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 SUR-REPLY IN OPPOSITION TO DEFENDANT TOBIN J. SENEFELD'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 56-1(d), Plaintiff United States Securities and Exchange Commission (the "SEC" or "Commission"), for its surreply in opposition to Senefeld's Reply in Support of his Motion for Summary Judgment [Filing No. 208], states as follows:

I. INTRODUCTION

On May 12, 2016, Defendant Tobin Senefeld filed his Reply in Support of his Motion for Summary Judgment. [Filing No. 208.] In it, Senefeld argued that Exhibits 6 through 33 to the SEC's Appendix of Exhibits in Support of Response in Opposition to Defendant Senefeld's

Motion for Summary Judgment ("Appendix") are inadmissible because they have not been authenticated and are hearsay. Senefeld also argues that a few statements in the declarations submitted by Matthew Haab and Jeffery Risinger contradict their SEC Investigative Testimony and are therefore inadmissible. Senefeld further argues that a few statements in the Haab Declaration, Risinger Declaration, and Gustafson Declaration are inadmissible speculation. Finally, Senefeld argues that certain facts offered by the SEC are inadmissible because they are not related to this lawsuit.

Under local rules, because Senefeld has challenged the admissibility of the evidence cited in the SEC's response, the SEC is entitled to file this surreply. As explained below, Senefeld's arguments regarding evidence being inadmissible are without any merit.

II. THE EHIBITS ARE ADMISSIABLE

A. The Exhibits Are Authentic.

Senefeld contends that the SEC did not authenticate the emails attached as Exhibits 6 to 33 to the SEC's Appendix. [Filing No. 198.] However, he does not argue, let alone establish, that the emails or offering documents offered by the SEC are not authentic. Indeed, Senefeld never even questioned the authenticity of the emails or offering documents.

Exhibits 6 through 35 were produced to the SEC by Defendant Veros Partners, Inc. or Defendant Haab. (Filing No. 214, at Ex. 1, Haab Decl. ¶¶ 2, 3, 6, 8.) According to Haab, Veros and he produced true and correct copies of the documents to the SEC. (*Id.*, Haab Decl. ¶¶ 5, 6, 8.) Haab either authored or received the emails at issue and has provided testimony that the exhibits are what they are claimed to be. (*Id.*, Haab Decl. ¶¶ 3, 5, 6, 8.) Rules 901(a) and (b)(1) of the Federal Rules of Evidence provide that "testimony that an item is what it is claimed to be" satisfies "the requirement of authenticating or identifying an item of evidence."

Senefeld also complains that the exhibits are inadmissible because this is summary judgment practice "by ambush" because the SEC did not ask Senefeld about these specific exhibits during his investigative testimony or deposition. [*See* Filing No. 208 at 2.] However, the Federal Rules do not require that a party question an opposing party about an exhibit before using it in opposition to a motion for summary judgment. Here, for example, the SEC could not have anticipated that Senefeld would have offered a declaration containing so many factual statements that contradicted the contemporaneous emails and offering documents.

The cases relied on by Senefeld are inapposite. In *Zagklara v. Sprague Energy Corp.*, 2012 WL 3679635 (D. Maine July 2, 2012), the plaintiff "surprise[ed] the defendant with expert opinion evidence that should have been revealed to the defendant long before this court's deadline for the filing of motions for summary judgment approached." And in *Fieldturf USA Inc. v. Tencate Thiolon Middle East, LLC*, 945 F. Supp. 2d 1379, 1390 (N.D. Ga. 2013), the only evidence of a false statement consisted of an email by in which the author repeated what he had been told. In contrast, here, the SEC's opposition exhibits included emails authored by Senefeld, or sent to him by his business partners and co-owners of PinCap LLC. Using Senefeld's own emails to identify disputed issues of material fact is far from an ambush, and does not render the emails inadmissible.

