UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

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

Plaintiff U. S. Securities and Exchange Commission ("SEC" or "Plaintiff"), respectfully submits this Reply in support of Plaintiff's Motion for Disgorgement, Prejudgment Interest, and Civil Penalties Against Defendant Tobin Senefeld ("Motion") [Filing No. 444.] In further support of its Motion, the SEC has filed the Declaration of Craig L. McShane Regarding Tobin Senefeld's Finances [Filing No. 453] and the Declaration of William E. Wendling, Jr., Receiver [Filing No. 454].

I. INTRODUCTION

The only issues for the Court to decide are (1) the amount of disgorgement including prejudgment interest that Senefeld has to pay and (2) whether to impose civil penalties and, if so, the amount. In making these determinations, pursuant to the Judgment as to Defendant

Tobin J. Senefeld ("Judgment") [Filing No. 436], the Court must accept as true the allegations in the Amended Complaint.

There were no declarations or affidavits submitted with Defendant Tobin J. Senefeld's Response to Plaintiff's Motion for Disgorgement, Prejudgment Interest, and Civil Penalties ("Response"). [Filing No. 448.] The Response relies heavily on the factually and legally inapposite decision in *SEC v. Collins*, 2003 WL 21196236 (N.D. Ill. May 21, 2003) to argue that the SEC has not proven that Senefeld violated the securities laws, engaged in wrongdoing, or received ill-gotten gains. [Filing No. 448 at 8-11.] The Consent signed by Senefeld, the Judgment entered against him, and the applicable case law and authority regarding disgorgement directly contradict this main argument in the Response.

Moreover, the Response argues, without any supporting authority, that the ill-gotten gains taken by Senefeld should be offset because Relief Defendant Pin Financial LLC ("Pin Financial") received a fee from a deal. Senefeld's argument is not based on any authority and ignores or omits critical facts such as that according to Pin Financial's client, Senefeld's involvement and failures resulted in the client disputing the fee and the fee, albeit reduced, was received in large part due to the efforts of the Receiver.

The arguments in the Response do not withstand scrutiny. On October 11, 2017, this Court entered Judgment against Senefeld. [Filing No. 436.] The Judgment expressly provided that in connection with the SEC's motion for disgorgement and civil penalties and at any hearing held on such a motion, Senefeld "will be precluded from arguing that he did not violate the federal securities laws as alleged in the Amended Complaint;" (b) Senefeld "may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the Amended Complaint shall be accepted as and deemed true by the

Court." [Filing No. 436 at pp. 3-4, ¶ III.]

The Judgment further ordered that Senefeld:

> **shall** pay disgorgement of ill-gotten gains and prejudgment interest thereon; that the amounts of the disgorgement and civil penalty shall be determined by the Court upon motion of the Commission . . . .

[Filing No. 436 at p. 3, ¶ III (emphasis added).] The Judgment also provided that "the Court shall determine whether a civil penalty . . . is appropriate and, if so, the amount of the penalty." [*Id.*]

Hence, pursuant to the Consent and Judgment, it has already been determined that for purposes of this Motion Senefeld violated the following anti-fraud provisions of the federal securities laws: Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. [Filing No. 436.]

In support of its Motion, the SEC previously filed the Declaration of Craig L. McShane Regarding Disgorgement and Prejudgment Interest that detailed the $698,818.29 in ill-gotten gains received by Senefeld. [Filing No. 443.] Tellingly, the Response fails to identify even $1 of this amount that was legitimately received by Senefeld independent of the scheme to defraud investors.

II. THE SEC HAS MET ITS BURDEN OF SHOWING THAT $698,818.29 IS A "REASONABLE APPROXIMATION" OF THE PROFITS SENEFELD REAPED FROM THE WRONGFUL CONDUCT

A. Senefeld's Reliance on *SEC v. Collins* To Conclude That He Should Not Have To Disgorge $698,818.29 Of Ill-Gotten Gains Is Misplaced.

The Consent signed by Senefeld and the Judgment directly contradict the Response's main argument that the SEC has not proven that Senefeld violated the securities laws, engaged in wrongdoing, or received ill-gotten gains. [Filing Nos. 429-2 and 436.] The Response relies primarily on *SEC v. Collins*, 2003 WL 21196236. However, that reliance is misplaced and

misleading as the consents signed by the defendants in *Collins* and the facts are completely distinguishable from the Consent agreed to by Senefeld and the facts in the instant action.

