Senefeld." SEC's Response, p. 9. Exhibit 16 appears to be an email from Haab requesting information about "Boyer Farms." The SEC asserts in its Response that "Senefeld responded and provided information so Haab could provide that information to the investors," p. 9, but that assertion is not supported by any citation to the record nor does it suggest, let alone establish, that Senefeld provided any information that caused Haab to mislead his investors. Moreover, nothing ties any of these unauthenticated, context-less emails to any of the SEC's claims in *this lawsuit*. It is undisputed that Veros was involved in other deals that are not the subject of the SEC's claims in this litigation. Haab Test., 106: 18-23; 107: 1-9. And none of these emails remotely suggest actionable misrepresentations were made by Senefeld to any such "potential investors."

without a defendant's consent[.]" *Berry v. Chicago Transit Auth*., 618 F.3d 688, 693 (7th Cir. 2010).

**II. The Material Facts Remain Undisputed.**

Despite the SEC's attempts to muddy the record with inadmissible evidence in opposition to summary judgment, the material facts remain undisputed and defeat the SEC's claims. It remains undisputed that Senefeld did not write or control the content of the private placement memoranda or other disclosures to investors and did not disseminate them to Veros investors. Haab Decl., ¶ 8 ("Risinger was responsible for writing the disclosures and investment documents for use with individual investors, assisted by *Gustafson*.") (emphasis added); Haab Test., 82: 2-4 ("Q: Do you personally send PPMs to Veros client? A: Yes, via e-mail."); Risinger Test., 59: 24 ("I was the writer."). It remains undisputed that Haab had final authority over what loans he offered as investments to his investors. Risinger Decl., ¶ 11 ("neither I nor Senefeld could require Veros to participate in these loans . . . ."). It remains undisputed that Haab, through Veros, controlled the farm loan and investment accounts and had final authority over what payments would be made and when. Gustafson Decl., ¶ 10 ("Haab made the final decisions on how funds contributed by investors, or repaid by the farms, would be used and which investors would be repaid and when."); Risinger Decl., ¶ 15 (disbursements to farmers "made at Senefeld's request" but "approved by Haab"); Haab Declaration, ¶ 18 ("'[O]nly Veros employees at the direction of Haab could wire any funds out of the accounts' . . . . This is true."). It remains undisputed that the loan agreements were between the farmers and the lending-entity, and the lending-entity was repaid at refinance. Haab Test., 113: 8-11; 134: 8-14; Risinger Test., 21: 14-18; 21: 23-25; 22: 1-3; Declaration of Harold Birch, designated as Exhibit 4 in support of Senefeld's Motion for Summary Judgment, ¶¶ 20, 24, 25, 26.

It remains undisputed that Senefeld was responsible for communicating with the farmers, not the investors. Gustafson Decl., ¶ 7 ("Senefeld's main role was to locate and identify farmers who needed financing and, with my assistance, *investigate* whether the farmer was a good loan candidate . . . Haab's role . . . was to . . . communicate with investors about the investments, and handle the money.") (emphasis added); Risinger Test., 55: 1-4 ("Tobin . . . is the person with the contacts in the farming community and the banking community . . . ."); Haab Decl., ¶ 9 ("Performing the due diligence, and identifying which farms were the best candidates for private farm loan investments, was the value and expertise Senefeld was supposed to bring to our business relationshipThe SEC raised no allegations of fraud with regard to the loans themselves or that Senefeld falsified documents or engaged in any other deceptive conduct. It is undisputed that Senefeld could not, and did not, pay himself. Risinger Decl., ¶ 27.

It remains undisputed that Risinger, not Senefeld, drafted the disclosure of Senefeld's former SEC settlement. Risinger Decl., ¶ 27. It remains undisputed that Risinger was acting in his self-described capacity as General Counsel at the time he did so and that Risinger also made a practice of consulting with outside attorneys in his work. Haab Test., 82: 12-18; Risinger Test., 11: 13-14; 14: 12-13. Indeed, the SEC has failed to make a record as to what actually was disclosed to investors regarding Senefeld's prior SEC settlement, versus drafted and circulated by Risinger. The SEC's Exhibit 26 is only a draft by Risinger of the 2013 Offering Memorandum and the SEC made no record on what document Haab ultimately disseminated to his investors.[3] Nor has the SEC offered a single declaration or affidavit from an investor

[3] The SEC's representation that "[t]he 2013 VFLH PPM also contained the misleading disclosure about Senefeld's SEC settlement" is not supported by any citation to the record. Counsel's unsupported assertions are not evidence. Fed. R. Civ. P. 56(e); L.R. 56-1(e). *See also Kirkwood v. Fort Wayne Police Dep't Officers*, 683 F. Supp. 2d 823, 827 (N.D. Ind. 2010) ("Rule 56(e) requires specificity because, absent evidence supported by specific facts, conclusory allegations

suggesting that any disclosure to them of Senefeld's prior SEC settlement was misleading or was material to their decision to invest.

