

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

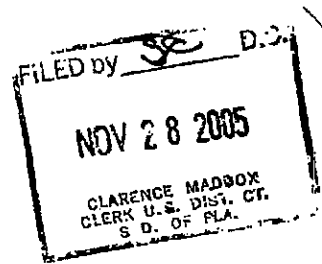
vs.

MUTUAL BENEFITS CORP., *et al.*,

Defendants,

VIATICAL BENEFACTORS, LLC, *et al.*,

Relief Defendants.



**ORDER GRANTING IN PART STEVEN STEINER'S MOTION TO DISMISS WITH
LEAVE TO REFILE**

I. Introduction

The SEC filed its amended complaint adding Steven Steiner as a defendant on June 17, 2005. In the amended complaint, the SEC brings four counts against the Defendant. In Count I, the SEC brings a claim for the sale of unregistered securities under §§ 5(a) and 5(c) of the Securities Act. In Counts II, III, and IV, the SEC brings claims for fraud in connection with the sale of securities: Count II alleges fraud in violation of § 17(a)(1) of the Securities Act; Count III alleges fraud in violation of § 10(b) of the Exchange Act and under Rule 10b-5; and Count IV alleges fraud in violation of §§ 17(a)(2) and 17(a)(3) of the Securities Act.

Presently before the Court is Defendant's Motion to Dismiss (**D.E. No. 1219**), filed on **July 25, 2005**. The SEC has filed a response, and the Defendant has filed a reply in support of his motion.

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For the reasons set forth below, the Defendant's Motion to Dismiss is GRANTED in PART. Counts II, III, and IV of the Amended Complaint are DISMISSED without prejudice with leave to refile consistent with this order. The Defendant's Motion to Dismiss Count I is DENIED.

II. Analysis

A. Failure to Plead Fraud with Particularity

The Defendant argues that Counts II, III, and IV should be dismissed because the SEC has failed to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.¹ Under Rule 9(b), the Plaintiff must plead the circumstances constituting fraud with particularity. In considering a motion to dismiss for failure to plead fraud with particularity, however, courts must also keep in mind the notice pleading standard set forth in Rule 8(a). Courts "must be careful to harmonize the directives of Fed. R. Civ. P. 9(b) with the broader policy of notice pleading." *SEC v. Physicians Guardian Unit Inv. Trust ex rel. Physicians Guardian, Inc.*, 72 F. Supp. 2d 1342, 1352 (M.D. Fla. 1999) (citing *Friedlander v. Nims*, 755 F.2d 810, 810 (11th Cir. 1985)). According to the Eleventh Circuit, "Rule 9(b) is satisfied if the complaint sets forth '(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.'" *Ziamba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks v. Blue Cross and Blue*

¹ Because the Court finds that Counts II, III, and IV must be dismissed pursuant to Rule 9(b), it does not reach the merits of the Defendant's other arguments regarding dismissal of these Counts.

Shield of Florida, Inc., 116 F.3d 1364, 1371 (11th Cir.1997)). Finally, Rule 9(b)'s requirements apply to actions brought by the SEC. See, e.g., *SEC v. Dunlap*, No. 01-8437-CIV, 2002 WL 1007626, *2 (S.D. Fla. March 27, 2002).

Examining the Amended Complaint under these standards, Counts II, III, and IV must be dismissed. Contrary to the SEC's assertions in its response, the allegations of fraud in the Amended Complaint against the Defendant are general in nature and fail to provide the details required by Rule 9(b). For example, looking at its most detailed allegations of fraud, the SEC states:

On at least one occasion, Steiner misrepresented to a large group of investors that most of the policies matured on time or before their life expectancy date, and that the longest period an investor had had to wait was two years. Steiner also wrote articles in newspapers and business journals (provided in investor packets) touting viatical settlement investments, new regulations designed to protect investors, and specifically referring to MBC as a superior operation and clean company with 'thousands' of satisfied customers.

Amended Complaint ¶ 58. Even in this paragraph, however, the SEC has not alleged the specific oral representations or documents containing these statements. Further, the SEC has not detailed when and where the Defendant allegedly made the representations. Similarly, in the context of omissions, the complaint is devoid of any details regarding, for example, the date, time, and location of the omissions.

