IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UN TED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. VEROS PARTNERS, INC , MATTHEW D. HAAB, JEFFREY B. RISINGER, VEROS FARM LOAN HOLDING LLC, TOBIN J. SENEFELD, FARMGROWCAP LLC, and PINCAP LLC, Defendants, and PIN FINANCIAL LLC, Relief Defendant.	)	Case No. 1 15-cv 659-JMS MJD

DEFEND NT TO IN J. SENEFELD'S RESPONSE TO PL INTIFF'S MOTION FOR DISGORGEMENT, PREJUDGMENT INTEREST, ND CIVIL PEN LTIES

The U.S. Securities and Exchange Commission's amended complaint alleged that defendants Veros Partners, Inc., Matthew Haab, Jeffrey Risinger, Veros Farm Loan Holding LLC, Tobin Senefeld, FarmGrowCap LLC, and PinCap LLC violated its laws by offering fraudulent farm loan investments and sought (1) a permanent injunction, (2) an order of disgorgement, and (3) a civil monetary penalty against Mr. Senefeld. Doc. 57.

The SEC and Senefeld entered into a bifurcated consent agreement, with Senefeld agreeing—without admitting or denying the allegations of the amended complaint—to be permanently enjoined from violating federal securities laws Doc 429 2 ¶ 2 He also agreed to the disgorgement of "ill gotten gains" and prejudgment interest on any such gains. *Id* ¶ 5. The appropriateness and amount of any civil penalty under 15 U S.C. §§ 77t(d) and 78u(d)(3), however, was reserved for later determination by the Court *Ibid.*

On October 11, 2017, the Court entered a judgment against Senefeld, which approved the terms of the consent agreement. Doc. 436. The SEC has since moved for an award of disgorgement, prejudgment interest, and a civil penalty. Doc 444 Senefeld now responds, asserting that the disgorgement requested is too high because it does not consider appropriate set offs, and that the amount of the civil penalty, if any, should be small

ST TEMENT OF F CTS[1]

Due to the procedural posture of this matter, the facts are largely established Senefeld presents them here for two distinct purposes. First, on the issue of disgorgement, Senefeld sets forth facts related to amounts that should be set off from the SEC's request Second, as to the issue of civil penalties, the goal is to "punish[] the violator and deter[] future violations " Doc 445 at 20. Accordingly, it is critical

[1] Though the allegations of the amended complaint must be accepted as true for purposes of the disgorgement motion, "the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence . . ." Doc 436. Senefeld submitted a detailed statement of facts with his Motion for Summary Judgment See Doc 191. Citations herein are to that document, which is incorporated by reference The most pertinent of those facts are discussed below

to understand that while Senefeld, as shown by his consent judgment with the SEC, deeply regrets his role in these proceedings, he also had a very defined and limited role

I. Th gov rnm nt has alr ady r c iv d hundr ds of thousands of dollars that should b cr dit d toward any disgorg m nt, and th gov rnm nt's calculation ignor s busin ss xp ns s.

In July of 2015, after both the lawsuit and the amended complaint were filed, Pin Financial LLC received a $310,000 fee as a result of Senefeld. Exhibit 1. This fee was paid for a transaction that was not part of this litigation, except that it was paid into an account controlled by the receiver thus becoming part of the funds of the receivership estate Exhibit 2 Even the receiver, Mr William Wendling, acknowledged Senefeld's helpful role in receiving the funds, noting Senefeld "did a really good job under very difficult circumstances." See Exhibit 3

From that $310,000, Senefeld petitioned the Court and received a $30,000 disbursement, $20,000 of which was money he advanced as a due diligence payment Exhibits 1, 4. Originally the transaction would have paid a 7% fee, or $542,500 *Id.* The receiver, however, negotiated that fee down to 4%. Doc 80.

In addition, Senefeld used some of the proceeds that the government wants to be disgorged as ordinary business expenses. These do not represent any pecuniary gain to Senefeld Specifically, Senefeld incurred $31,719 49 of unreimbursed expenses, after adding back in the $20,000 due diligence payment. See Exhibit 5. Accordingly, Senefeld spent $51,719.49 on business expenses and generated an

additional net $280,000 for the receivership estate. None of these are factored into the SEC's disgorgement request.

