

Division of Securities
Utah Department of Commerce
160 East 300 South
P.O. Box 146760
Salt Lake City, Utah 84114-6760
Telephone: 801 530-6600
Facsimile: 801 530-6980

**BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF:

**SMC CAPITAL MANAGEMENT, INC.,
IARD #108471**

Respondent.

ORDER TO SHOW CAUSE

Docket No. SD07-0056

**TO: SMC Capital Management, Inc.
8188 S. Highland Drive, Suite D-5
Sandy, Utah 84093**

It appears to the Presiding Officer ("Presiding Officer") of the Utah Division of Securities ("Division") that Respondent SMC Capital Management, Inc. ("SMC"), IARD #108471, may have engaged in acts and practices that violate the Utah Uniform Securities Act ("Act"), Utah Code Ann. § 61-1-1, *et seq.* Those acts and practices are more fully described herein. Based upon the Division's examination of this matter, the Presiding Officer issues this Order to Show Cause in accordance with the provisions of § 61-1-20(1) of the Act.

A. THE PARTIES

1. SMC Capital Management, Inc. (“SMC”), IARD #108471, is a Utah corporation located in Sandy, Utah and has been a federal-covered investment adviser registered with the United States Securities and Exchange Commission (“SEC”) since April 3, 1971. SMC is notice-filed as a federal-covered adviser in Utah.
2. WBB Securities, LLC (“WBB”), CRD #118440, is a California limited liability company located in San Diego, California. WBB has been a licensed broker-dealer in Utah since January 4, 2006. On January 3, 2006, WBB applied for an investment adviser license in Utah, which was approved on February 2, 2007.
3. Gary R. Gygi (“Gygi”), CRD #1577760, has been a licensed broker-dealer agent in Utah with WBB since January 4, 2006. On September 14, 2006, WBB submitted an application to license Gygi as an investment adviser representative in Utah. That application was approved on February 5, 2007. Prior to his association with WBB, Gygi was a licensed broker-dealer agent and investment adviser representative with Eagle Gate Securities, Inc. from April 29, 2003 until December 31, 2005.
4. Eagle Gate Securities, Inc. (“Eagle Gate”), CRD #46959, is a dissolved Utah corporation which was located in Salt Lake City, Utah. Eagle Gate was licensed in Utah as a broker-dealer and investment adviser until it withdrew both licenses on December 31, 2005.

B. FACTS

5. In January 2006, the Division received an investment adviser application from WBB. The application was incomplete. Through the Division's attempts to obtain additional information, the Division discovered that one of WBB's registered broker-dealer agents, Gygi, was engaged in soliciting investment advisory clients for SMC.
6. The Central Registration Depository ("CRD")¹ revealed that Gygi was not licensed as an investment adviser representative with SMC.
7. The Division conducted an on-site exam at Gygi's office in Sandy, Utah in September 2006, which revealed the following:

Associating with an Unlicensed Investment Adviser Representative

8. SMC entered into a "Marketing Agreement" with Gygi on May 1, 2003. At that time, Gygi was a licensed broker-dealer agent and investment adviser representative with Eagle Gate.
9. Pursuant to the terms of the Marketing Agreement, Gygi agreed to a) develop advertising and marketing pieces to promote SMC's investment management services; b) conduct seminars for potential SMC clients; c) act as the primary voice for Salt Lake radio station

¹CRD is a computerized licensing database maintained by the National Association of Securities Dealers ("NASD")(now "FINRA"). CRD contains employment, licensing and disciplinary information on broker-dealers, investment advisers and investment adviser representatives.

KSL's daily securities market update segments, which also promoted SMC; and d) solicit new clients for SMC's third-party money management services.

10. In consideration for his services, the Marketing Agreement provided that Gygi would receive fifty percent of the quarterly investment management fee paid by clients that Gygi solicited for SMC.
11. The Marketing Agreement further required Gygi to pay SMC \$200 per month to compensate SMC for office space, equipment, and secretarial services used by Gygi.
12. On December 31, 2005, Eagle Gate went out of business and WBB accepted Eagle Gate's accounts and registered representatives, including Gygi. WBB was not licensed as an investment adviser in Utah at that time.
13. On August 1, 2006, SMC and Gygi entered into a "Solicitation Agreement." Although the compensation terms were the same as the 2003 Marketing Agreement, Gygi was no longer required to pay SMC for office space and equipment rental.
14. WBB did not file an investment adviser representative application for Gygi until September 14, 2006, after the Division conducted its examination of Gygi's office.
15. SMC did not file an investment adviser representative application with the Division for Gygi until September 15, 2006. SMC subsequently withdrew this application, as "made in error" on October 17, 2006.

