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**
VEROS PARTNERS, INC, MATTHEW D. HAAB, JEFFERY B. RISINGER, VEROS FARM LOAN HOLDING LLC, TOBIN J. SENEFELD, FARMGROWCAP LLC, and PINCAP LLC,	
Defendants,	
PIN FINANCIAL LLC,	
Relief Defendant.	

PLAINTIFF'S RESPONSE TO DEFENDANT TOBIN J. SENEFELD'S MOTION FOR SUMMARY JUDGMENT

Plaintiff United States Securities and Exchange Commission (the "SEC" or "Commission"), for its response to Defendant Tobin J. Senefeld's Motion for Summary Judgment [Filing No. 189], states as follows:

I. Preliminary Statement

This case involves several fraudulent farm loan investments offered by Defendants Matthew D. Haab, Jeffery B. Risinger, and Tobin J. Senefeld, as well as the entities they own and control, 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* SEC's Amended Complaint, Filing No. 57] The Court already is familiar with the SEC's allegations regarding fraudulent farm loan offerings. On May 7, 2015 this Court entered a Preliminary Injunction against Senefeld and the other Defendants, prohibiting them from violating Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933 ("Securities Act"). [Preliminary Injunction Order, Filing No. 48 at 2-3]

However, in his motion for summary judgment, Senefeld does not attempt to show that the other Defendants were engaged in legitimate business activities. Instead, Senefeld argues that *he* cannot be liable for direct violations of the securities laws, because he was a mere consultant to various lending entities, he did not prepare any offering documents or communicate with any investors, and he had no relationship with or duties towards any investors. [Filing No. 190 at 2] Senefeld further argues that he did not engage in any "inherently deceptive" conduct that would subject him to primary liability as a participant in a fraudulent scheme. [*Id.*] However, Senefeld's arguments fail because "actual or first-hand" contact with the investors is *not* a condition precedent to primary liability for antifraud violations. *See, e.g.*, *SEC v. Holschuh*, 694 F.2d 130, 134, 142 (7th Cir. 1982) (finding primarily liability for violations of the Securities Act and the Exchange Act and Rule 10b-5 where defendant "had no direct part in writing [offering] circular and did not read it prior to distribution").

In addition, there are numerous disputed issues of material fact and a reasonable jury could find Senefeld liable for violating the Securities Act and/or the Exchange Act. Among other things:

- Senefeld was an owner and one of the managers of FarmGrowCap and PinCap, entities which received and dispersed investor funds to make the private farm loans;
- Senefeld helped create the misleading documents used in the 2013 and 2014 offerings;

- Senefeld personally communicated with several investors in private offerings, and even collected funds from at least one investor;

- Senefeld personally received several hundred thousand dollars in fees generated by the various farm loan offerings, which were not disclosed to investors;

- Senefeld knew that the farm loans were not performing as anticipated, and that funds from 2013 and 2014 offerings were used to repay investors in prior offerings. He personally directed at least one such transfer;

- And finally, Senefeld personally approved the use of an investor disclosure document which mischaracterized his 1999 settlement with the SEC.

The factual basis for Senefeld's liability is set forth in investigative and deposition testimony, as well as the offering materials, emails and other documents filed previously or submitted herewith.[1] The SEC also has obtained declarations from Haab, Risinger and Shawn Gustafson, which contradict Senefeld's version of events in a number of ways.

II. Undisputed Facts

In 2009, Senefeld approached Haab with a farm loan opportunity that was ultimately offered to Veros clients and other investors through a private offering. [Filing No. 9-4 at 18; Haab Tr. 72:9-24; Exhibit 5, Senefeld Tr[2]. 31:12-32:21; 35:4] Subsequently, Senefeld approached Haab with a number of additional investment opportunities that were packaged into private offerings and offered to clients of Veros and other investors. (Filing No. 9-4 at 19, 25; Haab Tr. 73:12-22, 97:23-24:98:1; Ex. 5, Senefeld Tr. 35:19-36:7, 40; Filing No. 10-1 at 8-9, Risinger Tr. 27, 29:7-30:6) Since at least 2010, Senefeld has worked with Haab and Risinger to originate farm loan investments and other loan investments sold as private offerings to advisory

[1] The SEC previously articulated the legal and factual basis for Senefeld's liability under the Securities Act and the Exchange Act in its memorandum supporting its motion for a temporary restraining order. [See Filing No. 8 at 31-33]

[2] The Senefeld SEC investigative testimony transcript will be referred to as "Senefeld Tr." It was previously filed as Filing No. 10-2.

clients of Veros and other investors. (Ex. 5, Senefeld Tr. 31:12-24; 33:3-4) Senefeld, Haab, and Risinger have worked together on approximately 40 private offerings. (Filing No. 9-4, Haab Tr. 86)

The SEC's response will focus on the following private offerings:

- **2012 Crossroads Offering.** $3,370,000 was raised from investors. [Filing No. 31-1 at 1] The stated rate of return for investors was 12%. [*Id.*] The investors were supposed to be repaid their principal and interest by March 30, 2013. [*Id.*]

- **2012 Kirbach Offering.** $1,430,000 was raised from investors. [Filing No. 31-1 at 1] The stated rate of return for investors was 11.5%. [*Id.*] The investors were supposed to be repaid their principal and interest by March 30, 2013. [*Id.*]

- **2013 VFLH Offering.** $9,664,000 was raised from investors. [Filing No. 31-1 at p.1] The stated rate of return for investors was 10%. [*Id.*] The investors were supposed to be repaid their principal and interest by April 30, 2014. [*Id.*] Funds from the 2013 VFLH Offering were used to repay investors in the 2012 Kirbach Offering and 2012 Crossroads Offerings, which collectively are referred to as "2012 Offerings."

- **2014 PinCap Bridge Loan Offering.** $5,200,000 was raised from investors. [Filing No. 31-1 at 2] The stated rate of return for investors was 1.5% per month. [*Id.*] The investors were supposed to be repaid their principal and interest by April 30, 2014. [*Id.*] However, funds from the 2014 FarmGrowCap Offering were used to repay investors in other offerings.

- **2014 FarmGrowCap Offering.** The stated rate of return for investors was 9%. [Filing No. 31-1 at 2] The investors were supposed to be repaid their principal and interest by April 30, 2015. [*Id.*] These amounts have not been repaid.

The 2012 Offerings, the 2013 VFLH Offering, 2014 PinCap Bridge Loan Offering, and the 2014 FarmGrowCap Offering were all separate investments with separate offering materials and separate groups of investors. [Filing No. 9-4, Haab Tr. 75:23-25; 76:1-2; 198: 1-10; 203-204]

Senefeld is a one-third owner of PinCap. [Filing No. 11-1, 2013 PPM at 3, 6; Ex. 4, Risinger Declaration at ¶ 2] The other two owners are Risinger and Veros. (Filing No. 11-1 at 3; Ex. 4, Risinger Decl. at ¶ 2] PinCap was managed by Senefeld, Risinger, and Veros. [Filing No. 11-1 at 3.6] PinCap is an Indiana limited liability company that owned and operated

FarmGrowCap LLC and PIN Financial LLC. (Filing No. 11-1 at 2] PinCap was the entity used by Senefeld, Risinger, and Haab to make and manage farm loans in the 2013 Offering and other private offerings. (Filing No. 11-1 at 2-3]

Senefeld, Risinger, and Haab were signatories on the PinCap bank account that was established as the operating account for PinCap. [Filing No. 31 at p. 4 ¶ e] The fees received by PinCap in connection with the 2013 VFLH Offering and 2014 FarmGrowCap Offering were deposited in this account. [*Id.*] PinCap was also the issuer of the 2014 PinCap Bridge Loan Offering. Investor funds from the 2014 PinCap Bridge Loan Offering were also deposited into the PinCap operating bank account over which Senefeld, Risinger, and Haab had authority. [Filing No. 31 at p. 4 ¶ e]

Additionally, Senefeld is the CEO of, and a registered representative with, Pin Financial LLC, a broker-dealer registered with the SEC. (Ex. 5, Senefeld Tr. 56:2-5) Risinger and Senefeld acquired Pin Financial in or around 2013, and currently the firm is majority owned by PinCap.

