UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	
v.	**Case No. 1-15-cv-659-JMS-MJD**
TOBIN J. SENEFELD, et al.	
Defendants,	
and	
PIN FINANCIAL LLC,	
Relief Defendant.	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR DISGORGEMENT, PREJUDGMENT INTEREST, AND CIVIL PENALTIES AGAINST DEFENDANT TOBIN SENEFELD

Plaintiff U. S. Securities and Exchange Commission ("SEC" or "Plaintiff"), pursuant to the Consent filed on October 10, 2017 [Filing No. 429-2] and the Judgment as to Defendant Tobin J. Senefeld ("Senefeld") entered on October 11, 2017 [Filing No. 436], respectfully submits this memorandum in support of its motion for disgorgement, prejudgment interest, and civil penalties [Filing No. 444].

I. INTRODUCTION

The SEC filed this enforcement action on April 22, 2015, to halt ongoing investment fraud and a Ponzi scheme perpetrated by Senefeld, Matthew Haab, Jeffrey Risinger, and several entities that they owned and controlled, namely, Veros Partners, Inc. ("Veros"), Veros Farm Loan Holding LLC ("VFLH"), FarmGrowCap LLC ("FarmGrowCap"), PinCap LLC

("PinCap") and Relief Defendant Pin Financial LLC ("Pin Financial"). [*See* Filing No. 57, SEC's Amended Complaint.] The SEC's Amended Complaint alleged, among other things, that the defendants told investors through private placement memorandums and otherwise that the funds they invested would be used to make 12 to 14 month operating loans to farms (*i.e.* a loan that farmers use to pay for seed, fertilizer, equipment, and similar expenses associated with the farm's operations for a given year). [Filing No. 57.] Without disclosure to the investors, the defendants (1) made approximately $7 million in Ponzi payments to investors in separate, earlier in time offerings and (2) paid hundreds of thousands of dollars in so-called "success" fees and "interest rate spread" fees to PinCap and ultimately to Senefeld. Furthermore, defendants failed to disclose to investors that loans in the 2013 Offering included debt from unpaid loans in two 2012 Offerings and loans in the 2014 Offering included debt from unpaid loans in the 2013 Offering and 2012 Offerings.

Senefeld consented to a "bifurcated" settlement process for resolving the SEC's claims against him. [Filing No. 429-2.] On October 11, 2017, this Court entered judgment against Senefeld ("Judgment"), which permanently restrained and enjoined him from violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), Rules 10b-5(a) and 10b-5(c) thereunder, and Section 17(a) of the Securities Act of 1933 ("Securities Act") [Filing No. 436.]

The Judgment ordered that Senefeld:

> **shall** pay disgorgement of ill-gotten gains and prejudgment interest thereon; that the amounts of the disgorgement and civil penalty shall be determined by the Court upon motion of the Commission; and that prejudgment interest shall be calculated from December 1, 2013, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2).

[Filing No. 436 at p. 3, ¶ III (emphasis added).] The Judgment also provided that "the Court shall determine whether a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] is appropriate and, if so, the amount of the penalty." [Filing No. 436 at p. 3, ¶ III.]

The Judgment further provided that in connection with the SEC's motion for disgorgement and civil penalties and at any hearing held on such a motion, Senefeld "will be precluded from arguing that he did not violate the federal securities laws as alleged in the Amended Complaint;" (b) Senefeld "may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the Amended Complaint shall be accepted as and deemed true by the Court." [Filing No. 436 at pp. 3-4, ¶ III.]

Accordingly, the only issues remaining for the Court to decide are (1) the amount of disgorgement including prejudgment interest and (2) whether to impose civil penalties and, if so, the amount. In making this determination, the Court should accept as true the allegations in the Amended Complaint. The Court should also consider the additional evidence discussed herein.

II. FACTS ALLEGED IN THE AMENDED COMPLAINT ARE ACCEPTED AS TRUE AND SHOW THAT SENEFELD RECEIVED ILL-GOTTEN GAINS

A. Summary Of Facts That Must Be Accepted As True

In sum, the Amended Complaint alleged the following facts, which must be accepted as true for purposes of this motion:

- Senefeld was a one-third owner and one of three managers of PinCap. PinCap received investor funds and dispersed investor funds to FarmGrowCap, which was 100% owned by PinCap, to make the private farm loans;
- Senefeld provided information for and had the opportunity to read and comment on the

misleading documents for the 2013 and 2014 Offerings before they were distributed to the potential investors;

- Senefeld personally received several hundred thousand dollars in fees from the various farm loan offerings. It was not disclosed to investors that their funds would be used to pay these fees;

- Senefeld knew that the farms were not repaying their loans and that funds from the 2013 and 2014 offerings were being used to repay investors in separate, earlier offerings. He personally directed at least one such wire transfer;

- Senefeld personally approved the use of a disclosure to investors that mischaracterized SEC charges against him in a case he settled in 1999.

