

MIKE WINSOR
Office of the Commissioner of
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Attorney for the Department of Securities

**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE STATE AUDITOR
STATE OF MONTANA**

IN THE MATTER OF)	
SECURITIES AMERICA, INC.;)	CASE NO.: SEC-2010-48
JAMES D. NAGENGAST; STEVEN F.)	TEMPORARY CEASE AND DESIST
MCWHORTER; WALTER THOMAS)	ORDER AND OPPORTUNITY FOR
CROSS; KEVIN JOSEPH MILLER;)	HEARING
DEBRA A. HANSEN; LAMAR)	
STUART JONES, JR.; and PAMELA)	
JANINE WERTHEIM, individually)	
and as officers of Securities A)	
America Inc.,)	
)	
and,)	
)	
GREG SAUTTER, BARBARA)	
SLOBOJAN, and ERNEST)	
HATHAWAY, salespersons for)	
Securities America, Inc.,)	
)	
Respondents.)	

The Commissioner of Securities and Insurance of the State of Montana
("Commissioner"), pursuant to the authority of the Securities Act of Montana, Mont.
Code Ann. § 30-10-101, *et seq.*, hereby sets forth the following allegations of fact,
conclusions of law, order to cease and desist, and notice of right to a hearing:

ALLEGATIONS OF FACT

1. Securities America is a registered broker-dealer and a subsidiary of Ameriprise Financial, Inc. Securities America is a Delaware corporation with its principal place of business located at 7100 West Center Road, Suite 500, Omaha, NE 68106.

2. Securities America was the placement agent for the sale of Medical Capital Holdings, Inc. ("MCHI") promissory notes to Montana investors from 2006 through 2008 and was responsible for the sale of 37 percent of the total MCHI notes nationwide since 2003, amounting to \$697 million.

3. At all times material hereto, James D. Nagengast was the president, chief financial officer, and chief operating officer of Securities America; Steven F. McWhorter was its chairman and CEO; Walter Thomas Cross was its senior vice president, and director of product distribution; Kevin Joseph Miller was its vice president, chief compliance officer, and deputy counsel; Debra A. Hansen was its first vice president of marketing; Lamar Stuart Jones, Jr. was its vice president of risk management; and Pamela Janine Wertheim was its vice president and chief marketing officer.

4. Securities America's salespeople sold MCHI promissory notes utilizing Private Placement Memorandums ("PPMs") which characterized the investments as secured notes, indicating to Montana investors that the investments were safe.

5. The Securities America salespeople who sold MCHI promissory notes to Montana investors were the following respondents: Gregg Sautter ("Sautter"), CRD #440761; Barbara Slobojan ("Slobojan"), CRD #2701108; and Ernest Hathaway ("Hathaway"), CRD #2506927.

6. In Montana, four individuals, one defined benefit plan, and one ranch limited liability partnership bought a total of 12 MCHI promissory notes called Medical Provider Financial Series Three, Four, and Five. The total amount that Montana investors invested in MCHI defaulted notes was \$808,000.

7. The MCHI promissory notes were to be offered in a series of private placements under the Rule 506 exemption of Regulation D of the 1933 Securities Act, purportedly, to sophisticated and accredited investors and not to the general public who may have been unable to bear the risk of investing in high-risk, unregistered, securities.

8. MCHI's enterprise consisted of, *inter alia*, causing promissory notes to be issued by various of its special purpose corporation subsidiaries ("SPCs") to raise capital for the purchase of medical accounts receivables which were then to be held in third party trust accounts for each SPC which issued the notes. Profits were to be generated by collection of medical accounts receivables and other ventures.

9. MCHI has been placed in receivership as a result of a federal action brought by the Securities and Exchange Commission ("SEC"). All the SPCs are now in default to investors for failing to make interest and principal payments on nearly \$1 billion worth of notes. After reviewing internal records and interviewing company employees, the Receiver reported to the federal district court that only \$80 million of the approximately \$625 million of the SPCs' medical accounts receivable is verifiable, and the remaining \$542 million "no longer exist[s]."

10. Respondents represented to Montana investors that the notes were fully collateralized in excess of the notes value and secured by medical provider assets, including medical equipment. Montana investors were promised annual interest

payments in the amount of 8.25 percent or greater depending on the series and the class of the notes. Also, Montana investors were promised a return of principal when the note reached maturity, in Montana, between one to five years, or an option to rollover the note for another period of one to five years.

