

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

**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.

**STIPULATION AND CONSENT
ORDER**

Docket No. SD-07-0056

The Utah Division of Securities (“Division”), and SMC Capital Management, Inc., IARD#108471 (“SMC”) hereby stipulate and agree as follows:

1. SMC was the subject of an examination conducted by the Division into allegations that it, WBB Securities, LLC, CRD#118440 (“WBB”) and Gary R. Gygi, CRD #157760 (“Gygi”) violated the Utah Uniform Securities Act (“Act”), Utah Code Ann. § 61-1-1, *et seq.*
2. On August 23, 2007, the Division filed an Order to Show Cause against SMC. The Division also filed a Petition to Censure Licensees and Impose Fines against WBB and Gygi at that time. The actions against WBB and Gygi are currently pending.
3. In lieu of proceeding with the formal action, SMC and the Division have agreed to settle this matter by way of this Stipulation and Consent Order (“Order”). If entered, the Order will fully resolve all claims the Division has against SMC pertaining to this matter.

4. SMC admits the jurisdiction of the Division over it and over the subject matter of this action.
5. SMC waives any right to a hearing to challenge the Division's evidence and present evidence on its behalf.
6. SMC has read the Order, understands its contents and submits to this Order voluntarily. No promises or threats have been made by the Division, nor by any representative of the Division, to induce SMC to enter into this Order, other than as described in this Order.
7. SMC is represented by attorney Mark W. Pugsley and is satisfied with the legal representation it has received.

I. FINDINGS OF FACT

8. SMC 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.
9. WBB 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.
10. Gygi 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, shortly after WBB's application as an investment adviser was approved. 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.

11. 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.
12. 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.
13. The Central Registration Depository (“CRD”)¹ revealed that Gygi was not licensed as an investment adviser representative with SMC.
14. 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

15. 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.
16. 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 database maintained by the Financial Industry Regulatory Authority (“FINRA”). CRD contains employment, licensing and disciplinary information on broker-dealers, agents, 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.

17. 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.
18. 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.
19. 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.
20. 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.
21. 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.
22. After being instructed by the Division that Gygi needed to be dual-licensed with SMC, SMC filed an investment adviser representative application with the Division for Gygi on September 15, 2006. SMC subsequently withdrew this application on October 17, 2006.

Splitting Consideration with an Unlicensed Investment Adviser Representative

23. From January through September 2006, SMC paid solicitation fees directly to Gygi 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.

II. CONCLUSIONS OF LAW

24. SMC violated § 61-1-3(4)(a)(ii) of the Act by associating contractually with Gygi from January 1, 2006 until October 17, 2006, during which Gygi solicited clients for SMC's third-party money management services while not licensed as an investment adviser representative for WBB or SMC.
25. SMC also violated § 61-1-2(1)(c) of the Act by splitting consideration with an unlicensed investment adviser representative during that period.

III. ADMISSIONS

26. For purposes of this Order only, SMC admits that Gygi was not properly licensed in 2006 as an investment adviser representative. SMC represents it was operating under the assumption that Gygi was properly acting as a solicitor for SMC pursuant to SEC Rule 206(4)-3 at all times.

IV. REMEDIAL ACTIONS/SANCTIONS

27. With the exception of the Admission contained in Section III, SMC neither admits nor denies the Division's investigative findings and conclusions, but consents to the Division entering an Order requiring SMC to pay a fine of \$2,500 within thirty (30) days of this Order.
28. Without submitting to the ongoing jurisdiction of the Division, SMC agrees to the following remedial measures:
 - a. SMC will voluntarily permit the Division to review and comment on its current Form ADV Part I and Part II and Schedule F disclosures; and
 - b. If SMC enters into contracts or business relationships with solicitors in the future, Parts I & II of its ADV will be updated as soon as practicable, and in no event later than 30 days after the contract or business relationship is

finalized.

IV. FINAL RESOLUTION

29. SMC acknowledges that this Order, upon approval by the Division Director, shall be the final compromise and settlement of this matter. SMC further acknowledges that if the Division Director does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.
30. SMC acknowledges that the Order does not affect any civil or arbitration causes of action that third-parties may have against SMC arising in whole or in part from SMC's actions, and that the Order does not affect any criminal cause of action that a prosecutor might bring.
31. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way.

Utah Division of Securities

Date: March 5, 2008

By: Thad LeVar
Wayne Klein Thad LeVar
Director Acting Director

Date: Feb. 27, 2008

By: Lynn Miller
SMC Capital Management, Inc.

Its: President

Approved:

D. Scott Davis
D. Scott Davis

Approved:

Mark W. Pugsley
Mark W. Pugsley

ORDER

IT IS HEREBY ORDERED THAT:

1. The Division has made a sufficient showing of Findings of Fact and Conclusions of Law to form a basis for this settlement, including SMC's admission that Gygi was not properly licensed as an investment adviser representative;
2. SMC pay a fine in the amount of \$2,500 within thirty (30) days of entry of this Order.
3. SMC comply with the requirements of the Utah Uniform Securities Act in all future business in this state.

DATED this 5TH day of March, 2008.



THAD LEVAR

Interim Director, Utah Division of Securities



CERTIFICATE OF MAILING

I hereby certify that on the 6th day of March 2008, I mailed, by certified mail, a true and correct copy of the forgoing **Stipulation and Consent Order** to:

Mark W. Pugsley
Ray Quinney & Nebeker
36 S State Street Ste 1400
Salt Lake City UT 84145-0385

CERTIFIED MAIL: 7004 1160 0003 0195 6221



Pam Radzinski
Executive Secretary