B. The Fraudulent Investments And Ponzi Scheme

1. Background

In 2009, Senefeld approached Haab with a farm loan opportunity which Haab decided to offer to Veros' clients and other investors through a private offering. [Amended Complaint, Filing No. 57 at ¶20.] Over the next few years, Senefeld approached Haab with a number of other investment opportunities. [*Id.* at ¶21.] Since at least 2010, Senefeld has worked with Haab and Risinger to originate private farm loan investments offered to Veros advisory clients and others. [*Id.* at ¶12.]

Senefeld and Risinger have worked together on about 40 of the private offerings, including most of the farm loan offerings. [Filing No. 57 at ¶22.] Senefeld has described himself as a "matchmaker" who found farmers in need of financing and then negotiated the terms of potential farm loans. [*Id.* at ¶22.] Senefeld knew these loans would be funded by Veros' clients as investments. [*Id.* at ¶22.]

PinCap is an entity owned by Senefeld, Risinger, and Veros. [Filing No. 57 at ¶15.] PinCap was managed by Risinger, Senefeld, and Haab. [*Id.*] PinCap was used by Senefeld, Risinger, and Haab to make the loans and manage the private offerings. [*Id.*]

In 2012, 2013, and 2014, investors were offered the chance to invest in certain private offerings that were supposed to fund 12- to 14-month operating loans for farmers during a particular crop season. [Filing No. 57 at ¶23.] A farm "operating loan" is a loan that farmers use to pay for seed, fertilizer, equipment, and other expenses associated with the farm's operations for a given year. [*Id.*]

2. The Offerings

In each offering, the investors purchased securities. [Filing No. 57 at ¶2.] In 2012, 35 investors invested $3.37 million in a loan to Crossroads Farm ("2012 Crossroads Offering"). [Filing No. 57 at ¶26.] In 2012, 24 investors also invested $1.43 million in a loan to Kirbach Farm ("2012 Kirbach Offering"). [*Id.*] Senefeld negotiated the terms of the loans with the farmers who received funds through these two 2012 Offerings. [*Id.* at ¶28.] Senefeld received a fee of 6% of the $3.37 million that was raised from investors in the 2012 Crossroads Offering. [*Id*.] Senefeld also received a fee of 4% of the $1.43 million raised from investors for the 2012 Kirbach Offering. [*Id*. at ¶28.]

In 2013, the securities were issued by Defendant VFLH (the "2013 VFLH Offering"). [Filing No. 57 at ¶2.] For the 2013 VFLH Offering, $9.7 million was raised from 65 investors. [*Id*. at ¶39.]

The 2014 Bridge Loan Offering was a 2-month interim investment to fund farm loans in advance of the completion of a new 2014 Offering. [Filing No. 57 at ¶69.] PinCap was the issuer of the securities and raised approximately $5.2 million from 24 investors. [Filing No. 57 at ¶69.]

In 2014, the securities were issued by Defendant FarmGrowCap (the "2014 FarmGrowCap Offering"). [Filing No. 57 at ¶2.] For the 2014 FarmGrowCap Offering at least

$3.5 million in new investor money was raised from 35 investors. [*Id*. at ¶77.] However, the amounts due to investors in connection with the 2014 FarmGrowCap Offering also include: (a) approximately $5.5 million of unpaid investor principal "rolled over" from the 2013 VFLH Offering investors; and (b) approximately $1.9 million in unpaid investor principal "rolled over" from investors in the 2014 Bridge Loan Offering. [*Id.*]

3. The Private Placement Memorandums Failed To Disclose Material Facts And Were Misleading

Senefeld, Haab, and Risinger repeatedly misled investors about the risks, nature, and performance of the investments and underlying farm loans. [Filing No. 57 at ¶3.]

2013 PPM The private placement memorandum for the 2013 VFLH Offering ("2013 PPM") advised investors that VFLH would use investor funds to make a loan to PinCap, to be used for three purposes: (a) to fund loans to farmers made by PinCap's subsidiary, FarmGrowCap; (b) to complete PinCap's purchase of Pin Financial; and (c) to provide operating capital for both FarmGrowCap and Pin Cap. [*Id*. at ¶35.] The 2013 PPM identified Haab, Risinger, and Senefeld as PinCap's "management team." [*Id*. at ¶36.] The 2013 PPM further stated that all management decisions would be made by Senefeld, Risinger, and Veros. [*Id.* at ¶51. Senefeld received multiple drafts of the 2013 PPM before it was provided to any investors. [*Id*. at ¶38.]

The 2013 PPM did not disclose that investor funds would be used to repay investors in the 2012 Offerings or to pay off or refinance any farm loans. [Filing No. 57 at ¶38.]

