

1 MICHAEL A. PIAZZA (SBN 235881)
Email: piazzam@gtlaw.com
2 ALAN A. GREENBERG (SBN 150827)
Email: greenbergal@gtlaw.com
3

4 GREENBERG TRAUERIG, LLP
3161 Michelson Drive, Suite 1000
5 Irvine, California 92612
6 Telephone: (949) 732-6500
7 Fax: (949) 732-6501

8 Attorneys for Defendants SIDNEY M. FIELD and
JOSEPH J. LAMPARIELLO
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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**

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15 SECURITIES AND EXCHANGE
16 COMMISSION,

17 Plaintiff,

18 vs.

19 MEDICAL CAPITAL HOLDINGS,
20 INC.; MEDICAL CAPITAL
21 CORPORATION; MEDICAL
22 PROVIDER FUNDING
CORPORATION VI; SIDNEY M.
23 FIELD; and JOSEPH J.
LAMPARIELLO,

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

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

DATE: January 25, 2010
TIME: 8:30 a.m.
JUDGE: Hon. David O. Carter
CTRM: 9D

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

NOTICE IS HEREBY GIVEN THAT on January 25, 2009, at 8:30 a.m., before the Honorable David O. Carter, in Courtroom 9D of the United States Courthouse for the Central District of California, Southern Division, 411 West 4th Street, Santa Ana, California, Defendants Sidney M. Field and Joseph J. Lampariello (the "Individual Defendants") will and hereby do move the Court to dismiss the First Amended Complaint for Violations of the Federal Securities Laws (Docket # 111) pursuant to Federal Rule of Civil Procedure 9(b) for failure to plead fraud with particularity, and Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Pursuant to Local Rule 7-3, on December 3, 2009 (more than five days prior to the last day for filing the motion) counsel for the Individual Defendants, Alan Greenberg, called counsel for Securities and Exchange Commission ("SEC"), John Bulgozdy, in an attempt to confer. Unable to reach Mr. Bulgozdy, Mr. Greenberg left him a voicemail. Mr. Bulgozdy was apparently out sick and did not return Mr. Greenberg's call. Mr. Greenberg was informed that Mr. Bulgozdy was the only attorney handling this case for the SEC. Mr. Greenberg left another voicemail for Mr. Bulgozdy on December 8th, and counsel then conferred on December 9th prior to the filing of this motion. Counsel were unable to reach a resolution other than to the date for hearing of the motion.

As set forth in the accompanying Memorandum of Points and Authorities, there is good cause for the relief requested. The SEC fails to describe the alleged fraudulent conduct with requisite specificity and how these vague allegations tie into the purchase or sale of any security.

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Securities and Exchange Commission ("SEC" or "Commission") has sued
 4 Sidney M. Field and Joseph J. Lampariello (the "Individual Defendants") for alleged
 5 securities fraud. The SEC refers to the alleged sale of notes by certain Special Purpose
 6 Corporations ("SPCs") including Medical Provider Funding Corporation VI ("MP VI")
 7 (also a named defendant), and several other entities called Medical Provider Funding
 8 Corporations I through V ("MP I" through "MP V"). However, even after the Individual
 9 Defendants stipulated to allow the SEC to file a First Amended Complaint and correct the
 10 deficiencies in its original pleading, the SEC still has failed to meet the pleading
 11 requirements of FRCP Rules 9(b) and 12(b)(6). In fact, many of the basic facts that one
 12 would expect to see in a securities fraud complaint are wholly absent from the SEC's
 13 pleading.

14 **II. ARGUMENT**

15 **A. The First Amended Complaint Should Be Dismissed For Failure To Plead**
 16 **Fraud With Requisite Particularity**

17 In the Ninth Circuit, the Rule 9(b) standard for pleading fraud is well settled -- a
 18 plaintiff must allege the "who, what, where, when, and how" of the fraudulent conduct.
 19 *Vess v. Ciba-Geigy Corp.*, 317 F.3rd 1097, 1106 (9th Cir. 2003). Fraud allegations must
 20 state "the time, place and specific content of the false representations as well as the
 21 identities of the parties to the misrepresentation." *Bassett v. Ruggles*, No. CV-F-09-528,
 22 2009 U.S. Dist. LEXIS 83349, at * 62 (E.D. Cal., Sept. 14, 2009) citing *Schreiber*
 23 *Distrib. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

24 As other federal courts in California have recognized, Rule 9(b)'s heightened
 25 pleading standard applies in SEC enforcement actions grounded in fraud and alleging
 26 violations of Section 17(a) of the 1933 Securities Act and Section 10(b) of the 1934
 27 Securities Exchange Act. *See, e.g. SEC v. Berry*, 580 F.Supp.2nd 911 (N.D. Cal. 2008).
 28 Under *Vess*, a complaint grounded in fraud which fails to meet the heightened pleading

1 requirements of Rule 9(b) warrants dismissal. *Vess*, 317 F.3rd at 1107. Here, the three
2 claims for relief asserted by the Commission against the Individual Defendants arise
3 under Section 17(a) of the 1933 Securities Act and Section 10(b) of the 1934 Securities
4 Exchange Act. It is manifest that the SEC's entire First Amended Complaint is grounded
5 in fraud and thus must meet the strict 9(b) standard for pleading. It does not.

