

1 DAVID R. ZARO (BAR NO. 124334)  
 MICHAEL R. FARRELL (BAR NO. 173831)  
 2 EDWARD G. FATES (BAR NO. 227809)  
 ALLEN MATKINS LECK GAMBLE  
 3 MALLORY & NATSIS LLP  
 515 South Figueroa Street, Ninth Floor  
 4 Los Angeles, California 90071-3309  
 Phone: (213) 622-5555  
 5 Fax: (213) 620-8816  
 E-Mail: dzaro@allenmatkins.com  
 6 mfarrell@allenmatkins.com  
 tfates@allenmatkins.com

7 Attorneys for Receiver  
 8 THOMAS A. SEAMAN

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

12 SECURITIES AND EXCHANGE  
 COMMISSION,

13 Receiver,

14 v.

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

19 Defendants.  
 20

Case No. SA CV09-0818 DOC (RNBx)

RENEWED APPLICATION FOR  
 APPROVAL OF RECEIVER'S  
 APPOINTMENT OF CONFLICTS  
 COUNSEL

Date: June 7, 2010  
 Time: 8:30 a.m.  
 Ctrm: 9D  
 Judge: Hon. David O. Carter

21 Thomas A. Seaman, Receiver, hereby renews his motion for approval to  
 22 engage Shartsis Friese LLP ("Shartsis Friese") as conflicts counsel, to represent the  
 23 Receiver in connection with matters involving Wells Fargo Bank, Bank of New  
 24 York Mellon, and/or their affiliates (collectively, the "Trustees"). The Receiver  
 25 seeks to retain Shartsis Friese to advise and represent him regarding claims against  
 26 the Trustees that, if pursued, would likely be for several hundred million dollars.  
 27 The Receiver further seeks to retain Shartsis Friese to advise and represent him in  
 28 ongoing discovery proceedings in the various litigation regarding Medical Capital

1 Corporation, in which the Receiver has a material interest and in which Allen  
 2 Matkins faces potential conflicts of interest due to the involvement of Wells Fargo.  
 3 By Minute Order dated April 27, 2010, the Court denied the Receiver’s  
 4 original Motion for an Order Approving Appointment of Conflicts Counsel “on the  
 5 basis that the proposed counsel’s fees are excessive in light of the overall goal of  
 6 both preserving and increasing the value of the Receivership Estate.” Dkt. No. 240.  
 7 As this Renewed Motion shows, Shartsis Friese has modified its rate structure for  
 8 this matter in order to address the Court’s concern. The Receiver brings this  
 9 Renewed Motion, moreover, because events to date have underscored the need for  
 10 conflicts counsel.

11 **I. DISCUSSION.**

12 The background of this matter, the expertise of Shartsis Friese, and the  
 13 conflict that the Receiver’s general counsel, Allen Matkins Leck Gamble Mallory &  
 14 Natsis LLP (“Allen Matkins”) has with Wells Fargo were discussed in the  
 15 Receiver’s original Motion for Approval of Conflicts Counsel, Dt. No. 187 (the  
 16 “Original Motion”). That discussion is incorporated herein by reference.

17 **A. Shartsis Friese Has Agreed To Modify Its Rate Structure.**

18 Shartsis Friese has agreed to modify its rate structure on all matters for the  
 19 Receiver. The rate structure proposed in the Original Motion was as follows:

LAWYER	HOURLY RATE	DISCOUNTED HOURLY RATE
Ronald Hayes Malone	\$750	\$675
Frank A. Cialone	\$500	\$450
Simone M. Katz	\$300	\$270
Christopher J. Garrett	\$275	\$247.50

1 Mr. Malone and Mr. Cialone are partners, while Ms. Katz and Mr. Garrett are  
 2 associates. Shartsis Friese intends to add attorney Gary Fontana to the matter; Mr.  
 3 Fontana is a senior counsel with extensive experience in matters involving indenture  
 4 trustees and other fiduciaries. His customary billing rate is \$550 per hour. Shartsis  
 5 Friese also intends to add paralegal Shepherd Smith, whose customary billing rate is  
 6 \$170 per hour.

7 Under the modified fee structure, Mr. Malone, Mr. Fontana, and Mr. Cialone  
 8 would bill at a blended hourly rate of \$550. This is consistent with, if not lower  
 9 than, the rates charged by attorneys with similar experience.<sup>1</sup> By way of  
 10 comparison, the Court recently approved an Interim Fee Application by Allen  
 11 Matkins that included partner rates in a similar range as those proposed by Shartsis  
 12 Friese. *See* First Interim Fee Application of Allen Matkins, Dkt. No. 172.