An exhibit to the 2013 PPM contained Senefeld's biography which mischaracterized the SEC's charges against Senefeld in a 1999 proceeding. [Filing No. 57 at ¶51.] The 2013 PPM falsely claimed that Senefeld was charged because an employee then under his supervision bought securities without the money to pay for them. [*Id*. at ¶52.] In fact, the SEC issued an

order in which it found that Senefeld had personally bought securities without the money to pay for them (*i.e.* engaged in a fraudulent free-riding scheme). [*Id.*] Senefeld read the draft disclosure before it was finalized. [*Id.* at ¶53.] Neither Senefeld nor the other defendants made any effort to ensure that the PPM's disclosure regarding Senefeld's 1999 settlement with the SEC was accurate. [*Id.*]

2014 PPM The private placement memorandum for the 2014 FarmGrowCap Offering ("2014 PPM") stated that investors had an opportunity to purchase "secured loans" issued by FarmGrowCap. [Filing No. 57 at ¶75.] The 2014 PPM stated that Haab and Senefeld were part of FarmGrowCap's management team. [*Id.* at ¶73.] Senefeld received drafts of the 2014 PPM before it was distributed to potential investors. [*Id.* at ¶78.]

The 2014 PPM also stated that investor funds would "be used by FarmGrowCap to make farming related loans with maturities of 1 to 13 months" and "deployed to make loans to select farmers." [Filing No. 57 at ¶75.] The 2014 PPM further stated that FarmGrowCap would make:

> 13 month or shorter term operating loans to farmers, primarily to support row crop farming (i.e. corn, soybeans), but also to small fruit growers (i.e. blueberries) and other crop producers. FarmGrowCap also makes other farming related loans, such as short-term, highly collateralized bridge loans to provide financing to farmers who have planned land sales, pending conventional bank-type financings, or other circumstances that reasonably require (and support) a gap loan.

[*Id.* at ¶76.]

The 2014 PPM did not disclose that money from the 2014 FarmGrowCap Offering would be used to repay investors in the 2013 VFLH Offering or the 2014 Bridge Loan Offering. [*Id.*]

The 2014 PPM further stated that seven of the farm loans made in connection with the 2013 Offering "have been fully repaid or are on track to do so … except that one farmer

borrower realized a repayment shortfall of approximately $130,000 (for which FarmGrowCap, in exchange for additional collateral, has granted an extension of time for payment)." [Filing No. 57 at ¶85.] Other than with regard to the $130,000 shortfall, the 2014 PPM did not disclose that any unpaid balances from the farm loans in the 2013 VFLH Offering were being added to or included in the 2014 FarmGrowCap Offering. [*Id*. at ¶86.] However, as early as February 2014, Senefeld, Haab, and Risinger all knew that at least three of the farm loans in the 2013 VFLH Offering would not be paid on time. [*Id*.] By May 1, 2014, Senefeld, Haab, and Risinger all knew that six of the eight farms still owed a total of approximately $3.9 million. [*Id*.] These facts were not disclosed to the investors. [*Id*. at ¶88.]

The 2014 PPM failed to disclose that the 2014 operating loans to three farms, including Crossroads and Kirbach, would include unpaid loan balances from the 2013 VFLH Offering of approximately $3 million. [Filing No. 57 at ¶90.] The 2014 PPM discussed a potential 2014 operating loan to Crossroads. [*Id.* at ¶93.] However, the 2014 PPM did not disclose that the anticipated loan would include unpaid balances from its 2013 operating loan. [*Id*.] Because Crossroads failed to repay about $1.4 million of its 2013 "operating" loan (which itself included unpaid 2012 debt), that entire amount due and owing was carried forward into 2014 and constituted the entire 2014 operating loan to Crossroads. [*Id*.] Thus, Crossroads received no fresh operating capital for the 2014 crop season. [*Id*. at ¶94.] The 2014 loan was not an operating loan but was simply an extension of the 2013 loan from the 2013 VFLH Offering. [*Id*.] This information was not disclosed in the 2014 PPM, despite the fact that Haab, Risinger, and Senefeld all knew as early as February 2014 that Crossroad's unpaid 2013 loan balance would be carried forward into a new 2014 loan. [*Id*.]

Moreover, with respect to the Crossroads loan, Senefeld and Risinger were paid three times – once for the 2012 Crossroads Offering, once in connection with the 2013 VFLH Offering, and again in connection with the 2014 FarmGrowCap Offering – for the same $1.4 million loan balance that Crossroads had carried forward from 2013 into 2014 (and a portion of which had been carried over from 2012). [*Id*. at ¶100.]

Similarly, Kirbach received no fresh operating capital for the 2014 crop season and the 2014 loan was not an operating loan but simply an extension of the 2013 debt owed from the 2013 VFLH Offering. [Filing No. 57 at ¶96.] This information was not disclosed in the 2014 PPM, despite the fact that Haab, Senefeld, and Risinger all knew that Kirbach's unpaid 2013 loan balance would be carried forward into the 2014 FarmGrowCap Offering. [*Id*.]

