

1 JOHN B. BULGOZDY, Cal. Bar No. 219897
Email: bulgozdyj@sec.gov
2 MORGAN B. WARD DORAN, Cal. Bar No. 246107
Email: warddorann@sec.gov

3 Attorneys for Plaintiff
4 Securities and Exchange Commission
Rosalind R. Tyson, Regional Director
5 Andrew G. Petillon, Associate Regional Director
John M. McCoy III, Regional Trial Counsel
6 5670 Wilshire Boulevard, 11th Floor
Los Angeles, California 90036-3648
7 Telephone: (323) 965-3998
Facsimile: (323) 965-3908
8

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

13 SECURITIES AND EXCHANGE
COMMISSION,

14 Plaintiff,

15 vs.

16 MEDICAL CAPITAL HOLDINGS,
17 INC.; MEDICAL CAPITAL
CORPORATION; MEDICAL
18 PROVIDER FUNDING
CORPORATION VI; SIDNEY M.
19 FIELD; and JOSEPH J.
LAMPARIELLO,

20 Defendants.
21

Case No. 09-CV-818 DOC (RNBx)

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
OPPOSITION TO MOTION TO
DISMISS OF DEFENDANTS
SIDNEY M. FIELD AND JOSEPH J.
LAMPARIELLO**

Date: September 28, 2009
Time: 8:30 a.m.
Place: Courtroom 9D
(Hon. David O. Carter)

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1 **I. INTRODUCTION**

2 Plaintiff Securities and Exchange Commission (“Commission”) opposes the
3 Motion to Dismiss filed by defendants Sidney M. Field and Joseph J. Lampariello
4 (collectively, “Defendants”) because the complaint complies with the Federal
5 Rules of Civil Procedure and states a claim for relief. Defendants clearly
6 understood the allegations in the complaint when they opposed the Commission’s
7 request for emergency relief and submitted declarations by Lampariello which
8 purported to squarely deny the allegations of fraud alleged in the complaint.
9 Indeed, in Defendants’ July 22, 2009 opposition to the Commission’s request for
10 emergency relief, Defendants included a section titled “Summary of SEC’s
11 Allegations and Defendants’ Responses.” (Docket No. 13 at pp. 4-8.) Moreover,
12 in determining to order emergency relief, the Court found that the Commission had
13 presented “cogent allegations” which “demonstrate that a prima facie violation of
14 the antifraud provisions of the federal securities laws has occurred as well as a
15 reasonable likelihood that they will be repeated.” (August 3, 2009 Minute Order
16 (Docket No. 21) (“Minute Order”) at p. 6.) The Minute Order included an outline
17 of the specific allegations against Field and Lampariello contained in the
18 complaint. (*Id.* at p. 3.)

19 Despite the record in this case, Defendants now argue that the allegations
20 concerning misrepresentations are “impermissibly vague” and that the complaint
21 fails to state a claim for securities fraud. In making these arguments, Defendants
22 ignore the Court’s Minute Order and findings therein, as well as Defendants’ prior
23 filings in this action. In addition, Defendants make the unsupported assertion that
24 the appointment of a receiver triggered a obligation for the Commission to amend
25 its complaint – although Defendants have argued that the receiver is inadequate to
26 the task of managing Defendants’ business, does not understand its complexity, his
27 accounting was “grossly inaccurate,” and the receiver was otherwise “grossly
28 negligent.” (Docket No. 43, *passim.*) Defendants fail to explain how the

1 appointment of a receiver has any bearing on the sufficiency of the allegations in
2 the complaint for the purposes of a motion to dismiss under Fed. R. Civ. P.
3 12(b)(6), or the requirements of Fed. R. Civ. P. 9(b). The complaint gives the
4 Defendants fair notice of the Commission's claims and the grounds upon which
5 they rest. Defendants' motion to dismiss is without merit and should be denied.