Senefeld admits, as he must, that he received the $698,818.29. [Filing No. 448 at 8.] Senefeld then claims, relying solely on *Collins*, that the SEC has not shown that Senefeld violated the securities laws or engaged in wrongful conduct that would require him to disgorge $698,818.29. For example, the Response heavily quoting *Collins* argues that "implicit in the disgorgement analysis is the notion that the person ordered to cough up the money actually received the money unjustly, i.e., that he received the money by means of a violation of the securities laws or through fraud or some other wrongdoing. . . . the remedy is imposed against the people who violate the securities laws, not simply the people who possess money obtained through violations committed by others" and "before we can order disgorgement, we need some evidence that these particular defendants violated the securities laws, participated in the fraud or otherwise engaged in wrongdoing." [Filing No. 448 at 8, 9.] Reliance on these quotes in particular and *Collins* in general is wrong because Senefeld entered into a consent where he agreed that he would be precluded from arguing that he did not violate the securities laws as alleged in the Amended Complaint.

In *Collins* the Court refused to order that two defendants had to pay disgorgement because there was no evidence that those defendants "knew about the fraud or participated in the fraud." *Collins*, 2003 WL 21196236, *6. The consents, orders, and facts in *Collins* are completely distinguishable from the Consent, Judgment, and facts in this case. For example, *Collins* held "given the language of the consents each signed, we cannot rely on [the] allegations [in the SEC's complaint] . . ." 2003 WL 21196236, *6. In *Collins*, the consents signed by two defendants were "completely silent as to what role either defendant played in the

scheme" and the orders did not "specify how the defendants violated the securities laws." *Collins*, 2003 WL 21196239, *1-2. To the contrary, in the Consent signed by Senefeld, he agreed:

> that in connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) **Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Amended Complaint**; (b) Defendant may not challenge the validity of this Consent or the Judgment; (c) solely for the purposes of such motion, **the allegations of the Amended Complaint shall be accepted as and deemed true by the Court**;

[Filing No. 429-2 at ¶ 5 (emphasis added).] Accordingly, the Judgment ordered that Senefeld "will be precluded from arguing that he did not violate the federal securities laws as alleged in the Amended Complaint" and "solely for the purposes of such motion, the allegations of the Amended Complaint shall be accepted as and deemed true by the Court." [Filing No. 436 at pp. 3-4, ¶ III.] Hence, Senefeld's Consent and Judgment are completely different from the consents and orders in *Collins*.

Senefeld cannot argue, directly or indirectly, that he did not violate the securities laws as alleged in the Amended Complaint or that the allegations of the Amended Complaint are not true. Therefore, unlike in *Collins*, it cannot be said that Senefeld did not violate the securities laws, participate in the fraud, or obtain ill-gotten gains. A brief recitation of some of the allegations in the Amended Complaint shows Senefeld violated the securities laws and received ill-gotten gains:

- "Haab, Risinger, and Senefeld used money from the 2013 and 2014 Offerings to make approximately $7 million in payments to investors in other offerings and to pay themselves over $800,000 in undisclosed 'success' and 'interest rate spread' fees. They also repeatedly misled investors about the risks, nature, and performance of the investments and underlying farm loans." [Filing No. 57 at ¶ 3.]

- "Risinger and Senefeld have worked together in about 40 of Veros' private offerings, including most of the farm loan offerings" and "Senefeld knew these loans would be

funded by Veros' clients." [*Id.* at ¶ 22.]

- PinCap "is owned by Veros, Risinger, and Senefeld, and managed by Risinger, Senefeld, and Haab. PinCap was an entity used by Risinger, Haab, and Senefeld to make and manage private offerings. . . ." [*Id.* at ¶ 15.]

- The Private Placement Memorandum for the 2013 Offering "identified Haab, Risinger, and Senefeld as PinCap's 'management team.'" [*Id.* at ¶ 36.] "The PPM for the 2013 Offering stated that all management decisions would be made by Senefeld, Risinger, and Veros." [*Id.* at ¶ 51.]

- "Senefeld received multiple drafts of the PPM for the 2013 Offering before it was provided to any investors." [*Id.* at ¶ 38.]