Senefeld also negotiated a loan extension for Kirbach on behalf of FarmGrowCap. [Filing No. 57 at ¶101.] In exchange, FarmGrowCap received a $10,000 fee. [*Id*.] The 2014 PPM did not disclose the payment of "extension" fees on unpaid 2013 loans extended into the 2014 FarmGrowCap Offering. [*Id*.]

According to Risinger, before the end of February 2014, Haab, Risinger, and Senefeld all anticipated that loan balances owed under some 2013 operating loans would be included in the loans issued by the 2014 FarmGrowCap Offering. [Filing No. 57 at ¶97.] However, this was not disclosed to investors. [*Id*.]

4. Defendants Used Investor Funds To Make Ponzi Payments

Senefeld, Haab, and Risinger used money from the 2013 VFLH Offering and 2014 FarmGrowCap Offering to make approximately $7 million in payments to investors in other offerings. [Filing No. 57 at ¶3.]

2012 Offerings The investors in the 2012 Crossroads Offering and 2012 Kirbach Offering were supposed to be repaid by March 30, 2013. However, as of March 30, 2013, the investors in the 2012 Crossroads Offering had been paid less than $330,000 of the $3.37 million they were owed. [Filing No. 57 at ¶31.] As of the same date, the investors in the 2012 Kirbach Offering had been paid around $840,000 and were still owed approximately $700,000. [*Id.*] Neither Crossroads nor Kirbach repaid their 2012 operating loan in full by March 30, 2013, as required under the loan agreements. [*Id.*]

Because Crossroads and Kirbach did not pay off their 2012 operating loans in full, the investors in the 2012 Offerings could not be repaid from the 2012 loan repayments as they were supposed to be. [Filing No. 57 at ¶40.] Between March and November 2013, approximately $2.8 million of investor funds from the bank account established for the 2013 VFLH Offering was used to repay investors in the 2012 Offerings. [*Id.*] Senefeld personally directed at least one of these payments. [*Id.* at ¶42.] Specifically, in March 2013, Senefeld directed Gustafson, an employee of FarmGrowCap, to send wire instructions to Haab so that the investors in the 2012 Kirbach Offering could be paid with funds invested by investors in the 2013 VFLH Offering. [*Id.*] The wire instructions related to a purported $375,000 farm loan which was part of the 2013 Offering. [*Id.*] Senefeld's instructions advised Haab that the farm's bank account should receive less than half of $375,000, and that $115,000 was to be used to "pay to investors" as part of the "2012 Loan Payoff." [*Id.*] Haab has testified that this was a payoff of 2012 investors with money from the 2013 VFLH Offering. [*Id.*]

2013 VFLH Offering The investors in the 2013 VFLH Offering were supposed to be repaid their principal and interest on April 30, 2014. [Filing No. 57 at ¶59.] On that date, investors were entitled to receive approximately $10.8 million, consisting of $9.7 million in

principal plus 10% annual interest. [*Id*.] However, as of July 2, 2014 – three months after the due date - the investors had been paid only about half of what they were owed in connection with the 2013 VFLH Offering. [*Id.* at ¶68.] The farmers had not fully repaid the loans received in connection with the 2013 VFLH Offering. [*Id*.] Additionally, between March and November 2013, approximately $2.8 million of investor funds from the 2013 VFLH Offering was used to repay investors in the 2012 Crossroads Offering and 2012 Kirbach Offering. [*Id*. at ¶40.]

2014 Bridge Loan Offering When the 2014 Bridge Loan Offering matured on March 31, 2014, PinCap lacked sufficient funds to repay all of the investors. [Filing No. 57 at ¶70.] Accordingly, only some of the investors in the 2014 Bridge Loan Offering were repaid in cash. [*Id*.] Of the approximately $3.3 million in cash that was repaid to those investors, approximately $2.4 million of that amount consisted of investor funds from the 2013 VFLH Offering and 2014 FarmGrowCap Offering. [*Id*.]

2014 FarmGrowCap Offering The investors in the 2014 FarmGrowCap Offering were supposed to be repaid their principal and interest on April 30, 2015. [Filing No. 57 at ¶78.] On that date, the investors were entitled to repayment of their entire investment plus a 9% annualized return. [*Id*.] At the time this lawsuit was filed, the investors in the 2014 FarmGrowCap Offering were owed approximately $9 million. [*Id*.] Between April and September 2014, at least $2 million from the 2014 FarmGrowCap Offering was used to repay some of the investors in both the 2013 VFLH Offering and the 2014 Bridge Loan Offering. [Filing No. 57 at ¶80.] These payments were not disclosed to investors. [*Id*.]

5. Senefeld Received "Success Fees" That Were Not Disclosed To Investors

Senefeld and Risinger used investor funds to pay themselves over $800,000 in

undisclosed "success" and "interest rate spread" fees. [Filing No. 57 at ¶3.] Senefeld and Risinger used PinCap to charge origination fees for seven of the eight farm loans that were funded by the 2013 VFLH Offering. [*Id*. at ¶43.] Risinger and Haab referred to these assessments as "success" fees. [*Id*.] These fees ranged from 1% to 12% of the total amount the farmer was obligated to repay. [*Id*.] These success fees were paid to PinCap out of the bank account for the 2013 VFLH Offering, which is the account that held investor money. [*Id*.] The success fees were paid to PinCap after loan proceeds were disbursed to a farmer, rather than when the farmer ultimately repaid the loan with interest. [*Id.* at ¶45.]