6 **II. LEGAL ARGUMENT**

7 **A. The Complaint States a Claim for Securities Fraud**

8 **1. The Pleading Standards of Rule 12(b)(6) and Rule 9(b)**

9 In assessing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts must
10 "accept[] as true all facts alleged in the complaint, and draw[] all reasonable
11 inferences in favor of plaintiff." *Al-Kidd v. Ashcroft*, --- F.3d ---, 2009 WL
12 2836448 (9th Cir. 2009). "To avoid dismissal under Rule 12(b)(6), a plaintiff must
13 aver in his complaint 'sufficient factual matter, accepted as true, to 'state a claim to
14 relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, --- U.S. ---, 129
15 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
16 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))). Determining
17 whether a complaint states a plausible claim for relief is a "context-specific task
18 that requires the reviewing court to draw on its judicial experience and common
19 sense." *Ashcroft v. Iqbal*, 129 S. Ct. at 1950. "When there are well-pleaded
20 factual allegations, a court should assume their veracity and then determine
21 whether they plausibly give rise to an entitlement to relief." *Id.* Indeed, a motion
22 to dismiss "is not a procedure for resolving a contest between the parties about the
23 facts or the substantive merits of the plaintiff's case." *Williams v. Gerber Products*
24 *Co.*, 552 F.3d 934, 938 (9th 2008) (quoting Charles Alan Wright & Arthur R.
25 Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2004)).

26 Rule 9(b) of the Federal Rules of Civil Procedure requires that "the
27 circumstances constituting fraud" be "stated with particularity." Fed. R. Civ. P.
28 9(b). In contrast, facts evincing scienter "may be averred generally." *Id.* "In a

1 securities fraud action, a pleading is sufficient under Rule 9(b) if it identifies the
2 circumstances of the alleged fraud so that the defendant can prepare an adequate
3 answer.” *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995) (quoting *Kaplan*
4 *v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994)). Fraud allegations satisfy the
5 particularity requirement so long as the allegations state “[t]he time, place, and
6 content of an alleged misrepresentation,” and “set forth an explanation as to why
7 the statement or omission complained of was false or misleading.” *In re GlenFed*
8 *Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994) (*en banc*) (“*GlenFed*
9 *I*”)(superseded by statute on other grounds). “This notice requirement is satisfied
10 by allegations of the ‘time, place and nature of the alleged fraudulent activities.’”
11 *Id.* (quoting *Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973)). *Vess v.*
12 *Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003). When a fraudulent
13 statement is alleged, the “‘plaintiff must set forth what is false or misleading about
14 [the] statement, and why it is false.’” *Id.* (quoting *GlenFed I*, 42 F.3d at 1548). In
15 other words, plaintiff must set forth as part of the circumstances constituting fraud,
16 an explanation as to why the disputed statement was untrue or misleading when
17 made. *Id.* The Ninth Circuit recognizes that “the requisite particularity might be
18 supplied with great simplicity.” *GlenFed I*, 42 F.3d at 1548.

19 **2. The Elements of Securities Fraud Claim**

20 Section 17(a) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. §
21 77q(a), prohibits fraud in the offer or sale of securities, and Section 10(b) of the
22 Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Rule
23 10b-5 thereunder, 17 C.F.R § 240.10b-5, prohibit fraud in connection with the
24 purchase or sale of any security. To state a claim under these antifraud provisions
25 of the federal securities laws, the Commission must allege three basic elements:
26 (1) a material misstatement or omission of material fact or other fraudulent device;
27 (2) in connection with the purchase, offer or sale of a security in interstate
28 commerce; and (3) the requisite mental state. *See SEC v. Phan*, 500 F.3d 895, 907-

1 08 (9th Cir. 2007); *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir.2001);
2 *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993). While violations
3 of Section 17(a)(1), Section 10(b), and Rule 10b-5 require scienter, violations of
4 Sections 17(a)(2) and (3) require a showing of negligence. *Dain Rauscher*, 254
5 F.3d at 856.