- "Senefeld was personally involved in at least one of these [Ponzi] payments. In March 2013, Senefeld directed a FarmGrowCap employee to send wire instructions to Haab so that [2012] Farm Loan Offering B investors could be paid with funds contributed by investors in the 2013 Offering. . . . Haab has testified that this was a payoff of 2012 investors with money from the 2013 Offering." [*Id.* at ¶ 42.]

- "Risinger and Senefeld used PinCap to charge origination fees for seven of the eight farm loans that were funded by the 2013 Offering. Risinger and Haab referred to these assessments as 'success' fees, which ranged from 1% to 12% of the total amount the farmer was obligated to repay." [*Id.* at ¶ 43.]

- "These success fees were paid to PinCap out of the bank account for the 2013 Offering – the same account that held investor money – after loan proceeds were disbursed to a farmer, rather than when the farmer ultimately repaid the loan with interest." [*Id.* at ¶ 45.]

- "Risinger and Senefeld received over $700,000 in 'success' fees, paid through PinCap, from the 2013 Offering. They also received over $100,000 in 'interest rate spread' fees." [*Id.* at ¶ 46.]

- These fees "were PinCap's only source of revenue in 2013." [*Id.* at ¶ 46.]

- "None of the offering materials sent to investors in the 2013 Offering disclosed that PinCap, Risinger or Senefeld would be paid 'success' fees or 'interest rate spread' fees. Haab and Risinger admitted in SEC testimony that the fees were not disclosed to investors – in PPMs or otherwise – before they invested." [*Id.* at ¶ 47.]

- "PinCap also used a portion of the fees it received to pay Risinger and Senefeld salaries of over $150,000 in 2013, and $200,000 in 2014." [*Id.* at ¶ 50.]

- "An exhibit to the PPM contained Senefeld's biography, drafted by Risinger, which mischaracterized the SEC's charges against Senefeld in 1999." [*Id.* at ¶ 51.] "[B]oth

Haab and Senefeld read the draft disclosure before it was finalized. But none of these individuals made any effort to ensure that the PPM's disclosure regarding Senefeld's 1999 settlement with the SEC was accurate." [*Id.* at ¶ 53.]

- "Senefeld also negotiated a loan extension for Farm B on behalf of FarmGrowCap. In exchange, FarmGrowCap received a $10,000 fee. The PPM for the 2014 Offering did not disclose the payment of 'extension' fees on unpaid 2013 loans extended into 2014." [*Id.* at ¶ 101.]

During the course of this litigation, the SEC also provided the Court with additional evidence that Senefeld violated the securities law and received ill-gotten gains. For example, Senefeld knew what was being communicated to the investors after they invested, and Senefeld provided information for updates to investors. Senefeld was copied on at least three update emails to the investors in the 2013 VFLH Offering. [Filing No. 198-13; Filing No. 198-14; Filing No. 198-15.] On May 1, 2014, Senefeld responded and provided information to Haab so Haab could provide updated information to the investors. [Filing No. 422-3.] Additionally, Senefeld knew and even discussed via email the fact that investors were being paid with funds from different, separate investments. [*See, e.g.*, Filing Nos. 198-23; 198-27; 198-28; 198-29; 198-30; 198-31; 198-32; 198-34.]

B. The SEC Showed That $698,818.29 Is A "Reasonable Approximation" Of The Profits Senefeld Reaped From The Wrongful Conduct

1. Standards Regarding Disgorgement

The SEC's Burden. The SEC is required to show merely that the amount of disgorgement is a "reasonable approximation" of the profits the defendant reaped from the wrongful conduct. *SEC v. Alanar, Inc.*, No. 1:05-cv-1102, 2008 WL 1994854, *4 (S.D. Ind. May 6, 2008). "The disgorgement figure calculation is discretionary and need not be exact." *Alanar*, 2008 WL 1994854, *4 (citing *SEC v. First Jersey Secs. Inc.*, 101 F.3d 1450, 1474–75 (2d Cir.1996)). "Courts do not require the SEC to trace every dollar of a defendant's ill-gotten

gains." *Alanar*, 2008 WL 1994854, *4 (citing *SEC v. First Pacific Bancorp.*, 142 F.3d 1186, 1192 n. 6. (9th Cir.1998)).