Senefeld and Risinger received over $700,000 in "success" fees, paid through PinCap, from the 2013 Offering. [Filing No. 57 at ¶46.] They also received over $100,000 in "interest rate spread" fees. [*Id*.] These fees were PinCap's only source of revenue in 2013. [*Id*.] None of the offering materials sent to investors in the 2013 Offering disclosed that PinCap, Risinger, or Senefeld would be paid "success" fees or "interest rate spread" fees. [*Id*. at ¶47.] Haab and Risinger admitted in SEC testimony that the fees were not disclosed to investors – in PPMs or otherwise – before they invested. [*Id*.]

PinCap also used a portion of the fees it received to pay Risinger and Senefeld salaries of over $150,000 in 2013 and $200,000 in 2014. [Filing No. 57 at ¶50.]

B. Senefeld Violated The Securities Laws

Based on Senefeld's Consent [Filing No. 429-2], the Court already has determined that Senefeld's conduct violated the following anti-fraud provisions of the federal securities laws: Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. [Filing No. 436.]

III. ADDITIONAL FACTS RELATING TO SENEFELD'S PARTICIPATION IN THE FRAUDULENT SCHEME

A. Senefeld's Securities Industry Experience

Senefeld has extensive experience in the securities industry. [Filing No. 422-2.] From 1991 to 2000 and then again from 2009 to 2016, Senefeld was registered as a broker with various broker-dealers. [*Id*.] As a broker, Senefeld could engage in the business of effecting transactions in securities for others. Senefeld has passed multiple securities industry exams and therefore holds several securities industry licenses including Series 24, 7, 63, and 65. [*Id*.] For example, the Series 24 is referred to as the General Securities Principal Qualification Exam. By holding this license Senefeld was entitled to supervise and manage the activities of a broker-dealer and the personnel. The supervisory activities allowed include regulatory compliance over trading and market making activities, underwriting, and advertising.

B. Senefeld Knew What Was Being Communicated to Investors After They Invested

Senefeld knew what was being communicated to the investors after they invested, and Senefeld provided information for updates to investors. Senefeld was copied on at least three update emails to the investors in the 2013 VFLH Offering. [Filing No. 198-13; Filing No. 198-14; Filing No. 198-15.] Those updates are dated April 3, 2013, April 24, 2013, and October 7, 2013. [*Id*.]

Additionally, on May 1, 2014, Haab sent Senefeld and Risinger a draft of an update to the investors in the 2013 VFLH Offering. [Filing No. 198-16.] Haab stated "[s]ee attached and let me know if anything else should be added. I specifically need some color to add on Boyer repayments yet to be received." [*Id*. at VEROS018022.] The draft update to the investors included a section entitled "Timing of Repayments to the Lending Group." [*Id.* at VEROS

018023.] It has "???" after Boyer Farms. [*Id*.] On that same date, May 1, 2014, Senefeld responded and provided information to Haab so Haab could provide that information to the investors. [Filing No. 422-3.]

C. Senefeld Knew The Earlier In Time Investors Were Being Repaid With Funds From Later Offerings

Senefeld knew and even discussed the fact that investors were being paid with funds from different, separate investments.

With respect to the 2012 Crossroads Offering and 2012 Kirbach Offering, the loans were due to be repaid with interest by March 30, 2013. Senefeld knew that not enough money had been repaid by Crossroads or Kirbach to pay back the investors in the 2012 Offerings. [Filing No. 198-23.] The 2012 investors were supposed to be repaid by March 30, 2013. On April 4, 2013, Senefeld sent Haab an analysis of the 2012 Crossroads loan showing that on March 31, 2013, $3,303,160.99 was due to the 2012 investors, but only $930,622.78 was available to pay the 2012 investors. [Filing No. 198-23 at VEROS 050342.] The analysis stated that $2,372,538.21 was needed from "**new investor funds**." [*Id.*] In fact, a total of $2,393,750.18 was transferred out of the 2013 VFLH Offering bank account and used to repay investors in the 2012 Crossroads Offering. [Filing No. 31 at 9.] During the time per this analysis was prepared Senefeld, Haab, and Risinger were raising funds from investors for the 2013 VFLH Offering (*i.e*. new investor funds). Hence, while raising funds for the 2013 VFLH Offering Senefeld, Haab, and Risinger knew they would be using the 2013 investor funds to repay the 2012 Crossroads Offering investors. Despite knowing this, they never disclosed it to the investors in the 2013 VFLH Offering.