6 In paragraphs 25-54 of the First Amended Complaint, the Commission *purports* to
7 set forth misrepresentations made in the offer and sale of notes issued by the various
8 Special Purpose Corporations (MP I through MP VI; collectively referred to as the
9 "SPCs") via the issuance of Private Placement Memos ("PPMs").

10 The Commission is required to specify particular misstatements that were made, to
11 whom they were made, when they were made, by whom they were made, and why they
12 were false. *In re GlenFed, Inc., Sec. Litg.*, 42 F.3rd 1541, 1547 n7 (9th Cir. 1994) (en
13 banc). As the basis for its three claims for relief based on fraud, the SEC points to some
14 representations made in the PPMs but never alleges with specificity that any particular
15 statements were false at the time they were made, in what manner the PPMs were
16 distributed, on what date(s), and to which investor, that caused what amount to be
17 allegedly defrauded. Indeed, the SEC has only alleged "garden variety" fraud, and
18 completely fails to connect the alleged fraud to any specific security offering or sale.

19 As a result, the Individual Defendants are left to guess what it is that the SEC
20 contends they did that the SEC contends specifically violated the securities laws.
21 Accordingly, the SEC's First Amended Complaint fails to meet the requirements of Rule
22 9(b).

23 **B. The First Amended Complaint Should Be Dismissed For Failure To State A** 24 **Claim Of Securities Fraud**

25 The lack of detail in the Complaint makes it deficient not only under Rule 9(b), but
26 Rule 12(b)(6) as well. To survive a Rule 12(b)(6) motion to dismiss, "a complaint must
27 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
28 plausible on its face.'... A claim has facial plausibility when the plaintiff pleads factual

1 content that allows the court to draw a reasonable inference that the defendant is liable
2 for the misconduct alleged.” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949, 173
3 L. Ed. 2d 868 (2009), citing *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 556,
4 570, 127 S. Ct. 1955, 1965, 1974, 167 L. Ed. 2d 929 (2007).

5 The Individual Defendants are charged by the SEC with violating both Section
6 17(a) of the 1933 Securities Act, and Section 10(b) of the 1934 Securities Exchange Act
7 and Rule 10(b)-5. These are commonly referred to as the anti-fraud provisions of the
8 federal securities laws. In order to state viable causes of action under these statutes, the
9 Commission must allege that Messrs. Field and Lampariello each made material
10 misrepresentations or omissions with the requisite degree of scienter in connection with
11 the purchase or sale of a security. *SEC v. Rana Research, Inc.*, 8 F.3rd 1358, 1364 (9th
12 Cir. 1993). Federal statutes require that the misstatement be made “in connection with”
13 the purchase, sale, or offering of a security. 15 U.S.C. § 77(q)(a); 15 U.S.C. § 78(j)(b);
14 17 C.F.R. § 240.10(b)-5.

15 In other words, as the Supreme Court has held, to allege securities fraud the
16 scheme to defraud must coincide with the sale of securities. *SEC v. Zandford*, 535 U.S.
17 813, 822 (2002). There can be no claim for securities fraud if, after a lawful transaction
18 has been consummated, a decision to engage in fraudulent conduct is made. *Id.* at 820;
19 825 n4. (“If a broker embezzles cash from a client’s account or . . . induce[s] his client
20 into a fraudulent real estate transaction, then the fraud would not include the requisite
21 connection to a purchase or a sale of securities.”) Thus, unless the alleged fraud and the
22 sale of securities coincide, there can be no securities law violation.

23 The SEC’s vaguely plead “garden variety” fraud allegations that are not tied to any
24 knowingly false representations alleged to have been made by either of the Individual
25 Defendants. The reader is left guessing as to the timeline of events and exactly how the
26 alleged misrepresentations were made in furtherance of the alleged fraudulent scheme
27 and further, whether the Individual Defendants had the requisite state of mind at the time
28 the alleged misrepresentations were made (and in furtherance of the alleged fraudulent

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 OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED BY DEFENDANTS SIDNEY M. FIELD AND JOSEPH J. LAMPARIELLO** 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:

JOHN B. BULGOZDY
Email: bulgozdyj@sec.gov
NICHOLAS S. CHUNG
Email: chungni@sec.gov
MORGAN B. WARD DORAN
Email: warddorannm@sec.gov
Securities and Exchange Commission
5670 Wilshire Boulevard, 11th Floor
Los Angeles, California 90036-3648
Telephone: (323) 965-3998
Facsimile: (323) 965-3908
Attorneys for Plaintiff

David Zaro, Esq.
Allen Matkins Leck Gamble Mallory & Natsis LLP
515 S. Figueroa Street, 7th Floor
Los Angeles, CA 90071
Email: dzaro@allenmatkins.com
Attorney for Receiver

LAWRENCE BASS
FAEGRE & BENSON LLP
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203-4532
Telephone: 303-607-3500
Facsimile: 303-607-3600
Email: lbass@faegre.com

EDWARD T. WAHL
STEPHEN M. MERTZ
THERESA H. DYKOSCHAK
(PRO HAC VICE APPLICATIONS TO BE FILED)
FAEGRE & BENSON LLP
90 South Seventh Street, Suite 2200
Minneapolis, Minnesota 55402-3901
Telephone: 612.766.7000
Facsimile: 612.766.1600
Email: ewahl@faegre.com
Email: smertz@faegre.com

(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

1 participant of CM/ECF, via electronic service through the CM/ECF system.

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

5 Executed on December 9, 2009, at Irvine, California.

6 /s/ Michael A. Piazza
7 Michael A. Piazza
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