Senefeld is simply wrong in asserting that the SEC's exhibits are inadmissible unless the SEC establishes that Senefeld received and read the emails on which he is copied. [Filing No. 208 at 3.] First, a number of the emails actually are from Senefeld -- including emails in Exhibits 6, 7, 8, 9, 10, 11, 12, 17, 18, 20, 23, 27, and 35. [*See* Filing No. 198-6 through 198-12; 198-17 through 198-18; 198-20, 198-23, 198-27, and 198-35.] Second, Senefeld does not deny sending, receiving, or reading any of the emails. Third, the emails were sent to or from Senefeld

at email addresses that he admits were his email addresses. (Filing No. 214, Ex. 2, Senefeld Deposition Tr. 17:22-25; 18;1-25; 19:1-8.) Senefeld testified that his email addresses included tobin@farmgrowcap.com, tobin@senefeld.me, tobin@ccgindy.com, and tobin@pinfinancial.com. (*Id.*) Haab stated that he sent emails to Senefeld at tobin@farmgrowcap.com, tobin@senefeld.me, and tobin@pinfinancial.com. (Filing No. 214, at Ex. 1, Haab Decl. at ¶ 7.) All of the emails included as exhibits to the SEC's Appendix were either sent from or to these same email addresses.

Furthermore, the cases selectively quoted by Senefeld are inapplicable and do not establish that the exhibits are inadmissible. [*See* Filing No. 208 at 3.] For example, in *Oracle America, Inc. v. Google, Inc.*, the court found that a declaration lacked adequate foundation that "the email was connected to work that [] requested from Lindholm as part of the provision of legal advice," because the declarant did not testify that he read the email in question. 2011 U.S. Dist. LEXIS 121446, at *18 (N.D. Ca. Oct. 20, 2011). And in *SEC v. True North Finance Corp.*, in ruling on a motion in *limine*, the court merely observed that proper foundation requires that "a particular witness has read any document in question or recalls a conversation at the time and place in question". 2013 U.S. Dist. LEXIS 132666, at *3 (D. Minn. Sept. 6, 2013). If another party can establish proper foundation, there is no requirement that Senefeld either admit the obvious (that he sent or received these emails), or agree with Haab's most recent declaration (same), before these emails are deemed admissible.

B. The Exhibits Are Not Inadmissible Hearsay.

Senefeld erroneously claims that the Exhibits are inadmissible hearsay. [Filing No. 208 at 3.] However, he fails to identify those statements that he claims are hearsay. This is fatal to his argument.

1. Exhibits 6 through 12 Are Not Hearsay And Were Offered to Show A Disputed Issue of Material Fact As To Whether Senefeld Communicated With Investors And Knew Their Identities.

In his summary judgment papers, Senefeld stated that:

- "the undisputed facts establish that Senefeld had no relationship to the investors, did not communicate with them." [Filing No. 190 at 2.]
- "Senefeld did not know the identities of the investors and did not communicate with them." [Filing No. 190 at 10.]
- "Senefeld did not know the identities of any of the investors in the various funds." [Filing No. 190 at 21.]
- "Senefeld did not know the identities of the investors in the bridge loan." [Filing No. 190 at 21.]
- I did not "otherwise communicate with investors." [Filing No. 191-2 at ¶ 48.]

The SEC offered Exhibits 6 through 12 and 20 to show that Senefeld did communicate with investors and knew their identities. [Filing No. 198-6 through 198-12.] For example, in Exhibit 8, Senefeld requested and received a list of the investors in the 2014 PinCap Bridge Loan Offering. [Filing No. 198-8 at 2, 7.] Also, in Exhibit 10, Senefeld was communicating with Rick Dennen, who a few days later invested in the 2014 PinCap Bridge Loan Offering. [Filing No. 198-10 and 198-8 at 3, 4.]

These exhibits are not hearsay because they were not offered to prove the truth of any statement within that email, such as whether Senefeld actually had coffee with an investor. *See* Fed. R. Evid. 801. The mere fact that he communicated with certain investors should be sufficient to raise an issue of material fact regarding the Senefeld's professed lack of knowledge and investor relationships.

Moreover, Rule 801(d)(2) of the Federal Rule of Evidence provides that a statement is not hearsay if offered against an opposing party and the party made the statement. Therefore, any of

Senefeld's statements in Exhibits 6 through 12 are not hearsay because they are his own statements.

Lastly, Exhibits 6 through 12 are admissible because they are communications which may be considered business records pursuant to Federal Rule of Evidence 803(6). Business records are an exception to the rule against hearsay. Fed. R. Evid. 803(6). Haab states that "[e]ach of the documents was created and maintained in the regular course of business at Veros." [Filing No. 214, Ex. 1, Haab Decl. at ¶ 3.] Even if Senefeld did not treat the emails communications as business records, Haab and Veros did, and appropriately so because Senefeld's communications were with investors. Accordingly, the email exhibits are admissible for the purposes they were offered by the SEC.[1]

2. Exhibits 13 Through 16 Are Not Hearsay And Were Offered To Show A Disputed Issue Of Material Fact As To Whether Senefeld Was Aware Of What Was Being Communicated To Investors About Loans And Repayments.

