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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**
12

13 SECURITIES AND EXCHANGE
14 COMMISSION,

15 Plaintiff,

16 vs.

17 MEDICAL CAPITAL HOLDINGS,
18 INC.; MEDICAL CAPITAL
19 CORPORATION; MEDICAL
CORPORATION VI; SIDNEY M.
20 FIELD; and JOSEPH J.
21 LAMPARIELLO,

22 Defendants.
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CASE NO. 09CV-818 DOC (RNBx)

**NOTICE OF MOTION AND MOTION
TO DISMISS FILED BY DEFENDANTS
SIDNEY M. FIELD AND JOSEPH J.
LAMPARIELLO**

DATE: September 28, 2009
TIME: 8:30 a.m.
JUDGE: Hon. David O. Carter
CTRM: 9D

1 **TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 NOTICE IS HEREBY GIVEN THAT on September 28, 2009, at 8:30 a.m., before
3 the Honorable David O. Carter, in Courtroom 9D of the United States Courthouse for the
4 Central District of California, Southern Division, 411 West 4th Street, Santa Ana,
5 California, Defendants Sidney M. Field and Joseph J. Lampariello (the "Individual
6 Defendants") will and hereby do move the Court to dismiss the original Complaint for
7 violations of the federal securities laws (Docket # 1) pursuant to Federal Rule of Civil
8 Procedure 9(b) for failure to plead fraud with particularity, and Rule 12(b)(6) for failure
9 to state a claim upon which relief can be granted.

10 Pursuant to Local Rule 7-3, counsel for the Individual Defendants conferred via
11 telephone with counsel for the Securities and Exchange Commission at least five days
12 prior to the last day for filing the motion on August 28, 2009. Both the substance of and
13 a potential resolution to this motion were stated by counsel for the Individual Defendants
14 to counsel for the SEC in a detailed voice message. No response to that voicemail was
15 received.

16 As set forth in the accompanying Memorandum of Points and Authorities, there is
17 good cause for the relief requested. The SEC wholly fails to describe the specific alleged
18 fraudulent conduct with requisite facts, leaving questions as to who made the allegedly
19 fraudulent misrepresentations, to whom they were made, when these acts took place, and
20 the specific nature of the supposed fraudulent actions or omissions allegedly committed
21 by each of the Individuals Defendants.

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1 This Motion is based on this Notice of Motion and Motion; the accompanying
2 Memorandum of Points and Authorities; the pleadings and papers filed in this action; and
3 such further argument and matters as may be offered at the time of the hearing of this
4 Motion.

5 Dated September 2, 2009

6 By: /s/ Michael A. Piazza
7 Michael A. Piazza
8 Alan A. Greenberg
9 Attorneys for Defendants Sidney M. Field and
10 Joseph J. Lampariello
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1 **INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The Securities and Exchange Commission (“SEC” or “Commission”) has sued
3 Sidney M. Field and Joseph J. Lampariello (the “Individual Defendants”) for alleged
4 fraud in the offer and sale of \$76.9 million in the form of notes, and specifically focuses
5 on the sale of notes by a Special Purpose Corporation called Medical Provider Funding
6 Corporation VI (“MP VI”) (also a named defendant). Despite a year long investigation
7 and the obvious seriousness of the allegations asserted by the SEC, nowhere in the three
8 and a half pages devoted by the SEC in its Complaint to the explanation of the alleged
9 “Fraudulent Scheme” is there a specific reference to actions or omissions directly
10 attributed to either of the Individual Defendants. (Complaint at ¶¶ 16-29).

11 Instead, throughout the Complaint the SEC simply refers to the named entities and
12 individuals collectively as “Defendants” with no attempt to differentiate among them.¹
13 Indeed, many of the basic facts that one would expect to see in a fraud complaint are
14 wholly absent from the SEC’s initial pleading.

15 The Complaint fails to specify the names of any investors that were defrauded, the
16 dates they were defrauded, the amounts they were defrauded, the documents that were
17 used to defraud them, who specifically defrauded them, the specific acts and omissions of
18 such defendants in furtherance of the alleged fraudulent scheme, and so forth. Thus the
19 original Complaint is patently deficient under Federal Rule of Civil Procedure 9(b).

20 The lack of specificity further renders the Complaint deficient under Rule 12(b)(6).
21 The Complaint was filed in mid July 2009, on the heels of a year-long investigation. As
22 of this writing, the SEC has had the benefit of having its chosen Receiver operate (or fail
23 to operate, as appears to be the case) the defendant companies for a full month. Yet the
24 SEC has failed to amend its Complaint to provide the requisite specificity to its
25 allegations against the Individual Defendants as required by governing case law.

26 _____
27 ¹ The SEC, in addition to the Individual Defendants, also has named Medical Capital
28 Holdings, Inc., and Medical Capital Corporation, and Medical Provider Funding
Corporation VI, as defendants in its action.