Money obtained or misappropriated from investors should be considered ill-gotten gains and disgorged accordingly. *See, e.g., SEC v. Brown*, 579 F. Supp. 2d 1228, 1245 (D. Minn. 2008), *aff'd* 658 F.3d 858 (8th Cir. 2011) (ordering disgorgement of misappropriated investor funds); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 384-85 (S.D.N.Y. 2007) (investor funds obtained by adviser subject to disgorgement). Where the defendants have commingled the money, the SEC is not required to identify the misappropriated money. *Alanar*, 2008 WL 1994854, *4 (citing *SEC v. Great Lakes Equities* Co., 775 F.Supp. 211, 214 n. 21(E.D. Mich. 1991)). "Since calculating disgorgement may at times be a near-impossible task, the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.*

Senefeld's Burden. "The burden then shifts to the defendant to show that this approximation is inaccurate." *Alanar*, 2008 WL 1994854, *4 (citing *First City Fin.*, 890 F.2d at 1232; *Randy*, 38 F.Supp.2d at 674). "Any ambiguity in the calculation should be resolved against the defrauding party." *Alanar*, 2008 WL 1994854, *4 (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996); *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995); *SEC v. Great Lakes Equities Co.*, 775 F.Supp. 211, 214 n. 21).

Senefeld's Ill-Gotten Gains. The SEC has met its burden of showing that $698,818.29 is a "reasonable approximation" of the profits Senefeld reaped from the wrongful conduct. However, Senefeld did not meet his burden of showing that the SEC's calculation is inaccurate. The SEC filed the Declaration of Craig L. McShane Regarding Disgorgement and Prejudgment Interest ("Disgorgement Declaration"). [Filing No. 443.] The Disgorgement Declaration and Exhibits detail payments made directly to Senefeld from bank accounts belonging to the

fraudulent private investments and/or PinCap LLC.

Pursuant to Senefeld's Consent [Filing No. 429-2 at ¶ 5] and Judgment [Filing No: 436 at 4] the allegations of the Amended Complaint "shall be accepted as and deemed true by the Court." The allegations include:

- PinCap is an entity owned by Senefeld, Risinger, and Veros. [Filing No. 57 at ¶15.]
- PinCap was managed by Risinger, Senefeld, and Haab. [*Id.*]
- PinCap was used by Senefeld, Risinger, and Haab to make the loans and manage the private offerings. [*Id.*]
- "Risinger and Senefeld used PinCap to charge origination fees for seven of the eight farm loans that were funded by the 2013 [VFLH] Offering." [*Id.* at ¶43.]
- "Risinger and Haab referred to these assessments as 'success' fees." [*Id.*]
- These fees "ranged from 1% to 12% of the total amount the farmer was obligated to repay." [*Id.*]
- "These success fees were paid to PinCap out of the bank account for the 2013 Offering - the same account that held investor money – after loan proceeds were disbursed to a farmer, rather than when the farmer ultimately repaid the loan with interest." [*Id.* at ¶ 45.]
- "Risinger and Senefeld received over $700,000 in 'success' fees, paid through PinCap, from the 2013 Offering." [*Id.* at ¶ 46.]
- "They also received over $100,000 in 'interest rate spread' fees." [*Id.*]
- These fees "were PinCap's only source of revenue in 2013." [*Id.*]
- "PinCap also used a portion of the fees it received to pay Risinger and Senefeld salaries of over $150,000 in 2013 and $200,000 in 2014." [*Id.* at ¶50.]

- "None of the offering materials sent to investors in the 2013 Offering disclosed that PinCap, Risinger, or Senefeld would be paid 'success' fees or 'interest rate spread' fees." [*Id.* at ¶47.]
- "Haab and Risinger admitted in SEC testimony that the fees were not disclosed to investors – in PPMs or otherwise – before they invested." [*Id.*]