Indeed, even if the Court considers the SEC's inadmissible evidence, these material facts remain undisputed. The most the SEC has offered is that Senefeld provided undefined "information" to be included in the disclosures (but does not establish or even allege that any such "information" was misleading) and that he communicated with investors in investments that are not the subject of this lawsuit. Significantly, the SEC has not offered a single declaration or affidavit from an investor alleging they were misled by anything Senefeld said or did.[4] The SEC has not met its burden to "do more than raise some metaphysical doubt as to the material facts[.]"*Argyropoulos v. City of Alton*, 539 F.3d 724, 732 (7th Cir. 2008) (quotation and citation omitted). Accordingly, because there is not "sufficient evidence favoring the nonmoving party [that] exists to permit a jury to return a verdict for that party" summary judgment must be granted in Senefeld's favor. *Id*. (quotation and citation omitted).

## III. Senefeld Is Entitled To Judgment In His Favor As A Matter Of Law.

As the undisputed facts continue to establish, Senefeld is entitled to summary judgment on the SEC's claims.

### A. The SEC Still Has Not Identified Any Actions Senefeld Took That Support Liability For Primary Violations Of The Securities Laws.

In its Response, the SEC continually refers to what Senefeld "knew" versus identifying anything he actually *did* that would support a finding of a primary violation of the securities

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by a party opposing summary judgment cannot defeat a motion for summary judgment." To the extent the SEC relies on its ex parte filings Doc. 11-1 or 11-2, which it references in its legal argument but not its Statement of Material Facts in Dispute, those documents are unauthenticated.

[4] The SEC references declarations of investors the SEC filed with its Motion for Temporary Injunction, Doc. 9-1, 9-2 and 9-3. SEC's Response, p. 10. However, none of those declarations mention Senefeld at all, referring only to misrepresentations by "Veros" or "Haab."

laws. "[W]hat [Senefeld] knew, as opposed to what he did, does not support [primary] liability." *SEC v. Patel*, 2009 U.S. Dist. LEXIS 90558, * 37 (D. N.H. Sept. 30, 2009). Nor does the SEC's argument that Senefeld was a "willing participant" in any alleged scheme support primary liability. "[A] claim based on mere 'participation' is legally insufficient" to establish primary liability. *SEC v. Collins & Aikman Corp*., 524 F. Supp. 2d 477, 486 (S.D.N.Y. 2007). Anything short of Senefeld's *own actual acts* "is not enough to trigger [primary] liability . . . " *Wright v. Ernst & Young, LLP*, 152 F.3d 169, 175 (2d Cir. 1998). Indeed, the SEC allegations of what Senefeld was "aware" of or a "participant" in do not properly state the requirements for personal primary violations of the securities laws, let alone prove them.[5] The time has come for the SEC to establish that it has evidence to prevail on its claims, which it has not even come close to doing. "[S]ummary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quotation and citation omitted).

### B. The SEC Has Not Even Acknowledged The Controlling Supreme Court Precedent Providing As A Matter Of Law That Senefeld Was Not The "Maker" Of Disclosures To The Investors.

[5] The SEC's attempts to conflate the required proof of aiding and abetting versus primary liability fail even to properly state the required elements of s*econdary* liability. The SEC's allegations of simple "awareness" or "participation" would have been legally insufficient to state, let alone prove, even a claim of secondary liability, which requires proof of (1) a primary violation of the relevant securities law; (2) knowledge by the alleged aider and abettor of the primary violation and of his or her role in furthering it; and (3) substantial assistance in commission of the primary violation. *SEC v. Shanahan*, 646 F.3d 536, 547 (8th Cir. 2011). "Negligence . . . is never sufficient, and a bare inference that the defendant must have had knowledge of the primary violator's transgressions is insufficient." *Id*. (quotation and citation omitted). The SEC has come nowhere close to even stating these elements, let alone proving them. And, of course, the SEC must prove the case it brought – for alleged primary violations of the securities laws.