In 1999, Senefeld settled an SEC administrative proceeding alleging that he engaged in a fraudulent scheme where as a registered representative of a now defunct broker-dealer he purchased stocks without sufficient funds to pay for those purchases and then used the proceeds of the sale of that same stock to cover the purchase price. [Filing No. 11-17] Senefeld was ordered to cease and desist from violations of the antifraud provisions of the Securities and Exchange Acts, he paid a $25,000 civil penalty, and he served a twelve-month suspension from associating with any broker-dealer. [*Id.*]

III. Statement of Material Facts in Dispute

Senefeld relies on numerous statements by Haab and Ringer during their investigative testimony. However, in his motion for summary judgment, Senefeld does not rely on any statements from the SEC Investigative Testimony he gave on March 27, 2015 (Ex. 5) or the deposition he gave in this case on February 24, 2016.[3] (Ex. 1) Instead, Senefeld offers a self-serving, 49 paragraph, declaration, which repeatedly mischaracterizes the responsibilities of Haab and Risinger and minimizes Senefeld's role and participation in the events relevant to this case. (Ex. 3, Haab Declaration at ¶ 1; Ex. 4, Risinger Declaration at ¶ 1)

A. Senefeld Had Personal Contacts with Investors

Senefeld claims that he "did not know the identities of the investors and did not communicate with them." [Filing No. 190 at 10; Filing No. 191-2 at 3 ¶ 21] He further claims that he did not "otherwise communicate with investors." [Filing No. 191-2 at 6 ¶ 48] At best, these facts are disputed; at worst, these statements are false. Haab already has testified that "there were also some relationships that were referred to the investments through Tobin Senefeld." [Filing No. 9-4, Haab Tr. 80:5-7] Senefeld also communicated via email and had meetings with investors while attempting to persuade them to invest in the private offerings. (Ex. 6, VEROS 054432-434; Ex. 7, VEROS 061515 - 517) For example:

- On February 26, 2013, Senefeld emailed Rick Dennen and Martin McFarland stating "[t]hank you for coffee and the time you took to meet with me last Friday. I appreciated your input and continued interest in Farm Grow Cap." (Ex. 6 at VEROS 054433)

[3] In those testimonies Senefeld was evasive, or frequently claimed a lack of knowledge. However, in his Declaration, Senefeld has both a detailed and certain recollection.

- On June 18, 2013, Senefeld emailed the principals of one of the farms that borrowed money through private offerings stating, "I look forward to meeting with you again [tomorrow] and introducing you to our clients Marty and Laura McFarland and my business partner Matt Haab." (Ex. 9, VEROS 029307) McFarland was an investor in the private offerings.
- On Monday, February 24, 2014, Senefeld emailed Dennen stating, "Let me know if you have any time available to meet for coffee early one morning this week. I can will (sic) fill you in on the details of our meeting with Marty along with the opportunities we presently (sic) working on for 2014." (Ex. 10 at VEROS 059927) Within days, Dennen and McFarland invested in the 2014 PinCap Bridge Loan Offering. (Ex. 8 at VEROS 021837, VEROS 021840)
- On Saturday, June 21, 2014, Haab sent an email to McFarland describing conversations with Senefeld and Risinger in which "we discussed that we could provide some separate assurances from our group to you that you would be paid the 2% monthly interest until your investment was fully repaid" (Ex. 7 at VEROS 061516.) That same day Senefeld emailed McFarland stating: "Thanks again Marty for your continued support & involvement. Let me know if you have time early Mon morning to meet for coffee before you head out . . ." (*Id*. at VEROS 061516)
- On at least one occasion, Senefeld collected funds to be invested in a private offering directly from Dennen. (Ex. 12, VEROS 029440-441)

Senefeld also claims that he did not "disseminate any disclosures or offering materials to investors or otherwise communicate with investors." [Filing No. 191-2 at 6 ¶ 48] This is directly contradicted by the evidence. For example:

- On June 23, 2014, Senefeld sent an email to Haab and Risinger stating, "[p]lease see the attached list of my most recent contacts for the TBF 2014 deal. ***I have recently sent out offering documents out to the following*** and will keep you updated." (Ex. 11) The attachment lists the names of the potential investors to whom Senefeld sent the offering documents." (*Id.*)
- According to Risinger, Senefeld was responsible for introducing at least 5 people who subsequently invested in the private offerings. (Ex. 4, Risinger Declaration at 5 ¶ 10). Senefeld communicated directly with them to solicit their investment in the private offerings. (*Id.*) (*See also* Ex. 3, Haab Declaration at 5 ¶ 12)

B. Senefeld Received Communications and Information Sent to Investors

Senefeld claims that "Haab and Risinger made the decision to refinance part of Kirbach's operating debt from 2012 through FarmGrowCap" and "I did not know what Haab communicated to his investors about the refinance or payments to investors." [Filing No. 191-2 at 5 ¶¶ 35, 37] These statements are contradicted by the evidence. For example:

- Senefeld was on at least three update emails to the investors in the 2013 VFLH Offering, dated April 3, 2013, April 24, 2013, and October 7, 2013. (Ex. 13, VEROS 003472 – 474; Ex. 14, VEROS 004037-039; Ex. 15, VEROS 007023-726) All three of these updates show a $375,000 loan to Kirbach Farms, but they do not inform investors that Kirbach had not repaid its 2012 loan, so the loan amount includes the unpaid debt. (Ex. 13 at VEROS 003473) Because Senefeld received these emails, he

knew that nothing was being communicated to the investors about the so-called refinance.

- On May 1, 2014, Haab sent Senefeld and Risinger a draft of an update to the investors in the 2013 VFLH Offering. (Ex. 16, VEROS 018022-024) 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." (Ex. 16 at VEROS 018022) The draft update to the investors includes a section entitled "Timing of Repayments to the Lending Group." (Ex. 16 at VEROS 018023) It has "???" after Boyer Farms. (*Id.*) On that same date, May 1, 2014, Senefeld responded and provided information so Haab could provide that information to the investors.