Hence, Senefeld's ill-gotten gains that should be disgorged consist of the success fees and interest rate spread fees that were paid with investor funds but not disclosed to investors; the amounts that PinCap received from investor funds and then transferred to Senefeld as salary; and amounts Senefeld received from the bank accounts of the fraudulent 2013 VFLH Offering and 2014 FarmGrowCap Offering. *See, e.g.*, *SEC v. Black*, 2009 WL 1181480, *2 (N.D. Ill. Apr. 30, 2009) (citing *SEC v. Koenig*, 557 F.3d 736, 744-45 (7th Cir. 2009)) ("Disgorgement of salaries and other forms of compensation may be an appropriate remedy."); *Brown*, 579 F. Supp. 2d 1245, *aff'd* 658 F.3d 858 (Money obtained or misappropriated from investors should be considered ill-gotten gains and disgorged accordingly.); *Haligiannis*, 470 F. Supp. 2d at 384-85 (investor funds obtained by adviser subject to disgorgement). Furthermore, where the defendants have commingled the money, the SEC is not required to identify the misappropriated money. *Alanar*, 2008 WL 1994854, *4.

As detailed in the Disgorgement Declaration [Filing No. 443], $698,818.29 is a "reasonable approximation" of the profits Senefeld reaped from the wrongful conduct. *Alanar*, 2008 WL 1994854, *4. Senefeld admits that he received $698,818.29. [Filing No. 448 at 8.] The Response does not identify even one payment or even $1 dollar listed in the Disgorgement Declaration that is not an ill-gotten gain. Senefeld offered nothing to show that he received any of the $698,818.29 for doing legitimate work that was unrelated to the fraudulent scheme

described in the Amended Complaint. Senefeld has not met his burden of showing that the $698,818.29 calculation is inaccurate. *Alanar*, 2008 WL 1994854, *4.

The Response makes the conclusory, unsupported statement that the disgorgement amount should be reduced by amounts Senefeld paid for "ordinary business expenses." [Filing No. 448 at 3.] The Court should reject this invitation. First, "general business expenses, such as overhead expenses," "should not reduce the disgorgement amount." *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009) (internal quotes and citations omitted), *aff'd* 438 Fed. Appx. 23 (2d Cir. 2011). Second, Senefeld provided no evidence of any "ordinary business expenses" that he paid. Instead, Senefeld attached a spreadsheet that merely lists some expenses that he claims were never reimbursed. [Filing No. 448-5.] There were no receipts or a declaration provided.

Additionally, a brief review of the spreadsheet shows that the vast majority of the claimed business expenses relate to Pin Financial. [Filing No. 448-5.] For example, two claimed expenses purport to be: (1) a payment for "Pin Fin Office Expenses" and (2) "FINRA Registration Fee (PIN FINANCIAL)." [*Id.*] Senefeld provided no authority, reasoning, or analysis as to why ill-gotten gains he received from investors' investments in the 2013 VFLH Offering and 2014 FarmGrowCap Offering should be reduced by unsubstantiated general business expenses he allegedly paid regarding Pin Financial. Senefeld did not offer any explanation as to why investors in the 2013 VFLH Offering and 2014 PinCap Offering should pay Pin Financial's "ordinary" expenses. Moreover, "it is irrelevant for disgorgement purposes, how the defendant chose to dispose of the ill-gotten gains; subsequent investment of these funds, payments to charities, and/or payment to co-conspirators are not deductible from the gross profits subject to disgorgement." *Universal*

Express, 646 F. Supp. 2d at 564 (internal quotes and citations omitted), *aff'd* 438 Fed. Appx. 23. Consequently, there is no legal or evidentiary basis for the Court to reduce the amount of disgorgement by these unsubstantiated and unrelated general business expenses.

Furthermore, even if Senefeld did not receive reimbursement for Pin Financial's business expenses, it is irrelevant in resolving the amount of disgorgement. It is undisputed that financial hardship of the defendant is not a factor to be considered in determining the amount of disgorgement. *See, e.g., SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008); *SEC v. Mohn*, 2005 WL 2179340, *4 (E.D. Mich. Sept. 9, 2005); *SEC v. Thorn*, 2002 WL 31412439, *3 (S.D. Ohio Sept. 30, 2002); *SEC v. Robinson*, 2002 U.S. WL 1552049, *8 (S.D.N.Y. July 16, 2002).