1 Accordingly, these Individual Defendants file this motion to dismiss for failure to meet
2 the pleading requirements of Fed. R. Civ. P. 9(b) and 12(b)(6).

3 ARGUMENT

4 **A. The Complaint Should Be Dismissed For Failure To Plead Fraud With** 5 **Requisite Particularity**

6 In the Ninth Circuit, the Rule 9(b) standard for pleading fraud is well settled -- a
7 plaintiff must allege the “who, what, where, when, and how” of the fraudulent conduct.
8 *Vess v. Ciba-Geigy Corp.*, 317 F.3rd 1097, 1106 (9th Cir. 2003). The heightened pleading
9 standard imposed by Rule 9(b) can only be met if “the pleader states the specific content
10 of the false representations.” *Moore v. Kayport Package Express*, 885 F.2nd 531, 541 (9th
11 Cir. 1989).

12 The SEC does not have special status to avoid the pleading requirements of Rule
13 9(b) simply because of its role as a government regulatory agency. As other federal
14 courts in California have recognized, Rule 9(b)’s heightened pleading standard applies in
15 SEC enforcement actions grounded in fraud and alleging violations of Section 17(a) of
16 the 1933 Securities Act and Section 10(b) of the 1934 Securities Exchange Act. *See, e.g.*
17 *SEC v. Berry*, 580 F.Supp.2nd 911 (N.D. Cal. 2008).

18 Under *Vess*, a complaint grounded in fraud which fails to meet the heightened
19 pleading requirements of Rule 9(b) warrants dismissal. *Vess*, 317 F.3rd at 1107. Here,
20 the two claims for relief asserted by the Commission against the Individual Defendants
21 arise under Section 17(a) of the 1933 Securities Act and Section 10(b) of the 1934
22 Securities Exchange Act. It is manifest that the SEC’s entire complaint is grounded in
23 fraud and thus must meet the strict 9(b) standard for pleading. It does not.

24 **1. The Commission’s Description Of Alleged Misrepresentations Are** 25 **Impermissibly Vague**

26 In paragraphs 20-29 of the Complaint, the Commission purports to set forth
27 misrepresentations made in the offer and sale of notes of Medical Provider Funding
28 Corporation VI (“MP VI”). Yet, when describing these alleged misrepresentations, the

1 SEC only refers to the generic group of Defendants without providing any detail of
2 specific misrepresentations allegedly made by either of the Individual Defendants, be it
3 to a potential or actual investor, a broker-dealer, or anyone else.

4 This is not permissible. The SEC is required to specify particular misstatements
5 that were made, to whom they were made, when they were made, by whom they were
6 made, and why they were false. *In re GlenFed, Inc., Sec. Litg.*, 42 F.3rd 1541, 1547 n7
7 (9th Cir. 1994) (en banc) (stating that Rule 9(b) requires pleading facts that are
8 evidentiary,” including “persons, statements made, [and an] explanation of why or how
9 such statements are false or misleading”). The Commission does make a vague
10 allegation that “fees exceeded . . . collections by approximately \$18.5 million in direct
11 contravention to [MP VI’s] PPM’s representations . . .” But the SEC makes no attempt to
12 connect this allegation to any specific defendant other than MP VI. There is no
13 documentation appended to the Complaint describing or otherwise attempting to trace
14 these payments, and indeed there is no detail whatsoever (either through allegations or
15 documents) that provides any evidence that these fees were received, and if so, by whom.

16 **2. The SEC’s Pleading Of Alleged Misrepresentation Regarding Defaults**
17 **Of Other SPCs Is Similarly Impermissibly Vague**

18 The crux of the SEC’s allegations relating to alleged defaults in other SPCs
19 focuses on the private placement memorandum (“PPM”) issued for MP VI in August of
20 2008. The specific allegation made by the SEC is that “the Defendants knew, or were
21 reckless in not knowing, that during the MP VI offering several of the affiliated SPCs had
22 defaulted on their obligations.” No further attempt was made by the Commission to
23 explain this allegation. There is no detail provided on the alleged defaults including
24 when they occurred, nor any other detailed information that would show the timeline of
25 events that might support the broad allegation of fraudulent misrepresentation as it now
26 stands in the Complaint.

27 When exactly did the MP VI PPM get issued? To whom was it disseminated? By
28 the Individual Defendants? We are left to ponder this with no guidance from the

1 Complaint. Further, there is no attempt made to list any potential or actual investors who
2 were provided with the allegedly false information, nor who made such representations to
3 those investors, and in what form (e.g. written or oral).

4 As a result, these Individual Defendants are left to guess what it is precisely that
5 the SEC contends they did or did not do in violation of securities laws. That is not proper
6 federal pleading, and is wholly inappropriate under the heightened pleading standard of
7 Rule 9(b). For these reasons, the SEC's original Complaint should be dismissed.