Splitting Consideration with an Unlicensed Investment Adviser Representative

16. Although Gygi was not licensed with WBB or SMC as an investment adviser representative, from January through September 2006, SMC paid Gygi solicitation fees in the amount of \$37,626.94. This amount represented fifty percent of the quarterly investment management fee paid by the SMC clients that were referred by Gygi.

Misrepresentations and Omissions of Material Fact

17. In its Form ADV Part II² provided to clients, SMC omitted material facts, including, but not limited to, the following:
- (a) SMC failed to disclose that Gygi was not licensed as an investment adviser or an investment adviser representative, nor associated with SMC as a registered representative;
 - (b) SMC failed to disclose to clients that SMC and WBB are not affiliated;
 - (c) SMC failed to disclose to clients that Gygi was affiliated with WBB as a broker-dealer agent; and

²Form ADV is a document used by investment advisers to register with the SEC or with state securities regulators. Section 203 of the Investment Advisers Act of 1940 requires investment advisers to furnish each advisory client and prospective advisory clients with a written disclosure statement which may be either a copy of Part II of its Form ADV or a written document or brochure that contains at least the information required by Part II of Form ADV. The license application requirements for investment advisers in Utah Administrative Rule R164-4-2(C) require that an investment adviser file a copy of Form ADV Part II with the Division.

- (d) SMC failed to disclose that beginning in August 2006 it waived Gygi's office rental and clerical fees in consideration for Gygi soliciting new clients for SMC.
18. In its investment management agreements, SMC misrepresented to some of its clients that Eagle Gate was the custodian broker-dealer, when in fact WBB was the custodian broker-dealer.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Associating with Unlicensed Investment Adviser Representative under § 61-1-3(4)(a) of the Act)

19. From January 1, 2006 until October 17, 2006, SMC and Gygi associated contractually wherein Gygi solicited clients for SMC's third-party money management services.
20. During this time period, Gygi was not licensed as an investment adviser or an investment adviser representative.
21. SMC violated § 61-1-3(4)(a)(ii) of the Act.

SECOND CAUSE OF ACTION

(Investment Adviser Unlawful Acts - Splitting Consideration with Unlicensed Investment Adviser Representative under § 61-1-2(1)(c) of the Act)

22. From January 1, 2006 until September 30, 2006, SMC paid Gygi solicitation fees in the amount of \$37,626.94.
23. This amount represented fifty percent of the quarterly investment management fee paid by the SMC clients that were referred by Gygi.

24. Gygi was not licensed as an investment adviser or investment adviser representative during this period.
25. SMC violated § 61-1-2(1)(c) of the Act.

THIRD CAUSE OF ACTION

(Misrepresentations and Omissions under § 61-1-1(2) of the Act)

26. SMC violated Section 61-1-1(2) of the Act by omitting and misrepresenting material facts as described in paragraphs 17 and 18, above.

REQUEST FOR RELIEF

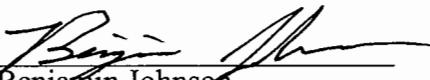
The Presiding Officer, pursuant to Utah Code Ann. § 61-1-20, hereby orders Respondent to appear at a formal hearing to be conducted in accordance with Utah Code Ann. §§ 63-46b-4 and 63-46b-6 to -11, and held before the Division. As set forth in the Notice of Agency Action accompanying this Order, Respondent is required to file a written response with the Division, and a prehearing conference on this matter has been scheduled for **October 2, 2007 at 9am**. The hearing will take place at the Division of Securities, Room 210, 160 East 300 South, Salt Lake City, Utah. If Respondent fails to file a written response or appear at the hearing, findings may be entered, a permanent Order to Cease and Desist may be issued, and a fine may be imposed against Respondent, as provided by Utah Code Ann. §§ 63-46b-8 or -11.

At the hearing, Respondent may show cause, if any it has:

1. Why Respondent should not be found to have violated the Utah Uniform Securities Act;

2. Why Respondent should not be ordered permanently to cease and desist from engaging in any further conduct in violation of Utah Code Ann. §§ 61-1-1, -2, -3 or any other section of the Act;
3. Why Respondent should not be ordered to disclose to all affected clients:
 - (a) that the person soliciting their investment advisory business was not licensed for that type of business;
 - (b) that advisory fees paid by the clients were shared with an unlicensed individual in violation of the Act; and
 - (c) the sum total of each client's management fees shared with Gygi.
4. Why Respondent should not be ordered to pay a fine in the amount of \$80,000.