6 **3. The Complaint States a Claim under Rule 12(b)(6) with the**
7 **Particularity Required by Rule 9(b)**

8 The factual allegations in the Complaint state a claim for securities fraud.
9 The Complaint alleges fraud in the offer and sale of \$76.9 million in securities in
10 the form of notes by defendants Medical Capital Holdings, Inc. (“MCHI”),
11 Medical Capital Corporation (“MCC”), Medical Provider Funding Corporation VI
12 (“MP VI”), Field, and Lampariello. (Complaint ¶ 1.) Defendants Field and
13 Lampariello were directors of MCHI, MCC, and MP VI. (*Id.*) Field was the Chief
14 Executive Officer of MCHI, MCC, and MP VI. (*Id.*) Lampariello was the
15 President and Chief Operating Officer of MCHI, MCC, and MP VI. (*Id.*)

16 The complaint alleges that from August 2008 to the present, MP VI conducted
17 a note offering which had raised \$76.9 million from about 700 investors. (*Id.* ¶ 8.)
18 Defendants made the offerings through registered broker-dealers to accredited
19 investors. (*Id.* ¶ 17.) Investors were provided with private placement memoranda
20 (“PPM”) prepared by Defendants. (*Id.* ¶¶ 16, 17, 20, 21, 22, 24, 26.) The complaint
21 specifically identifies two misrepresentations made by Defendants in the PPMs
22 provided to investors in the offer and sale of MP VI securities: (1) misappropriation
23 of offering proceeds to pay fees to MCC (*id.* ¶¶ 20-25); and (2) misrepresentations
24 regarding defaults of other SPCs. (*Id.* ¶¶ 26-28.) The Court found that the alleged
25 misrepresentations stated a prima facie case against Defendants for violations of the
26 federal securities laws. (Minute Order at page 6.)

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1 a. **Allegations Concerning Misappropriation of Investor**
2 **Funds**

3 The complaint identifies the specific misrepresentation concerning
4 administrative fees and explains why it was false. In the August 5, 2008 PPM and
5 supplemental May 27, 2009 PPM, Defendants represented under the heading
6 “Restrictions on Use of Proceeds,” that MP VI would not use “any proceeds from
7 the sales of notes to pay administrative fees to [MCC] for the services its provides
8 as administrator and that such fees would rather be “paid out of amounts collected
9 from the accounts receivable and proceeds from other investments.” (*Id.* ¶ 21.)
10 The complaint specifically alleges the falsity of this statement, by alleging that
11 Defendants have “misappropriated a substantial amount of the investors’ funds to
12 pay administrative fees to MCC,” and more specifically that “approximately \$18.5
13 million” of investors funds had been misappropriated to pay administrative fees,
14 contrary to the express representations made by Defendants in the PPMs that
15 investors’ funds would not be used to pay fees. (*Id.* ¶ 23 and Table 1.)

16 The complaint further alleges that the May 27, 2009 Supplemental PPM
17 stated that \$65,558,703.02 of the offering proceeds had been used to “finance
18 accounts receivable,” (*id.* ¶ 24); however, Defendants actually spent approximately
19 \$48.8 million on receivables as of that time. (*Id.*) Moreover, the May 27, 2009
20 Supplemental PPM stated that \$3.2 million had been applied to “commissions and
21 other expenses,” when in fact Defendants had paid themselves \$21.7 million in
22 administrative fees. (*Id.*)

23 The complaint identifies the specific statements that were false, the
24 documents in which they were made – including the dates of the PPMs which
25 Defendants distributed to investors through registered broker-dealers, and alleges
26 facts showing the falsity of the statements. Field and Lampariello were the CEO,
27 and President and COO, respectively, of all entities involved in the fraudulent
28 offering. Contrary to Defendants’ assertion, the Commission is not required in the

1 complaint to identify each person to whom the misrepresentations were made, and
2 in fact the Commission is not required to allege or prove reliance by investors on
3 Defendants' misrepresentations. *SEC v. Rana Research Inc.*, 8 F.3d at 1363-64.