11. PPMs represented that investor funds would be segregated into trust accounts and used to pay for accounts receivables from medical providers. The PPM assured Montana investors their funds would not be used to pay administrative fees to MCH and its affiliates.

12. In fact, reports issued by the court-appointed receiver in the SEC action and correspondence from the trustees to investors revealed that MCHI and its principals used the trustee-controlled accounts improperly by requesting and obtaining funds to pay themselves “administrative fees” of close to \$325 million. These funds were used to purchase lavish goods, including a multimillion dollar, 118-foot yacht. MCHI and its affiliates also invested in non-medical projects, including investment in an internet pornography promotion business, mobile phone and movie projects, and commingled investor funds between the various SPCs.

13. Montana investors were promised that they had been informed, by Securities America, of all pertinent facts relating to their investments, that their investments were fully secured, and their investments were suitable for them.

14. In fact, Securities America withheld material information regarding heightened risks associated with the MCHI promissory notes from investment advisers, salespersons, and investors, including the facts that the high-risk investments were not

fully secured and the investments were not suitable for the unsophisticated Montana investors to whom the notes were sold.

15. Securities America utilized an internal Due Diligence Committee to approve of new products and employed an outside due diligence analyst to review each note offering from 2003 until 2008. During that time period, the due diligence analyst issued reports each year warning Securities America about a number of material risks concerning MCHI investments and strongly recommended that investors be provided with a disclosure of those risks. Securities America concealed these risks from investment advisers, salespeople, and investors.

16. Some of the material risks reported to Securities America by the due diligence analyst that Securities America failed to disclose to investors included, but were not limited to:

- (a) a failure of MCHI to maintain audited financials;
- (b) MCHI's notes did not require a sinking fund for payment of the notes;
- (c) MCHI did not require the maintenance of any particular financial ratios to better ensure repayment of the notes;
- (d) inadequate PPM disclosure regarding mortgage financing;
- (e) conflicts of interest as dual lenders;
- (f) commercial real estate risks;
- (g) no independent directors for MCHI;
- (h) a failure of MCHI's principals to personally certify monthly net collateral coverage directly to noteholders; and

(i) MCHI's SPCs had the ability to purchase receivables older than 180 days.

17. Securities America sold MCHI notes even when proper due diligence would have told, or did tell, Securities America that the PPMs for the notes were misleading. Securities America's officers, James D. Nagengast, Steven F. McWhorter, Walter Thomas Cross, Kevin Joseph Miller, Debra A. Hansen, Lamar Stuart Jones, Jr., and Pamela Janine Wertheim received reports from the outside due diligence analyst on a regular basis with information that MCHI's PPM contained material omissions and misrepresentations. Instead of halting the sale of MCHI investments or requiring amendments to the PPM, the officers allowed the continuing sales of MCHI investments to unsophisticated investors.

18. Additionally, the SEC and Receiver found that MCHI and its affiliates operated without financial or accounting controls, failed to prepare financial statements in accordance with Generally Accepted Accounting Principles ("GAAP"), and failed to perform annual appraisals of assets.

19. Further, the MCHI receiver conducted a forensic accounting of the sources and uses of MCHI's funds and in the receiver's January 11, 2010, report to the court, the receiver issued the following preliminary conclusions:

- (a) investors are owed principal of \$1.079 billion;
- (b) MCHI's lending activities were unprofitable and resulted in losses in excess of \$316 million;
- (c) none of MCHI's SPCs generated enough profit to pay its investors principal and interest;

(d) MCHI requested from the SPC account trustees and was paid more than \$323 million in administrative fees;

(e) MCHI transferred loans and other assets valued at just under \$1 billion between the eight MPCs, which facilitated the payment of earlier investors' principal from new investors' funds.

20. In addition to conducting a reasonable investigation concerning the issuer and its securities, broker-dealer salespersons Sautter, Slobojan and Hathaway were required to have reasonable grounds to believe that MCHI investments were suitable for the particular customers to whom they offered the investments and to ensure their customers fully understood the risks involved in the investment and to ensure the investments were appropriate based on a thorough suitability analysis based on the age, financial objectives, liquidity needs, level of sophistication of the investor and other relevant information particular to each investor.