Senefeld claims that he "did not know what agreements or representations Haab made to investors about repayments of their investments or any farms' refinancing debt." [Filing No. 191-2 at 7 ¶ 49] This is directly contradicted by the evidence. For example:

- Senefeld was copied on an October 7, 2013 investor update email regarding the 2013 VFLH Offering. (Ex. 15, VEROS 007023-026) The email includes a three (3) page update to the investors. (*Id.*) The email provides information about repayments by the farms and repayment of the investors' investment. (Ex. 15 at VEROS 007025 - 026) Some of the information in the update likely was supplied by Senefeld, including information in the sections entitled "Update on the Farms 2013 Crops & Harvest" and "Repayment of Loans." (Ex. 15 at VEROS 007025)
- Senefeld received certain emails sent to update investors. (Ex. 13 VEROS 003472 – 474; Ex. 14 VEROS 004037- 039; Ex. 15 VEROS 007023-726)

C. <u>Senefeld Received Copies of Offering Documents and Disclosures</u>

Senefeld claims that "he did not know what disclosures Haab made to his investors." [Filing No. 190 at 10] This is disputed.

- Risinger testified that Senefeld was provided with multiple drafts of the PPMs. [*See* Filing No. 10-1, Risinger Tr. 59:20-24)
- Gustafson has attested that Senefeld was provided with copies of the draft PPMs for his review and comment. [*See* Ex, 2, Gustafson Declaration at 3 ¶ 8)
- Haab confirms that Senefeld received drafts of the PPMs for his review and comment. (Ex. 3, Haab Declaration at 10 ¶ 29) These drafts were the subject of calls between Risinger, Haab and Senefeld, so Senefeld knew what was in them. (*Id.* at 11 ¶ 32)

D. Senefeld Requested Disbursements from the Farm Loan Bank Accounts

In addition, Senefeld claims that Haab controlled the accounts for the farm loans and for investors. [Filing No. 191-2 at 4 ¶ 30) However, Senefeld or Gustafson (acting at Senefeld's direction) routinely requested that Veros make disbursements to the farms, pursuant to budgets they created.[4] (Ex. 4, Risinger Declaration at 6 ¶15) Haab states that he did not make disbursement decisions himself, and that Senefeld had significant authority regarding the timing and amounts disbursed to farmers. (Ex. 3, Haab Declaration at 7 ¶ 18) After an initial budget was approved by Haab, Senefeld and Risinger, then Senefeld or Gustafson would request disbursements as Senefeld deemed them necessary. (*Id)* And Senefeld also had significant input into the timing and amount of disbursements of funds to investors. (*Id.*)

[4] 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." (Ex 17, VEROS 028126) Senefeld also wrote to Haab, "if you could please wire all funds in the Affiliated Farms/Rosentreter account back to him today." (Ex. 18VEROS 051168) Further, 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." (Ex. 19, VEROS 054359-361)

E. Senefeld's Role Was More Than a Mere Consultant or Liaison with Farmers

Senefeld claims that after Risinger presented a business proposal to Veros, Haab and Decker proposed that Veros would provide funding for farm loans it approved, and develop the funding structure, interest rate and other terms to make it a suitable investment for Veros' clients. [Filing No. 191-2 at 2 ¶ 17] Both Haab and Risinger dispute this. According to Risinger, he and Senefeld jointly created a proposal regarding farm loan investments, which they pitched to Haab and Veros; Senefeld, Haab and Risinger began working together to develop this project, and jointly decided to finance farm loans through individual investors. (Ex. 4, Risinger Declaration at 3 ¶¶ 6-7) Haab confirms that Senefeld and Risinger jointly made a proposal to work with Veros on this project. (Ex. 3, Haab Declaration at 3 ¶ 7)

Senefeld claims that Risinger and Gustafson were to evaluate the potential loans and work with Veros to develop the legal structure of the loan and investment offerings, while he identified farms in need of financing and provided the information Veros needed to conduct its own due diligence. [Filing No. 191-2, Senefeld Declaration at 3 ¶¶ 18-19] This is not accurate. Risinger says that he, Senefeld and Haab all jointly evaluated the loan candidates, but that Senefeld played a leading role because of his prior experience in evaluating loans and dealing with farmers. (Ex. 4, Risinger Declaration at 4 ¶ 7) According to Risinger, Senefeld and Gustafson normally would work together on the due diligence items for a loan candidate first, then involve Risinger and then present them to Haab. (*Id.* at 4 ¶ 9) And according to Haab, Senefeld was responsible for performing the due diligence, and identifying the best candidates for a farm loan investment; Risinger would review that due diligence in working up the loan documentation, and eventually Haab would see it. But performing the due diligence was the

unique value and expertise Senefeld was supposed to bring to the business. (Ex. 3, Haab Declaration at 4 ¶ 9)

Senefeld further claims that the due diligence was prepared by Gustafson, and that Haab then "conduct[ed] his own analysis of the information underlying the due diligence." [Filing No. 190 at 5; No. 191-2 at 3 ¶ 20] Again, the page of testimony cited by Senefeld does not support his claim. Rather, Haab stated: "[s]o I would kind of see, you know, the final result of their pro forma financial analysis of providing the borrowed funds and the farmer, you know, being able to repay the loan. And so that was – my involvement was just reviewing kind of the finished product." [Filing No. 9-4 at 35, Haab Tr, 140] Haab further testified that Senefeld, Risinger, and Gustafson all conducted the due diligence. (*Id.*)

Senefeld further claims that "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 need."[5] [Filing No. 190 at 5-6] However, Risinger noted that Senefeld negotiated directly with the farmer on the amount of the loan, the interest rate and the origination fee, which were documented and then became the terms for their discussion and evaluation of a loan. (Ex. 4, Risinger Declaration at 5 ¶ 12) And Haab stated that Senefeld had an equal say in making the loan, and he was instrumental in determining interest rate to be charged to the farm, and the necessary collateral. deal structure, including the interest rate to be charged to the farm and the necessary collateral. (Ex. 3, Haab Decl at 6 ¶ 16) In fact, Senefeld

[5] Senefeld also claims that "[i]n 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." [Filing No. 190 at 6] According to Senefeld, "[Haab] would look at the sources of collateral and determine what collateral would be required to properly secure the investment." [*Id.*] However, the transcript pages Senefeld cites do support either of these statements. [See Filing No. 9-4 at 15, Haab Tr. 57]

was the one who actually negotiated the loan amount, interest rate and origination fee with the farmers. (*Id.*)

Finally, Senefeld claims that "Haab had final authority over the terms of the investment." [Filing No. 190 at 6] Once again, the pages cited by Senefeld do not support this proposition, and the only support is Senefeld's own declaration. Haab disagrees, stating that in practice, Senefeld, Risinger and Haab all had to be in agreement before a particular loan was funded; but the terms proposed by Senefeld in the due diligence materials usually were approved without modification when they agreed to move forward on a loan. (Ex. 3, Haab Declaration 5 at ¶ 10)

F. Senefeld Was Involved in Creating the PPMs and other Disclosures

Senefeld claims that "Risinger maintained responsibility for writing disclosures."[6] [Filing No. 190 at 9] Senefeld cites only a single page of Risinger's investigative testimony as support for this claim. However, Risinger's testimony does not establish either that he was responsible for the disclosures, or that Senefeld was not. Rather, Risinger testified that as he drafted the offering materials he "would get help from Tobin [Senefeld] and Shawn in terms of information that I would need." (Filing No. 10-1, Risinger Tr. 59: 17-18) Risinger further