4 While Defendants have repeatedly argued to the Court about the complexity
5 of their business (*see, e.g.*, Docket No. 43), at the end of the day, the fraud they
6 perpetrated was not so complex, and the requisite particularity is supplied with
7 great simplicity. Field and Lampariello stated in their PPMs that no investor funds
8 would be used to pay administrative fees to themselves, and in direct contravention
9 of that representation, Field and Lampariello used millions of dollars of investors'
10 funds to pay themselves fees. No additional allegations are necessary to comply
11 with Rules 12(b)(6) and 9(b).¹

12 **b. Misrepresentations Regarding Defaults of Other SPCs**

13 The complaint alleged that Defendants misrepresented in the August 5, 2008
14 PPM that MP VI's "affiliates have never defaulted in the payment of their
15 obligations on those debt securities, and all interest payments on those securities
16 were made when due." (Complaint ¶ 26.) Defendants erroneously assert that the
17 complaint does not identify any detail about the alleged defaults "including when
18 they occurred." (MTD at 3:23-24.) In fact, the complaint alleges that Defendants
19 notified investors in MP II and MP III about defaults "beginning in August 2008."
20 (*Id.* ¶ 28.) Thus, at the time Defendants were raising funds from investors based
21 on the August 5, 2008 PPM for MP VI, Field and Lampariello were informing
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24 ¹ Defendants' argument that the complaint is deficient is contradicted by their
25 prior filings in this proceeding. In the July 22, 2009 Supplemental Declaration of
26 Joseph J. Lampariello (Docket No. 14), at ¶¶ 16-23, Lampariello clearly had notice
27 of the misrepresentation alleged in the complaint concerning misappropriation of
28 investors' funds to pay administrative fees, because Lampariello went to great
lengths to refute the Commission's allegations. Having engaged in such an
exercise, it is not clear how any more particularity in the complaint is necessary to
provide Defendants with notice of the claim being made by the Commission with
regard to this misrepresentation.

1 investors in MP II and MP III – identified as affiliates of MP VI – that defaults
2 were occurring.

3 Defendants’ fraudulent statements are simple and straightforward. Field and
4 Lampariello supplied false information to investors through the PPM about their
5 prior business performance.² The Court found in its Minute Order that the
6 statement concerning no defaults was “admittedly untrue at the time it was made.”
7 (Minute Order at page 6.) The Ninth Circuit’s standard “is most easily satisfied
8 when there is direct evidence of fraud, i.e., ‘[inconsistent] facts that had existed all
9 along and were later revealed.’” *Fecht v. Price*, 70 F.3d at 1082 (citing *GlenFed I*,
10 42 F.3d at 1549). In such cases, a plaintiff may simply set forth these facts, along
11 with allegations of time, place, and scienter, to satisfy Rule 9(b). *Id.* The
12 complaint identifies the false statement and facts showing its falsity. To the extent
13 Defendants seek evidentiary detail, that is appropriately accomplished through
14 discovery and not at the pleading stage.

15 c. **Defendants’ Misrepresentations Were Made “In**
16 **Connection With” the Sale of Securities**

17 Defendants also argue that their fraudulent statements were not made “in
18 connection with” the sale of a security because the decision to commit fraud may
19 have been made after the securities were sold. Defendants’ argument ignores the
20 fact that the alleged misrepresentation concerning prior defaults was made in the
21 original PPM, which was issued before any MP VI securities were sold. Thus, the
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24 ² Again, Defendants’ argument for dismissal is contradicted by their prior
25 filings. In the July 20, 2009 Declaration of Joseph J. Lampariello (Docket No. 7),
26 at ¶ 6, Lampariello understood the alleged misrepresentation concerning prior
27 defaults, and, in fact, admitted that the representation in the PPM was false. In his
28 Supplemental Declaration, Lampariello again responded to the allegation that
Defendants misrepresented that MP VI’s affiliates had not defaulted.
(Supplemental Declaration of Joseph J. Lampariello at ¶¶ 24-28 (Docket No. 14).)
It is therefore unclear on what basis Defendants now claim a lack of particularity
concerning this allegation.

1 allegations plainly satisfy the “in connection with” requirement for a securities
2 fraud claim.