In arguing that Senefeld can be liable for alleged misstatements and omissions in the private placement memoranda and other disclosures Haab disseminated to his Veros investors, the SEC does not even acknowledge the controlling United States Supreme Court precedent in *Janus Capital Gp. v. First Derivative Traders*, 131 S. Ct. 2296, 2301 (2011), unequivocally providing that "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." The SEC argues that Senefeld provided unidentified "information" to be included in the disclosures, without making any record that such "information" was inaccurate or misleading, but even so, *Janus* is clear that "assistance . . . does not mean that [Senefeld] 'made' any statements . . . ."

Instead of addressing *Janus*, the SEC points the Court to a case decided almost thirty years before the Supreme Court's controlling precedent, *SEC v. Holschuh*, 694 F.2d 13 (7th Cir. 1982). Indeed, the *Holschuh* court telegraphed the question about the viability of a "participant" theory to be enough to establishing a primary violation, *id*. at 140, n. 15, which of course, has since been completely rejected by the United States Supreme Court. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (secondary actor can only be held primarily liable for securities law violations when that actor himself "employs a manipulative device or makes a material misstatement" and "*all* the requirements for primary liability under Rule 10b-5 are met.") (court's emphasis). The SEC again ignores controlling United States Supreme Court precedent; its reliance on a "participation" theory of primary liability has been rejected by the Supreme Court must also be rejected by this Court. The SEC's allegations that Senefeld "received" or "approved" disclosures are not supported by evidence, but in any event "no court has found" "'review and approval' allegations . . . sufficient to trigger liability after *Central Bank*." *Filler v. Lernour*, 230 F. Supp. 2d 152, 171 (D. Mass. 2002).

Further, while the SEC is correct that direct contact with investors is not required for liability, "contrary to [the SEC]'s argument, a secondary actor cannot incur primary liability under the Act for a statement not attributed to that actor at the time of its dissemination." *Wright*, 152 F.3d at 175. The SEC has identified *no* statements to investors attributed to Senefeld.

### C. The SEC Cannot Establish That Senefeld "Caused" Haab Or Risinger To Make Any Misleading Statements.

Even before *Janus* and still under Section 17(a)(2), the SEC must establish that Senefeld *himself* actually created, composed or caused misleading statements. *SEC v. Tambone*, 597 F.3d 436, 447 (1st Cir. 2010) (en banc) (focus must be on party's "*actual role* . . . in creating, composing. or causing the existence of an untrue statement of material fact.") (emphasis added). The SEC contends that Senefeld provided "information" for the disclosures, but makes no record identifying specifically what "information" he provided or whether any of it was misleading.

Nor did Senefeld "cause" any misleading disclosures regarding his 1999 SEC settlement. It is undisputed that he provided a copy of the settlement itself to Risinger. It is also undisputed that he relied on Risinger's legal expertise to draft the settlement. The SEC's contention that Senefeld could not rely on Risinger's legal expertise because he was not his personal attorney is not supported to any citation to case law and, indeed, is contrary to the law. Risinger was acting in his self-described capacity as General Counsel, and Senefeld is entitled to rely on the legal expertise of the corporation's counsel. *See, e.g.*, *Shanahan*, 646 F.3d at 544 (reliance on the corporation's "outside and general counsel" to ensure "appropriate and accurate disclosures" "is not severely reckless conduct that is the functional equivalent of intentional securities fraud") (citation omitted).

Troublingly, although the SEC alleges that the disclosure drafted by Risinger was inaccurate, the SEC itself has not even accurately represented the settlement to this Court. The SEC's allegation that Senefeld "was found to have personally engaged in securities fraud" is simply untrue. SEC Response, p. 31. Senefeld entered into a settlement whereby he neither admitted nor denied the charges against him. No claim ever was adjudicated against him, and there was no such "finding." And the SEC's wild accusation that Senefeld is an "SEC recidivist" – whatever that means – also is wholly untrue. There was no finding of guilt before, and of course this Court has yet to rule on the merits of the SEC's claims.