III. THE $310,000 PAID TO PIN FINANCIAL IN 2015 SHOULD NOT REDUCE THE AMOUNT OF DISGORGEMENT THAT SENEFELD IS ORDERED TO PAY

A. The Response Did Not Offer Any Authority Or Facts To Support Reducing Senefeld's Disgorgement Amount By $310,000

Without any supporting case law or authority, the Response argues that the amount of disgorgement Senefeld is ordered to pay should be reduced by a $310,000 fee paid to Pin Financial. [Filing No. 448 at 11.] In essence, Senefeld is asking this Court to allow him to keep $310,000 in ill-gotten gains. The Response is devoid of any legal or factual reasons why Senefeld should be allowed to keep $310,000 in ill-gotten gains.

Moreover, Pin Financial is owned by PinCap. [Declaration of William E. Wendling, Jr., Receiver, Filing No. 454 at ¶ 5.] PinCap is owned one-third each by Risinger, Senefeld, and Veros. [Filing No. 57 at ¶ 15.] Senefeld offered no explanation as to why he should receive 100% of the credit for the fee paid to Pin Financial when Pin Financial is owned by PinCap and Senefeld in turn owns 33%, not 100%, of PinCap. Senefeld offered no evidence that he

personally would have received the entire $310,000, especially when PinCap and Pin Financial had other financial obligations.

B. The Fee Paid To Pin Financial Was Substantially Reduced Because Of Senefeld

The Response states that the fee paid to Pin Financial was reduced from 7% to 4%, but it is vague with respect to why the fee was reduced. As detailed below, the fee paid to Pin Financial was reduced because Hardes, the client, claimed that Senefeld did very little work. Hardes' counsel also mentioned the SEC's lawsuit against Senefeld. In the Response, Senefeld did not accept any responsibility for that reduction. It was due to the Receiver's efforts that Pin Financial received any of the fee. Moreover, the Receiver's motion for authority to renegotiate the fee stated that the $310,000 would be paid to the Receivership Estate and "will be to the benefit of the investors." [Filing No. 80 at ¶ 7.] Senefeld did not object to the Receiver's motion.

Here are the specific facts. In 2015, Pin Financial was a registered broker-dealer. (It was expelled from the securities industry in June 2016 by the Financial Industry Regulatory Authority.) At the time Mr. Wendling was appointed Receiver, Pin Financial had been working with the Hardes farm operation to obtain financing for Hardes. [Filing No. 454 at ¶ 4.] Several weeks before the closing of the loan to Hardes, counsel for Hardes contacted the Receivership. [Filing No. 454 at ¶ 6.] The Receiver's declaration states, "after mentioning the SEC's complaint regarding Mr. Senefeld, Hardes' counsel stated that Senefeld did very little work to accomplish securing a loan for Hardes and stated that Hardes did not intend to pay any of the contractual fees to Pin Financial." [Filing No. 454 at ¶ 7.] "Furthermore, the Receiver learned that the lender had sent correspondence to Mr. Hardes stating that he should not pay the contractual fee to Pin Financial from the loan proceeds because the lender did not think Mr.

Senefeld provided the services set forth in the Hardes contract." [Filing No. 454 at ¶ 8.] Thus, both Mr. Hardes and the lender contended that Pin Financial should not be paid because Senefeld had not performed the services.

The Receiver "was significantly involved in presenting information and argument to Mr. Hardes' attorney as to why his client was wrong and that Hardes was contractually responsible for paying a commission to Pin Financial. In addition, the Receivership was preparing to file a lawsuit in South Dakota to enforce the provisions of Pin Financials' contractual rights." [Filing No. 454 at ¶ 8.]

The Receiver then filed a motion seeking the Court's authority to renegotiate the fee from 7% to 4% [Filing No. 80.] The Receiver's motion stated "Hardes contends that Pin Financial failed to perform all of the required services and that Pin Financial is not entitled to the full amount of fees." [Filing No. 80 at ¶ 5.] The Receiver's motion further stated "[t]he fees paid to Pin Financial for this transaction will bring money into the Receivership Estate and will be to the benefit of the investors." [Filing No. 80 at ¶ 7.] Senefeld did not object to this motion. [Filing No. 80 at ¶ 9.] Now, two years later, Senefeld wants to deprive the investors of this benefit by reducing his disgorgement amount by this exact amount.