8 **B. The Complaint Should Be Dismissed For Failure To State A Claim Of**
9 **Securities Fraud**

10 The lack of detail in the Complaint makes it deficient not only under Rule 9(b), but
11 Rule 12(b)(6) as well. And while this Court must accept as true all factual allegations in
12 the Complaint in determining a motion to dismiss, it is just as true that "conclusory
13 allegations of law and unwarranted inferences are insufficient to defeat a motion to
14 dismiss for failure to state a claim." *Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89
15 F.3rd 1399, 1403 (9th Cir. 1996).

16 To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient
17 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'...
18 A claim has facial plausibility when the plaintiff pleads factual content that allows the
19 court to draw a reasonable inference that the defendant is liable for the misconduct
20 alleged." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868
21 (2009), citing *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 556, 570, 127 S. Ct.
22 1955, 1965, 1974, 167 L. Ed. 2d 929 (2007). A pleading will not suffice if it offers
23 "labels and conclusions" or "a formulaic recitation of the elements" *Id.* And "the tenet
24 that a court must accept as true all of the allegations contained in a complaint is
25 inapplicable to legal conclusions." *Id.*

26 The Individual Defendants, along with the entity defendants, are collectively
27 charged by the SEC with violating both Section 17(a) of the 1933 Securities Act, and
28 Section 10(b) of the 1934 Securities Exchange Act and Rule 10(b)-5. (Complaint at ¶¶

1 10-11). These are commonly referred to as the anti-fraud provisions of the federal
2 securities laws. In order to state viable causes of action under these statutes, the
3 Commission must allege that Messrs. Field and Lampariello made material
4 misrepresentations or omissions with the requisite degree of scienter in connection with
5 the purchase or sale of a security. *SEC v. Rana Research, Inc.*, 8 F.3rd 1358, 1364 (9th
6 Cir. 1993). Federal statute requires that the misstatement be made “in connection with”
7 the purchase, sale, or offering of any security. 15 U.S.C. § 77(q)(a); 15 U.S.C. § 78(j)(b);
8 17 C.F.R. § 240.10(b)-5.

9 In other words, as the Supreme Court has held, to allege securities fraud the
10 scheme to the fraud must coincide with the sale of securities. *SEC v. Zandford*, 535 U.S.
11 813, 822 (2002). There can be no claim for securities fraud if, after a lawful transaction
12 has been consummated, the decision to engage in fraudulent conduct is made. *Id.* at 820;
13 825 n4. (“If a broker embezzles cash from a client’s account or . . . induce[s] his client
14 into a fraudulent real estate transaction, then the fraud would not include the requisite
15 connection to a purchase or a sale of securities.”) So in other words, unless the alleged
16 fraud and the sale of securities coincide, there is no securities law violation.

17 Based on the vague manner in which the Complaint is drafted, one cannot tell
18 whether the SEC is alleging that the Individual Defendants engaged in fraud in
19 connection with the sale of any security. This is so because based upon the vague
20 allegations, it is entirely possible that investor funds were received before any alleged
21 misrepresentations could have occurred.

22 Moreover, as noted above, the broad and ambiguous manner in which the SEC
23 chose to plead the complaint leaves unclear who, if anyone, made the alleged
24 misrepresentations and there is no specificity given as to which investors, if any, were
25 alleged victims of such misrepresentations.

26 The manner in which the SEC chose to plead its Complaint leaves all readers
27 guessing as to the precise timeline of events and the specific actors who purportedly
28 carried out the fraudulent scheme. Without more, it is impossible to tell whether some,

1 or possibly none of the investors in MP VI received misstated information. Without
2 knowing when the PPM was issued, to whom it was issued and when it was received by
3 the investors, there is simply no way to tell on the face of the Complaint whether anyone
4 was allegedly defrauded.

5 **CONCLUSION**

6 For the reasons set forth above, Defendants Field and Lampariello respectfully
7 request that the Court dismiss all of the claims asserted against them.

8 Respectfully submitted.

9 Dated: September 2, 2009

GREENBERG TRAURIG, LLP

10 By: /s/ Michael A. Piazza

11 Michael A. Piazza

12 Alan A. Greenberg

13 Attorneys for Defendants Sidney M. Field and

14 Joseph J. Lampariello
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **3161 Michelson Drive, Suite 1000, Irvine, CA 92612.**

On the below date, I electronically filed the **NOTICE AND DEFENDANTS SIDNEY M. FIELD'S AND JOSEPH J. LAMPARIELLO'S EX PARTE MOTION TO AMEND ORDER FREEZING ASSETS TO RELEASE LIVING EXPENSES AND ATTORNEYS FEES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** with the Clerk of the United States District Court for the Central District of California, using the CM/ECF System. The Court's CM/ECF System will send an email notification of the foregoing filing to the following parties and counsel of record who are registered with the Court's CM/ECF System:

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(BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM)
In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic service through the CM/ECF system.

(FEDERAL) I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 2, 2009, at Irvine, California.

/s/ Alan A. Greenberg
Alan A. Greenberg