In his summary judgment papers, Senefeld stated that:

- "Senefeld did not know what Haab disclosed to his investors regarding the refinancing of debt." [Filing No. 190 at 16.]
- "Senefeld was not privy to Haab's communications with his investors and did not know what Haab disclosed regarding refinancing of debt or the terms of payments to investors." [Filing No. 190 at 21.]
- "I did not know what Haab communicated to his investors about the refinance or payments to investors." [Filing No. 191-2 at ¶¶ 37, 41.]

[1] *See e.g., Healix Infusion Therapy, Inc. v. HHI Infusion Services, Inc.*, 2011 WL 291160 at *1 (N.D. Ill. Jan. 27, 2011) (affidavits from records custodian during summary judgment briefing established that emails kept in the normal course of business were not hearsay); *Komal v. Arthur J. Gallagher & Co.*, 833 F.Supp.2d 855, 859 (N.D. Ill. 2011) (affidavits submitted during summary judgment briefing authenticated meeting notes, emails and personnel documents, demonstrating that they were business records); Skybluepink Concept, LLC v. Wowwee USA, Inc., 2013 WL 997458 at n.1 (N.D. Ill. March 13, 2013) (in ruling on motion to dismiss for lack of personal jurisdiction, finding that emails constituted business records and not hearsay).

- "I 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 ¶ 49.]

The SEC offered Exhibits 13 through 16 to dispute Senefeld's statements by showing that Senefeld received copies of emails to the investors in which the investors were provided with updates regarding the investments including loans to the farms, repayments from the farms, and repayments to investors. [Filing No. 198-13 through 198-16.] They were not offered to prove the truth of any particular statement within those updates, but clearly show that Senefeld had notice of what Haab was saying to investors.

Moreover, Senefeld failed to identify any particular statements that he claims are unreliable hearsay. Exhibits 13 through 16 are also admissible because they may be considered business records pursuant to Rule 803(6) Federal Rule of Evidence. Even if Senefeld did not create or maintain those emails, Haab and Veros did, and Haab attested that "[e]ach of the documents was created and maintained in the regular course of business at Veros." [Filing No. 214, Ex. 1, Haab Decl. at ¶ 3.] Haab also stated that exhibits 13 through 15 were sent by him to investors in the 2013 VFLH Offering. [*Id.*, Haab Decl. ¶ 9.] So Senefeld's claim that no investors names are in the "To" line is of no legal consequence.

3. Exhibits 17 Through 19 Are Not Hearsay And Were Offered To Show A Disputed Issue Of Material Fact As To Whether Senefeld Requested Disbursements From The Offerings' Bank Accounts.

In his summary judgment papers Senefeld stated that:

- "Haab, through Veros, controlled the accounts for the farm loans and for the investors. Haab, through Veros, controlled all the disbursements from those accounts." [Filing No. 191-2 at ¶ 30.]

The SEC offered Exhibits 17 through 20 to dispute Senefeld's statements by showing that Senefeld routinely requested that disbursements be made to farms. [Filing No. 198-17 through

198-19.] Hence, the Exhibits are not hearsay because they were not offered to prove that any particular disbursement was made, in a particular amount, or the reason(s) why. The exhibits were offered to simply show the requests for disbursements were made by Senefeld. Fed. R. Evid. 801. In his reply, Senefeld did not deny making these disbursement requests.

In addition, Exhibits 17 and 19 are not hearsay because under Rule 801(d)(2) of the Federal Rules of Evidence, a statement offered against an opposing party who made the statement is not hearsay.

Lastly, Exhibits 17 through 19 are admissible because they are business records pursuant to Federal Rule of Evidence 803(6). Haab's most recent declaration stated that "[e]ach of the documents was created and maintained in the regular course of business at Veros." [Filing No.214, Ex. 1, Haab Decl. at ¶ 3.]

4. Exhibits 21 Through 22 Are Not Hearsay And Were Offered To Show That There Is A Disputed Issue Of Material Fact As To Whether Veros Was The Lending Entity For The 2012 Offerings.