13 Under the modified fee structure, Shartsis Friese would continue to apply a  
 14 10% discount to its normal hourly rates for associate attorneys and paralegals.  
 15 Again, these rates are consistent with, if not lower than, rates charged by law firms  
 16 doing similar work. *See id.*

17 **B. The Scope Of Shartsis Friese's Representation.**

18 Shartsis Friese intends to make a recommendation to the Receiver regarding  
 19 whether to pursue claims against the Trustees within 15 days of the Court's decision  
 20 on the Trustees' pending Motions to Dismiss. As noted above, if the Receiver  
 21 pursues such claims, the amounts at issue will likely be several hundred million  
 22 dollars.

23 Using the modified rate structure herein, retroactive to March 1, 2010,  
 24 Shartsis Friese anticipates that the total fees for the work entailed in making that  
 25

26 <sup>1</sup> The blended rate is also reasonable given the individual attorneys' levels of  
 27 seniority and experience. Mr. Malone (California State Bar No. 51087) was  
 28 admitted to the California Bar in January of 1972, and began practicing in 1971  
 at the United States Justice Department. Mr. Fontana (California State Bar No.  
 52830) was admitted to the California Bar in 1972. Mr. Cialone (California State  
 Bar No. 172816) was admitted to the California Bar in 1994.

1 recommendation will be between \$100,000 and \$125,000. This includes legal  
 2 research on issues such as the standing of the Receiver to pursue claims against the  
 3 Trustees, whether the conduct of principals in Medical Capital will be imputed to  
 4 the Receiver for purposes of equitable defenses such as *in pari delicto*, governing  
 5 statutes of limitations and applicable tolling rules, and the potential grounds for  
 6 liability of an indenture trustee. Where the legal issues are controlled by state law,  
 7 this task has required researching the law in three jurisdictions (California,  
 8 Colorado, and New York) due to the choice of law provisions in the governing  
 9 agreements, as well as research regarding the interpretation of the unusual choice of  
 10 law provisions present in some of those agreements. The work entailed in making a  
 11 recommendation to the Receiver also includes factual investigation and analysis,  
 12 including detailed analysis of the Trustees' obligations under the governing  
 13 agreements and working with the Receiver's staff to assess the existence, scope, and  
 14 materiality of breaches of those agreements.<sup>2</sup> Cialone Dec., ¶ 5.

15 Note, another reputable firm that offered to represent the Receiver and  
 16 perform a similar scope of work (i.e. perform the foregoing tasks and make a  
 17 recommendation on whether to file a claim) presented a preliminary fee estimate  
 18 that, on the low end of a range, was more than double the estimate provided by  
 19 Shartsis Friese. Declaration of Michael R. Farrell , filed concurrently herewith  
 20 ("Farrell Dec."), ¶ 6. The Receiver determined that such costs were too high and  
 21 continued the search for counsel. *Id.* The Receiver's team believes the fee estimate  
 22 of Shartsis Friese is reasonable given the complexity of the issues, the volume of  
 23 information, and the magnitude of the potential claims.

24

25

26

27

28

<sup>2</sup> The above discussion and estimate do not include other work on behalf of the Receiver that is not directly related to investigation of potential claims such as the work relating to the document production by Waverton described above.

1           **C.    The Continuing Need For Conflicts Counsel.**

2           In the Original Motion, the Receiver described the need for conflicts counsel  
3 to investigate claims against the Trustees. In sum, Allen Matkins has a conflict of  
4 interest that precludes it from investigating or litigating claims against Wells Fargo.  
5 While Allen Matkins does not have a similar conflict with respect to BONYM, it is  
6 more efficient to have the same law firm investigate, and if appropriate pursue,  
7 claims against both Trustees. Moreover, because claims against either Trustee may  
8 involve common issues of law or fact, it would be appropriate for conflicts counsel  
9 to be responsible for all such potential claims.