21. When considering Private Placement investments, securities salespeople and investors must consider various investment risks including, by way of example, the following:

(a) the potential of speculative practices that may increase the risk of investment loss;

(b) the potential for illiquidity;

(c) the fact that those offering Private Placement investments are not required to provide periodic pricing or valuation information to investors;

(d) the investments may involve complex tax structures and delays in distributing important tax information;

(e) the investments are not subject to the same regulatory requirements as stocks and mutual funds, often charge high fees; and in many cases,

(f) the underlying investments are not transparent and are known only to the investment manager and the underwriter or placement agent.

22. As indicated by the facts set forth below, Sautter failed to conduct an adequate suitability analysis for several investors to whom he offered and sold MCHI's notes.

(a) Sautter failed to conduct an adequate suitability analysis with respect to joint investors J.C. and S.C. because the existence of the following facts made the high-risk MCHI notes unsuitable for them:

(i) their low annual joint income of \$72,000, which, according to Regulation D should have exceeded \$300,000 for each of the immediately preceding two years prior to the investment;

(ii) their low liquid net worth of \$400,000, 57 percent of which was invested in the MCHI notes;

(iii) their limited investment experience;

(iv) their investment objectives were growth and income with moderate risk;

(v) they were both 63 and nearing retirement age;

(vi) poor diversification, *to wit*: they invested \$225,000 in five different MCHI notes; and

(vii) their account with Sautter was opened on July 26, 2006, and their first investment was on July 26, 2006, indicating Sautter had limited investment experience with the clients.

(b) Sautter failed to conduct an adequate suitability analysis with respect to joint investors W.R. and E.R. because the existence of the following facts made the high-risk MCHI notes unsuitable investments for them:

(i) their low annual joint income of \$46,600, which, according to Regulation D should have exceeded \$300,000 for each of the immediately preceding two years prior to the investment;

(ii) their low liquid net worth of \$528,000, 10 percent of which, \$75,000, was wrapped up in the MCHI notes;

(iii) their limited investment experience;

(iv) their investment objectives were current income with moderate risk;

(v) W.R. was 70 years old and E.R. was 65 years old at the time of the investment; and

(vi) their account with Sautter was opened on June 16, 2006, and their first investment was on June 29, 2006, indicating Sautter had limited investment experience with the clients.

(c) Sautter failed to conduct an adequate suitability analysis with respect to EDBPT, defined benefit plan (pursuant to ERISA) because the existence of the following facts made the high-risk MCHI notes an unsuitable investment for it:

(i) the plan's investment objective was growth but the MCHI notes were only an income opportunity;

(ii) the plan indicated moderate risk exposure in its account application;

(iii) \$100,000, 10 percent of the plan's liquid net worth, was invested in MCHI notes; and

(iv) the plan's account with Sautter was opened on March 31, 2006, and its first investment was made on April 13, 2007, indicating Sautter had limited investment experience working with the plan.

23. Hathaway failed to conduct an adequate suitability analysis with respect to joint investors D.M. and N.M. because the existence of the following facts made the high-risk MCHI notes unsuitable for them:

(a) their low annual joint income of \$110,000, which, according to Regulation D, should have exceeded \$300,000 for each of the immediately preceding two years prior to the investment;

(b) their low liquid net worth of \$90,000, 66 percent of which (\$58,000) was invested in the MCHI notes;

(c) their limited investment experience;

(d) their investment objectives were current income with moderate risk

(e) they were both 62 at the time of the investment and nearing retirement age; and

(f) their account with Hathaway was opened on December 30, 2005, and their first investment was on April 11, 2007, indicating Hathaway had limited investment experience with the clients.

24. Slobojan failed to conduct an adequate suitability analysis with respect to L.S.K. because the existence of the following facts made the high-risk MCHI notes unsuitable for it:

(a) the funds invested in MCHI were proceeds from the sale of a ranch;

(b) L.S.K.'s low annual income;

(c) L.S.K.'s limited investment experience;

(d) L.S.K.'s investment objectives were short time horizon with moderate risk;

(e) L.S.K. invested \$150,000 in MCHI notes which was 12 percent of its liquid net worth; and

(f) Slobojan had minimal investment experience with the clients since its account was opened on April 9, 2007, and its first investment was made on April 27, 2007.

CONCLUSIONS OF LAW

1. The Montana State Auditor is the Commissioner of Securities ("Commissioner") pursuant to Mont. Code Ann. §§ 2-15-1903 and 30-10-107.