3 The Ninth Circuit has held that fraud “is in connection with the securities
4 transaction if it ‘coincide[s]’ with the transaction.” *Falkowski v. Imation Corp.*,
5 309 F.3d 1123, 1130 (9th Cir. 2002) (citing *SEC v. Zandford*, 535 U.S. 813, 122 S.
6 Ct. 1899, 153 L. Ed. 2d 1 (2002)). The “in connection with” requirement is met if
7 the fraud alleged “somehow touches upon” or has “some nexus” with “any
8 securities transaction.” *SEC v. Rana Research, Inc.*, 8 F.3d at 1362 (citing *SEC v.*
9 *Clark*, 915 F.2d 439, 449 (9th Cir.1990)). Where the fraud alleged involves public
10 dissemination in a document such as a press release, annual report, investment
11 prospectus or other such document on which an investor would presumably rely,
12 the “in connection with” requirement is generally met by proof of the means of
13 dissemination and the materiality of the misrepresentation or omission. *Id.* Here,
14 it is alleged that the Defendants disseminated the false statements to investors in
15 the PPMs, which meets the “in connection with” requirement.

16 **III. CONCLUSION**

17 For the reasons stated above, the Court should deny Defendants’ Motion to
18 Dismiss. Alternatively, if the Court does not deny the motion, the Commission
19 respectfully requests an opportunity to amend its Complaint.

20
21 Dated: September 18, 2009

Respectfully submitted,

22
23 /s/ John B. Bulgozdy
24 John B. Bulgozdy
25 Morgan B. Ward Doran
26 Attorneys for Plaintiff
27 Securities and Exchange Commission
28

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036-3648

Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On September 18, 2009, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO MOTION TO DISMISS OF DEFENDANTS SIDNEY M. FIELD AND JOSEPH J. LAMPARIELLO** on all the parties and counsel of record addressed as stated on the attached service list:

OFFICE MAIL: By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

PERSONAL DEPOSIT IN MAIL: By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

EXPRESS U.S. MAIL: Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

HAND DELIVERY: I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

FEDERAL EXPRESS: By placing in sealed envelope(s) designated by Federal Express with delivery fees paid or provided for, which I deposited in a facility regularly maintained by Federal Express or delivered to a Federal Express courier, at Los Angeles, California.

ELECTRONIC MAIL: By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

FAX: By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

(Federal) I declare under penalty of perjury that I am a member of the bar of this Court and that the foregoing is true and correct.

Date: September 18, 2009

/s/ John B. Bulgozdy
John B. Bulgozdy

SEC v. MEDICAL CAPITAL HOLDINGS, INC., et al.
United States District Court – Central District of California
Case No. SACV 09-818 DOC (RNBx)
LA-3474

SERVICE LIST

Alan A. Greenberg, Esq.
Michael A. Piazza, Esq.
Greenberg Traurig, LLP
3161 Michelson Drive, Suite 1000
Irvine, CA 92612
Email: greenbergal@gtlaw.com
Email: piazzam@gtlaw.com
Attorneys for Defendants Sidney M. Field and Joseph J. Lampariello

David R. 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 Defendants Medical Capital Holdings, Inc., Medical Capital Corporation, and Medical Provider Funding Corporation VI

Lawrence Bass, Esq.
Faegre & Benson
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203-4532
Email: lbass@faegre.com
Attorneys for Wells Fargo Bank, National Association

Edward T. Wahl, Esq.
Stephen M. Mertz, Esq.
Theresa H. Dykoschak, Esq.
Faegre & Benson LLP
90 South Seventh Street, Suite 2200
Minneapolis, MN 55402-3901
Email: ewahl@faegre.com
Email: smertz@faegre.com
Email: tdykoschak@faegre.com
Attorneys for Wells Fargo Bank, National Association

David A. Robinson, Esq.
Benjamin P. Pugh, Esq.
Enterprise Counsel Group
Five Park Plaza, Suite 450
Irvine, CA 92614
Email: drobinson@enterprisecounsel.com
Email: bpugh@enterprisecounsel.com
Attorneys for Integrated Healthcare Holdings, Inc.