[6] Senefeld further claims that "Risinger . . . consulted with other attorneys in providing his legal services and hired counsel to advise him regarding the disclosures . . ." [*See* Filing No. 190 at 8] However, Senefeld has no evidentiary support for this claim. Senefeld cites to Haab's investigative testimony at pages 82 and 101, but these pages contain no such testimony. Page 82 simply says that there have been two attorneys, other than Risinger, who prepared offering materials for different private investments offered to Veros clients. Page 101 simply says that PinCap has recently "hired another attorney to help with the workload." Senefeld also cites Risinger's investigative testimony at page 14; however, that page simply says that another lawyer works for PinCap. Finally, Senefeld cites to ¶ 45 of his own declaration, which states that "[Risinger] represented to me that he also had consulted with another outside securities attorney in drafting the disclosure [about Senefeld's SEC settlement]." That statement obviously is narrower than Senefeld has claimed and relates only to the disclosure of the SEC settlement. Moreover, it is disputed because Risinger states that he did not make this representation to Senefeld. (Ex. 4, Risinger Decl. at 10 ¶ 29)

testified "I would go through several drafts, multiple drafts each time. I would write it. Then I would send it out to Tobin [Senefeld] and Matt and Shawn and say here is draft number two, here is draft number three, here is draft number four, red line to show you the changes, and making sure that everybody was up to speed with me. But I was writer." [Filing No. 10-1 at 16, Risinger Tr. 59:18-24] More recently, in his declaration, Risinger adds that Senefeld instructed Gustafson to provide him with specific information about farms to include in the PPMs; that Senefeld, Risinger and Haab sometimes would have calls to discuss the draft PPMs; and that he is certain from his interactions with Senefeld that he knew the PPMs were being provided to investors and potential investors. (Ex. 4, Risinger Declaration at 10 ¶ 28)

Gustafson agrees that Risinger sent drafts of the PPMs to the entire team, including Senefeld, for review and comment. (Ex. 2, Gustafson Decl. ¶ 8) And Haab confirms that Senefeld participated in calls to discuss the PPMs, and provided information to Risinger and Haab to be used in the PPMs and other disclosures provided to investors. (Ex. 3, Haab Declaration at 11 ¶ 32) One such document was entitled "The Case for Investing in Farms: A Summary for Accredited Investors Only." (*Id.* at Ex. A thereto) Although the final document was a group effort, Senefeld and Risinger were the source of the information about the economics of farming, collateral security and farm profitability which was contained therein, and that document was used with investors and potential investors.

G. Senefeld Negotiated the Loan in Connection with the 2012 Kirbach Farms Offering

In ¶ 22 of his Declaration, Senefeld claims that "Haab, through Veros, decided to make farm operating loans to Kirbach Farms and Crossroads Farms." Risinger and Haab disagree, and state that Senefeld, Risinger, and Haab had all decided to make the loans to Crossroads and Kirbach. (Ex. 3, Haab Decl. at 5-6 ¶ 13; Ex. 4, Risinger Decl. at 5 ¶ 11) Senefeld also cites to

Haab's and Risinger's investigative testimony. [Filing No. 190 at 11] But none of the pages cited demonstrate that Haab unilaterally made the decision to make the loan to Kirbach Farms.

In ¶ 24 of his Declaration, Senefeld claims that "Haab determined the structure of the terms of the loan, including the interest rate Veros would charge to Kirbach and the necessary collateral, which I would communicate to Birch and Kirbach." In his Statement of Facts, Senefeld made the same claim. [Filing No. 190 at 11] However, this is disputed. In conducting the due diligence Senefeld negotiated directly with the farmers and worked up a proposal which included the amount of the loan, the interest rate and the origination fee which became a template for the discussion and evaluation of the loan. (*See* Ex. 4, Risinger Decl. at 5 ¶ 12) Haab goes a bit further, and states that Senefeld also was instrumental in determining the necessary collateral, and had an equal say in establishing the terms of the loan. (Ex. 3, Haab Declaration at 6 ¶ 14) And the documents confirm that Senefeld was the one proposing terms to Haab and Risinger. (*See* Ex. 20, VEROS 032057-060)

In his Statement of Facts and at ¶ 25 of his Declaration, Senefeld also claims that Veros was the lending entity for the 2012 loan to Kirbach. (Filing No. 190 at 12; Filing No. 191-2 at 3) This is incorrect. The investors were the lenders. (*See* Ex. 21 at VP 0023291stating "[e]ach Investor Lender will sign a Loan and Agreement and Promissory Note for the Farm by which the investor loans an amount to the Farm" and "[e]ach investor will receive a separate Security Agreement and its own guaranties as to the Farm.")

H. Senefeld Negotiated the Loan in Connection with the 2012 Crossroads Offering

Senefeld claims he "gathered information on Crossroads and provided all of the information he had gathered to Haab for Haab to perform his own due diligence." [Filing No. 190 at 12] Senefeld made a similar claim in ¶ 26 of his declaration. In fact, Senefeld was

heavily involved in conducting due diligence on the each of the farms seeking loans, including Crossroads. (*See* Ex. 3, Haab Decl. at 5-6 ¶ 13; Ex. 4, Risinger Decl. at 5 ¶ 11)

Senefeld claims that "Haab determined the terms of the loan to Crossroads." [Filing No. 190 at 13] In ¶ 27 of the Senefeld Decl., Senefeld also claims that "Haab determined the structure of the terms of the loan, including the interest to be charged to Crossroads and the necessary collateral, which I communicate to the partners of Crossroads and Birch." To the contrary, Senefeld was instrumental in determining the terms of the loans including the interest rate and necessary collateral. (Ex. 4, Risinger Decl. at 5-6 ¶ 13; Ex. 3, Haab Decl. at 6 ¶ 16) Senefeld had an equal say in making the decision on the terms of the loan. (Ex. 3, Haab Decl. at 6 ¶ 16)

Senefeld further claims that the 2012 Crossroads Loan Agreement was between Crossroads and Veros, and Veros was the lending entity. [Filing No. 190 at 13] This is incorrect. He cites Risinger's testimony, but Risinger did not testify that Veros was the lending entity. The investors were the lenders. (*See* Ex. 22 at VP 0007031 stating "[e]ach investor lender will make a loan directly to the Farm"; Ex. 3, Haab Decl. at ¶ 17; Ex. 4, Risinger Decl. at 6 ¶ 14)

I. Senefeld Knew that Kirbach and Crossroads Farms Could Not Repay Their Loans

In describing his activities with FarmGrowCap as legal consulting work, Senefeld failed to acknowledge that neither Kirbach Farms nor Crossroads Farms was able to repay their loans. Both loans were due with interest on March 30, 2013. On that date, investors in the 2012 Offerings were entitled to full repayment of their remaining investment principal, plus interest at the stated rates. Kirbach and Crossroads farms still owed millions of dollars on their 2012 loans,

and investors in the 2012 Offerings were owed eve more. [Filing No. 9-4 at 48, Haab Tr. 190:7-9; 196:14-22)

Senefeld knew that there was not enough money that had been repaid by Crossroads and Kirbach to pay back the investors in the 2012 offerings; Senefeld, Risinger and Haab also were planning to raise funds through a new, much larger 2013 farm loan offering to pay back the investors in the 2012 offerings. (Ex. 23 VEROS 050341-343) Accordingly, Senefeld sent Haab an analysis of the 2012 Crossroad loan showing that, 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. (Ex. 23 at VEROS 050342) The analysis stated that $2,372,538.21 was required from **new investor funds**. (*Id.*) Accordingly, $2,393,750.18 was transferred out of the 2013 VFLH offering bank account to repay investors in the 2012 Crossroads offering. [Filing No. 31, Amended Declaration of Craig McShane at 9]

There is no evidence that Senefeld ever opposed this transfer, or encouraged his co-managers to disclose the 2012 investor losses. To the contrary, if he was not the ringleader pushing for this transfer, Senefeld was at least a willing participant. Gustafson stated that:

> Based on my communications during 2013 with Senefeld, Risinger, and Haab, I am certain that they all 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.