It is the Receiver's "belief and contention that without the authority given to the Receiver and Receivership by the court to negotiate with Hardes and Pin Financial LLC, the commission would not have been paid and Pin Financial would not have collected any fees from Hardes." [Filing No. 454 at ¶ 15.] Regardless of the truth of the claim that Senefeld did not do sufficient work on the Hardes transaction, the real credit for actually collecting the Hardes fee belongs with the Receiver – not with Senefeld.

C. Senefeld Has Already Received Payment For His Services

Senefeld agreed to receive $31,000 for his services related to the Hardes transaction. After the fee for the Hardes loan had been paid to Pin Financial and became a part of the Receivership Estate, Senefeld filed a motion requesting that $15,000 be paid to him. [Filing No. 85.] Senefeld's motion stated "[a]ll parties agree that Senefeld has earned payment for his services in assisting the Receiver and bringing the fee to Pin Financial. While the parties have not determined the exact amount that should be paid, the SEC and Wendling have agreed that Senefeld may now be paid $15,000. If additional amounts subsequently are requested, a separate motion will be made to the Court." [Filing No. 85 at ¶ 5.] Senefeld filed a second motion seeking an additional $16,000. [Filing No. 99 at 1.] In that motion, Senefeld acknowledged that he would receive a total of $31,000, which is 10% of the Pin Financial fee. The second motion further stated "[t[he total amount paid to Senefeld accordingly would be $31,000, ten percent (10%) of the fee he assisted in bringing in to Pin Financial" and "[t]he remaining funds received by Pin Financial will continue to remain under the control and supervision of the Receiver." [Filing No. 99 at ¶¶ 6, 8.] Thus, Senefeld has already personally received payment for his work on the Hardes loan.

Moreover, the Response mischaracterizes an email sent by the Receiver. The Response claims the Receiver praised Senefeld's helpful role in receiving the fee. [Filing No. 448 at 11.] The Receiver in his Declaration states that the accolade was in regard to helping Hardes, not with regards to helping obtain the $310,000. [Filing No. 454 at ¶ 14.]

In sum, Hardes refused to pay any fee to Pin Financial claiming that Senefeld did very little work and mentioning the fact that Senefeld was a defendant in an SEC lawsuit. The Receiver stepped in and was able to secure a 4% commission. Senefeld did not object when the Receiver filed a motion stating this fee would be paid to the Receivership Estate and for the

benefit of investors. Additionally, Senefeld previously acknowledged that he would receive a total of $31,000 for his work. That $31,000 has been paid to Senefeld.

D. The SEC Did Not Seek Disgorgement From Senefeld Of $389,286.87 In Ill-Gotten Gains Taken By PinCap

PinCap received $389,286.87 of ill-gotten gains, which it spent. [Filing No. 443 at ¶ 10.] By definition, Senefeld, as a one-third owner of PinCap, benefited from the ill-gotten gains received by PinCap. [*Id.* at ¶ 10.] The SEC did not seek disgorgement of any of these ill-gotten gains from Senefeld. The Response does not even acknowledge this, let alone establish the propriety of allowing Senefeld to avoid a PinCap liability in the amount of $389,286.87, while seeking a $310,000 reduction in his own liability because of a fee paid to a subsidiary of PinCap.

IV. THE COURT SHOULD IMPOSE CIVIL PENALTIES ON SENEFELD

Given Senefeld's fraud, the Court should impose civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. A civil penalty is necessary because "disgorgement…does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud…," and "…is necessary for the deterrence of securities law violations that otherwise may provide great financial returns to the violator." *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (*quoting* H.R. Rep. No.101-616 (1990)).

The Court would be justified in imposing either a first, second, or third tier civil penalty on Senefeld for his violations of the securities laws. For the first tier, which imposes the lowest penalty, "the amount of the penalty shall be determined by the court in light of the facts and circumstances." *See e.g.* 15 U.S.C. § 78u(d)(3)(B)(i). The second tier applies where the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a

regulatory requirement." 15 U.S.C. § 78u(d)(3)(B)(ii). The third and highest tier applies where the violation (i) "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and (ii) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 78u(d)(3)(B)(iii); *Haligiannis*, 470 F. Supp. 2d 373, 385-86.

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

Ordering Senefeld to disgorge his ill-gotten gains, without the imposition of a penalty, merely returns him to the *status quo ante*. Thus, a civil penalty is necessary to serve as a form of punishment for Senefeld's illegal actions. The amount of the civil penalty should be large enough to discourage Senefeld from future misconduct, as well as deter others who are similarly-situated from engaging in comparable instances of misconduct.