Dated this 23rd day of August 2007


Benjamin Johnson
Presiding Officer
Utah Division of Securities

Approved:



D. Scott Davis
Assistant Attorney General



Division of Securities
Utah Department of Commerce
160 East 300 South
P.O. Box 146760
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NOTICE OF AGENCY ACTION

Docket No. SD-07-0056

THE DIVISION OF SECURITIES TO THE ABOVE-NAMED RESPONDENT:

You are hereby notified that agency action in the form of an adjudicative proceeding has been commenced against you by the Utah Division of Securities (Division). The adjudicative proceeding is to be formal and will be conducted according to statute and rule. See Utah Code Ann. §§ 63-46b-3 and 63-46b-6 through 11; see also Utah Admin. Code R151-46b-1 et seq. The legal authority under which this formal adjudicative proceeding is to be maintained is Utah Code Ann. § 61-1-20. You may be represented by counsel or you may represent yourself in this proceeding. Utah Admin. Code R151-46b-6.

You must file a written response with the Division within thirty (30) days of the mailing date of this Notice. Your response must be in writing and signed by you or your representative. Your response must include the file number and name of the adjudicative proceeding, your version of the facts, a statement of what relief you seek, and a statement summarizing why the relief you seek should be granted. Utah Code Ann. § 63-46b-6(1). In addition, pursuant to Utah Code Ann. § 63-46b-6(3), the presiding officer requires that your response:

- (a) admit or deny the allegations in each numbered paragraph of the Order to Show Cause, including a detailed explanation for any response other than an unqualified admission. Allegations in the Order to Show Cause not specifically denied are deemed admitted;
- (b) identify any additional facts or documents which you assert are relevant in light of the allegations made; and
- (c) state in short and plain terms your defenses to each allegation in the Order to Show Cause, including affirmative defenses, that were applicable at the time of the conduct (including exemptions or exceptions contained within the Utah Uniform Securities Act).

Your response, and any future pleadings or filings that should be part of the official files in this matter, should be sent to the following:

Signed originals to:

Administrative Court Clerk
c/o Pam Radzinski
Utah Division of Securities
160 E. 300 South, 2nd Floor
Box 146760
Salt Lake City, UT 84114-6760
(801) 530-6600

A copy to:

D. Scott Davis
Assistant Attorney General
160 E. 300 South, Fifth Floor
Box 140872
Salt Lake City, UT 84114-0872
(801) 366-0310

Shortly after the deadline for filing your response to the Order to Show Cause, an initial pre-hearing conference in this adjudicative proceeding will be held. Utah Admin. Code R151-46b-9(9). The time, date and place for that hearing are given below as well as in the Order to Show Cause. Utah Code Ann. § 61-1-20(1)(b). The purpose of the initial pre-hearing conference is to set a deadline for the filing of pre-hearing motions, including summary judgment; determine whether to modify the deadlines for disclosures; to order initial disclosures and resolve discovery issues; schedule any additional pre-hearing conferences; schedule a tentative hearing date to adjudicate whether the facts alleged in the Order to Show Cause or agency action accompanying this Notice are true and the relief requested is appropriate; and to deal with any other matters.

Please note that the initial pre-hearing conference on the Order to Show Cause has been scheduled for **October 2, 2007 at 9am**. The hearing will take place at the Division of Securities, 160 East 300 South, Salt Lake City, Utah.

If you fail to file a response, as described above, or fail to appear at any hearing that is set, the presiding officer may enter a default order against you without any further notice. Utah Code Ann. § 63-46b-11; Utah Admin. Code R151-46b-10(11). After issuing the default order, the presiding officer may grant the relief sought against you in the Order to Show Cause, and will

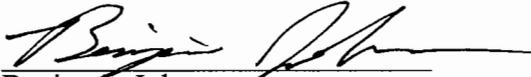
conduct any further proceedings necessary to complete the adjudicative proceeding without your participation and will determine all issues in the proceeding. Utah Code Ann. § 63-46b-11(4); Utah Admin. Code R151-46b-10(11)(b). In the alternative, the Division may proceed with a hearing under § 63-46b-10.

The presiding officer in this case is Benjamin Johnson, Director, Corporate Finance, Division of Securities. An administrative law judge will be assigned to hear this matter. At any hearings, the Division will be represented by the Attorney General's Office. You may appear and be heard and present evidence on your behalf at any such hearings.

You may attempt to negotiate a settlement of the matter without filing a response or proceeding to hearing. To do so, please contact the Utah Attorney General's Office. Questions regarding the Order to Show Cause should be directed to D. Scott Davis, Assistant Attorney General, 160 E. 300 South, Fifth Floor, Box 140872, Salt Lake City, UT 84114-0872, Tel. No. (801) 366-0310.

Dated this 23rd day of August, 2007.




Benjamin Johnson
Presiding Officer
Division of Securities
Utah Department of Commerce

Certificate of Mailing

I certify that on the 29th day of AUGUST 2007, I mailed, by certified mail, a true and correct copy of the Notice of Agency Action and Order to Show Cause to:

SMC Capital Management, Inc.
8188 S. Highland Drive
Suite D-5
Sandy, Utah 84093

Certified Mail # 7005 1820 0003 7191 3159

PAMALA RASZINSKI
Executive Secretary