(Ex. 2, Gustafson Decl. at 3-4 ¶¶ 11- 12)

J. Senefeld Helps Facilitate the Fraudulent 2013 VFLH Offering

Senefeld claims that "Haab decided that part of Kirbach Farms' and Crossroads 2012 loans should be refinanced."[7] [Filing No. 190 at 14] But this is disputed. Senefeld cites to

[7] Senefeld claims that FarmGrowCap assigned all of its rights in the 2013 loans to VFLH. [*See* Filing No. 190 at 14] But Haab actually testified that FarmGrowCap assigned the loans and

pages in Haab's and Risinger's transcripts which do not support the proposition that Haab unilaterally made the decision to refinance the loans. Risinger and Haab both state that the decision not to foreclose on the collateral securing these loans was made jointly. (Ex. 4, Risinger Decl. at ¶ 18; Ex. 3, Haab Decl. at ¶ 22) Defendants collectively decided to extend the time for Kirbach and Crossroads to repay their 2012 loans and include the unpaid balances in the 2013 VFLH Offering. (*Id.*) Once again, Senefeld led the negotiations with Kirbach Farms and Crossroads Farms that would provide them with a portion of the investor funds raised through the 2013 VFLH offering. (*Id.*)

Senefeld claims that Risinger, on behalf of FarmGrowCap, determined the refinance of the Crossroads loan was warranted. [Filing No. 190 at 15] Senefeld also claims that "he recommended to Risinger that he foreclose on Crossroads, but Risinger overruled him and decided the loan should be refinanced." [*Id.*] Senefeld relies on pages from Risinger's testimony, but those pages do not support these propositions. Furthermore, Risinger states that this did not happen, and that Senefeld endorsed and actively supported the decision to refinance. (Ex. 4, Risinger Decl. at ¶ 22) According to Haab, Senefeld wanted to continue lending money to Crossroads every year. (Ex. 3, Haab Declaration at ¶ 25)

Senefeld also claims that the "refinance" of the 2012 Kirbach loan and 2012 Crossroads loan functioned like any other standard refinance. [Filing No. 190 at 16] This is incorrect. Investor funds from the 2013 VFLH Offering were used to pay investors in the 2012 Kirbach Offering and 2012 Crossroads Offering without disclosing this to the investors in the 2013 VFLH Offering. [*See* Filing No. 31, Amended McShane Declaration at 9 and at Ex. 3; Filing

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security collateral to the investors in VFLH, and that VFLH was "just a holding company for the loan investments made by the individual investors." [Filing No. 9-4 at 34, Haab Tr. 134:18-24]

No. 9-4 at 48-50, Haab Tr. 190:24-25, 191:1-9, 196:15-25, 197:1-2, 198:6-10)

It was represented to investors, both orally and in the offering materials, that investor money in the 2013 VFLH Offering would be used to make operating loans to farmers for the 2013 crop year. (Filing No. 9-1, Cavazzoni Declaration at ¶¶ 6-7, 10; Filing No. 9-2, Dotzal Declaration at ¶¶ 9, 11-13; Filing No. 9-3, Guillaume Declaration at ¶¶ 4, 6; Filing No. 9-4 at 35, Haab Tr. 137:24-138:5; Filing No. 10-1 at 28, Risinger Tr. 94:13-18] The 2013 PPM explicitly stated that investor funds would be used to make "operating loans" to four pre-arranged farms and did not disclose that the loans would be anything other than an operating loan. [Filing No. 11-1 at 2] The PPM did not disclose that 2013 investor money would be used to repay investors in the 2012 Offerings or to pay off or refinance 2012 loans. Senefeld was sent drafts of the PPM before it was provided to investors. (Ex. 24 VEROS 000075-078; Ex. 25 VEROS 000184-217; Ex. 4, Risinger Declaration at ¶ 28; Ex. 3, Haab Declaration at ¶ 32; Ex. 2, Gustafson Decl. at ¶ 8) Accordingly, Senefeld's claim that he "did not know what Haab disclosed to his investors regarding the refinancing of debt or terms Haab agreed to in repaying his investors," is both disputed and false. Senefeld knew what was in the 2013 VFLH Offering PPM because he received drafts copies and the final version. (Ex. 26 VEROS 000316, VEROS 000349-380)

Senefeld claims that he "was not a party to Haab's communications with his investors and does not know what Haab disclosed to his investors." [Filing No. 190 at 14 n. 4] This is not correct. Senefeld was on at least three (3) investor update emails that Haab sent to the investors in the 2013 VFLH Offering. (Ex. 13 VEROS 003472 – 474; Ex. 14 VEROS 004037- 039; Ex. 15 VEROS007023-726.)

The 2013 VFLH PPM also contained the misleading disclosure about Senefeld's SEC settlement. Senefeld claims that Risinger told him that "he had drafted the disclosure about the

prior settlement after consulting with an outside attorney with securities law experience." (Filing No. 190 at 17) This is disputed. Risinger doesn't think he said anything like what Senefeld reports, because such a statement would have been untrue. Risinger used a document prepared by another attorney describing Senefeld's SEC settlement, which Senefeld provided to him, as a starting point. Risinger then emailed a redline draft of the disclosure regarding Senefeld's SEC settlement to Senefeld for his review and comment. Senefeld never disagreed with, or edited, anything in the draft disclosure. (See Ex. 4, Risinger Decl. at 10, ¶ 27)

Senefeld claims that "he did not question the accuracy of the disclosure." [Filing No. 190 at 17] However, Senefeld does not claim in his brief that the disclosure is accurate. His silence speaks volumes. Moreover, in his recent deposition, Senefeld finally admitted that the disclosure did not accurately describe the charges against him or the findings. (Ex. 1, Senefeld Dep., 114:9-16; 118:13-20) Furthermore, Senefeld cannot claim to be relying on the advice of counsel because Risinger was not acting as Senefeld's attorney. (Ex. 1, Senefeld Dep. 193:15-17; Ex. 4, Risinger Declaration at ¶¶ 27)

K. Senefeld Discussed Repaying the 2013 VFLH Investors with Funds from the 2014 FarmGrowCap Investors

Senefeld states that "Haab requested updates from Senefeld, which he represented he would communicate to his investor group" and "Senefeld understood from Haab's representations that Haab was accurately communicating to his clients the information Senefeld was communicating to him." [Filing No. 190 at 18] However, the evidence shows exactly the opposite – that Senefeld knew and discussed the fact that investors were being paid with funds from different, separate investments. For example, Gustafson stated:

> Based on my communications during 2014 with Senefeld, Risinger, and Haab, I am certain that 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.

(Ex. 2, Gustafson Decl. ¶ 14) Senefeld was the recipient of numerous emails which discussed paying investors in one offering with funds from a different, separate offering.