II. Th facts of Mr. S n f ld's involv m nt r lat d to a pot ntial civil p nalty.

Senefeld was never an owner or employee of Veros Partners, nc.; Senefeld never had any contact with Veros' clients; and Senefeld hired an attorney, Jeffrey Risinger, to review and approve the transactions and structure of his business. Doc. 57 ¶ 1; Doc. 191 2 ¶¶ 6, 21 Senefeld did hold an SEC license, however in the transactions at issue he served only as a liaison between the farmers and Veros Doc 191-2 ¶3. Haab, not Senefeld, solicited Veros's client for the 2013 transactions Doc 57 ¶ 32 Risinger, not Senefeld, "prepared the offering materials and the loan agreements for the 2012 offerings" *Id.* at ¶ 28 Risinger prepared the PPM for the 2013 offering. *Id* at ¶ 37 Haab used investor money to repay prior investors *Id* at ¶ 38. While Senefeld had the opportunity to review Risinger's work related to his and Haab's representations to investors, there is no independent fact or allegation to suggest Senefeld did anything other than rely upon Risinger's legal expertise as to what should be disclosed or represented, and those communications with Veros's investors were not handled by Senefeld.

Senefeld and his company, CCG, as well as other companies involved in the transactions, hired an attorney, Risinger, to review the transactions and provide advice regarding, among other things, Senefeld's role in the transactions at issue here See generally Doc 191 2. Risinger reviewed various documents, and advised Senefeld on his SEC obligations related to the various transactions at issue. *See id.*

Senefeld's role, through his various entities, was to serve as a liaison between farmers and lenders. *Id.* ¶ 10. Senefeld's background in agriculture, and connections with various individuals—including Haab and Risinger—allowed him to connect these individuals, and be paid a fee when the transactions closed. *Id.* ¶¶ 10 24.

Indeed, the amended complaint alleges that:

> Veros and Haab were the ones who raised the money, Doc. 57 ¶ 1;
>
> Veros and FarmGrowCap issued the securities, and Senefeld was one of its three owners, *id* ¶ 2;
>
> Haab was the party who orally and in writing informed his investors of the offerings, and asked the investors to "roll over" their investments, *id.* ¶ 3;
>
> Haab managed Veros's investment advisory business, *id.* ¶ 17;
>
> Haab looked for investment opportunities for Veros' clients, *id.* ¶ 20;
>
> Haab paid PinCap and Risinger and Senefeld fees he did not disclose, *id* ¶¶ 45, 46;
>
> Risinger drafted a misleading biography of Senefeld in relation to his 1999 SEC charges, *id.* ¶ 51; and
>
> Haab solicited clients for the 2013 and 2014 offerings *id. passim*

Of the six counts in the amended complaint, three include Senefeld, but none is directed solely to him. While Senefeld does not make light of the allegations, it is clear from a fair reading of it that Senefeld played a supporting role. Senefeld is, for example, alleged to have had access to the offering documents he did not author and that he knew Haab and Risinger would "handle the offerings," and Senefeld was

involved in one payment to Haab that the SEC alleged violated the law Doc 57 ¶¶ 3, 22, 42.

RGUMENT

I. This Court should us its broad discr tion in ord ring S n f ld to disgorg an amount far l ss than th SEC has r qu st d.

Senefeld has agreed to disgorge any "ill gotten gains" and the prejudgment interest on any such gains Doc 429 2 ¶ 5 The amounts of disgorgement and the appropriateness and amounts of civil penalties (if any) were, however, reserved for determination by this Court. *Ibid*. To that end, the SEC has asked the Court order Senefeld to disgorge $698,818.29, plus prejudgment interest of $94,538.36 But absent from the SEC's brief is any analysis of how or why these amounts constitute "ill-gotten gains" subject to disgorgement. Also conspicuously absent from the SEC's brief is any discussion of the $310,000 Senefeld helped return to the receivership estate, or any attempt to calculate ordinary business expenses that are unrelated to the SEC's allegations The SEC has failed to meet its burden, and in any event the disgorgement is subject to a substantial discount.

"Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir 1989). This "court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged " *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 75 (2d Cir 1996). But "[i]n crafting any disgorgement remedy

, the district court should keep in mind the limitation placed on its equitable powers by th[e] requirement that there be a relationship between the amount of disgorgement and the amount of the ill gotten gain" *CTFC v. American Metals Exchange Corp.*, 991 F.2d 71, 78 79 (3d Cir 1993) (internal quotation marks omitted).

Though Senefeld agreed to disgorgement, that does not change the SEC's burden of showing the amount must be "a reasonable approximation of profits causally connected to the violation." *First City Financial*, 890 F.2d at 1231. f the SEC can demonstrate a reasonable approximation of tainted profits, then the burden of production shifts to the defendant to produce evidence showing that at least some part of the amount in question should not be subject to disgorgement. The defendant must show that "the disgorgement figure [i]s not a reasonable approximation ., for instance, by pointing to intervening events from the time of the violation" *Id.* at 1232. But, again, "[d]istrict courts enjoy so much latitude in these matters that a decision not to order disgorgement will not be disturbed by an appellate court unless it is established that the district court abused its discretion." *SEC v. Merchant Capital, LLC*, 400 F Supp 2d 1336, 1373 (N.D. Ga. 2005)

. Th SEC has fail d to m t its burd n of d monstrating th amount of S n f ld's all g d "ill-gott n gains" subj ct to disgorg m nt

The SEC has asked the Court to order Senefeld to disgorge $698,818.29, plus $94,538.36 in prejudgment interest. The SEC claims that this amount represents the dollars that went directly to Senefeld from accounts connected to the alleged fraud.

See Doc 443 at ¶ 8 [2] Senefeld admits that he received this money, but as *SEC v. Collins*, No. 01 C 3085, 2003 WL 21196236 (N.D. Ill. May 21, 2003), makes clear, that is not to say that all of that amount is subject to disgorgement.

In *Collins* the SEC alleged that the defendants engaged in a fictitious prime bank investment scheme, which bilked more than 400 investors out of more than $10 million. In addition to the fraud's mastermind, the SEC named as defendants two other parties (Jerome Coppage and Bill Wilson) and alleged that they attended investor meetings and made material misrepresentations to the investors in the fraud.

The SEC sought an order enjoining Coppage and Wilson from future violations of securities laws and for the disgorgement of their ill gotten gains and the payment of civil penalties Coppage and Wilson signed bifurcated consent decrees and agreed to be permanently enjoined from future violations of securities laws and also agreed to disgorgement and civil penalties "In signing these documents, Coppage and Wilson admitted only the jurisdictional allegations of the complaint; they neither admitted nor denied the substantive allegations concerning their roles in the Gateway scheme, and in fact that Consents [were] completely silent as to what role either defendant played in the scheme." *Collins*, 2003 WL 21196236, at *1. The court then entered orders approving the consent decrees, but, "[l]ike the Consents, the Orders [did] not spell what role, if any, the defendants played in the . . scheme; nor

[2] The accounts at issue are: a) Account xxx7816 in the name of PinCap LLC; 2) Account xxx7557 in the name of Veros Partners, nc. as agent for several lenders under PinCap LLC; 3) Account xxx6456 in the name of Veros Partners, nc. as manager for several lenders under Veros Farm Loan Holding, LLC; and 4) Account xxx7010 in the name of FarmGrowCap, LLC

[did] they specify how the defendants violated the securities laws; the Orders simply describe[d] the various types of relief awarded to the SEC against each defendant." *Id.*, at *2

On the damages question, the SEC asked the court to order the defendants to disgorge all amounts they received from accounts connected to the alleged fraud. *Id*, at *5 The defendants conceded that they had, in fact, received the amounts in question, but the court determined that "[t]he relevant question . is whether money obtained from investors is necessarily subject to disgorgement, something the SEC seems to have assumed. On the record that has been submitted to the court, the answer is no." *Ibid*

The court found that, "[i]mplicit 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 very language used in the cases—e.g., '*unjust* enrichment,' '*ill-gotten* gains,' '*wrong* doer'—emphasizes that 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 The SEC essentially concedes in its damages brief that disgorgement is appropriate only as against 'wrongdoers,' those who violated the law. Thus, before we can order disgorgement, we need some evidence that these particular defendants violated the securities laws, participated in the fraud or otherwise engage in some wrongdoing." *Ibid.* (internal citations omitted, emphasis in original)

The court further held that, "[t]hrough Norman Jones, the SEC's accountant, the SEC has established that Coppage and Wilson received money that could be traced directly back to the people who invested in the [alleged fraud]. But even if we accept[ed] that the [alleged fraud] was a complete scam and the [leader of the fraud] and others obtained money from investors through the fraud, the SEC has cited no case holding—or even hinting—that receipt of money obtained through someone else's securities laws violations is a sufficient basis to order disgorgement, especially where there is no evidence showing that the recipient even knew about those violations." *Id.*, at *6.