The Response argues that Senefeld should not have to pay civil penalties in part because he cooperated with the Receiver. The Receiver is not an enforcement authority, and the

Response does not cite any authority for the proposition that cooperating with a Receiver precludes the imposition of civil penalties. Additionally, Senefeld did not cooperate with the SEC.

Furthermore, Senefeld has received substantial amounts of money over the past few years. The Response argues that Senefeld should not have to pay a civil penalty because "Mr. Senefeld's current net income is $44,993.25 a year." [Filing No. 448 at 13.] Absolutely no support was provided for this claim. To the contrary, Craig McShane, an SEC staff accountant, has examined Senefeld's financial information and determined that from September 3, 2015 through January 18, 2017, Senefeld received **$524,412.14.** [Declaration of Craig L. McShane Regarding Tobin Senefeld's Finances, Filing No. 453 at ¶ 14.]

The Response incorrectly asserts that Senefeld's role in the fraudulent scheme was minor and therefore, only a small penalty, if any, should be imposed. For example, the Response incorrectly claims that Senefeld did not know the identities of or have contact with any investors. [Filing No. 448 at 4, 14, 15.] In a previous declaration, defendant Jeffery Risinger stated that Senefeld knew and communicated with investors. Specifically, Risinger stated "Senefeld states that he did not know the identities of Haab's investor-clients nor did he communicate with them. However, Senefeld was acquainted with and was responsible for introducing at least five people who subsequently invested in private offerings. Senefeld (and I in some cases) communicated directly with and met with these individuals in order to solicit them to invest in private offerings (other than FarmGrowCap)." [Filing No. 198-4 at ¶ 10.]

Additionally, defendant Matthew Haab, in a previous declaration further confirmed that Senefeld knew and communicated with investors in the private offerings. Haab stated "Senefeld states that he did not know the identities of the investors and that he did not

communicate with any of them. This is incorrect. Senefeld knew certain investors in the private offerings such as Marty McFarland and Rick Dennen. In fact, Senefeld communicated with these individuals and had meetings with them in order to encourage them to invest in the private offerings." [Filing No. 198-3 at ¶ 12.]

The SEC also filed a number of emails as exhibits to its opposition to Senefeld's motion for summary judgment showing that Senefeld communicated with and solicited investors. [Filing Nos. 198-6; 198-7; 198-8; 198-9; 198-10; 198-11; 198-12.]

Furthermore, the Response falsely claims that Senefeld hired Risinger to advise Senefeld on his disclosure and other SEC obligations. [Filing No. 448 at 4.] To the contrary, in his deposition testimony Senefeld admitted that he did not hire Risinger as his personal attorney. [Filing No. 198-1 at p. 7 (193:16-17).] Risinger also stated in his previous declaration "in creating a draft disclosure regarding Senefeld's SEC history, I was not acting as Senefeld's personal attorney." [Filing No. 198-4 at ¶ 27.]

Senefeld should be required to pay a civil penalty as punishment for his actions and to deter him and others from future violations of the securities laws.

V. CONCLUSION

In sum, the Amended Complaint alleged the following facts, which must be accepted as true for purposes of the SEC's Motion:

- Senefeld was a one-third owner and one of three managers of PinCap. PinCap received investor funds and dispersed investor funds to FarmGrowCap, which was 100% owned by PinCap, to make the private farm loans;

- Senefeld provided information for and had the opportunity to read and comment on the misleading documents for the 2013 and 2014 Offerings before they were distributed to the potential investors;

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

pay these fees;

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

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

For all of the foregoing reasons, Plaintiff U.S. Securities and Exchange Commission respectfully requests that the Court issue a final judgment setting $698,818.29 as the amount of disgorgement and prejudgment interest of $94,538.36 to be paid by Senefeld and requiring him to pay an appropriate civil penalty.

December 12, 2017

Respectfully submitted,

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

I hereby certify that on December 12, 2017, I served **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DISGORGEMENT, PREJUDGMENT INTEREST, AND CIVIL PENALTIES AGAINST DEFENDANT TOBIN SENEFELD** on all counsel of record through the Court's ECF filing system.

/s/Doressia L. Hutton