Moreover, Senefeld received or sent numerous emails discussing paying investors in one offering with funds from a different, separate offering. For example:

1. Gustafson, the FarmGrowCap employee who was supervised by Senefeld, forwarded a spreadsheet showing how investors in the 2014 PinCap Bridge Loan Offering would be repaid with funds from the 2013 VFLH Offering and outlining how much was needed from other offerings to repay investors in the 2013 VFLH Offering. [Filing No. 198-27 at VEROS033324.] Senefeld reviewed the spreadsheet and instructed Gustafson to make several changes to it and resend it to Senefeld, Risinger, and Haab. [Filing No. 198-27 at VEROS033323.]

2. Senefeld received an email at his FarmGrowCap email account discussing paying the investors in the 2014 PinCap Bridge Loan with funds from the 2013 VFLH Offering and 2014 FarmGrowCap Offering. [Filing No. 198-28.]

3. Senefeld received an email dated October 9, 2014, discussing paying the investors in the 2013 VFLH Offering with funds from the 2014 FarmGrowCap Offering. [Filing No. 198-29 at VEROS027450 stating "we currently only have a balance of $108,365 in the Farm Grow Cap account (after making a final payment to the 2013 investors yesterday)."] Indeed, the bank records show that on "yesterday" which was October 8, 2014, funds were transferred from the 2014 FarmGrowCap Offering bank account to the 2013 VFLH Offering bank account. [Filing No. 31-3.]

4. Senefeld received an email discussing using funds raised for the 2014 FarmGrowCap Offering to pay investors in the 2013 VFLH Offering. [Filing No. 198-30 at VEROS 041302 Haab stating to Senefeld, Gustafson, and Risinger "I want to explore/discuss the idea of raising some additional [in 2014 FarmGrowCap Offering] so we can repay the 2013 farm loan investors".]

5. Senefeld received an email discussing using funds raised for the 2014 FarmGrowCap Offering to pay investors in the 2013 VFLH Offering. [Filing No. at 198-31 VEROS026625 stating, "have we set a carryover accrual date for what we are paying to the 2013 investors with 2014 funds for the balances on Williams and Boyer's 2013 loans."]

6. Senefeld received an email dated August 26, 2014, that discussed using funds raised from the 2014 FarmGrowCap Offering to pay investors in the 2013 VFLH Offering. [Filing No. 198-32 at VEROS027239 and VEROS027242 stating "see attached on the current amounts due to 2013 investors – as shown on this schedule we have another $225k from investors that will fund this week that will pay that balance down to just over $300k."]

7. Senefeld received an email asking Senefeld and Risinger how to repay the investors in the 2013 VFLH Offering months after the repayment was due. [Filing No. 198-34 at VEROS 027352]

There is no evidence that Senefeld ever opposed or objected to investors in the earlier in time offerings being repaid with funds from later offerings.

D. Senefeld Requested That Funds Be Disbursed From The Bank Accounts Containing Investor Funds

Senefeld was intimately involved with the finances of the offerings. Senefeld or Gustafson, an employee acting at Senefeld's direction, routinely requested that Veros disburse investor funds to the farms, pursuant to budgets Senefeld or Gustafson created. For example, Senefeld wrote in one email: "I am proposing that we wire to FFBT. . .all funds we have in the account today before 2pm cut off. Then on Friday please wire the remaining amount of funds due to RJW & D&S for loan agreements." [Filing No. 198-17 at VEROS028126.] Senefeld also wrote to Haab, "if you could please wire all funds in the Affiliated Farms/Rosentreter account back to him today." [Filing No. 198-18 at VEROS051168.] Furthermore, Haab wrote,

"[m]et with Jeff and Tobin yesterday and according to them there is about $1.5 million currently in the Crossroads Mainsource account. We need to process these wires ASAP." [Filing No. 198-19 at VEROS 054359-361.]

E. Senefeld Was Barred From Associating With Any Broker-Dealer

In August 2016, Financial Industry Regulatory Authority ("FINRA") staff requested that Senefeld testify regarding the allegations made by the SEC in this action. [Filing No. 422-1.] Senefeld through his counsel advised FINRA staff that he would not appear for the testimony. [*Id*. at 2-3.] Due to his refusal to comply with FINRA rules, Senefeld consented to being barred from associating with any FINRA member in any capacity. [*Id.* at 3.]

IV. SENEFELD CONSENTED TO PAY DISGORGEMENT AND PREJUDGMENT INTEREST

In the Consent, Senefeld agreed "that the Court shall order disgorgement of ill-gotten gains and prejudgment interest thereon; that the amounts of the disgorgement and civil penalty shall be determined by the Court upon motion of the Commission; and that prejudgment interest shall be calculated from December 1, 2013." [Filing No. 429-2 at p. 3, ¶5.] Accordingly, the Judgment ordered that Senefeld "**shall** pay disgorgement of ill-gotten gains and prejudgment interest thereon [and] that the amounts of the disgorgement and civil penalty shall be determined by the Court upon motion of the Commission." [Filing No. 436 at p. 3, ¶ III (emphasis added).]