- Gustafson 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. (Ex. 27 at VEROS 033324) Senefeld reviewed the spreadsheet and instructed Gustafson to make several changes to it and resend it to Senefeld, Risinger, and Haab). (Ex. 27 at VEROS 033323)

- He received an email discussing paying the investors in the 2014 PinCap Bridge Loan with funds from 2013 VFLH Offering and 2014 FarmGrowCap Offering. (Ex. 28,VEROS 025550-554 and attachment)

- He received an email discussing paying the investors in the 2013 VFLH Offering with funds from the 2014 FarmGrowCap Offering. (Ex. 29 at VEROS 027450 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).)

- He received an email discussing using funds raised from the 2014 FarmGrowCap Offering to pay investors in the 2013 VFLH Offering. (Ex. 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" .)

- He received an email discussing using funds raised from the 2014 FarmGrowCap Offering to pay investors in the 2013 VFLH Offering. (Ex. 31 at VEROS 026625 stating, "have we set a carryover accrual date for what we are paying to the 2013 investors with 2014 funds.")

- He received an email discussing using funds raised from the 2014 FarmGrowCap Offering to pay investors in the 2013 VFLH Offering. (Ex. 32 at VEROS 027239 and VEROS 027242)

- He received an email asking Senefeld and Risinger how to repay the investors in the 2013 VFLH Offering months after the repayment was due. (Ex. 34 at VEROS 027352)

L. Senefeld Helps Facilitate the Fraudulent 2014 FarmGrowCap Offering

FarmGrowCap was the investment entity for the 2014 FarmGrowCap Offering. [Filing No. 11-2 at 3] Funds for this offering were raised beginning in late March 2014. The PPM for the 2014 FarmGrowCap listed Senefeld as a member of FarmGrowCap's management team. [Filing No. 11-2 at 5] The PPM did not disclose that funds from the 2014 FarmGrowCap Offering would be used to repay investors in the 2013 VFLH Offering or the 2014 PinCap Bridge Loan Offering.

Senefeld claims that Risinger decided "on behalf of FarmGrowCap to refinance portion of Kirbach's, Crossroads', and Boyer's 2013 loans." [Filing No. 190 at 19] Once again, Senefeld cites pages from Risinger's testimony; however, no testimony supporting that proposition appears on those pages. Senefeld also claims "[i]t was Risinger's, not Senefeld' s idea and decision to refinance 2013 loans. [Filing No. 190 at 19] Senefeld cites a page from Risinger's testimony; however, Risinger actually testified that Senefeld wanted to use a loan repayment from D&S to fund a new loan, but Risinger told Senefeld "we are going to have to use those funds to honor the decision ***we*** have made to refinance some of the 2013 loans" and "it was my idea to **use it** to refinance loans from 2013." [Filing No. 10-1, Risinger Tr. 147:7-10, 12-16] Senefeld also claims that Haab agreed to refinance the 2013 loans on behalf of VFLH. But the page of testimony cited as support is not helpful.

Senefeld next claims that the so-called refinance of the 2013 loans that Crossroads and Kirbach did not repay in full by the time the investors were due to be repaid functioned like any standard refinance. [Filing No. 190 at 20] This is incorrect. Investor funds from the 2014 FarmGrowCap Offering were used to pay investors in the 2013 VFLH Offering and 2014 PinCap Bridge Loan Offering without informing the investors in the 2014 FarmGrowCap Offering.

[Filing No. 31 at 9 and Ex. 3] With respect to funds from the 2014 FarmGrowCap Offering, Gustafson stated:

> Based on my communications during 2014 with Senefeld, Risinger, and Haab, I am certain that 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.

(Ex. 2, Gustafson Decl. at ¶ 14)

Senefeld offers no evidence to show that funds from the 2014 FarmGrowCap Offering were not misused to repay investors in the 2013 VFLH Offering and 2014 PinCap Bridge Loan Offering. As set forth above, Senefeld was on numerous emails where paying investors in one offering with funds from other, separate offerings was discussed. The content of the emails are evidence that that Senefeld was on calls with Haab and Risinger where paying investors in one offering with funds from other, separate offerings was discussed. Senefeld also reviewed a spreadsheet that outlined how investors in the 2014 PinCap Bridge Loan Offering would be repaid with funds from the 2013 VFLH Offering and how much was needed from other offerings to repay investors in the 2013 VFLH Offering. Senefeld even asked Gustafson to make changes to this spreadsheet, which constituted his endorsement of the project. (Ex. 27 at VEROS 033323) Senefeld offers no evidence that anyone disclosed to investors in the 2014 FarmGrowCap Offering that their money would be used to pay investors in other offerings.

M. Senefeld Was Allowed to Set His Own Compensation, Which Was Derived in Part from Undisclosed Fees

In ¶ 34 of the Senefeld Decl., Senefeld claims that "Haab agreed to pay me monthly consulting fees. . . . Haab paid me through PinCap. I could not pay myself as I did not have access to the PinCap account." These facts are disputed. In fact, Senefeld was a signatory on the PinCap operating account. (Ex. 3, Haab Decl. at ¶ 21) As a one-third owner of PinCap,

Senefeld was paid a monthly draw against the firm's earning, not consulting fees. (*Id.*) Senefeld's salary from PinCap was paid with fees collected by PinCap including the "success fees." (*Id.*) There were times when PinCap did not have enough money to pay Senefeld, Risinger, and Veros their monthly draws. (*Id.*) In some instances Risinger and/or Veros would not be paid so Senefeld could be paid because he indicated that he needed the money. (*Id.*)

Senefeld claims that Haab set the amount of Senefeld's compensation. [Filing No. 190 at 18-19] However, Senefeld, Haab, and Risinger all participated in the decision setting their own salaries. (Ex. 4, Risinger Decl. at ¶17) For example, Senefeld sent to Haab a proposed operating budget for FarmGrowCap and Pin Financial in which Senefeld proposed that he, Risinger, and Veros each receive a $300,000 salary for 2014. (Ex. _35at VEROS 051026 and attachment.)

IV. Senefeld Is Not Entitled to Summary Judgment

A. Summary Judgement Standard

In order to prevail, Senefeld must "show[] that there is no genuine dispute as to any material fact and [he] is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). This he has failed to do. The Seventh Circuit has noted that "summary judgment briefs that present different versions of the facts arouse our attention given the standard under the Federal Rules of Civil Procedure." *Paz v. Wauconda Healthcare and Rehabilitation Centre*, 464 F.3d 659, 664 (7th Cir. 2006). "Where the parties present two vastly different stories – as they do here–it is almost certain that there are genuine issues of material fact in dispute." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

"On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Id.* "Rather, the court has one task and one task only: to decide, based on the evidence of record,

whether there is any material dispute of fact that requires a trial." *Id*. (citations omitted.) "Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. (citations omitted.) We must look therefore at the evidence as a jury might, construing the record in the light most favorable to the nonmovant and avoiding the temptation to decide which party's version of the facts is more likely true. *Id*. As we have said many times, summary judgment cannot be used to resolve swearing contests between litigants. *Id*.

Senefeld has failed to meet his burden of showing that (1) there is no genuine issue of material fact and (2) judgment as a matter of law should be granted in his favor. Senefeld's version of the material facts is directly contradicted by documentary evidence, testimony, and declarations. This alone would require the denial of his motion for summary judgment.

B. Securities Law Standards

Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit, directly or indirectly, in connection with the purchase or sale of any security, (a) using any device, scheme, or artifice to defraud, (b) making a false statement or omitting a material fact; or (c) engaging in a practice or course of conduct that operates as a fraud.[8]

Section 17(a)(2) and (a)(3) of the Securities Act prohibits any person in the offer or sale of any security from, *directly or indirectly*, obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading. Misstatements or omissions are material if there is a "substantial likelihood . . . [that they] . . .