In his summary judgment papers, Senefeld stated that:

- "Risinger prepared the loan materials and the loan agreement was between Kirbach Farms as the borrower and Veros as the lending-entity." [Filing No. 191-2 at ¶ 25.]

- "Risinger prepared the loan materials and the loan agreement was between Crossroads Farms as the borrower and Veros as the lending-entity." [Filing No. 191-2 at ¶ 29.]

The SEC offered Exhibits 21 and 22 to dispute Senefeld's statements by showing that the 2012 offering documents provide that the investors are the lenders. [Filing No. 198-21 and 198-22.] The offering documents are not hearsay as there is no declarant. Fed. R. Evid. 801. In addition, Exhibits 21 and 22 are admissible because they are business records pursuant to Federal Rule of Evidence 803(6); *see also* [Filing No. 214, Haab Decl. at ¶ 3 stating "[e]ach of the

documents was created and maintained in the regular course of business at Veros."]

5. Exhibits 24 Through 26 Are Not Hearsay And Were Offered To Show A Disputed Issue Of Material Fact As To Whether Senefeld Was Aware Of What Was Being Disclosed To Investors.

With respect to the 2013 VFLH Offering, Senefeld stated that:

- "I did not know what Haab communicated to his investors about the [Kirbach] refinance or payments to investors." [Filing No. 191-2 at ¶ 37.]

- "I did not know what Haab communicated to his investors about the [Crossroads] refinance or payments to investors." [Filing No. 191-2 at ¶ 41.]

Exhibit 26 was offered to show that Senefeld was sent a copy of the final 2013 VFLH Offering PPM, which contained the disclosures made to investors. [Filing No. 198-26.] Exhibits 24 and 25 were offered to show that Senefeld was sent drafts of the 2013 VFLH Offering PPM. [Filing Nos. 198-24 and 198-25.] Senefeld did not point to a single statement in these exhibits that he claims is unreliable hearsay. Indeed, these exhibits are not hearsay because they were not offered to prove the truth of any statements made by a declarant. Fed. R. Evid. 801. Additionally, Exhibits 24 through 26 are admissible because they were created and maintained as business records and therefore they are not considered hearsay under Rule 806€ of the Federal Rules of Evidence. [*See* Filing No. 214, Ex. 1, Haab Decl. at ¶ 3 stating "[e]ach of the documents was created and maintained in the regular course of business at Veros."]

6. Exhibits 20, 23 and 27 Through 34 Are Not Hearsay And Were Offered To Show A Disputed Issue Of Material Fact As To Whether Senefeld Discussed And Was Involved In Paying Investors In A Certain Offering With Funds From Different Offerings.

Senefeld has denied that he was involved in repaying farm loan investors in certain offerings with funds raised in different, separate offerings. [Filing No. 190 at 18.] Exhibits 20, 23, and 27 through 34 were offered to raise a disputed issue of material fact, and to show that Senefeld was a recipient of numerous emails which discussed paying investors in one offering

with funds from different, separate offerings. Senefeld did not identify a single statement in these exhibits that he claims is unreliable hearsay. Indeed, these exhibits are not hearsay because the SEC is not offering these documents to prove the truth of any of the statements contained within those emails. Fed. R. Evid. 801. As explained in its response brief, the SEC can prevail on its claims against Senefeld if he was part of a fraudulent scheme and acted knowingly or recklessly. Additionally, these same exhibits are admissible because they were created and maintained as business records by Veros, and are not considered hearsay under Rule 803(b) of the Federal Rules of Evidence. [*See* Filing No. 214, Ex. 1, Haab Decl. at ¶ 3 stating "[e]ach of the documents was created and maintained in the regular course of business at Veros."]

7. Exhibit 35 Is Not Hearsay And Was Offered To Show A Disputed Issue Of Material Fact As To Whether Senefeld Had No Say In His Compensation.

In his summary judgment papers, Senefeld stated:

- "Haab agreed to pay me monthly consulting fees" and "Haab set the amount of my compensation." [Filing No. 191-2 at ¶ 34.]

The SEC offered Exhibit 35 to dispute the above statement by showing that Senefeld put together the operating budgets for PinCap and FarmGrowCap and proposed a $300,000 draw/salary for himself, Risinger, and Haab for 2014. Senefeld did not point to a single statement in this exhibit that he claims is unreliable hearsay. Exhibit 35 is not hearsay because it was not offered to prove that Senefeld actually was paid the amount he proposed. Fed. R. Evid. 801. Instead, the exhibit was offered to show that Senefeld put together the budgets and made a $300,000 salary proposal.