2. The Commissioner has jurisdiction over this matter pursuant to Mont. Code Ann. §§ 30-10-102, 30-10-107, 30-10-110, 30-10-201, 30-10-301, 30-10-305, 30-10-307, 30-10-309, and 30-10-321.

3. The administration of the Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.*, is under the supervision and control of the Commissioner pursuant to Mont. Code Ann. § 30-10-107.

4. The Commissioner shall administer the Securities Department to protect investors pursuant to Mont. Code Ann. § 30-10-102.

5. Pursuant to Mont. Code Ann. § 30-10-301(1)(b), it is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, in, into, or from this state, to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

6. Pursuant to Mont. Code Ann. § 30-10-103(16) a “[p]erson”, for the purpose of parts 1 through 3 of this chapter, means an individual, a corporation, a partnership, an association, a joint-stock company, a trust in which the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government

7. Securities America violated Mont. Code Ann. § 30-10-301(1)(b) by concealing the following material facts from investment advisers, salespeople, and investors relating to the heightened risk of the MCHI investments:

(a) the fact that the PPMs represented that investor funds would be segregated into trust accounts and used to pay for accounts receivables from medical providers, when Securities America knew that often times investor funds were instead used to pay MCHI and affiliates’ administrative fees and were not segregated into trust accounts;

(b) the fact that MCHI and its principals used investor funds to purchase lavish goods, including a multimillion dollar 118-foot yacht, to invest in non-medical projects, including an internet pornography promotion business, mobile phone and movie projects;

(c) the fact that Securities America withheld material information regarding the heightened risks associated with the MCHI promissory notes, including the fact that they were not fully secured and the investments were not suitable for most Montana investors;

(d) the fact that Securities America's Due Diligence Committees annually issued warnings to Securities America about certain additional material risks involving MCHI investments and Securities America chose to not make these material disclosure available to investors; and

(e) the fact that Securities America was aware that MCHI and its affiliates operated without financial or accounting controls, failed to prepare financial statements in accordance with Generally Accepted Accounting Principles ("GAAP"), and failed to annually appraise assets.

8. Pursuant to Mont. Code Ann. § 30-10-301(1)(c), it is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly, in, into, or from this state, to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

9. Securities America violated Mont. Code Ann. § 30-10-301(1)(c) by engaging in the practice of concealing material facts identified above in Paragraph 7 (a –

e) from salespeople, investment advisers and investors relating to the heightened risk of the MCHI investments.

10. Pursuant to Mont. Code Ann. § 30-10-201(13)(k), “[t]he Commissioner may by order deny, suspend, or revoke the registration of any broker-dealer, salesperson, investment adviser, or investment adviser representative if the Commissioner finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, director, person occupying a similar status or performing similar functions, or person directly or indirectly controlling the broker-dealer or investment adviser has failed to reasonably supervise the person’s salespersons or employees or investment adviser representatives or employees to ensure their compliance with [the Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.*]”

11. The Commissioner may suspend or revoke Securities America’s registration because it is in the public interest to protect Montana investors from broker-dealers who substantially fail to reasonably supervise their salespersons by withholding material information relating to heightened investment risks, thereby preventing those salespersons from informing investors.

12. Pursuant to Mont. Code Ann. § 30-10-201(13)(g), “[t]he Commissioner may by order deny, suspend, or revoke the registration of any broker-dealer, salesperson, investment adviser, or investment adviser representative if the Commissioner finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, director, person occupying a similar status or performing similar functions, or person directly or indirectly controlling

the broker-dealer or investment adviser has engaged in dishonest or unethical practices in the securities business.”

13. The Commissioner may suspend or revoke Securities America’s registration because it is in the public interest to protect investors from broker-dealers who engage in dishonest or unethical practices, such as here, where Securities America concealed material facts relating to known, heightened investment risks from Montana investors.

14. According to Mont. Admin. R. 6-10-401(1)(c), “[f]or purposes 30-10-201 . . . MCA, fraudulent and unethical practices means, but is not limited to recommending to a customer [by a salesperson] the purchase, sale, or exchange of a security without grounds to believe that the transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer’s information known by the broker-dealer.”