[8] Misstatements or omissions are material if there is a "substantial likelihood . . . [that they] . . . would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

Rule 10b-5(a) prohibits the use of any device, scheme or artifice to defraud in connection with the purchase or sale of any security. Rule 10b-5(c) prohibits engaging in any act, practice or course of business which operates, or would operate, as a fraud or deceit on investors in connection with the purchase or sale of any security. Sections 17(a)(1) and (3) prohibit similar conduct in the offer or sale of any security.

Negligence is sufficient to prove a violation of Sections 17(a)(2) or 17(a)(3), but the Commission must prove scienter, which is a mental state embracing an intent to deceive, manipulate or defraud, to establish a violation of Section 17(a)(1) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *Aaron v. SEC*, 446 U.S. 680, 695, 697, 701-02 (1980). The Supreme Court has defined scienter as a "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). However, a knowing or reckless disregard of the truth is sufficient to establish scienter. *SEC v. Lyttle*, 538 F.3d 601, 603 (7th Cir. 2008) (affirming award of penalties against defendants in prime bank case where district court granted SEC's motion for summary judgment for violations of the anti-fraud provisions); *SEC v. Montana*, 464 F. Supp. 2d 772, 784 (S.D. Ind. 2006) (granting summary judgment on scienter-based claims where "defendant had to have known that his statements" were false).

C. Senefeld May Be Found Liable for Violating Sections 17(a)(1) and (a)(3) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rules 10b-5(a) and (c).

The SEC has alleged that Senefeld engaged in a fraudulent scheme with the other Defendants in violation of Section 17(a)(1) and (a)(3) of the Securities Act, Section 10(b) of the

Exchange Act, and Exchange Act Rules 10b-5(a) and 10b-5(c). A "scheme to defraud" is "merely a plan or means to obtain something of value by trick or deceit." *SEC v. Kimmes*, 799 F. Supp. 852, 858 (N.D. Ill. 1992). Section 17(a) "is a general antifraud provision that, among other things, prohibits schemes to defraud in the offer or sale of securities." *Id.* Section 17(a) "is given broad scope and flexible interpretation in order to encompass all of the ingenious variations of securities fraud that may arise." *Id.* (citing *SEC v. Van Horn*, 371 F.2d 181, 185-86 (7th Cir. 1966)). The purpose of the Securities Act . . . is to protect the investor." *SEC v. Van Horn*, 371 F.2d at 186. "To that end a heavy responsibility is placed upon a person engaging in the securities business. He must truthfully and without reservation inform the investor of all factors material to the security which he offers." *Id.*

Senefeld contends that he cannot held liable under Section 10(b) of the Exchange Act because he is not a "maker" of any false statements with ultimate authority over the statement, including its content and how to communicate it. [Filing No. 190 at 23-24] He also argues that he cannot be subject to primary liability for any false or misleading statements which he did not personally draft or communicate to others. [*Id.* at 25]

However, in *SEC v. Holschuh*, 694 F.2d at 142, the Seventh Circuit rejected this argument and held that "actual or first-hand" contact with investors is not a condition precedent to primary liability. In that case, the defendant argued that he could not be held primarily liable under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, or Exchange Act Rule 10b-5 because he had no contact with the investors and no editorial control over the offering documents. *Id.* The court held that defendant was a necessary and substantial participant in the illegal plan or scheme, even though he had no direct part in writing the offering material, did not review the offering material before it was distributed to investors, and had no

contact with the investors. *Id.* at 134, 140, 143. Similarly, the evidence in this case would allow a reasonable jury to conclude that Senefeld was a necessary and substantial participant in the plan or scheme alleged by the SEC.

Senefeld May Be Subject to Scheme Liability

Senefeld was an important participant in a fraudulent scheme. Over the course of two years, Defendants all worked together to raise new investor money in the 2013 VFLH and 2014 FarmGrowCap offerings, and with the intention of using some that those investor funds to repay investors in the 2012 and 2013 farm loan offerings. Senefeld was well aware that the offering materials did not disclose that investor money was to be misused, or that the prior farm loans were not profitable, or that the farmers were not receiving the entire loan amounts because some was needed to pay off their prior obligations. And Senefeld knew that he would profit from the receipt of undisclosed success fees with the closing of each new farm loan. This entire course of conduct is inherently deceptive and manipulative, and Senefeld was a willing participant.

Senefeld does not dispute that he helped design and participated in a fraudulent scheme and personally received hundreds of thousands of dollars in "success" fees that were not disclosed to the investors. He only contends that he cannot be held liable for his conduct because, unlike Haab, he did not communicate directly with investors or disburse investor funds. But Senefeld cannot escape liability in this fashion. *See e.g, In re Global Crossing*, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004) (auditor was subject to scheme liability under Rule 10b-5 because he had a central role in fraudulent accounting). Senefeld cannot dispute that he helped create and manage PinCap and FarmGrowCap, for the purpose of raising additional investor funds, knowing that prior farm loan offerings had not been profitable, while knowing that fact was not being disclosed to new investors whose would be used to repay investors in those prior loans. In

fact, Senefeld and Risinger were paid more than $1.3 million in loan origination fees, which were paid "up front" from investor contributions in the 2013 and 2014 Offerings.[9] [Filing No. 9-4 at 36; Haab Tr. 143:4-8.; Filing No. 10-1 at 9; Risinger Tr. 32:21-43:6, 45:16-18, 37:25-38:3]

Furthermore, Senefeld personally directed at least one of the Ponzi payments from the 2013 VFLH Offering to the investors in the 2012 Offerings. In March 2013, Senefeld instructed Gustafson to send Haab wire instructions so that certain 2012 Kirbach investors could be repaid with funds from the 2013 Offering.[10] (Ex. 5, Senefeld Tr. 98:10-102:13) Accordingly, Senefeld can be deemed to have personally engaged in a transaction or conduct that operated as a fraud or deceit upon investors in violation of Section 17(a)(3).

Senefeld also claims that he cannot be liable because he did not sell or offer any securities.[11] [Filing No. 190 at 32] However, that fact does not provide him with immunity. Senefeld was an integral part of the offering fraud scheme. He knew that a purpose of raising

[9] Over $800,000 in origination or "success" fees and "interest rate spread" fees were paid to PinCap from the 2013 Offering account. [Filing No. 9-4 at 39; Haab Tr. 153:1-21] These fees were not disclosed, in the PPM or otherwise, to the 2013 investors. [Filing No. 9-4 at 42; Haab Tr. 166:15-18, 168:2-13; Filing No. 10-1 at 25, Risinger Tr. 96:21-97:12; Filing No. 11-4] Senefeld's claim that the farmers were advised of the success fees is irrelevant. The farmers were not the investors, and the investors were entitled to know that PinCap's fees were being paid up-front.

[10] The wire instructions were for a $375,000 loan to Kirbach that was part of the 2013 VFLH Offering. (Ex. 5, Senefeld Tr. 99:3-17.) The wire instructions reflected that only $148,678.77 was to be paid to Kirbach's bank account, and that Haab was to "pay to investors out of Veros account" $115,000 for the "[Kirbach] 2012 Loan Payoff." (*Id.*, Senefeld Tr. 99:21-101:21.) Haab admitted this payment to 2012 investors came from funds invested in the 2013 VFLH Offering. (Ex. 9-4, Haab Tr. 188:14-191:9.)