A. Disgorgement

"Disgorgement of illegal profits and unjust enrichment is an equitable remedy available under the federal securities laws." *SEC v. Alanar*, 2008 WL 1994854, *4 (S.D. Ind. May 6, 2008) (citing *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C.Cir.1989)). *See also SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002). The remedy is "designed to deprive a

wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Alanar*, 2008 WL 1994854, *4 (quoting *First City Fin.*, 890 F.2d at 1230). "The disgorgement figure calculation is discretionary and need not be exact." *Alanar*, 2008 WL 1994854, *4 (citing *SEC v. First Jersey Secs. Inc.*, 101 F.3d 1450, 1474–75 (2d Cir.1996)).

The SEC is required to show merely that the amount of disgorgement is a "reasonable approximation" of the profits the defendant reaped from the wrongful conduct. *Alanar*, 2008 WL 1994854, *4 (citing *First City Fin.*, 890 F.2d at 1231; *SEC v. Randy*, 38 F.Supp.2d 657, 673–74 (N.D.Ill.1999)). The burden then shifts to the defendant to show that this approximation is inaccurate. *Alanar*, 2008 WL 1994854, *4 (citing *First City Fin.*, 890 F.2d at 1232; *Randy*, 38 F.Supp.2d at 674). "Any ambiguity in the calculation should be resolved against the defrauding party." *Alanar*, 2008 WL 1994854, *4 (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir.1996); *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995); *SEC v. Great Lakes Equities Co.*, 775 F.Supp. 211, 214 n. 21 (E.D. Mich. 1991)).

"Courts do not require the SEC to trace every dollar of a defendant's ill-gotten gains." *Alanar*, 2008 WL 1994854, *4 (citing *SEC v. First Pacific Bancorp.*, 142 F.3d 1186, 1192 n. 6. (9th Cir.1998)). Where the defendants have commingled the money, the SEC is not required to identify the misappropriated money. *Alanar*, 2008 WL 1994854, *4 (citing *Great Lakes Equities* Co., 775 F.Supp. at 214 n. 21)). "Since calculating disgorgement may at times be a near-impossible task, the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.*

B. Prejudgment Interest

Senefeld agreed to pay prejudgment interest on any amounts he must disgorge. An order to pay prejudgment interest is supported by Seventh Circuit precedent as well as

decisions by courts in this district. *SEC v. Koenig*, 557 F.3d 736, 744-45 (7th Cir. 2009); *Alanar*, 2008 WL 1994854, *6.

V. SENEFELD SHOULD BE REQUIRED TO DISGORGE $698,818.29

"Disgorgement of salaries and other forms of compensation may be an appropriate remedy." *SEC v. Black*, 2009 WL 1181480, *2 (N.D. Ill. Apr. 30, 2009) (citing *SEC v. Koenig*, 557 F.3d at 744-45). "[G]eneral business expenses, such as overhead expenses," "should not reduce the disgorgement amount." *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009) (internal quotes and citations omitted), *aff'd* 438 Fed. Appx. 23 (2d Cir. 2011). Also, money obtained or misappropriated from investors should be considered ill-gotten gains and disgorged accordingly. *See, e.g., SEC v. Brown*, 579 F. Supp. 2d 1228, 1245 (D. Minn. 2008), *aff'd* 658 F.3d 858 (8th Cir. 2011) (ordering disgorgement of misappropriated investor funds); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 384-85 (S.D.N.Y. 2007) (investor funds obtained by adviser subject to disgorgement).

Additionally, "it is irrelevant for disgorgement purposes, how the defendant chose to dispose of the ill-gotten gains; subsequent investment of these funds, payments to charities, and/or payment to co-conspirators are not deductible from the gross profits subject to disgorgement." *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009) (internal quotes and citations omitted), *aff'd* 438 Fed. Appx. 23 (2d Cir. 2011).

Furthermore, financial hardship of the defendant is not a factor to be considered in determining the amount of disgorgement. *See, e.g., SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008); *SEC v. Mohn*, 2005 WL 2179340, *4 (E.D. Mich. Sept. 9, 2005); *SEC v. Thorn*, 2002 WL 31412439, *2 (S.D. Ohio, Sept. 30, 2002); *SEC v. Robinson*, 2002 U.S. WL 1552049, *8 (S.D.N.Y. July 16, 2002).

Throughout the period of the fraudulent scheme, Senefeld received ill-gotten gains. As shown below, Senefeld's ill-gotten gains total at least $698,818.29. [McShane Declaration, Filing No. 443 at ¶6.]

The table below summarizes the payments made to Senefeld.[1] [*Id.* at ¶7.]

Payments to Senefeld		
Tobin Senefeld	$ 477,855.60	
Mary Senefeld	$ 220,962.69	
TOTAL		$ 698,818.29

Senefeld consented to pay prejudgment interest on the entire amount that he is ordered to disgorge. Pre-judgement interest of $94,538.36 is applicable to $698,818.29, the sum of the payments made to Senefeld [*Id.* at ¶14.]