Again, another reason Exhibit 35 is not hearsay is under Rule 801(d)(2) of the Federal Rules of Evidence, a statement is not hearsay if offered against an opposing party who made the statement. Exhibit 35 contains the statements of Senefeld. Lastly, Exhibit 35 is admissible

because it is a business record pursuant to Federal Rule of Evidence 803(6). [*See* Filing No. 214, Ex. 1, Haab Decl. at ¶ 3 stating "[e]ach of the documents was created and maintained in the regular course of business at Veros."] Hence, Exhibit 35 is admissible.

C. The Statements In The Haab and Risinger Declarations That Are Challenged By Senefeld Are Admissible.

Next, Senefeld claims that a few statements in the Haab Declaration and Risinger Declaration contradict their investigative testimony during the SEC's investigation. The SEC acknowledges that a party generally cannot create an issue of fact by submitting an affidavit which contradicts prior testimony. However, the contradiction must be real and not imagined. And there is an exception for newly discovered evidence. *See Adelman-Trembly v. Jewel Companies, Inc.*, 859 F.2d 517, 520-21 (7th Cir. 1988). In addition, a party is permitted to present a contradictory affidavit when there is a suitable explanation for the change in testimony. *See McCann v. Iroquois Hospital*, 622 F.3d 745, 750-51 (7th Cir. 2010).

Here, Senefeld does not show any actual contradictions between Haab's and Risinger's statements in their SEC investigative testimony, and what they said in the declarations filed by the SEC in opposition to Senefeld's motion for summary judgment. One explanation is that, in their investigative testimony, Haab and Risinger were responding generally to a series of questions asked by SEC, before all of the facts, and relevant documents, had been identified. In their declarations, Haab and Risinger were responding directly to specific, affirmative statements made by Senefeld.

For example, Senefeld claims that the statement: "I strongly disagree with ¶ 20 of the Senefeld Declaration, in which Senefeld states that I had 'ultimate authority on what loans Veros would fund and what the terms of the investments [I] offered Veros clients would be" [Filing No. 198-3 at ¶ 10], is contradicted by Haab's investigative testimony. [Filing No 208 at 4.]

Senefeld then misquotes a sentence of the Haab Declaration. The actual quote is "[i]n practice, all three of us, Senefeld, Risinger, and me had to be in agreement before a particular loan was offered as an investment opportunity." [Filing No. 198-3 at ¶ 10.] These pages of the Haab SEC testimony do not contradict the statements in the Haab Declaration, because Haab never testified that he alone made the decision on what farm loans would be funded, or that he alone determined the terms such as the interest rate.

In response to the question, "what role did you play on – in the Kirbach 2012 private loan investment." Haab responded:

> The role I played is is that, you know, generally Jeff and Tobin would look at the farmer's need, look at, you know, how much capital was needed for their operating loan. You know, we'll do a detailed due diligence and pro forma on, you know, both what the farmer could repay and their source of security collateral. And then they would share the opportunity with me in terms of, you know, is this something that you think is a suitable investment, an investment with an appropriate risk/reward. **You know, a lot of times they would bring the deal to me and already have thoughts on what rate would be used and, you know, how it would – what that reward would be from a client return perspective.** But they would also look to me to give them feedback and advice in terms of saying, you know, hey, the return needs to be higher for the risk/reward to be appropriate or to be – you know, appropriate for investors that would invest in it. And then, you know, at that time if the – if everything came together and you know, we felt it was a suitable investment, then we would proceed to offering it to our clients.

[Filing No. 9-4 at 30, Haab Tr. 119:18-25; 120:1-15 (emphasis supplied)]

Haab was also asked, "So does Veros itself identify any of the investment opportunities that underlie the 53 private investments here?" Haab responded:

> We have not been – I mean, these opportunities have all been brought to us in some form or capacity and then we reviewed it based on a risk/reward and, you know, what we believe it to be a good investment for our clients or not to be a good investment for our clients.

[Filing No. 9-4 at 21, Haab Tr. 83:7-15.]