The cases cited by the SEC further support dismissal of Counts II, III, and IV, as the complaints in those cases all contained vastly more detail than the SEC has provided in the Amended Complaint here. In *SEC v. Digital Lightwave, Inc.*, for example, the court denied the defendant's motion to dismiss and explained that the complaint described the fraudulent acts with ample particularity:

In the first 15 pages of the Complaint, the SEC sets forth on a

transaction-by-transaction basis how Zwan allegedly caused Digital to fraudulently overstate its revenues. In its allegations, the SEC identifies the companies to which Digital falsely claimed to have sold its product, the number of units and dollar amounts that were improperly recognized as revenues, the dates of the bogus sales, the reasons why Digital was not entitled to recognize revenue, and Zwan's knowledge of, and responsibility for, Digital's fraudulent revenue recognition. Likewise, the SEC sufficiently pleads its claim for fraudulent pledge of stock. The SEC alleges the date of the pledge, the party to whom Zwan pledged the Digital stock, the number of shares pledged, the line of credit that the pledge secured, and the amount of money that Zwan borrowed.

196 F.R.D. 698, 700-01 (M.D. Fla. 2000); *see also Meterlogic, Inc. v. Copier Solutions, Inc.*, 126 F. Supp. 2d 1346, 1361 (S.D. Fla. 2000) (denying motion to dismiss where plaintiff gave exact time and place for some of the allegedly fraudulent statements, and thus, provided the "who, what, where, and when" of the alleged fraud). Thus, the complaint in *Digital Lightwave* provided details regarding the fraud that are absent from the SEC's Amended Complaint in this case - namely, the who, what, when, where, and how. Finally, at no point did the SEC argue that it should be relieved from the burden of pleading fraud consistent with Rule 9(b). Accordingly, Counts II, III, and IV are DISMISSED without prejudice with leave to refile consistent with this order.

B. Failure to State a Claim for the Sale of Unregistered Securities

The Defendant argues that Count I should be dismissed for failure to state a claim under Section 5 of the Securities Act. In particular, the Defendant argues that the SEC does not sufficiently allege that he "sold" unregistered securities because "the SEC fails to allege, as required, that Mutual Benefits could not have engaged in the unregistered sale of securities without Mr. Steiner." Defendant's Motion to Dismiss at 4.

A court will not grant a motion to dismiss unless the plaintiff fails to allege any facts that

would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Bradberry v. Pinellas County*, 789 F.2d 1513, 1515 (11th Cir. 1986). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well-pleaded facts as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986).

To prove that the Defendant sold unregistered securities, "the SEC must prove that the defendant was a 'necessary participant' or 'substantial factor' in the illicit sale." *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004). Here, the Amended Complaint alleges that the Defendant was actively involved in the offer and sale of securities by MBC. The Amended Complaint alleges that the Defendant participated in all of most of the initial training sessions of sales agents, that he produced some of the offering materials, that he met with investors regarding MBC's role in the viatical industry, and that he composed articles related to MBC's business. *See* Amended Complaint ¶¶ 23, 26, & 58. The SEC also alleges that, on at least one occasion, the Defendant assured a group of investors that most of the policies matured on time or before their life expectancy date. *Id.* ¶ 58. Finally, the Amended Complaint alleges that the Defendant has described himself as an "owner" of MBC to investors and sales agents, and the SEC alleges that MBC corporate filings represent that the Defendant "participates in decision making processes that stand to affect" MBC's operations. *Id.* ¶ 8.

Viewed in the light most favorable to the SEC, the Amended Complaint alleges that the Defendant was a substantial factor and necessary participant in the sale of unregistered securities. Thus, Count I states a claim for the sale of unregistered securities. Accordingly, the Defendant's Motion to Dismiss Count I is DENIED.

III. Conclusion

For the reasons above, the Defendant's Motion to Dismiss (D.E. No. 1219), filed on July 25, 2005, is GRANTED in PART. Counts II, III, and IV of the amended complaint are DISMISSED without prejudice with leave to refile consistent with this order. The Defendant's Motion to Dismiss Count I is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 28 day of November, 2005.


FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Magistrate Judge Andrea Simonton

All Counsel of Record