[11]Senefeld also claims that "[S]ection 17(a) applies only to brokers and dealers selling or offering to sell securities." [Filing No. 190 at 32] This is incorrect. The plain language of Section 17(a) makes it "unlawful for ***any person*** in the sale or offering of securities" to engage in the conduct enumerated in that section. *See also Holschuh*, 694 F.2d 130 (holding person, who was not a broker-dealer, liable for violations of Section 17(a)).

funds in a new farm loan offering (both for VFLH in 2013 and FarmGrowCap in 2014) way to pay investors in a previous offering. He also knew that the PPMs did not disclose this fact, or disclose that PinCap would be receiving "success fees" from which he would personally benefit.

Senefeld argues that his conduct was not deceptive because he did not conceal any facts from Haab or otherwise engage in a scheme to defraud." [Filing No. 190 at 33] First, the SEC never alleged that Senefeld defrauded Haab. The SEC alleged that Senefeld and the other defendants defrauded the 2013 and 2014 farm loan investors. Second, Senefeld's citation to *SEC. v. Goldstone*, 952 F. Supp. 2d 1060, 1237 (D. N.M. 2013), does not appear to provide any support for his argument. In this case, the SEC has offered evidence that Senefeld engaged in improper and deceptive conduct, distinct from the false or misleading statement to investors in the PPMs, which helped further defendants' offering fraud scheme in 2013 and 2014.

These facts include: Senefeld negotiated loan extensions with the farmers, knowing that they had not repaid their prior loans; (2) these loan extensions allowed the other Defendants to claim that the farmers' prior loan balances had been repaid; (3) Senefeld received undisclosed "success fees" upon closing of the new farm loans, which consisted of investor funds and which were not disclosed to investors; the farms; (4) he directed at least one wire transfer constituting a Ponzi payment. (Ex. 5, Senefeld Tr. 65:18-23, 71:6-20, 76:5-16, 94:13-23, 99-101:21, 107:1-5; Filing No. 31 ¶ 20 and chart) Senefeld also approved the use of a PPM, drafted by Risinger, which mischaracterized the facts of his own 1999 SEC settlement.

Senefeld Acted with Scienter

Senefeld acted with scienter in that he was at least reckless in not knowing that the Defendants' scheme, and his own conduct, defrauded investors with regard to the March 2013 wire transfer and by obtaining undisclosed fees from the 2013 VFLH offering. *See Jakubowski*,

150 F.3d at 681 (holding that "reckless disregard of the truth counts as intent" for purposes of establishing scienter). He was also negligent in that he failed to conform to the standard of care expected of someone with experience and expertise in farming loans.

Accordingly, Senefeld can be found liable for employing a fraudulent scheme, and engaging in transactions, acts, or courses of business, that operated as a fraud or deceit to investors within the meaning of Section 17(a)(1) and (a)(3) of the Securities Act, as well as Section 10(b) of the Exchange Act, and Rule 10b-5(a) and (c) thereunder.

D. Senefeld May Be Found Liable for Violating Sections 17(a)(2) and (a)(3) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rules 10b-5(b).

Senefeld, as a principal of PinCap and FarmGrowCap, used misleading PPMs to obtain the "success" fees that were not disclosed to investors. The false or misleading statements in the 2013 PPM include (1) that investor money would be used to make operating loans for the 2013 crop season and (2) that past farm loans originated by Senefeld and Risinger– including the 2012 loans – generated annual returns of over 20%. The false or misleading statements in the 2014 PPM include: (1) that investor money would be "deployed" to make 1 to 13-month farm loans for the 2014 crop season and (2) that seven of the eight loans in the 2013 Offering "have been fully repaid or are on track to do so." The 2013 and 2014 PPMs also failed to disclose that investor funds would be used to repay investors in prior offerings and also mischaracterized Senefeld's 1999 SEC settlement by representing that the conduct that gave rise to the case was conducted by an employee under his supervision. [Filing No. 11-1 at 2; Filing No. 11-2 at 76]

The misstatements were material because reasonable investors would have likely considered $7 million in Ponzi payments – payments to investors in different offerings, $800,000 in undisclosed "success" fees paid in part to a SEC recidivist who was found to have personally

engaged in securities fraud, $7 million in past due farm loans, and the non-operating nature of these loans to be important facts in their investment decision. Indeed, investors in both the 2013 Offering and 2014 Offering have stated that they would have wanted to know these facts. (Filing No. 9-1 Cavazzoni Decl. at ¶¶ 4, 7-14; Filing No. 9-2, Dotzlaf Decl. at ¶¶ 7, 9-18; Filing No. 9-3, Guillaume Decl. at ¶¶ 4-8) The misrepresentations were made in the offer and sale of securities, both orally and in writing, to investors prior to their decision to invest the 2013 VFLH offering and 2014 FarmGrowCap offering.

Senefeld showed reckless disregard for the truth regarding the misleading description of his SEC settlement. He knew he was charged with personally violating the antifraud provisions of the securities laws. Additionally, he showed reckless disregard for the truth regarding the undisclosed "success" fees. He received copies of the draft and final PPMs and knew those fees were not disclosed to the investors. He showed reckless disregard for the truth regarding the Ponzi payments. He negotiated the 2012 and 2013 loans with Kirbach, and knew Kirbach did not actually receive a $375,000 operating loan in 2013, but that much of that amount represented Kirbach's unpaid 2012 debt, and was actually wired from the 2013 Offering bank account directly to 2012 investors. He was also on multiple emails discussing other Ponzi payments.

Senefeld's Actions Were Negligent

Evidence of mere negligence is all that is needed to prove a violation of Section 17(a)(2) and (a)(3). "[N]egligence is not a state of mind; it is a failure, whether conscious or even unavoidable (by the particular defendant, who may be below average in his ability to exercise due care), to come up to the specified standard of care." *See, e.g., Beck v. Dombrowski,* 559 F.3d 680, 682 (7th Cir. 2009).

Senefeld argues that he had no duty to the investors not to engage in a fraudulent scheme involving Ponzi payments and undisclosed fees. [Filing No. 190 at 35] However, his citation to *SEC v. True North Finance Corp*., 909 F. Supp. 2d 1073 (D. Minn. 2012), does not help him. In that case the court denied defendants' motion for summary judgment, finding that the defendants' "experience and expertise" in real estate would permit the conclusion that they breached a duty of care in not informing investors that nearly all of the fund's borrowers were insolvent, and that the collapse of the real estate market and global recession had negatively impacted the fund. *Id*. at 1123.

Similarly, in this case, Senefeld had knowledge and expertise regarding farm loans. This 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. Accordingly, Senefeld can be found liable for his negligent conduct under Section 17(a)(2) and (a)(3) of the Securities Act.

V. **Conclusion**

For all of the foregoing reasons, Plaintiff Securities and Exchange Commission respectfully requests that the Court deny Defendant Tobin J. Senefeld's Motion for Summary Judgment.

Dated: April 28, 2016.

Respectfully submitted,

By: ***/s/Robert M. Moye***
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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2016, I served copies of ***Plaintiff's Response to Defendant Tobin J. Senefeld's Motion for Summary Judgment*** on all counsel of record through the Court's ECF filing system.

/s/Robert M. Moye
Robert M. Moye