This testimony does not contradict Haab's subsequent statement that all three – Senefeld, Haab, and Risinger – "had to be in agreement before a particular loan was offered as an

investment opportunity." [Filing No. 198-3 at ¶ 10.] It also does not contradict Haab's statement that "the terms for the farm loans were proposed by Senefeld in due diligence materials, and usually were approved without modification by the three of us whenever we decided to move forward on a loan." [Filing No. 198-3 at ¶ 10.]

Senefeld next complains that the last sentence of ¶ 18 of the Haab Declaration states, "Senefeld also had significant input into the timing and amount of the disbursement of funds to investors." [Filing No. 208 at 5-6.] However, Senefeld did not identify a direct conflict with this statement.

Senefeld is also incorrect in asserting that Haab contradicted his SEC testimony that "[i]n Veros Farm Loan Holding and FarmGrowCap, those loans were all made by FarmGrowCap to the farm . . ." [Filing No. 208 at 6-7.] In his SEC testimony, Haab also testified:

> Q. So it is fair to describe it as kind of as Veros Farm Loan Holding, a fund?
> A. Yes. A portfolio of –
> . . .
> Q. So the investor money was pooled together, right?
> A. Correct.
> Q. And then it was, in turn, lent out to farmers, seven different farmers?
> A. I believe it was seven, yes.

In his declaration, Haab stated that Senefeld was wrong and Veros was not the "lending-entity" with Crossroads Farms and Kirbach Farms, because the sources of those funds in 2013 and 2014 were FarmGrowCap and Veros Farm Loan Holdings, which in turn received those funds from investors. [Filing No. 198-3 at ¶¶ 23, 24.] So the Haab declaration does not contradict his SEC testimony. In both he testified the money was provided by the investors.

Senefeld next erroneously claims that the Haab declaration directly contradicted his SEC testimony that "Jeff drafted the document." [Filing No. 208 at 7.] The document in question is entitled "The Case for Investing in Farms: A Summary for Accredited Investors Only." [Filing

No. 208 at 7.] In his declaration, Haab stated that "Risinger and Senefeld helped create a document entitled "The Case for Investing in Farms: A Summary for Accredited Investors . . ." and "Senefeld and Risinger were the source of the information on the economics of farming, collateral security, and farm profitability . . ." [Filing No. 198-3 at ¶ 32.] Neither of these statements contradicts a statement that Risinger "drafted" the document. Senefeld could assist in the creation of a document, without drafting it, even if he was the source some of the information Risinger used to create the draft.

Similarly, Senefeld erroneously claims that Risinger's SEC testimony contradicts the statement in his declaration that "Haab, Senefeld, and I jointly made the decision to extend operating loans to Kirbach and Crossroads." [Filing No. 208 at 7.] Senefeld selectively cites page 57 of Risinger's Investigative Testimony to claim "Haab was the guy." [Filing No. 208 at 7.] Risinger actually testified that

> Q. Just to stop you there, who at Veros would be involved?
> A. That would be Matt.
> Q. Was it anybody other than Matt?
> A. Not at that stage. He was the guy. He was the one involved and, from my information, making the decisions."

[Filing No. 10-1 at 16, Risinger Tr. 57:13-18.] Risinger testified that Haab "was the guy" *at Veros*. This bit of testimony does not in any way contradict Risinger's subsequent declaration that "Haab, Senefeld, and I jointly made the decision to extend operating loans to Kirbach and Crossroads."

Senefeld also erroneously claims that Risinger' testimony that "I would get input from Matt and Tobin, but I had the authority to make the decisions, and I exercised that authority" contradicts his statement in ¶ 11 of the Risinger Declaration that "Haab, Senefeld and I jointly made the decision to extend operating loans to Kirbach and Crossroads. It was a group

decision." [Filing No. 208 at 7 emphasis added.] However, Paragraph 11 of the Risinger Declaration is referring to **2012** while page 22 of the Risinger SEC Investigative Testimony is referring to **2014**, after the ownership of FarmGrowCap was transferred to Risinger.

On page 22 of the Risinger SEC Investigative Testimony, he testified:

A. But when we got to '14 . . . I suggested, and Tobin and Matt agreed, that I was probably the most independent person with knowledge of the deals that were around to fill that role and that's why we transferred the ownership to me.

Q. And – but has the – has the decision making process for FarmGrowCap changed at all after the ownership transferred to you?

A. Yes. I mean – yes, it has. I would get input from Matt and Tobin, but I had the authority to make the decisions, and I exercised that authority.