15. The Commissioner may suspend or revoke the registrations of Respondents Greg Sautter and Ernest Hathaway because the same recommended to Montana investors, J.C., S.C., W.R., E.R., D.M., N.M., and E.D.B.P.T., the purchase of the MCHI notes without reasonable grounds to believe that the recommendations were suitable for Montana investors based upon reasonable inquiry concerning Montana investors’ information, coupled with the heightened risk of investing in the MCHI notes known by Securities America.

16. Pursuant to Mont. Code Ann. § 30-10-321, “[f]or purposes of any action brought by the commissioner under 30-10-304, 30-10-305, or 30-10-306, for violations of 30-10-301 through 30-10-303, any person that knowingly provides substantial assistance

to another person in violation of a provision of this part or of any rule or regulation issued under this part must be considered to be in violation of that provision to the same extent as the person to whom the assistance is provided.”

17. Because Securities America sold MCHI notes even when proper due diligence would have told, or did tell, Securities America that the PPMs for the notes were misleading and because Securities America’s officers, James D. Nagengast, Steven F. McWhorter, Walter Thomas Cross, Kevin Joseph Miller, Debra A. Hansen, Lamar Stuart Jones, Jr., and Pamela Janine Wertheim received reports from the outside due diligence analyst on a regular basis with information that MCHI’s PPM contained material omissions and misrepresentations and instead of halting the sale of MCHI investments or requiring amendments to the PPM, the officers allowed the continuing sales of MCHI investments to unsophisticated investors. and therefore, knowingly provided substantial assistance to Sautter, Slobojan and Hathaway in violation of Mont. Code Ann. § 30-10-321.

18. Pursuant to Mont. Code Ann. § 30-10-305(3), the Commissioner may impose a fine not to exceed \$5,000 upon the Respondents, and each of them, for each of the foregoing violations of the Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.*

CEASE AND DESIST ORDER

Pursuant to Mont. Code Ann. §§ 30-10-305, it appears to the Department that the above-named Respondents have engaged, are engaged, or are about to engage in acts or practices constituting violations of the Securities Act of Montana, Montana Code Ann. § 30-10-101 *et seq.*

1. Therefore, **IT IS HEREBY ORDERED** that the Respondents, their agents, employees, and all other persons participating in or about to participate in the above-described violations with knowledge of this Order shall immediately cease and desist from engaging in any practice, or course of business that violates any section of the Securities Act of Montana.

2. **IT IS FURTHER ORDERED** that, pursuant to Mont. Code Ann. §§ 30-10-305(3), the Commissioner will determine whether to impose a fine of up to five thousand dollars (\$5,000) against each Respondent for multiple violations of Mont. Code Ann. § 30-10-101, *et seq.*, unless the Respondents request a hearing and show cause why the penalty should not be imposed.

3. **IT IS FURTHER ORDERED** that this Order is effective immediately and (i) shall continue in full force and effect until ten days after the hearing examiner issues proposed findings of fact and conclusions of law and a proposed order, or (ii) becomes final if the person to whom notice is addressed does not request a hearing within 15 days after receipt of the notice.

NOTICE OF RIGHT TO HEARING

You are entitled to a hearing and to respond to this Temporary Cease and Desist Order and to present evidence and arguments on all issues involved in this case. If you wish to contest the allegations herein, you must make a written request for a hearing within 15 days of receipt of this Order to Mike Winsor, Attorney for the Department of Securities, Office of the Commissioner of Securities and Insurance, Montana State Auditor, 840 Helena, Avenue, Helena, MT 59601. The matter shall then be held

promptly set for hearing. If you do not request a hearing and the Commissioner orders none, this Order shall become permanent, and the above allegations will be declared the findings of fact and the above conclusions of law will be declared the final conclusions of law.

Should you request a hearing, you have the right to be accompanied, represented and advised by an attorney. If the attorney you choose has not been admitted to the practice of law in the state of Montana, she or he must comply with the Montana State Bar for appearing *pro hac vice*, the requirements of *Application of American Smelting and Refining, Co.*, 164 Mont. 139, 520 P.2d 103 (1973), and *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200 (2006). If you request a hearing, you will be given notice of the date, time, and place of the hearing.

DATED this 4th day of August, 2010.

MONICA J. LINDEEN
Commissioner of Securities and Insurance
Montana State Auditor

By: 

LYNNE EGAN

Deputy Commissioner of Securities

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of August, 2010, a true and correct copy of the foregoing Temporary Cease and Desist Order and Opportunity for Hearing was served upon the following by certified mail, with postage prepaid and return receipt requested:

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