"In sum," the court found, "the SEC's arguments concerning disgorgement simply assume that money obtained from [allegedly fraud] related accounts is all ill gotten gains." *Id*, at *7 But "[t]hat is not the way things work To win a judgment, a party must present evidence to support its contentions, and the SEC failed to do so. The fact that the Court had already entered injunction orders does not relieve the SEC of that responsibility." *Ibid*

The same is true here. The SEC has simply used a staff accountant to identify payments that went to Senefeld, and assumes that they represent ill-gotten gains subject to disgorgement. There was also no attempt at set-off for any business expenses or money seized. Again, there is no question that Senefeld received the amounts identified in Doc. 443-1, but the SEC must do more, particularly here given Senefeld's role For without that connection, the predicate, causal relationship between the amount of disgorgement and the amount of ill gotten gain cannot be

established. So while Senefeld agrees that some amount of disgorgement should be ordered, whatever that amount is (as determined by the court in its discretion) should be set off against the $310,000 that Senefeld brought into the receivership estate.

. Th $310,000 that S n f ld g n rat d for th r c iv rship stat should b cr dit d against any amount of disgorg m nt th Court ord rs

On May 1, 2015, William Wendling was appointed as the receiver in this matter Doc 34 On July 16, 2015, the receiver filed an "urgent" motion seeking to renegotiate a fee due to Pin Financial, who had been working on obtaining financing for a farming operation in South Dakota. Doc. 80 ¶ 5. The receiver sought to reduce the commission due to Pin Financial from 7% to 4% of the $7,750,000 loan. *Id.* ¶¶ 4 8; Exhibit 1 The SEC agreed to the receiver's proposal. *Id* ¶ 9 This reduced the fee due to Pin Financial from $542,500 to $310,000. Exhibits 1, 4.

That $310,000 fee was then transferred to an account controlled by the receiver thus becoming part of the funds of the receivership estate. Exhibit 2 Even the receiver acknowledged Senefeld's helpful role in receiving the funds, noting Senefeld "did a really good job under very difficult circumstances." *See* Exhibit 3. The SEC has not offered any evidence that, but for Senefeld's assistance, those funds would have been received by the receivership estate. Mr. Senefeld respectfully asks that if the Court determines that the government has met its burden on disgorgement, any amounts ordered be set off or reduce any disgorgement ordered by $310,000, plus the costs of any business expenses, plus the amount of money seized from Senefeld and his wife.

II. S n f ld's all g d rol in th fraud, coupl d with his curr nt and futur financial condition, dictat s th any civil p nalty should b small if any.

Courts have discretion to determine the amount of a civil penalty "in light of the facts and circumstances" of the particular case. 15 U S C §§ 77(t)(d)(2)(A), 78u(d)(3)(B)(i); *SEC v. aly*, 572 F.Supp 2d 129, 134 (D D.C. 2006) "The purpose of a civil penalty is to punish the individual violator and deter future violations " *SEC v. One or More Unknown Traders in the Common Stock of Certain Issuers*, 825 F.Supp 2d 26, 33 (D D C. 2010) n determining whether civil penalties should be imposed, and the amount of the fine, courts look to a number of factors, including: (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition. See *S C v. Coates,* 137 F.Supp 2d 413, 428 29 (S.D.N Y 2001) (listing factors); *SEC v. Allen*, No 11 882, 2012 WL 5986443 (N.D Tex. Nov 28, 2012); *S C v. Credit Bancorp, Ltd.,* No 99 Civ 11395(RWS), 2002 WL 31422602 (S.D.N Y Oct 29, 2002); *SEC v. Rubin*, 91 Civ 6531, 1993 WL 405428, at *7 (S D.N.Y Oct. 9, 1993) (court considers defendant's "impecunious financial condition" in imposing $1,000 penalty) Courts also consider whether the defendant has cooperated with the enforcement authorities. *SEC v. Church Extension of the Church of God, Inc.*, 429 F.Supp 2d 1045, 1050 (S D nd 2005) While these factors are helpful in characterizing a particular defendant's actions, the civil penalty framework is of a "discretionary nature" and each case "has

its own particular facts and circumstances which determine the appropriate penalty to be imposed." *Moran,* 944 F.Supp. at 296 97.