[Filing No. 10-1 at p. 7, Risinger Tr. 22:4-19.]

So there is no contradiction. Senefeld is relying on testimony discussing what happened 2 years after the 2012 loans were made, and after a change in ownership of FarmGrowCap. The same is true for Senefeld's reliance on pages 133 and 134 of the Risinger Investigative Testimony. [Filing No. 208 at 8.] There, Risinger is testifying about the September 2014 time frame and an agreement between FarmGrowCap and VFLH, which is after the ownership of FarmGrowCap was transferred to him. This testimony has no bearing on and does not contradict Risinger's declaration that in **2012**, Senefeld, Haab, and Risinger "jointly made the decision to extend operating loans to Kirbach and Crossroads. It was a group decision." [Filing No. 198-4 at ¶ 11.]

Senefeld also wrongly claims that pages 147 and 148 of the Risinger testimony contradicts some unspecified paragraph of the Risinger Declaration regarding "Senefeld had 'equal' authority over what loans to fund." [Filing No. 208 at 8.] Senefeld selectively quotes pages 147 and 148 of the Risinger testimony. Senefeld leaves out the portions where Risinger is

testifying that he is telling Senefeld that "we" have already made a decision on what to do with a certain loan repayment and "we" have to stick to that decision. Risinger testified:

> So Tobin was wanting to use it for another loan he was working on. And I was saying, no, we are going to have to use those funds to honor the decision we have made to refinance some of the 2013 loans, so it will have to be used for that.

[Filing No. 10-1 at 38, Risinger Tr. 147:7-11.]

Risinger further testified:

> [Tobin] want[s] to go use this money for something else, a new loan. And maybe we could do that. Maybe we could squeeze through and figure out a way that we can do that, but we really need to just be doing what we have already said we were going to do, which is to refinance and purchase the loans from the 2013 Fund, and we should do that before we go make some other new loan . . . We have already determined to refinance and purchase from the 2-13 loans. Let's do that.

[Filing No. 10-1 at 38, Risinger Tr. 148:1-7.] Accordingly, this testimony does not contradict any portion of the Risinger Declaration.

D. The Declarations Do Not Contain Inadmissible Speculation.

Next, Senefeld argues that Haab's statement that "[b]ased on my conversations and interactions with Senefeld, I am confident he knew the content of the PPMs that were provided to investors" is inadmissible speculation. [Filing No. 208 at 9.] However, it is clear from the context that this statement is based upon facts such as "Risinger sent multiple drafts of the 2013 and 2014 PPMs to both Senefeld and me. Senefeld, Risinger, and I occasionally had calls to discuss the draft PPMs." [Filing No. 198-3 at ¶ 32.] Furthermore, Exhibits 24, 25, and 26 demonstrate that Senefeld was provided with drafts of and the final 2013 VFLH PPM. [*See* Filing Nos. 198-24 through 198-26.]

Senefeld also incorrectly claims that Risinger is speculating with respect to the 2014 Crossroads refinance when he states, "Senefeld was aware that the funds for this extension/refinance would be provided by investors." [Filing No. 208 at 9.] Risinger also stated

that "Senefeld personally negotiated and signed a loan agreement . . . extending this balance into a 2014 loan by FarmGrowCap." [Filing No. 198-4 at ¶ 25.] The investors were the source of funds to FarmGrowCap. Hence, Senefeld knew that funds from the 2014 FarmGrowCap investors would be used. Thus, Risinger's statement is not speculation.

Moreover, Senefeld testified that he worked with multiple potential lending sources on the 2014 Crossroads Refinance and that he did not know what Haab communicated to the investors about the refinance. [Filing No. 191-2 at ¶¶ 42, 43.] If Senefeld did not know that his efforts to obtain alternative financing were unsuccessful, and that the investors were providing funds for the refinance, Senefeld could not have indicated that he lacked knowledge about what Haab communicated to the investors about the "refinance or payments." [Filing No. 191-2 at ¶ 43.] So Senefeld's own declaration demonstrates that he knew funds for the refinance were coming from the investors. [Filing No. 191-2 at ¶ 43.]

Senefeld next claims that Risinger is speculating when he states that "based on my conversations and interactions with Senefeld, I am certain he knew that the private placement memoranda were being provided to investors and potential investors." [Filing No. 208 at 9.] Senefeld ignores the fact that Risinger "personally sent multiple drafts of the private placement memoranda to both Senefeld and Haab for their review and comment. Senefeld, Haab, and I would sometimes have calls to discuss the draft private placement memoranda." [Filing No. 198-4 at ¶ 28.] Thus the bases for Risinger's statement are his personal communications and interactions with Senefeld, not improper speculation.