Moreover, the SEC has not even established a record of the actual disclosure Haab made to investors, as opposed to the drafts circulated by Risinger. Nor has the SEC established that a single investor was misled by anything Senefeld said or did – none of the investor declarations cited by the SEC even mention Senefeld. It is undisputed that neither Senefeld nor Risinger questioned the accuracy of the disclosure at the time, and Risinger continues to contend it is accurate. *See id*. (noting neither defendant nor the professionals upon whom he relied questioned the accuracy of disclosures when they were made).

**D. The SEC Has Not Identified Any Deceptive Acts By Senefeld.**

The SEC also has wholly failed to identify any deceptive acts by Senefeld. Instead, the SEC speculates as to what Senefeld "knew," which is insufficient to establish primary violations of the securities laws. The SEC generally alleges that it was somehow deceptive for Senefeld to receive fees for work he performed, but does not, and cannot, allege that payment of fees was in "furtherance" of any alleged scheme. The SEC's argument accordingly does not establish a claim for scheme liability. *SEC v. Sullivan*, 68 F. Supp. 3d 1367, 1378 (D. Co. 2014) (accepting

payments "fail[s] to satisfy the requirements of scheme liability" because it does not "clearly contribute[] to the operation of the underlying [alleged] fraud.").

The SEC's continued allegations – as opposed to evidence – that Senefeld "directed" a payment to investors stretches an email requesting wire instructions for farmers "Kirbach" and "Rosentreter" beyond any permissible reasonable inference. *Fischer v. Avanade, Inc.*, 519 F.3d 393, 401 (7th Cir. 2008) (drawing reasonable inferences in favor of nonmoving party "does not permit drawing "[i]nferences that are supported by only speculation or conjecture.") (citation omitted). It is undisputed that Senefeld did not draft the wire instructions and did not make any payments to any investors. Haab testified that he – not Senefeld – controlled the bank accounts and was responsible for authorizing payments to investors. Although Haab now claims that Senefeld had "input" into the timing of payments to investors, this undefined "input" does not support a finding of any violations of the securities laws by Senefeld – Haab at all times had control of the accounts and authority on any payments to investors. A simple request for wire instructions for two farmers can in no conceivable way be a "direction" of payments to investors, nor can it constitute a request "so that certain 2012 Kirbach investors could be repaid with funds from the 2013 Offering," as the SEC argues. SEC's Response, p. 29. The SEC offers no evidence or even a viable argument as to how Senefeld could "direct" a payment through wire instructions he did not draft or disseminate, from an account to which he had no access, to another account to which he had no access, to investors whose identities he did not know. And, contrary to the SEC's allegations, Senefeld's email requesting Gustafson to prepare wire instructions to two farmers cannot be construed as "involvement" in Haab making payments to his investors – but, even if it could, such a claim fails to establish liability as a matter of law. *Collins & Aikman Corp.*, 524 F. Supp. 2d at 486 ("mere 'participation' is legally insufficient").

**E. The SEC Has Identified No Duty Senefeld Owed To Haab's Investors.**

In arguing that Senefeld can be liable for negligence, the SEC does not identify any source of a duty for Senefeld to Haab's investors. Rather, the SEC alleges, without factual or legal support, that because "Senefeld had knowledge and expertise regarding farm loans" "[t]his would allow a reasonable trier of fact to conclude that Senefeld breached a duty of care by failing to advise the VFLH and FarmGrowCap investors that the 2012 and 2013 farm loans had not been profitable, and that Defendants' plans to repay prior investors with VFLH and FarmGrowCap offering funds made it less likely that the new farm loans would ever be profitable." SEC's Response, p. 33.

Once again, the SEC ignores controlling United States Supreme Court precedent, in this instance that a party's nondisclosure of information is only actionable where there is an independent duty to disclose arising from a "*fiduciary* or other similar relation of trust and confidence" between the party and investors. *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (emphasis added, quotation and citation omitted). The SEC has identified no fiduciary relationship between Senefeld and Veros investors, and therefore Senefeld as a matter of law cannot be liable for "failing to advise" the investors as to anything. Moreover, the SEC offered no evidence of the standard of care. Absent such evidence, a trier of fact "could only speculate as to whether he failed to exercise reasonable care[.]" *Shanahan*, 646 F.3d at 547.

## IV. CONCLUSION

For the foregoing reasons, as well as those set forth in Senefeld's Motion for Summary Judgment, Brief in Support thereof and Designation of Evidence in support thereof, Senefeld is entitled to judgment as a matter of law on all of the SEC's claims.

Respectfully submitted,

*/s/ Jeanine Kerridge*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 12th day of May, 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*