The receiver's own emails confirm Mr. Senefeld cooperated at least insofar as helping to generate income for the receivership estate. Moreover, Mr. Senefeld's current net income is $44,993.25 a year. A significant civil penalty will not serve any additional deterrent purpose.

While it is true that the allegations of the amended complaint must be accepted as true in determining the size of the civil penalty against Senefeld, it is important to remember exactly what those allegations are

It was Veros and Haab that "fraudulently raised at least $15 million from at least 80 investors." Doc. 57 ¶ 1 In 2013 "Haab used $2.8 million from the 2013 Offering to pay off investors in earlier farm loan offerings when those farms did not fully repay their 2012 loans, without informing investors that they intended to do so." *Id.* ¶ 3(a). "Haab and Risinger did not disclose the 2012 loan defaults to the 2013 investors, nor did they disclose that the 2012 unpaid loan balances were included in loans involved in the 2013 Offering." *Ibid.* And "[w]ithout disclosure to investors," Haab and Risinger "also used $1.9 million from the 2013 Offering to repay investors in a separate 2014 'Bridge Loan' offering that was set to mature on the same date." *Ibid*

"In 2014, after Haab leaned that several of the farms involved in the offering would not repay their 2013 loans in time, Haab, with the assistance of Risinger, used over $2 million from the 2014 offering to repay investors in the 2013 Offering and in

the earlier 2014 Bridge Loan offering, without informing investors that they intended to do so." *Id.* ¶ 3(b).

"Knowing that the actual amounts repaid by the farmers on the 2013 loans would be far less than what was necessary to fully repay all of the 2013 investors, Haab urged many of those investors to 'roll over' their principal into the 2014 Offering. Haab falsely represented to that they both the 2013 investors and the 2013 loans had been repaid in full." *Id.* ¶ 3(c). "Haab and Risinger then 'rolled' over $7.5 million of unpaid investor principal from the 2013 and 2014 Bridge Loan Offerings into the 2014 Offering, and raised at least $3.5 million in new investor funds." *Id.* ¶ 3(d)

There is not a single, specific allegation in paragraphs 1 through 110 of the amended complaint that Senefeld had any contact with Veros's investors. See Doc. 57 In fact, Senefeld was never an owner or employee of Veros, nor did he ever know the identities of or have contact with any of Veros's clients. Doc. 191-2 ¶ 21. Senefeld's clients were the farmers.

The SEC has offered no evidence that Senefeld engaged in any "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," making a penalty under 15 U.S.C §§ 78u(d)(3)(B)(ii) or (iii) inappropriate. Senefeld does agree, however, that a first tier civil penalty is appropriate and should "be determined by the court in light of the facts and circumstances" of this case. *See* 15 U S.C § 78u(d)(3)(B)(i). For each first tier violation, the civil penalty is capped at $7,500. See 17 C.F.R. § 201.1001 and Table I to Subpart E.

But because Senefeld never had any contact with Veros's clients, he is unable to suggest the amount of the civil penalty The SEC also has not chosen to suggest an appropriate amount or the number of violations to act as the multiplier, and has simply said that the Court could justify the imposition of any tier of civil penalty. For the reasons set out above, Senefeld respectfully asks the court to order a small civil penalty, if any.

CONCLUSION

The government has not met its burden of showing all monies earned is the proper amount of any disgorgement, and has not shown that a substantial civil penalty is warranted. Senefeld requests that this Court consider and award the appropriate amounts, if any, based on the facts of this matter.

Respectfully submitted,

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CERTIFIC TE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on November 29, 2017 Notice of this filing will be sent to all parties registered to receive such notice by operating of the court's electronic filing system. Parties may access this filing through the court's electronic filing system.

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/s/ Paul L. Jefferson

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