Similarly, Senefeld's arguments regarding three statements in Gustafson's Declaration are also without merit. Gustafson testified that Senefeld directed his work and acted as his supervisor. [Filing No. 198-2 at ¶ 2.] Gustafson also testified that he "tracked the payments

made by the farms;" "used [Veros] spreadsheets to track the payments made to investors in the farm loan investments;" and communicated frequently, via telephone and email, with Senefeld." [Filing No. 198-2 at ¶¶ 5, 6.] Based on this, Gustafson is not speculating when he stated that "based on his communications" with Senefeld, Risinger and Haab during 2013, 2014 and 2015, he was certain "they all knew" the farmers had not fully repaid their loans, that there were not sufficient funds to repay the lenders (investors), and funds from new offerings were needed or used to repay the investors. [*See* Filing No. 198-2 at ¶¶ 12, 14, and 16.]

E. The Facts Offered By The SEC Are Admissible Because They Directly Dispute The Facts Offered By Senefeld.

Senefeld also claims that some of the SEC's evidence, offered in opposition to his motion for summary judgment, is irrelevant to this lawsuit. [Filing No. 208 at 10.] The is not correct. The facts offered by the SEC directly dispute the so-called "undisputed facts" which Senefeld claimed in his brief and declaration were relevant to this motion. For example:

- "Senefeld did not know the identities of the investors and did not communicate with them." [Filing No. 190 at 10.]
- "Senefeld did not know the identities of **any** of the investors in the **various funds**." [Filing No. 190 at 21 (emphasis added).]
- "Senefeld did not know the identities of the **investors in the bridge loan**." [Filing No. 190 at 21 (emphasis added).]
- did not "otherwise communicate with investors." [Filing No. 191-2 at ¶ 48.]

So Exhibits 8 and 10 to the SEC's Appendix refute these facts. [Filing No. 198-8 and 198-10]. Exhibit 10 shows Senefeld asking Rick Dennen for a coffee meeting to discuss "opportunities we presently (sic) working on for 2014." [Filing No. 198-10 at 2.] The coffee meeting was scheduled for Tuesday, February 25, 2014. [Filing No. 198-10 at 2.] Two days later on Thursday, February 27, 2014, Dennen was sent the subscription documents for the

PinCap LLC Bridge Loan. [Filing No. 198-8 at 5.] The next day, Friday, February 28, 2014, Dennen returned the signed documents and stated "[t]he wire should already be in the account." [Filing No. 198-8 at 4.] On March 3, 2014, Senefeld was sent a spreadsheet of the investors who invested in the PinCap LLC Bridge Loan. [Filing No. 198-8 at 2, 7.] The spreadsheet lists the names of the investors and the amounts they invested. [Filing No. 198-8 at 2, 7.]

Senefeld also claims that it is irrelevant that Pin Financial acted as the placement agent for the Blue Crop Group investment. [Filing No. 208 at 11.] However, in ¶ 32 of the Senefeld Declaration, he stated "Pin Financial never issued any of the securities to Veros' clients." [Filing No. 191-2 at ¶ 32.] This statement is an attempt to distance himself from the transactions at issue. So it is relevant that Pin Financial was the placement agent for private offerings in which clients of Veros invested.

Lastly, Senefeld is just plain wrong in claiming that the "2013 VFLH Offering . . . is the only Offering at issue in this litigation." [Filing No. 208 at 10 n. 2.] This assertion is belied both by the SEC's Amended Complain, and by Senefeld's own Brief and Declaration, wherein he goes to great length to explain the 2012 Kirbach Offering, 2012 Crossroads Offering, 2013 VFLH Offering, 2014 PinCap Bridge Loan Offering, and 2014 FarmGrowCap Offering. So the facts offered by the SEC describing these transactions are relevant, and admissible, because they demonstrate that the SEC has broader grounds to prevail in this matter against Senefeld, than are admitted by Senefeld.

III. Conclusion

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

Dated: May 23, 2016.

Respectfully submitted,

By: ***/s/Robert M. Moye***

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, I served copies of ***Plaintiff's Sur-Reply in Opposition 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
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