VI. THE COURT SHOULD IMPOSE CIVIL PENALTIES ON SENEFELD

Given Senefeld's fraud, the Court should impose civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. Congress authorized such penalties to achieve the dual goals of punishing the violator and deterring future violations. *SEC v. Jakubowski*, 1997 WL 598108, *3 (N.D. Ill. Sept. 19, 1997), *aff'd* 150 F.3d 675 (7th Cir. 1998). A civil penalty is necessary because "disgorgement…does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud…," and "…is necessary for the deterrence of

[1] Attached to the McShane Declaration, at Exhibit 1, is a schedule of all payments made to Senefeld during the review period which identifies the date of each cash payment, the account which made the payment, and the categorization of the payment. [Filing No. 443-1.]

securities law violations that otherwise may provide great financial returns to the violator." *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (*quoting* H.R. Rep. No.101-616 (1990)).

The Securities Act and Exchange Act each set out three identical tiers for determining the amount of civil penalties that may be imposed for "each violation" of the securities laws. The applicable penalty amounts are periodically adjusted for inflation. Here, the Court would be justified in imposing either a first, second, or third tier civil penalty on Senefeld for his violations of the securities laws.

For the first tier, which imposes the lowest penalty, "the amount of the penalty shall be determined by the court in light of the facts and circumstances." *See e.g.* 15 U.S.C. § 78u(d)(3)(B)(i). For each violation under the first tier, the amount of the penalty shall not exceed the greater of $7,500 for a natural person or the gross amount of pecuniary gain to such defendant as a result of the violation. *Id.*; 17 C.F.R. § 201.1001 and 17 C.F.R. Part 201 Table I to Subpart E.

The second tier applies where the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. § 78u(d)(3)(B)(ii). For the second tier, the amount of penalty for each violation shall not exceed the greater of $80,000 for a natural person or the gross amount of pecuniary gain to such defendant as a result of the violation. *Id.*; 17 C.F.R. § 201.1001 and 17 C.F.R. Part 201 Table I to Subpart E.

The third and highest tier applies where the violation (i) "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and (ii) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 78u(d)(3)(B)(iii); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 385-86 (S.D.N.Y. 2007). For the third tier, the amount of penalty for each violation shall not exceed

the greater of $160,000 for a natural person or the gross amount of pecuniary gain to such defendant as a result of the violation. 15 U.S.C. § 78u(d)(3)(B)(iii); 17 C.F.R. § 201.1001 and 17 C.F.R. Part 201 Table I to Subpart E. .

Concerning the penalty calculation, courts have defined "per violation" to mean: (a) per *claim* against a defendant, *SEC v. Shehyn*, 2010 WL 3290977, *8 (S.D.N.Y. Aug. 9, 2010); (b) per *misrepresentation* by a defendant, *SEC v. Coates*, 137 F. Supp. 2d 413, 430 (S.D.N.Y. 2001); and (c) per *investor* defrauded by a defendant, *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 18 n. 15 (D.D.C. 1998); among other methodologies.

Senefeld's conduct involved deliberate or reckless actions constituting fraud, and his actions harmed investors. The Court should find that Senefeld's securities laws violations warrant the imposition of civil penalties. Taken as true for the purposes of this motion, the allegations in the Amended Complaint demonstrate that Senefeld violated multiple anti-fraud provisions of the federal securities laws, namely, Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Senefeld's conduct resulted in substantial losses of millions of dollars invested by the defrauded investors. At the time this lawsuit was filed, investors were owed approximately $9 million. [Filing No. 57 at ¶78.] Consequently, the Court would be justified in imposing any tier of civil penalty. *See, e.g., SEC v. Lipson*, 278 F.3d 656, 664-65 (7th Cir. 2002) (affirming imposition of maximum civil penalty).

Ordering Senefeld to disgorge his ill-gotten gains, without the imposition of a penalty, merely returns him to the *status quo ante*. Thus, a civil penalty is necessary to serve as a form of punishment for Senefeld's illegal actions. The amount of the civil penalty should be large

enough to discourage Senefeld from future misconduct, as well as deter others who are similarly-situated from engaging in comparable instances of misconduct.

VII. CONCLUSION

For all of the foregoing reasons, Plaintiff U.S. Securities and Exchange Commission respectfully requests that the Court issue a final judgment setting the amount of disgorgement and prejudgment interest to be paid by Senefeld and requiring him to pay an appropriate civil penalty.

November 6, 2017

Respectfully submitted,

By: **/s/Doressia L. Hutton**
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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I served **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR DISGORGEMENT, PREJUDGMENT INTEREST, AND CIVIL PENALTIES AGAINST DEFENDANT TOBIN SENEFELD** on all counsel of record through the Court's ECF filing system.

/s/Doressia L. Hutton