10           The Receiver's experience to date has demonstrated a further need for  
11 conflicts counsel. For example, issues have arisen in connection with discovery in  
12 the *Masonek* litigation that Allen Matkins has requested Shartsis Friese to address,  
13 in order to steer clear of any actual or potential conflicts of interest. Declaration of  
14 Frank A. Cialone ("Cialone Dec."), ¶ 2. The largest such issue concerns a document  
15 production by The Waverton Group, LLC ("Waverton"), in response to a subpoena  
16 from counsel for the plaintiff class. Shortly before production was due, counsel for  
17 Waverton informed Allen Matkins that the documents responsive to the subpoena  
18 included materials that were potentially subject to claims of confidentiality and  
19 attorney-client privilege *by the Receiver*. Because the Trustees might have objected  
20 (and ultimately did object) to any assertion of confidentiality or privilege by the  
21 Receiver, Allen Matkins requested that Shartsis Friese address these issues. Shartsis  
22 Friese did so, devoting significant time (mostly by partner Frank Cialone) to work  
23 that included: (1) negotiating an arrangement with Waverton, class counsel, and  
24 counsel for the Trustees to allow Shartsis Friese to review all documents potentially  
25 subject to privilege or confidentiality claims before the documents were released to  
26 the parties in the *Masonek* action; (2) preparing a motion for a protective order, to be  
27 filed in the District Court of Colorado where the subpoena was pending, when it  
28 appeared that such negotiations would be unsuccessful; and (3) conducting the



1 initial review of the Waverton documents. The latter task, the review of the  
2 Waverton documents, is not yet complete, and in light of the Court's Minute Order  
3 denying the Receiver's request to appoint conflicts counsel, Shartsis Friese has  
4 stopped that work. Cialone Dec., ¶ 3.

5 The above issue underscores that the need for conflicts counsel will be  
6 ongoing, even if the Receiver ultimately determines not to file claims against the  
7 Trustees. For example, the Receiver and his staff may ultimately be subject to  
8 discovery in actions involving the Trustees. In fact, in the few days since the Court  
9 issued its order denying the Receiver's Original Motion, counsel for the plaintiffs in  
10 the mass action pending in the Southern District of Florida have contacted Shartsis  
11 Friese to discuss extensive discovery requests that they intend to serve on the  
12 Receiver in that action. Cialone Dec., ¶ 4 and Ex. 1. Such discovery processes may  
13 result in disputes between the Receiver and Wells Fargo regarding the scope of  
14 discovery, objections, assertions of privilege, and other similar issues. In light of  
15 Allen Matkins' ongoing representation of Wells Fargo in other matters, it would be  
16 inappropriate for Allen Matkins to represent the Receiver in connection with  
17 proceedings where the potential of such disputes is present.

18 The Court should also be aware of the difficulty the Receiver encountered in  
19 retaining conflicts counsel. Over a period of several months after his appointment,  
20 the Receiver and his team contacted and interviewed a number of firms, attempting  
21 to identify a firm that satisfied three critical criteria: (1) attorneys with the  
22 competency and experience to advise the Receiver on the complex issues involved  
23 here (e.g. securities law, fiduciary duty, etc.), (2) the ability to deliver services at a  
24 reasonable cost, and (3) no conflicts with either Wells Fargo or BONYM. Given the  
25 amount of legal work generated by these large financial institutions, the number of  
26 firms satisfying these criteria and willing to accept the representation was relatively  
27 small. The Receiver's team, after assisting several firms conduct due diligence and  
28

1 interviewing counsel, determined that Shartsis Friese was the best choice to  
2 represent the Receiver. Farrell Dec., ¶ 5.

3 In light of the foregoing difficulties, the magnitude of the potential claims  
4 against the Trustees, the Receiver's immediate and continuing need for conflicts  
5 counsel, and the likely delays and problems that would result if new conflicts  
6 counsel must be found, the Receiver respectfully requests that the Court grant this  
7 application.

8 **II. CONCLUSION.**

9 The Receiver requests that this Court approve its employment of the law firm  
10 of Shartsis Friese as conflicts counsel for the purpose of investigating and pursuing  
11 potential claims against the Trustees, Wells Fargo and BONYM, and addressing all  
12 issues that may give rise to an Allen Matkins conflict of interest, with compensation  
13 to be paid as a priority administrative expense of the Receivership Estate in such  
14 amounts as this Court may hereinafter allow and order paid.

15  
16 Dated: May 6, 2010

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
DAVID R. ZARO  
MICHAEL R. FARRELL  
EDWARD G. FATES

17  
18  
19 By: \_\_\_\_\_ /s/ Michael R. Farrell

MICHAEL R. FARRELL  
Attorneys for Receiver  
THOMAS A. SEAMAN